

COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES*

REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE

March 29, 1919

The Preliminary Peace Conference at the plenary session on the 25th January, 1919 (Minute No. 2), decided to create, for the purpose of inquiring into the responsibilities relating to the war, a commission composed of fifteen members, two to be named by each of the Great Powers (United States of America, British Empire, France, Italy and Japan) and five elected from among the Powers with special interests.

The Commission was charged to inquire into and report upon the following points:

1. The responsibility of the authors of the war.
2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.
5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.

* Official English text, reprinted from Pamphlet No. 32, Division of International Law, Carnegie Endowment for International Peace, Washington, D. C., in which the report and all appendices are published in full, with an introductory note by James Brown Scott, Technical Delegate of the United States to the Peace Conference and one of the American members of the Commission.

At a meeting of the Powers with special interests held on the 27th January, 1919, Belgium, Greece, Poland, Roumania and Serbia were chosen as the Powers who should name representatives. (Minute No. 2. Annex VI.)

After the several states had nominated their respective representatives, the Commission was constituted as follows:

United States of America:

Hon. Robert Lansing.

Major James Brown Scott.

British Empire:

The Rt. Hon. Sir Gordon Hewart, K.C., M.P.

or

Sir Ernest Pollock, K.B.E., K.C., M.P.

The Rt. Hon. W. F. Massey.

France:

Mr. André Tardieu.

(Alternate: Captain R. Masson.)

Mr. F. Larnaude.

Italy:

Mr. Scialoja.

(Alternates: Mr. Ricci Busatti, Mr. G. Tosti.)

Mr. Raimondo. Later, Mr. Brambilla (3rd February);

Mr. M. d'Amelio (16th February).

Japan:

Mr. Adatei.

Mr. Nagaoka. Later, Mr. S. Tachi (15th February).

Belgium:

Mr. Rolin-Jaequemyns.

Greece:

Mr. N. Politis.

Poland:

Mr. C. Skirmunt. Later, Mr. N. Lubienski (14th February).

Roumania:

Mr. S. Rosental.

Serbia:

Professor Slobodan Yovanovitch.

(Alternates: Mr. Koumanoudi, Mr. Novacovitch.)

Mr. Lansing was selected as Chairman of the Commission, and as Vice-Chairmen, Sir Gordon Hewart or Sir Ernest Pollock and Mr. Scialoja. Mr. A. de Lapradelle (France) was named General Secretary and the Secretaries of the Commission were:

Mr. A. Kirk, United States of America; Lieutenant-Colonel O. M. Biggar, British Empire; Mr. G. H. Tosti, Italy; Mr. Kuriyama, Japan; Lieutenant Baron J. Guillaume, Belgium; Mr. Spyridion Marchetti, Greece; Mr. Casimir Rybinski, Poland.

Mr. G. H. Carmerlynck, *Professeur agrégé* of the University of France, acted as interpreter to the Commission.

The Commission decided to appoint three Sub-Commissions.

Sub-Commission I, on Criminal Acts, was instructed to discover and collect the evidence necessary to establish the facts relating to culpable conduct which (a) brought about the World War and accompanied its inception, and (b) took place in the course of hostilities.

This Sub-Commission selected Mr. W. F. Massey as its Chairman.

Sub-Commission II, on the Responsibility for the War, was instructed to consider whether, on the facts established by the Sub-Commission on Criminal Acts in relation to the conduct which brought about the World War and accompanied its inception, prosecutions could be instituted, and, if it decided that prosecutions could be undertaken, to prepare a report indicating the individual or individuals who were, in its opinion, guilty, and the court before which prosecutions should proceed.

This Sub-Commission selected alternatively Sir Gordon Hewart or Sir Ernest Pollock as Chairman.

Sub-Commission III, on the Responsibility for the Violation of the Laws and Customs of War, was instructed to consider whether, on the facts established by the Sub-Commission on Criminal Acts

in relation to conduct which took place in the course of hostilities, prosecutions could be instituted, and if it decided that prosecutions could be undertaken, to prepare a report indicating the individual or individuals who were, in its opinion, guilty, and the court before which prosecutions should proceed.

This Sub-Commission selected Mr. Lansing as its Chairman.

When the reports of the Sub-Commissions had been considered, a committee, composed of Mr. Rolin-Jaequemyns, Sir Ernest Pollock and Mr. M. d'Amelio was appointed to draft the report of the Commission. This committee was assisted by Mr. A. de Lapradelle and Lieutenant-Colonel O. M. Biggar.

The Commission has the honor to submit its report to the Preliminary Peace Conference. The report was adopted unanimously subject to certain reservations by the United States of America and certain other reservations by Japan. The United States Delegation has set forth its reservations and the reasons therefor in a memorandum attached hereto (Annex II) and the same course has been taken by the Japanese Delegation (Annex III).

CHAPTER I

RESPONSIBILITY OF THE AUTHORS OF THE WAR

On the question of the responsibility of the authors of the war, the Commission, after having examined a number of official documents relating to the origin of the World War, and to the violations of neutrality and of frontiers which accompanied its inception, has determined that the responsibility for it lies wholly upon the Powers which declared war in pursuance of a policy of aggression, the concealment of which gives to the origin of this war the character of a dark conspiracy against the peace of Europe.

This responsibility rests first on Germany and Austria, secondly on Turkey and Bulgaria. The responsibility is made all the graver by reason of the violation by Germany and Austria of the neutrality of Belgium and Luxemburg, which they themselves had guaranteed. It is increased, with regard to both France and Serbia, by the violation of their frontiers before the declaration of war.

I.—PREMEDITATION OF THE WAR

A.—*Germany and Austria*

Many months before the crisis of 1914 the German Emperor had ceased to pose as the champion of peace. Naturally believing in the overwhelming superiority of his army, he openly showed his enmity towards France. General von Moltke said to the King of the Belgians: "This time the matter must be settled." In vain the King protested. The Emperor and his Chief of Staff remained no less fixed in their attitude.¹

On the 28th June, 1914, occurred the assassination at Sarajevo of the heir-apparent of Austria. "It is the act of a little group of madmen," said Francis Joseph.² The act, committed as it was by a subject of Austria-Hungary on Austro-Hungarian territory, could in no wise compromise Serbia, which very correctly expressed its condolences³ and stopped public rejoicings in Belgrade. If the Government of Vienna thought that there was any Serbian complicity, Serbia was ready⁴ to seek out the guilty parties. But this attitude failed to satisfy Austria and still less Germany, who, after their first astonishment had passed, saw in this royal and national misfortune a pretext to initiate war.

At Potsdam a "decisive consultation" took place on the 5th July, 1914.⁵ Vienna and Berlin decided upon this plan: "Vienna will send to Belgrade a very emphatic ultimatum with a very short limit of time."⁶

The Bavarian Minister, von Lerchenfeld, said in a confidential despatch dated the 18th July, 1914, the facts stated in which have never been officially denied: "It is clear that Serbia cannot accept the demands, which are inconsistent with the dignity of an independent state."⁷ Count Lerchenfeld reveals in this report that,

¹ Yellow Book, M. Cambon to M. Pichon, 22nd November, 1913.

² Message to his people.

³ Serbian Blue Book, page 30.

⁴ Yellow Book, No. 15, M. Cambon to M. Bienvenu Martin, 21st July, 1914.

⁵ Lichnowsky Memoir.

⁶ Dr. Muehlton's Memoir.

⁷ Report of the 18th July, 1914.

at the time it was made, the ultimatum to Serbia had been jointly decided upon by the Governments of Berlin and Vienna; that they were waiting to send it until President Poincaré and M. Viviani should have left for St. Petersburg; and that no illusions were cherished, either at Berlin or Vienna, as to the consequences which this threatening measure would involve. It was perfectly well known that war would be the result.

The Bavarian Minister explains, moreover, that the only fear of the Berlin Government was that Austria-Hungary might hesitate and draw back at the last minute, and that on the other hand Serbia, on the advice of France and Great Britain, might yield to the pressure put upon her. Now, "the Berlin Government considers that war is necessary." Therefore, it gave full powers to Count Berchtold, who instructed the Ballplatz on the 18th July, 1914, to negotiate with Bulgaria to induce her to enter into an alliance and to participate in the war.

In order to mask this understanding, it was arranged that the Emperor should go for a cruise in the North Sea, and that the Prussian Minister of War should go for a holiday, so that the Imperial Government might pretend that events had taken it completely by surprise.

Austria suddenly sent Serbia an ultimatum that she had carefully prepared in such a way as to make it impossible to accept. Nobody could be deceived; "the whole world understands that this ultimatum means war."⁸ According to M. Sazonof, "Austria-Hungary wanted to devour Serbia."⁹

M. Sazonof asked Vienna for an extension of the short time limit of forty-eight hours given by Austria to Serbia for the most serious decision in its history.¹⁰ Vienna refused the demand. On the 24th and 25th July England and France multiplied their efforts to persuade Serbia to satisfy the Austro-Hungarian demands. Russia threw in her weight on the side of conciliation.¹¹

Contrary to the expectation of Austria-Hungary and Germany,

⁸ Lichnowsky Memoir.

⁹ Austro-Hungarian Red Book, No. 16.

¹⁰ Blue Book, No. 26.

¹¹ Yellow Book, No. 36; Blue Book, Nos. 12, 46, 55, 65, 94, 118.

Serbia yielded. She agreed to all the requirements of the ultimatum, subject to the single reservation that, in the judicial inquiry which she would commence for the purpose of seeking out the guilty parties, the participation of Austrian officials would be kept within the limits assigned by international law. "If the Austro-Hungarian Government is not satisfied with this," Serbia declared she was ready "to submit to the decision of The Hague Tribunal."¹²

A quarter of an hour before the expiration of the time limit, at 5.45 on the 25th, M. Pachich, the Serbian Minister of Foreign Affairs, delivered this reply to Baron Geisl, the Austro-Hungarian Minister. On M. Pachich's return to his own office he found awaiting him a letter from Baron Geisl saying that he was not satisfied with the reply. At 6.30 the latter had left Belgrade, and even before he had arrived at Vienna, the Austro-Hungarian Government had handed his passports to M. Yovanovitch, the Serbian Minister, and had prepared thirty-three mobilization proclamations, which were published on the following morning in the *Budapesti Kozlóni*, the official gazette of the Hungarian Government. On the 27th Sir Maurice de Bunsen telegraphed to Sir Edward Grey: "This country has gone wild with joy at the prospect of war with Serbia."¹³ At midday on the 28th Austria declared war on Serbia. On the 29th the Austrian Army commenced the bombardment of Belgrade, and made its dispositions to cross the frontier.

The reiterated suggestions of the *Entente* Powers with a view to finding a peaceful solution of the dispute only produced evasive replies on the part of Berlin or promises of intervention with the Government of Vienna without any effectual steps being taken.

On the 24th of July Russia and England asked that the Powers should be granted a reasonable delay in which to work in concert for the maintenance of peace. Germany did not join in this request.¹⁴

On the 25th July Sir Edward Grey proposed mediation by four Powers (England, France, Italy and Germany). France¹⁵ and

¹² Yellow Book, No. 46.

¹³ Blue Book, No. 41.

¹⁴ Russian Orange Book, No. 4; Yellow Book, No. 43.

¹⁵ Yellow Book, No. 70.

Italy¹⁶ immediately gave their concurrence. Germany¹⁷ refused, alleging that it was not a question of mediation but of arbitration, as the conference of the four Powers was called to make proposals, not to decide.

On the 26th July Russia proposed to negotiate directly with Austria. Austria refused.¹⁸

On the 27th July England proposed a European conference. Germany refused.¹⁹

On the 29th July Sir Edward Grey asked the Wilhelmstrasse to be good enough to "suggest any method by which the influence of the four Powers could be used together to prevent a war between Austria and Russia."²⁰ She was asked herself to say what she desired.²¹ Her reply was evasive.²²

On the same day, the 29th July, the Czar Nicholas II despatched to the Emperor William II a telegram suggesting that the Austro-Serbian problem should be submitted to The Hague Tribunal. This suggestion received no reply. This important telegram does not appear in the German White Book. It was made public by the Petrograd *Official Gazette* (January, 1915).

The Bavarian Legation, in a report dated the 31st July, declared its conviction that the efforts of Sir Edward Grey to preserve peace would not hinder the march of events.²³

As early as the 21st July German mobilization had commenced by the recall of a certain number of classes of the reserve,²⁴ then of German officers in Switzerland,²⁵ and finally of the Metz garrison on the 25th July.²⁶ On the 26th July the German fleet was called back from Norway.²⁷

¹⁶ Yellow Book, No. 72; Blue Book, No. 49.

¹⁷ Blue Book, No. 43.

¹⁸ Yellow Book, No. 54.

¹⁹ *Ibid.*, Nos. 68 and 73.

²⁰ *Ibid.*, No. 97; Blue Book, No. 84.

²¹ Blue Book, No. 111.

²² Yellow Book, 97, 98 and 109.

²³ Second Report of Count Lerchenfeld, Bavarian Plenipotentiary at Berlin, published on the instructions of Kurt Eisner.

²⁴ Yellow Book, No. 15.

²⁶ *Ibid.*, No. 106.

²⁵ *Ibid.*, No. 60.

²⁷ *Ibid.*, No. 58.

The *Entente* did not relax its conciliatory efforts, but the German Government systematically brought all its attempts to nought. When Austria consented for the first time on the 31st July to discuss the contents of the Serbian note with the Russian Government and the Austro-Hungarian Ambassador received orders to "converse" with the Russian Minister of Foreign Affairs,²⁸ Germany made any negotiation impossible by sending her ultimatum to Russia. Prince Lichnowsky wrote that "a hint from Berlin would have been enough to decide Count Berchtold to content himself with a diplomatic success and to declare that he was satisfied with the Serbian reply, but this hint was not given. On the contrary they went forward towards war."²⁹

On the 1st August the German Emperor addressed a telegram to the King of England³⁰ containing the following sentence: "The troops on my frontier are, at this moment, being kept back by telegraphic and telephonic orders from crossing the French frontier."

Now, war was not declared till two days after that date, and as the German mobilization orders were issued on that same day, the 1st August, it follows that, as a matter of fact, the German army had been mobilized and concentrated in pursuance of previous orders.

The attitude of the *Entente* nevertheless remained still to the very end so conciliatory that, at the very time at which the German fleet was bombarding Libau, Nicholas II gave his word of honor to William II that Russia would not undertake any aggressive action during the *pourparlers*,³¹ and that when the German troops commenced their march across the French frontier M. Viviani telegraphed to all the French Ambassadors "we must not stop working for accommodation."

On the 3rd August von Schoen went to the Quai d'Orsay with the declaration of war against France. Lacking a real cause of complaint, Germany alleged, in her declaration of war, that bombs had been dropped by French aeroplanes in various districts in Ger-

²⁸ Blue Book, No. 133; Red Book, No. 55.

²⁹ Lichnowsky Memoir, p. 1.

³⁰ White Book, Anlage 32; Yellow Book, Annex II bis, No. 2.

³¹ Telegram from Nicholas II to William II; Yellow Book, No. 6, Annex V.

many. This statement was entirely false. Moreover, it was either later admitted to be so³² or no particulars were ever furnished by the German Government.

Moreover, in order to be manifestly above reproach, France was careful to withdraw her troops 10 kilom. from the German frontier. Notwithstanding this precaution, numerous officially established violations of French territory preceded the declaration of war.³³

The provocation was so flagrant that Italy, herself a member of the Triple Alliance, did not hesitate to declare that in view of the aggressive character of the war the *casus fœderis* ceased to apply.³⁴

B.—*Turkey and Bulgaria*

The conflict was, however, destined to become more widespread and Germany and Austria were joined by allies.

Since the Balkan War the Young Turk Government had been drawing nearer and nearer Germany, whilst Germany on her part had constantly been extending her activities at Constantinople.

A few months before war broke out, Turkey handed over the command of her military and naval forces to the German General Liman von Sanders and the German Admiral Souchon.

In August, 1914, the former, acting under orders from the General Headquarters at Berlin, caused the Turkish Army to begin mobilizing.³⁵

Finally, on the 4th August, the understanding between Turkey and Germany was definitely formulated in an alliance.³⁶ The con-

³² Statement of the Municipality of Nuremburg, dated the 3rd April, 1916.

³³ Patrols of various strengths crossed the French frontier at fifteen points, one on the 30th July at Xures, eight on the 2nd August, and the others on the 3rd August, before war was declared. The French troops lost one killed and several wounded. The enemy left on French territory four killed, one of whom was an officer, and seven prisoners. At Suarce, on the 2nd August, the enemy carried off nine inhabitants, twenty-five horses, and thirteen carriages. Four incursions by German dirigibles took place between the 25th July and the 1st August. Finally, German aeroplanes flew over Lunéville on the 3rd August, before the declaration of war, and dropped six bombs. (Yellow Book, Nos. 106, 136, 139, etc.)

³⁴ Yellow Book, No. 124.

³⁵ H. Morgenthau, *Secrets of the Bosphorus*, London, 1918, pp. 39, 40.

³⁶ German White Book, 1913, 1917, Nos. 19 and 20.

sequence was that when the *Goeben* and the *Breslau* took refuge in the Bosphorus, Turkey closed the Dardanelles against the *Entente* squadrons and war followed.

On the 14th October, 1915, Bulgaria declared war on Serbia, which country had been at war with Austria since the 28th July, 1914, and had been attacked on all fronts by a large Austro-German army since the 6th October, 1915. Serbia had, however, committed no act of provocation against Bulgaria.

Serbia never formulated any claim against Bulgaria during the negotiations which took place between the *Entente* Powers and Bulgaria prior to the latter's entry into the war. On the contrary, she was offering herself ready to make certain territorial concessions to Bulgaria in order to second the efforts of the *Entente* Powers to induce Bulgaria to join them. According to Count Lerchenfeld's reports, however, Bulgaria had begun negotiations with the Central Powers as early as the 18th July, 1914, with a view to entering the war on their side. In April, 1915, the Bulgars made an armed attack against Serbia near Valandovo and Struvmitza, where a real battle was fought on Serbian territory. Being defeated, the Bulgars retired, ascribing this act of aggression to some comitadjis. An international commission (composed of representatives of the *Entente*) discovered, however, that there had been Bulgarian regular officers and soldiers among the dead and the prisoners.³⁷

On the 6th September, 1915, Bulgaria and Austria-Hungary concluded a treaty which recited that they had agreed to undertake common military action against Serbia and by which Austria-Hungary guaranteed to Bulgaria certain accretions of territory at Serbia's expense, and also agreed, jointly with Germany, to make to the Bulgarian Government a war loan of 200,000,000 fr., to be increased if the war lasted more than four months.³⁸ Even after this, M. Malinoff, one of the former Prime Ministers of Bulgaria, took part in negotiations with the *Entente*, and, while these negotiations were

³⁷ Memorandum I of the Serbian Delegation, Chapter II, para. c.

³⁸ Treaty between Bulgaria and Austria-Hungary, dated the 24th August, 1915 (furnished by the Serbian Delegation).

continuing, Bulgaria, on the 23rd September, mobilized, ostensibly to defend her neutrality.

No sooner had the army been mobilized and concentrated and Bulgarian forces massed on the whole length of the Serbian frontier, than the Bulgarian Government openly and categorically repudiated M. Malinoff, stating that he was in no way qualified to commit Bulgaria, and that he deserved "to be subjected to the utmost rigor of his country's laws for his conduct on that occasion." Some days later, Austro-German troops crossed the Danube and began to invade Serbia.

As soon as the Serbian troops began to retire, the Bulgars, on the pretext that the former had violated their frontier, launched the attack which eventually led to the complete subjugation of Serbia.

Two documents in the possession of the Serbian Government prove that this incident on the frontier was "arranged" and represented as a Serbian provocation. On the 10th October, 1915, the Secretary-General to the Foreign Office at Sofia, at the request of the Bulgarian Minister for Foreign Affairs, sent the following communication to Count Tarnovski, Austro-Hungarian Minister at Sofia: "In order to divest the attack on Serbia of the appearance of a preconceived plot, we shall, this evening or to-morrow morning, provoke a frontier incident in some uninhabited region."³⁹ Also, on the 12th October, 1915, Count Tarnovski sent the following telegram to Vienna: "The Generalissimo informs me that the desired incident on the Serbian frontier was arranged yesterday."⁴⁰

Bulgaria, in fact, first attacked on the 12th October, 1915, two days before the declaration of war on Serbia, which took place on the 14th October, 1915. That this was the case does not prevent Bulgaria from asserting that the Serbs first crossed her frontier.

The above sequence of events proves that Bulgaria had premeditated war against Serbia, and perfidiously brought it about.

By means of German agents Enver Pasha and Talaat Pasha had, since the spring of 1914, been aware of the Austro-German plan,

³⁹ Memorandum I of the Serbian Delegation, Chapter II, para. c.

⁴⁰ *Ibid.*

i.e., an attack by Austria against Serbia, the intervention by Germany against France, the passage through Belgium, the occupation of Paris in a fortnight, the closing of the Straits by Turkey, and the readiness of Bulgaria to take action.

The Sultan acknowledged this plot to one of his intimates. It was indeed nothing but a plot engineered by heads of four states against the independence of Serbia and the peace of Europe.⁴¹

CONCLUSIONS

1. *The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable.*
2. *Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war.*

II.—VIOLATION OF THE NEUTRALITY OF BELGIUM AND LUXEMBURG

A.—Belgium

Germany is burdened by a specially heavy responsibility in respect of the violation of the neutrality of Belgium and Luxemburg. Article 1 of the Treaty of London of the 19th April, 1839, after declaring that Belgium should form a "perpetually neutral State," had placed this neutrality under the protection of Austria, France, Great Britain, Russia and Prussia. On the 9th August, 1870, Prussia had declared "her fixed determination to respect Belgian neutrality." On the 22nd July, 1870, Bismarck wrote to the Belgian Minister at Paris, "This declaration is rendered superfluous by existing treaties."

It may be of interest to recall that the attributes of neutrality were specifically defined by the fifth Hague Convention, of the 18th October, 1907. That convention was declaratory of the law of nations, and contained these provisions—"The territory of neutral

⁴¹ Basri, *L'Orient débalkanisé*, Chapter II (Paris, 1919).

Powers is inviolable" (Article 1). "Belligerents are forbidden to move troops or convoys, whether of munitions of war or of supplies, across the territory of a neutral Power" (Article 2). "The fact of a neutral Power resisting, even by force, attempts against its neutrality cannot be regarded as a hostile act" (Article 10).

There can be no doubt of the binding force of the treaties which guaranteed the neutrality of Belgium. There is equally no doubt of Belgium's sincerity or of the sincerity of France in their recognition and respect of this neutrality.

On the 29th July, 1914, the day following the declaration of war by Austria-Hungary against Serbia, Belgium put her army on its reinforced peace strength, and so advised the Powers by which her neutrality was guaranteed and also Holland and Luxemburg.⁴²

On the 31st July the French Minister at Brussels visited the Belgian Minister of Foreign Affairs to notify him of the state of war proclaimed in Germany, and he spontaneously made the following statement: "I seize this opportunity to declare that no incursion of French troops into Belgium will take place, even if considerable forces are massed upon the frontiers of your country. France does not wish to incur the responsibility, so far as Belgium is concerned, of taking the first hostile act. Instructions in this sense will be given to the French authorities."⁴³

On the 1st August, the Belgian Army was mobilized.⁴⁴

On the 31st July, the British Government had asked the French and German Governments separately if they were each of them ready to respect the neutrality of Belgium, provided that no other Power violated it.⁴⁵ In notifying the Belgian Government on the same day of the action taken by the British Government, the British Minister added: "In view of existing treaties, I am instructed to inform the Belgian Minister for Foreign Affairs of the above, and to say that Sir Edward Grey presumes that Belgium will do her utmost to maintain her neutrality, and that she desires and expects that the other Powers will respect and maintain it."⁴⁶ The imme-

⁴² Grey Book I, No. 8.

⁴³ *Ibid.*, No. 9.

⁴⁴ *Ibid.*, No. 10.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, No. 11.

diate and quite definite reply of the Belgian Minister of Foreign Affairs was that Great Britain and the other nations guaranteeing Belgian independence could rest assured that she would neglect no effort to maintain her neutrality.⁴⁷

On the same day, Paris and Berlin were officially asked the question to which reference was made in the British communication. At Paris the reply was categorical: "The French Government are resolved to respect the neutrality of Belgium, and it would only be in the event of some other Power violating that neutrality that France might find herself under the necessity, in order to assure the defence of her own security, to act otherwise."⁴⁸

On the same day as this reply was made at Paris, the French Minister at Brussels made the following communication to M. Davignon, the Belgian Minister of Foreign Affairs: "I am authorized to declare that, in the event of an international war, the French Government, in accordance with the declarations they have always made, will respect the neutrality of Belgium. In the event of this neutrality not being respected by another Power, the French Government, to secure their own defence, might find it necessary to modify their attitude."⁴⁹

It was decided that this communication should forthwith be made to the Belgian press.

Meanwhile the attitude of the German Government remained enigmatic. At Brussels the German Minister, Herr von Below, made efforts in his discussions to maintain confidence;⁵⁰ but at Berlin, in reply to the question which had been officially asked by the British Government, the Secretary of State informed the British Ambassador that "he must consult the Emperor and the Chancellor before he could possibly answer."⁵¹

On the 2nd August, in the course of the day, Herr von Below insisted to the Belgian Minister, M. Davignon, upon the feelings of security which Belgium had the right to entertain towards her eastern neighbor,⁵² and on the same day, at 7 o'clock in the evening, he

⁴⁷ Grey Book I, No. 11.

⁴⁸ Blue Book, No. 125.

⁴⁹ Grey Book I, No. 15.

⁵⁰ *Ibid.*, No. 19.

⁵¹ Blue Book, No. 122.

⁵² Grey Book I, No. 19.

sent him a "very confidential" note, which was nothing more than an ultimatum claiming free passage for German troops through Belgian territory.⁵³

It was impossible to be under any delusion as to the purely imaginary character of the reason alleged by the German Government in support of its demand. It pretended that it had reliable information leaving "no doubt as to the intention of France to move through Belgian territory" against Germany, and consequently had notified its decision to direct its forces to enter Belgium.⁵⁴

The facts themselves supply the answer to the German allegation that France intended to violate Belgian neutrality. According to the French plan of mobilization, the French forces were being concentrated at that very moment on the German frontier, and it was necessary, by reason of the situation created by the German violation of Belgian territory, to modify the arrangements for their transport.

In the meantime, at seven o'clock in the morning of the 3rd August, at the expiration of the time limit fixed by the ultimatum, Belgium had sent her reply to the German Minister. Affected neither by Germany's promises nor her threats, the Belgian Government boldly declared that an attack upon Belgian independence would constitute a flagrant violation of international law. "No strategic interest justifies such a violation of law. The Belgian Government, if they were to accept the proposals submitted to them, would sacrifice the honor of the nation and betray their duty towards Europe." In conclusion, the Belgian Government declared that they were "firmly resolved to repel by all the means in their power every attack upon their rights."⁵⁵

Even on the 3rd August, Belgium refused to appeal to the guarantee of the Powers until there was an actual violation of territory.⁵⁶ It was only on the 4th August, after German troops had entered Belgian territory, that the Belgian Government sent his passports to Herr von Below,⁵⁷ and it then appealed to Great Britain, France

⁵³ Grey Book I, No. 20.

⁵⁴ *Ibid.*, No. 20.

⁵⁵ *Ibid.*, No. 22.

⁵⁶ *Ibid.*, No. 24.

⁵⁷ *Ibid.*, No. 30.

and Russia to co-operate as guaranteeing Powers in the defence of her territory.⁵⁸

At this point it may be recalled that the pretext invoked by Germany in justification of the violation of Belgian neutrality, and the invasion of Belgian territory, seemed to the German Government itself of so little weight, that in Sir Edward Goschen's conversations with the German Chancellor, von Bethmann Hollweg, and with von Jagow, the Secretary of State, it was not a question of aggressive French intentions, but a "matter of life and death to Germany to advance through Belgium and violate the latter's neutrality," and of "a scrap of paper."⁵⁹ Further, in his speech on the 4th August, the German Chancellor made his well-known avowal: "Necessity knows no law. Our troops have occupied Luxemburg, and perhaps have already entered Belgian territory. Gentlemen, that is a breach of international law. . . . We have been obliged to refuse to pay attention to the justifiable protests of Belgium and Luxemburg. The wrong—I speak openly—the wrong we are thereby committing we will try to make good as soon as our military aims have been attained. He who is menaced, as we are, and is fighting for his all can only consider how he is to hack his way through." To this avowal of the German Chancellor there is added the overwhelming testimony of Count von Lerchenfeld, who stated in a report of the 4th August, 1914, that the German General Staff considered it "necessary to cross Belgium: France can only be successfully attacked from that side. At the risk of bringing about the intervention of England, Germany cannot respect Belgian neutrality."⁶⁰

As for the Austrian Government, it waited until the 28th August to declare war against Belgium,⁶¹ but as early as the middle of the month "the motor batteries sent by Austria have proved their excellence in the battles around Namur,"⁶² as appears from a proclama-

⁵⁸ Grey Book I, No. 42.

⁵⁹ Blue Book, No. 160.

⁶⁰ *Stenographische Berichte über die Verhandlungen des Reichstags, Dienstag, 4 August, 1914.* See also E. Mühler. *Des Weltkrieges und das Völkerrecht*, Berlin, G. Reimer, 1915, pp. 24 *et seq.*

⁶¹ Grey Book I, No. 77.

⁶² *Ibid.*, II, No. 104.

tion of the German general who at the time was in command of the fortress of Liége, which German troops had seized. Consequently, the participation of Austria-Hungary in the violation of Belgian neutrality is aggravated by the fact that she took part in that violation without any previous declaration of war.

B.—*Luxemburg*

The neutrality of Luxemburg was guaranteed by Article 2 of the Treaty of London, 11th May, 1867, Prussia and Austria-Hungary being two of the guarantor Powers. On the 2nd August, 1914, German troops penetrated the territory of the Grand Duchy. Mr. Eyschen, Minister of State of Luxemburg, immediately made an energetic protest.⁶³

The German Government alleged "that military measures had become inevitable, because trustworthy news had been received that French forces were marching on Luxemburg." This allegation was at once refuted by Mr. Eyschen.⁶⁴

CONCLUSION

The neutrality of Belgium, guaranteed by the treaties of the 19th April, 1839, and that of Luxemburg, guaranteed by the treaty of the 11th May, 1867, were deliberately violated by Germany and Austria-Hungary.

CHAPTER II

VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR

On the second point submitted by the Conference, *the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their allies on land, on sea, and in the air, during the present war*, the Commission has considered a large number of documents. The Report of the British Commission drawn up by Lord Bryce, the labors of the French Commission presided over

⁶³ Yellow Book, No. 131.

⁶⁴ Telegram to the German Ministry of Foreign Affairs, the 2nd August, 1914.

by M. Payelle, the numerous publications of the Belgian Government, the Memorandum submitted by the Belgian Delegation, the Memorandum of the Greek Delegation, the documents lodged by the Italian Government, the formal denunciation by the Greeks at the Conference of the crimes committed against Greek populations by the Bulgars, Turks and Greeks, the Memorandum of the Serbian Delegation, the Report of the Inter-Allied Commission on the violations of the Hague Conventions and of international law in general, committed between 1915 and 1918 by the Bulgars in occupied Serbia, the summary of the Polish Delegation, together with the Roumanian and Armenian Memoranda, supply abundant evidence of outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and of the laws of humanity.

In spite of the explicit regulations, of established customs, and of the clear dictates of humanity, Germany and her allies have piled outrage upon outrage. Additions are daily and continually being made. By way of illustration a certain number of examples have been collected in Annex I.* It is impossible to imagine a list of cases so diverse and so painful. Violations of the rights of combatants, of the rights of civilians, and of the rights of both, are multiplied in this list of the most cruel practices which primitive barbarism, aided by all the resources of modern science, could devise for the execution of a system of terrorism carefully planned and carried out to the end. Not even prisoners, or wounded, or women, or children have been respected by belligerents who deliberately sought to strike terror into every heart for the purpose of repressing all resistance. Murders and massacres, tortures, shields formed of living human beings, collective penalties, the arrest and execution of hostages, the requisitioning of services for military purposes, the arbitrary destruction of public and private property, the aerial bombardment of open towns without there being any regular siege, the destruction of merchant ships without previous visit and without any precautions for the safety of passengers and crew, the massacre of prisoners, attacks on hospital ships, the poisoning of springs and of wells, outrages and profanations without regard for religion or

*Not printed herein for lack of space.—Ed.

the honor of individuals, the issue of counterfeit money reported by the Polish Government, the methodical and deliberate destruction of industries with no other object than to promote German economic supremacy after the war, constitute the most striking list of crimes that has ever been drawn up to the eternal shame of those who committed them. The facts are established. They are numerous and so vouched for that they admit of no doubt and cry for justice. The Commission, impressed by their number and gravity, thinks there are good grounds for the constitution of a special commission, to collect and classify all outstanding information for the purpose of preparing a complete list of the charges under the following heads:

The following is the list arrived at:

- (1) Murders and massacres; systematic terrorism.
- (2) Putting hostages to death.
- (3) Torture of civilians.
- (4) Deliberate starvation of civilians.
- (5) Rape.
- (6) Abduction of girls and women for the purpose of enforced prostitution.
- (7) Deportation of civilians.
- (8) Internment of civilians under inhuman conditions.
- (9) Forced labor of civilians in connection with the military operations of the enemy.
- (10) Usurpation of sovereignty during military occupation.
- (11) Compulsory enlistment of soldiers among the inhabitants of occupied territory.
- (12) Attempts to denationalize the inhabitants of occupied territory.
- (13) Pillage.
- (14) Confiscation of property.
- (15) Exaction of illegitimate or of exorbitant contributions and requisitions.
- (16) Debasement of the currency, and issue of spurious currency.
- (17) Imposition of collective penalties.

- (18) Wanton devastation and destruction of property.
- (19) Deliberate bombardment of undefended places.
- (20) Wanton destruction of religious, charitable, educational, and historic buildings and monuments.
- (21) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew.
- (22) Destruction of fishing boats and of relief ships.
- (23) Deliberate bombardment of hospitals.
- (24) Attack on and destruction of hospital ships.
- (25) Breach of other rules relating to the Red Cross.
- (26) Use of deleterious and asphyxiating gases.
- (27) Use of explosive or expanding bullets, and other inhuman appliances.
- (28) Directions to give no quarter.
- (29) Ill-treatment of wounded and prisoners of war.
- (30) Employment of prisoners of war on unauthorized works.
- (31) Misuse of flags of truce.
- (32) Poisoning of wells.

The Commission desires to draw attention to the fact that the offences enumerated and the particulars given in Annex I are not regarded as complete and exhaustive; to these such additions can from time to time be made as may seem necessary.

CONCLUSIONS

1. The war was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity.

2. A commission should be created for the purpose of collecting and classifying systematically all the information already had or to be obtained, in order to prepare as complete a list of facts as possible concerning the violations of the laws and customs of war committed by the forces of the German Empire and its Allies, on land, on sea and in the air, in the course of the present war.

CHAPTER III

PERSONAL RESPONSIBILITY

The third point submitted by the Conference is thus stated:

The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.

For the purpose of dealing with this point, it is not necessary to wait for proof attaching guilt to particular individuals. It is quite clear from the information now before the Commission that there are grave charges which must be brought and investigated by a court against a number of persons.

In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

We have later on in our Report proposed the establishment of a high tribunal composed of judges drawn from many nations, and included the possibility of the trial before that tribunal of a former head of a state with the consent of that state itself secured by articles in the Treaty of Peace. If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.

In view of the grave charges which may be preferred against—to take one case—the ex-Kaiser—the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished. Moreover, the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.

There is little doubt that the ex-Kaiser and others in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air.

We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.

CONCLUSION

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

CHAPTER IV

CONSTITUTION AND PROCEDURE, OF, AN APPROPRIATE TRIBUNAL

The fourth point submitted to the Commission is stated as follows:

The constitution and procedure of a tribunal appropriate for the trial of these offences (crimes relating to the war).

On this question the Commission is of opinion that, having regard to the multiplicity of crimes committed by those Powers which a short time before had on two occasions at The Hague protested their

reverence for right and their respect for the principles of humanity,⁶⁵ the public conscience insists upon a sanction which will put clearly in the light that it is not permitted cynically to profess a disdain for the most sacred laws and the most formal undertakings.

Two classes of culpable acts present themselves:

(a) Acts which provoked the world war and accompanied its inception.

(b) Violations of the laws and customs of war and the laws of humanity.

(a) Acts which Provoked the World War and Accompanied Its Inception.

In this class the Commission has considered acts not strictly war crimes, but acts which provoked the war or accompanied its inception, such, to take outstanding examples, as the invasion of Luxemburg and Belgium.

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

Further, any inquiry into the authorship of the war must, to be exhaustive, extend over events that have happened during many years in different European countries, and must raise many difficult

⁶⁵ See the declaration of Baron Marschall von Bieberstein, who, speaking at the Hague Conference of 1907 with regard to submarine mines, used the following expressions: "Military operations are not governed solely by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German Navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization."

and complex problems which might be more fitly investigated by historians and statesmen than by a tribunal appropriate to the trial of offenders against the laws and customs of war. The need of prompt action is from this point of view important. Any tribunal appropriate to deal with the other offences to which reference is made might hardly be a good court to discuss and deal decisively with such a subject as the authorship of the war. The proceedings and discussions, charges and counter-charges, if adequately and dispassionately examined, might consume much time, and the result might conceivably confuse the simpler issues into which the tribunal will be charged to inquire. While this prolonged investigation was proceeding some witnesses might disappear, the recollection of others would become fainter and less trustworthy, offenders might escape, and the moral effect of tardily imposed punishment would be much less salutary than if punishment were inflicted while the memory of the wrongs done was still fresh and the demand for punishment was insistent.

We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.

There can be no doubt that the invasion of Luxemburg by the Germans was a violation of the Treaty of London of 1867. and also that the invasion of Belgium was a violation of the Treaties of 1839. These treaties secured neutrality for Luxemburg and Belgium and in that term were included freedom, independence and security for the population living in those countries. They were contracts made between the high contracting parties to them, and involve an obligation which is recognized in international law.

The Treaty of 1839 with regard to Belgium and that of 1867 with regard to Luxemburg were deliberately violated, not by some outside Power, but by one of the very Powers which had undertaken not merely to respect their neutrality, but to compel its observance by any Power which might attack it. The neglect of its duty by the guarantor adds to the gravity of the failure to fulfil the undertaking given. It was the transformation of a security into a peril, of a defence into an attack, of a protection into an assault. It constitutes,

moreover, the absolute denial of the independence of states too weak to interpose a serious resistance, an assault upon the life of a nation which resists, an assault against its very existence while, before the resistance was made, the aggressor, in the guise of tempter, offered material compensations in return for the sacrifice of honor. The violation of international law was thus an aggravation of the attack upon the independence of states which is the fundamental principle of international right.

And thus a high-handed outrage was committed upon international engagements, deliberately, and for a purpose which cannot justify the conduct of those who were responsible.

The Commission is nevertheless of opinion that no criminal charge can be made against the responsible authorities or individuals (and notably the ex-Kaiser) on the special head of these breaches of neutrality, but the gravity of these gross outrages upon the law of nations and international good faith is such that the Commission thinks they should be the subject of a formal condemnation by the Conference.

CONCLUSIONS

1. *The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.*

2. *On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.*

3. *On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.*

4. *It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.*

(b) *Violations of the Laws and Customs of War and of the Laws of Humanity*

Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases. These courts would be able to try the incriminated persons according to their own procedure, and much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal.

There remain, however, a number of charges:

- (a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labor in mines where prisoners of more than one nationality were forced to work;
- (b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct of operations against several of the Allied armies;
- (c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators);
- (d) Against such other persons belonging to enemy countries as,

having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the high tribunal hereafter referred to.

For the trial of outrages falling under these four categories the Commission is of opinion that a high tribunal is essential and should be established according to the following plan:

- (1) It shall be composed of three persons appointed by each of the following governments: The United States of America, the British Empire, France, Italy and Japan, and one person appointed by each of the following governments: Belgium, Greece, Poland, Portugal, Roumania, Serbia and Czecho-Slovakia. The members shall be selected by each country from among the members of their national courts or tribunals, civil or military, and now in existence or erected as indicated above.
- (2) The tribunal shall have power to appoint experts to assist it in the trial of any particular case or class of cases.
- (3) The law to be applied by the tribunal shall be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience."
- (4) When the accused is found by the tribunal to be guilty, the tribunal shall have the power to sentence him to such punishment or punishments as may be imposed for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person.
- (5) The tribunal shall determine its own procedure. It shall have power to sit in divisions of not less than five members and to request any national court to assume jurisdiction for the purpose of inquiry or for trial and judgment.
- (6) The duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it shall be imposed upon a Prosecuting Commission of five members, of whom one shall be appointed by the Governments of the

United States of America, the British Empire, France, Italy and Japan, and for the assistance of which any other government may delegate a representative.

- (7) Applications by any Allied or Associated Government for the trial before the tribunal of any offender who has not been delivered up or who is at the disposition of some other Allied or Associated Government shall be addressed to the Prosecuting Commission, and a national court shall not proceed with the trial of any person who is selected for trial before the tribunal, but shall permit such person to be dealt with as directed by the Prosecuting Commission.
- (8) No person shall be liable to be tried by a national court for an offence in respect of which charges have been preferred before the tribunal, but no trial or sentence by a court of an enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States.

CONCLUSIONS

The Commission has consequently the honor to recommend:

- 1. *That a high tribunal be constituted as above set out.*
- 2. *That it shall be provided by the treaty of peace:*
 - (a) *That the enemy governments shall, notwithstanding that peace may have been declared, recognize the jurisdiction of the national tribunals and the high tribunal, that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity shall be excluded from any amnesty to which the belligerents may agree, and that the governments of such persons shall undertake to surrender them to be tried.*
 - (b) *That the enemy governments shall undertake to deliver up and give in such manner as may be determined thereby:*
 - (i) *The names of all persons in command or charge of or in any way exercising authority in or over all civilian internment camps, prisoner-of-war camps, branch camps, working*

camps and "commandoes" and other places where prisoners were confined in any of their dominions or in territory at any time occupied by them, with respect to which such information is required, and all orders and instructions or copies of orders or instructions and reports in their possession or under their control relating to the administration and discipline of all such places in respect of which the supply of such documents as aforesaid shall be demanded;

- (ii) All orders, instructions, copies of orders and instructions, General Staff plans of campaign, proceedings in naval or military courts and courts of inquiry, reports and other documents in their possession or under their control which relate to acts or operations, whether in their dominions or in territory at any time occupied by them, which shall be alleged to have been done or carried out in breach of the laws and customs of war and the laws of humanity;*
 - (iii) Such information as will indicate the persons who committed or were responsible for such acts or operations;*
 - (iv) All logs, charts, reports and other documents relating to operations by submarines;*
 - (v) All orders issued to submarines, with details or scope of operations by these vessels;*
 - (vi) Such reports and other documents as may be demanded relating to operations alleged to have been conducted by enemy ships and their crews during the war contrary to the laws and customs of war and the laws of humanity.*
3. *That each Allied and Associated Government adopt such legislation as may be necessary to support the jurisdiction of the international court, and to assure the carrying out of its sentences.*
4. *That the five states represented on the Prosecuting Commission shall jointly approach neutral governments with a view to obtaining the surrender for trial of persons within their territories who are charged by such states with violations of the laws and customs of war and the laws of humanity.*

CHAPTER V

COGNATE MATTERS

Finally, the Commission was asked to consider any other matters cognate or ancillary to the above which may arise in the course of the inquiry, and which the Commission finds it useful and relevant to take into consideration.

Under this head the Commission has considered it advisable to draft a set of provisions for insertion in the Preliminaries of Peace, for the assuring in practical form, in accordance with the recommendations at the end of the last chapter, the constitution, the recognition, and the mode of operation of the high Tribunal, and of the national tribunals which will be called to try infractions of the laws and customs of war or the laws of humanity.

The text of these provisions is set out in Annex IV.

March 29, 1919.

United States of America:

Subject to the reservations set forth in the annexed Memorandum. (Annex II.)

ROBERT LANSING.

JAMES BROWN SCOTT.

British Empire:

ERNEST M. POLLOCK.

W. F. MASSEY.

France:

A. TARDIEU.

F. LARNAUDE.

Italy:

V. SCIALOJA.

M. D'AMELIO.

Japan:

Subject to the reservations set forth in the annexed Memorandum. (Annex III.)

M. ADACHI.

S. TACHI.

Belgium:

ROLIN-JAEQUEMYS.

Grèce:

N. POLITIS.

Poland:

L. LUBIENSKI.

Roumania:

S. ROSENTAL.

Serbia:

SLOBODAN YOVANOVITCH.

ANNEX I.

SUMMARY OF EXAMPLES OF OFFENCES COMMITTED BY THE AUTHORITIES OR FORCES OF THE CENTRAL EMPIRES AND THEIR ALLIES AGAINST THE LAWS AND CUSTOMS OF WAR AND THE LAWS OF HUMANITY

[Thirty pages of details of the thirty-two classes of crimes listed on pp. 114-115 omitted for lack of space.]

ANNEX II.

MEMORANDUM OF RESERVATIONS PRESENTED BY THE REPRESENTATIVES OF THE UNITED STATES TO THE REPORT OF THE COMMISSION ON RESPONSIBILITIES

April 4, 1919.

The American members of the Commission on Responsibilities, in presenting their reservations to the report of the Commission, declare that they are as earnestly desirous as the other members of the Commission that those persons responsible for causing the Great War and those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal. The differences which have arisen between them and their colleagues lie in the means of accomplishing this common desire. The American members therefore submit to the Conference on the Preliminaries of Peace a memorandum of the reasons for their dissent from the report of the Commission and from certain provisions for insertion in treaties with enemy countries, as stated in Annex IV, and suggestions as to the cause of action which they consider should be adopted in dealing with the subjects upon which the Commission on Responsibilities was directed to report.

Preliminary to a consideration of the points at issue and the irreconcilable differences which have developed and which make this dissenting report necessary, we desire to express our high appreciation of the conciliatory and considerate spirit manifested by our colleagues throughout the many and protracted sessions of the Commission.

From the first of these, held on February 3, 1919, there was an earnest purpose shown to compose the differences which existed, to find a formula acceptable to all, and to render, if possible, a unanimous report. That this purpose failed was not because of want of effort on the part of any member of the Commission. It failed because, after all the proposed means of adjustment had been tested with frank and open minds, no practicable way could be found to harmonize the differences without an abandonment of principles which were fundamental. This the representatives of the United States could not do and they could not expect it of others.

In the early meetings of the Commission and the three Sub-Commissions appointed to consider various phases of the subject submitted to the Commission, the American members declared that there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offences were justiciable and liable to trial and punishment by appropriate tribunals, but that moral offences, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions.

While this principle seems to have been adopted by the Commission in the report so far as the responsibility for the authorship of the war is concerned, the Commission appeared unwilling to apply it in the case of indirect responsibility for violations of the laws and customs of war committed after the outbreak of the war and during its course. It is respectfully submitted that this inconsistency was due in large measure to a determination to punish certain persons, high in authority, particularly the heads of enemy states, even though heads of states were not hitherto legally responsible for the atrocious acts committed by subordinate authorities. To such an inconsistency the American members of the Commission were unwilling to assent, and from the time it developed that this was the unchangeable determination of certain members of the Commission they doubted the possibility of a unanimous report. Nevertheless, they continued their efforts on behalf of the adoption of a consistent basis of principle, appreciating the desirability of unanimity if it could be attained. That their efforts were futile they deeply regret.

With the manifest purpose of trying and punishing those persons to whom reference has been made, it was proposed to create a high tribunal with an international character, and to bring before it those who had been marked as responsible, not only for directly ordering illegal acts of war, but for having abstained from preventing such illegal acts.

Appreciating the importance of a judicial proceeding of this nature, as well as its novelty, the American representatives laid before the Commission a memorandum upon the constitution and procedure of a tribunal of an international character which, in their opinion, should be formed by the union of existing national military tribunals or commissions of admitted competence in the premises. And in view of the fact that "customs" as well as "laws" were to be considered, they filed another memorandum, attached hereto, as to the principles which should, in their opinion, guide the Commission in considering and reporting on this subject.

The practice proposed in the memorandum as to the military commissions was in part accepted, but the purpose of constituting a high tribunal for the trial of persons exercising sovereign rights was persisted in, and the abstention from preventing violations of the laws and customs of war and of humanity was insisted upon. It was frankly stated that the purpose was to bring before this tribunal the ex-Kaiser of Germany, and that the jurisdiction of the tribunals must be broad enough to include him even if he had not directly ordered the violations.

To the unprecedented proposal of creating an international criminal tribunal and to the doctrine of negative criminality the American members refused to give their assent.

On January 25, 1919, the Conference on the Preliminaries of Peace in plenary session recommended the appointment of a Commission to examine and to report to the Conference upon the following five points:

1. The responsibility of the authors of the war.
2. The facts as to the violations of the laws and customs of war committed by the forces of the German Empire and its allies, on land, on sea, and in the air during the present war.

3. The degree of responsibility for these crimes attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed.
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.
5. Any other matters cognate or ancillary to the above points which may arise in the course of the inquiry, and which the Commission finds it useful and relevant to take into consideration.

I.

The conclusions reached by the Commission as to the responsibility of the authors of the war, with which the representatives of the United States agree, are thus stated:

The war was premeditated by the Central Powers, together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable.

Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the *Entente* Powers and their repeated efforts to avoid war.

The American representatives are happy to declare that they not only concur in these conclusions, but also in the process of reasoning by which they are reached and justified. However, in addition to the evidence adduced by the Commission, based for the most part upon official memoranda issued by the various governments in justification of their respective attitudes towards the Serbian question and the war which resulted because of the deliberate determination of Austria-Hungary and Germany to crush that gallant little country which blocked the way to the Dardanelles and to the realization of their larger ambitions, the American representatives call attention to four documents, three of which have been made known by His Excellency Milenko R. Vesnitch, Serbian Minister at Paris. Of the three, the first is reproduced for the first time, and two of the others were only published during the sessions of the Commission.

The first of these documents is a report of Von Wiesner, the

Austro-Hungarian agent sent to Serajevo to investigate the assassination at that place on June 28, 1914, of the Archduke Francis Ferdinand, heir to the Austro-Hungarian throne, and the Duchess of Hohenberg, hismorganatic wife.

The material portion of this report, in the form of a telegram, is as follows:

Herr von Wiesner, to the Foreign Ministry, Vienna.

Serajevo, July 13, 1914, 1.10 p. m.

Cognizance on the part of the Serbian Government, participation in the murderous assault, or in its preparation, and supplying the weapons, proved by nothing, nor even to be suspected. On the contrary there are indications which cause this to be rejected.⁶⁶

The second is likewise a telegram, dated Berlin, July 25, 1914, from Count Szoegeny, Austro-Hungarian Ambassador at Berlin, to the Minister of Foreign Affairs at Vienna, and reads as follows:

Here it is generally taken for granted that in case of a possible refusal on the part of Serbia, our immediate declaration of war will be coincident with military operations.

Delay in beginning military operations is here considered as a great danger because of the intervention of other Powers.

We are urgently advised to proceed at once and to confront the world with a *fait accompli*.⁶⁷

⁶⁶ *Herr v. Wiesner an Ministerium des Aeussern in Wien.*

Sarajevo, 13. Juli 1914, 1.10 p.m.

Mitwissenschaft serbischer Regierung, Leitung an Attentat oder dessen Vorbereitung und Beistellung der Waffen, durch nichts erwiesen oder auch nur zu vermuten. Es bestehen vielmehr Anhaltspunkte, dies als ausgeschlossen anzusehen.

⁶⁷ *Graf Szoegeny an Minister des Aeussern in Wien.*

(285.)

Berlin, 25. Juli 1914.

Hier wird allgemein vorausgesetzt, dass auf eventuelle abweisende Antwort Serbiens sofort unsere Kriegserklärung verbunden mit kriegerischen Operationen erfolgen werde.

Man sieht hier in jeder Verzögerung des Beginnes der kriegerischen Operationen grosse Gefahr betreffs Einmischung andrer Mächte.

Man rät uns dringendst sofort vorzugehen und Welt vor ein *fait accompli* zu stellen.

The third, likewise a telegram in cipher, marked "strictly confidential," and dated Berlin, July 27, 1914, two days after the Serbian reply to the Austro-Hungarian ultimatum and the day before the Austro-Hungarian declaration of war upon that devoted kingdom, was from the Austro-Hungarian Ambassador at Berlin to the Minister of Foreign Affairs at Vienna. The material portion of this document is as follows:

The Secretary of State informed me very definitely and in the strictest confidence that in the near future possible proposals for mediation on the part of England would be brought to Your Excellency's knowledge by the German Government.

The German Government gives its most binding assurance that *it does not in any way associate itself with the proposals*; on the contrary, it is absolutely opposed to their consideration and only transmits them in compliance with the English request.⁶⁸

Of the English propositions, to which reference is made in the above telegram, the following may be quoted, which, under date July 30, 1914, Sir Edward Grey, Secretary of State for Foreign Affairs, telegraphed to Sir Edward Goschen, British Ambassador at Berlin:

If the peace of Europe can be preserved, and the present crisis safely passed, my own endeavour will be to promote some arrangement to which Germany could be a party, by which she could be assured that no aggressive or hostile policy would be pursued against her or her allies by France, Russia, and ourselves, jointly or separately.⁶⁹

While comment upon these telegrams would only tend to weaken their force and effect, it may nevertheless be observed that the last of them was dated two days before the declaration of war by Ger-

⁶⁸ *Graf Szöegeny an Ministerium des Aeussern in Wien.*

(307, Streng vertraulich.)

Berlin, 27. Juli 1914.

Staatssekretär erklärte mir in streng vertraulicher Form sehr entschieden, dass in der nächsten Zeit eventuelle Vermittlungsvorschläge Englands durch die deutsche Regierung zur Kenntnis Euer Exc. gebracht würden.

Die deutsche Regierung versichere auf das Bündigste, dass sie sich in keiner Weise mit den Vorschlägen identificire, sogar entschieden gegen derer Berücksichtigung sei, und dieselben nur, um der englischen Bitte Rechnung zu tragen, weitergebe.

⁶⁹ British Parliamentary Papers, Miscellaneous, No. 10 (1915), "Collected Documents relating to the Outbreak of the European War," p. 78.

many against Russia, which might have been prevented, had not Germany, flushed with the hope of certain victory and of the fruits of conquest, determined to force the war.

The report of the Commission treats separately the violation of the neutrality of Belgium and of Luxemburg, and reaches the conclusion, in which the American representatives concur, that the neutrality of both of these countries was deliberately violated. The American representatives believe, however, that it is not enough to state or to hold with the Commission that "the war was premeditated by the Central Powers," that "Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the *Entente* Powers and their repeated efforts to avoid war," and to declare that the neutrality of Belgium, guaranteed by the treaty of the 19th of April, 1839, and that of Luxemburg, guaranteed by the treaty of the 11th of May, 1867, were deliberately violated by Germany and Austria-Hungary. They are of the opinion that these acts should be condemned in no uncertain terms and that their perpetrators should be held up to the execration of mankind.

II

The second question submitted by the Conference to the Commission requires an investigation of and report upon "the facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies, on land, on sea, and in the air, during the present war." It has been deemed advisable to quote again the exact language of the submission in that it is at once the authority for and the limitation of the investigation and report to be made by the Commission. Facts were to be gathered, but these facts were to be not of a general but of a very specific kind, and were to relate to the violations or "breaches of the laws and customs of war." The duty of the Commission was, therefore, to determine whether the facts found were violations of the laws and customs of war. It was not asked whether these facts were violations of the laws or of the principles of humanity. Nevertheless, the report of the Commission does not, as in the opinion of the American represen-

tatives it should, confine itself to the ascertainment of the facts and to their violation of the laws and customs of war, but, going beyond the terms of the mandate, declares that the facts found and acts committed were in violation of the laws and of the elementary principles of humanity. The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law. The American representatives, therefore, objected to the references to the laws and principles of humanity, to be found in the report, in what they believed was meant to be a judicial proceeding, as, in their opinion, the facts found were to be violations or breaches of the laws and customs of war, and the persons singled out for trial and punishment for acts committed during the war were only to be those persons guilty of acts which should have been committed in violation of the laws and customs of war. With this reservation as to the invocation of the principles of humanity, the American representatives are in substantial accord with the conclusions reached by the Commission on this head that:

1. The war was carried on by the Central Empires, together with their Allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary principles of humanity.
2. A Commission should be created for the purpose of collecting and classifying systematically all the information already had or to be obtained, in order to prepare as complete a list of facts as possible concerning the violations of the laws and customs of war committed by the forces of the German Empire and its allies, on land, on sea, and in the air, in the course of the present war.

However, in view of the recommendation that a Commission be appointed to collect further information, the American representatives believe that they should content themselves with a mere expression of concurrence as to the statements contained in the report upon which these conclusions are based.

III

The third question submitted to the Commission on Responsibilities requires an expression of opinion concerning "the degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs, and other individuals, however highly placed." The conclusions which the Commission reached, and which is stated in the report, is to the effect that "all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of states, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution." The American representatives are unable to agree with this conclusion, in so far as it subjects 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 which no precedents are to be found in the modern practice of nations.

Omitting for the present the question of criminal liability for offences against the laws of humanity, which will be considered in connection with the law to be administered in the national tribunals and the high court, whose constitution is recommended by the Commission, and likewise reserving for discussion in connection with the high court the question of the liability of a chief of state to criminal prosecution, a reference may properly be made in this place to the masterly and hitherto unanswered opinion of Chief Justice Marshall, in the case of the *Schooner Exchange v. McFaddon and Others* (7 Cranch, 116), decided by the Supreme Court of the United States in 1812, in which the reasons are given for the exemption of the sovereign and of the sovereign agent of a state from judicial process. This does not mean that the head of the state, whether he be called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its

name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries, a chief executive, thus withdrawing him from the laws of his country, even its organic laws, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.

But the law to which the head of the state is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries, and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punishment created after the commission of the act.

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

The American representatives also believe that the above observations apply to liability of the head of a state for violations of positive law in the strict and legal sense of the term. They are not intended to apply to what may be called political offences and to political sanctions.

These are matters for statesmen, not for judges, and it is for them to determine whether or not the violators of the treaties guaranteeing the neutrality of Belgium and of Luxemburg should be subjected to a political sanction.

However, as questions of this kind seem to be beyond the mandate of the Conference, the American representatives consider it unnecessary to enter upon their discussion.

IV

The fourth question calls for an investigation of and a report upon "the constitution and procedure of a tribunal appropriate for the trial of these offences." Apparently the Conference had in mind the violations of the laws and customs of war, inasmuch as the Commission is required by the third submission to report upon "the degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed." The fourth point relates to the constitution and procedure of a tribunal appropriate for the investigation of these crimes, and to the trial and punishment of the persons accused of their commission, should they be found guilty. The Commission seems to have been of the opinion that the tribunal referred to in the fourth point was to deal with the crimes specified in the second and third submissions, not with the responsibility of the authors of the war, as appears from the following statement taken from the report:

On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Luxemburg and of Belgium, the Commission is of the opinion that it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.

This section of the report, however, deals not only with the laws and customs of war—improperly adding "and of the laws of humanity"—but also with the "acts which provoked the war and accompanied its inception," which either in whole or in part would appear to fall more appropriately under the first submission relating to the "responsibility of the authors of the war."

Of the acts which provoked the war and accompanied its inception, the Commission, with special reference to the violation of the neutrality of Luxemburg and of Belgium, says: "We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal." And

a little later in the same section the report continues: "The Commission is nevertheless of opinion that no criminal charge can be made against the responsible authorities or individuals, and notably the ex-Kaiser, on the special head of these breaches of neutrality, but the gravity of these gross outrages upon the law of nations and international good faith is such that the Commission thinks they should be the subject of a *formal condemnation by the Conference*." The American representatives are in thorough accord with these views, which are thus formally stated in the first two of the four conclusions under this heading:

The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

If the report had stopped here, the American representatives would be able to concur in the conclusions under this heading and the reasoning by which they were justified, for hitherto the authors of war, however unjust it may be in the forum of morals, have not been brought before a court of justice upon a criminal charge for trial and punishment. The report specifically states: (1) that "a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the Commission is authorized to consider under its terms of reference"; the Commission refused to advise (2) "that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal"; it further holds (3) that "no criminal charge can be made against the responsible authorities or individuals, and notably the ex-Kaiser, on the special head of these breaches of neutrality." The American representatives, accepting each of these statements as sound and unanswerable, are nevertheless unable to agree with the third of the conclusions based upon them:

On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts.

The American representatives believe that this conclusion is inconsistent both with the reasoning of the section and with the first and second conclusions, and that "in a matter so unprecedented," to quote the exact language of the third conclusion, they are relieved from comment and criticism. However, they observe that, if the acts in question are criminal in the sense that they are punishable under law, they do not understand why the report should not advise that these acts be punished in accordance with the terms of the law. If, on the other hand, there is no law making them crimes or affixing a penalty for their commission, they are moral, not legal, crimes, and the American representatives fail to see the advisability or indeed the appropriateness of creating a special organ to deal with the authors of such acts. In any event, the organ in question should not be a judicial tribunal.

In order to meet the evident desire of the Commission that a special organ be created, without however doing violence to their own scruples in the premises, the American representatives proposed—

The Commission on Responsibilities recommends that:

1. A Commission of Inquiry be established to consider generally the relative culpability of the authors of the war and also the question of their culpability as to the violations of the laws and customs of war committed during its course.
2. The Commission of Inquiry to consist of two members of the five following Powers: United States of America, British Empire, France, Italy, and Japan; and one member from each of the five following Powers: Belgium, Greece, Portugal, Roumania, and Serbia.
3. The enemy be required to place their archives at the disposal of the Commission, which shall forthwith enter upon its duties and report jointly and separately to their respective governments on the 11th November, 1919, or as soon thereafter as practicable.

The Commission, however, failed to adopt this proposal.

The fourth and final conclusion under this heading declares it to be "desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law." With this conclusion the American representatives find themselves to be in substantial accord. They believe that any nation going to war assumes a grave responsibility, and that a nation engaging in a war of aggression commits a crime. They hold that the neutrality of nations should be observed, especially when it is guaranteed by a treaty to which the nations violating it are parties, and that the plighted word and the good faith of nations should be faithfully observed in this as in all other respects. At the same time, given the difficulty of determining whether an act is in reality one of aggression or of defence, and given also the difficulty of framing penal sanctions, where the consequences are so great or may be so great as to be incalculable, they hesitate as to the feasibility of this conclusion, from which, however, they are unwilling formally to dissent.

With the portion of the report devoted to the "constitution and procedure of a tribunal appropriate for the trial of these offences," the American representatives are unable to agree, and their views differ so fundamentally and so radically from those of the Commission that they found themselves obliged to oppose the views of their colleagues in the Commission and to dissent from the statement of those views as recorded in the report. The American representatives, however, agree with the introductory paragraph of this section, in which it is stated that "every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes" constituting violations of the laws and customs of war, "if such persons have been taken prisoners or have otherwise fallen into its power." The American representatives are likewise in thorough accord with the further provisions that "each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases." The American representatives concur in the view that "these courts would be able to try the incriminated persons according to their own pro-

cedure," and also in the conclusion that "much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal," supposing that the single tribunal could and should be created. In fact, these statements are not only in accord with but are based upon the memorandum submitted by the American representatives, advocating the utilization of the military commissions or tribunals either existing or which could be created in each of the belligerent countries, with jurisdiction to pass upon offences against the laws and customs of war committed by the respective enemies.

This memorandum already referred to in an earlier paragraph is as follows:

1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;
2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;
3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence was committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;
4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and
5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences.

In a matter of such importance affecting not one but many countries and calculated to influence their future conduct, the

American representatives believed that the nations should use the machinery at hand, which had been tried and found competent, with a law and a procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice, or procedure. They further believed that, if an act violating the laws and customs of war committed by the enemy affected more than one country, a tribunal could be formed of the countries affected by uniting the national commissions or courts thereof, in which event the tribunal would be formed by the mere assemblage of the members, bringing with them the law to be applied, namely, the laws and customs of war, and the procedure, namely, the procedure of the national commissions or courts. The American representatives had especially in mind the case of Henry Wirz, commandant of the Confederate prison at Andersonville, Georgia, during the war between the States, who, after that war, was tried by a military commission, sitting in the city of Washington, for crimes contrary to the laws and customs of war, convicted thereof, sentenced to be executed, and actually executed on the 11th November, 1865.

While the American representatives would have preferred a national military commission or court in each country, for which the Wirz case furnished ample precedent, they were willing to concede that it might be advisable to have a commission of representatives of the competent national tribunals to pass upon the charges, as stated in the report:

- (a) Against persons belonging to enemy countries who have committed outrages against a number of civilians and soldiers of several Allied nations, such as outrages committed in prison camps where prisoners of war of several nations were congregated or the crime of forced labor in mines where prisoners of more than one nationality were forced to work.
- (b) Against persons of authority, belonging to enemy countries, whose orders were executed not only in one area or on one battle front, but whose orders affected the conduct towards several of the Allied armies.

The American representatives are, however, unable to agree that a mixed commission thus composed should, in the language of the report, entertain charges:

- (c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war, it being understood that no such abstention shall constitute a defence for the actual perpetrators.

In an earlier stage of the general report, indeed, until its final revision, such persons were declared liable because they "abstained from preventing, putting an end to, or repressing, violations of the laws or customs of war." To this criterion of liability the American representatives were unalterably opposed. It is one thing to punish a person who committed, or, possessing the authority, ordered others to commit an act constituting a crime; it is quite another thing to punish a person who failed to prevent, to put an end to, or to repress violations of the laws or customs of war. In one case the individual acts or orders others to act, and in so doing commits a positive offence. In the other he is to be punished for the acts of others without proof being given that he knew of the commission of the acts in question or that, knowing them, he could have prevented their commission. To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected. The difficulty in the matter of abstention was felt by the Commission, as to make abstention punishable might tend to exonerate the person actually committing the act. Therefore the standard of liability to which the American representatives objected are modified in the last sessions of the

Commission, and the much less objectionable text, as stated above, was adopted and substituted for the earlier and wholly inadmissible one.

There remain, however, two reasons, which, if others were lacking, would prevent the American representatives from consenting to the tribunal recommended by the Commission. The first of these is the uncertainty of the law to be administered, in that liability is made to depend not only upon violations of the laws and customs of war, but also upon violations "of the laws of humanity." The second of these reasons is that heads of states are included within the civil and military authorities of the enemy countries to be tried and punished for violations of the laws and customs of war and of the laws of humanity. The American representatives believe that the Commission has exceeded its mandate in extending liability to violations of the laws of humanity, inasmuch as the facts to be examined are solely violations of the laws and customs of war. They also believe that the Commission erred in seeking to subject heads of states to trial and punishment by a tribunal to whose jurisdiction they were not subject when the alleged offences were committed.

As pointed out by the American representatives on more than one occasion, war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity. The law of humanity, or the principle of humanity, is much like equity, whereof John Selden, as wise and cautious as he was learned, aptly said:

Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis

all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

While recognizing that offences against the laws and customs of war might be tried before and the perpetrators punished by national tribunals, the Commission was of the opinion that the graver charges and those involving more than one country should be tried before an international body, to be called the High Tribunal, which "shall be composed of three persons appointed by each of the following governments: The United States of America, the British Empire, France, Italy, and Japan, and one person appointed by each of the following governments: Belgium, Greece, Poland, Portugal, Roumania, Serbia, and Czecho-Slovakia"; the members of this tribunal to be selected by each country "from among the members of their national courts or tribunals, civil or military, and now in existence or erected as indicated above." The law to be applied is declared by the Commission to be "the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." The punishment to be inflicted is that which may be imposed "for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person." The cases selected for trial are to be determined and the prosecutions directed by "a prosecuting commission" composed of a representative of the United States of America, the British Empire, France, Italy, and Japan, to be assisted by a representative of one of the other governments, presumably a party to the creation of the court or represented in it.

The American representatives felt very strongly that too great attention could not be devoted to the creation of an international criminal court for the trial of individuals, for which a precedent is lacking, and which appears to be unknown in the practice of nations. They were of the opinion that an act could not be a crime in the legal sense of the word, unless it were made so by law, and that the commission of an act declared to be a crime by law could not be punished unless the law prescribed the penalty to be inflicted. They

were perhaps more conscious than their colleagues of the difficulties involved, inasmuch as this question was one that had arisen in the American Union composed of States, and where it had been held in the leading case of *United States v. Hudson* (7 Cranch, 32), decided by the Supreme Court of the United States in 1812, that "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence." What is true of the American States must be true of this looser union which we call the Society of Nations. The American representatives know of no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence. They felt, however, that the difficulty, however great, was not insurmountable, inasmuch as the various states have declared certain acts violating the laws and customs of war to be crimes, affixing punishments to their commission, and providing military courts or commissions within the respective states possessing jurisdiction over such offence. They were advised that each of the Allied and Associated states could create such a tribunal, if it had not already done so. Here then was at hand a series of existing tribunal or tribunals that could lawfully be called into existence in each of the Allied or Associated countries by the exercise of their sovereign powers, appropriate for the trial and punishment within their respective jurisdictions of persons of enemy nationality, who during the war committed acts contrary to the laws and customs of war, in so far as such acts affected the persons or property of their subjects or citizens, whether such acts were committed within portions of their territory occupied by the enemy or by the enemy within its own jurisdiction.

The American representatives therefore proposed that acts affecting the persons or property of one of the Allied or Associated Governments should be tried by a military tribunal of that country; that acts involving more than one country, such as treatment by Germany of prisoners contrary to the usages and customs of war, could be tried by a tribunal either made up of the competent tribunals of

the countries affected or of a commission thereof possessing their authority. In this way existing national tribunals or national commissions which could legally be called into being would be utilized, and not only the law and the penalty would be already declared, but the procedure would be settled.

It seemed elementary to the American representatives that a country could not take part in the trial and punishment of a violation of the laws and customs of war committed by Germany and her Allies before the particular country in question had become a party to the war against Germany and her Allies; that consequently the United States could not institute a military tribunal within its own jurisdiction to pass upon violations of the laws and customs of war, unless such violations were committed upon American persons or American property, and that the United States could not properly take part in the trial and punishment of persons accused of violations of the laws and customs of war committed by the military or civil authorities of Bulgaria or Turkey.

Under these conditions and with these limitations the American representatives considered that the United States might be a party to a high tribunal, which they would have preferred to call, because of its composition, the Mixed or United Tribunal or Commission. They were averse to the creation of a new tribunal, of a new law, of a new penalty, which would be *ex post facto* in nature, and thus contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities. They believed, however, that the United States could co-operate to this extent by the utilization of existing tribunals, existing laws, and existing penalties. However, the possibility of co-operating was frustrated by the insistence on the part of the majority that criminal liability should, in excess of the mandate of the Conference, attach to the laws and principles of humanity, in addition to the laws and customs of war, and that the jurisdiction of the high court should be specifically extended to "the heads of states."

In regard to the latter point, it will be observed that the American representatives did not deny the responsibility of the heads of states for acts which they may have committed in violation of law, including,

in so far as their country is concerned, the laws and customs of war, but they held that heads of states are, as agents of the people, in whom the sovereignty of any state resides, responsible to the people for the illegal acts which they may have committed, and that they are not and that they should not be made responsible to any other sovereignty.

The American representatives assumed, in debating this question, that from a legal point of view the people of every independent country are possessed of sovereignty, and that that sovereignty is not held in that sense by rulers; that the sovereignty which is thus possessed can summon before it any person, no matter how high his estate, and call upon him to render an account of his official stewardship; that the essence of sovereignty consists in the fact that it is not responsible to any foreign sovereignty; that in the exercise of sovereign powers which have been conferred upon him by the people, a monarch or head of state acts as their agent; that he is only responsible to them; and that he is responsible to no other people or group of people in the world.

The American representatives admitted that from the moral point of view the head of a state, be he termed emperor, king, or chief executive, is responsible to mankind, but that from the legal point of view they expressed themselves as unable to see how any member of the Commission could claim that the head of a state exercising sovereign rights is responsible to any but those who have confided those rights to him by consent expressed or implied.

The majority of the Commission, however, was not influenced by the legal argument. They appeared to be fixed in their determination to try and punish by judicial process the "ex-Kaiser" of Germany. That there might be no doubt about their meaning, they insisted that the jurisdiction of the high tribunal whose constitution they recommended should include the heads of states, and they therefore inserted a provision to this effect in express words in the clause dealing with the jurisdiction of the tribunal.

In view of their objections to the uncertain law to be applied, varying according to the conception of the members of the high court as to the laws and principles of humanity, and in view also of their

objections to the extent of the proposed jurisdiction of that tribunal, the American representatives were constrained to decline to be a party to its creation. Necessarily they declined the proffer on behalf of the Commission that the United States should take part in the proceedings before that tribunal, or to have the United States represented in the prosecuting commission charged with the "duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it." They therefore refrained from taking further part either in the discussion of the constitution or of the procedure of the tribunal.

It was an ungracious task for the American representatives to oppose the views of their colleagues in the matter of the trial and punishment of heads of states, when they believed as sincerely and as profoundly as any other member that the particular heads of states in question were morally guilty, even if they were not punishable before an international tribunal, such as the one proposed, for the acts which they themselves had committed or with whose commission by others they could be justly taxed. It was a matter of great regret to the American representatives that they found themselves subjected to criticism, owing to their objection to declaring the laws and principles of humanity as a standard whereby the acts of their enemies should be measured and punished by a judicial tribunal. Their abhorrence for the acts of the heads of states of enemy countries is no less genuine and deep than that of their colleagues, and their conception of the laws and principles of humanity is, they believe, not less enlightened than that of their colleagues. They considered that they were dealing solely with violations of the laws and customs of war, and that they were engaged under the mandate of the Conference in creating a tribunal in which violations of the laws and customs of war should be tried and punished. They therefore confined themselves to law in its legal sense, believing that in so doing they accorded with the mandate of submission, and that to have permitted sentiment or popular indignation to affect their judgment would have been violative of their duty as members of the Commission on Responsibilities.

They submit their views, rejected by the Commission, to the

Conference, in full confidence that it is only through the administration of law, enacted and known before it is violated, that justice may ultimately prevail internationally, as it actually does between individuals in all civilized nations.

Memorandum on the Principles which should Determine Inhuman and Improper Acts of War

To determine the principles which should be the standard of justice in measuring the charge of inhuman or atrocious conduct during the prosecution of a war, the following propositions should be considered:

1. Slaying and maiming men in accordance with generally accepted rules of war are from their nature cruel and contrary to the modern conception of humanity.

2. The methods of destruction of life and property in conformity with the accepted rules of war are admitted by civilized nations to be justifiable and no charge of cruelty, inhumanity, or impropriety lies against a party employing such methods.

3. The principle underlying the accepted rules of war is the necessity of exercising physical force to protect national safety or to maintain national rights.

4. Reprehensible cruelty is a matter of degree which cannot be justly determined by a fixed line of distinction, but one which fluctuates in accordance with the facts in each case, but the manifest departure from accepted rules and customs of war imposes upon the one so departing the burden of justifying his conduct, as he is *prima facie* guilty of a criminal act.

5. The test of guilt in the perpetration of an act, which would be inhuman or otherwise reprehensible under normal conditions, is the necessity of that act to the protection of national safety or national rights measured chiefly by actual military advantage.

6. The assertion by the perpetrator of an act that it is necessary for military reasons does not exonerate him from guilt if the facts and circumstances present reasonably strong grounds for establishing the needlessness of the act or for believing that the assertion is not made in good faith.

7. While an act may be essentially reprehensible and the perpetrator entirely unwarranted in assuming it to be necessary from a military point of view, he must not be condemned as wilfully violating the laws and customs of war or the principles of humanity unless it can be shown that the act was wanton and without reasonable excuse.

8. A wanton act which causes needless suffering (and this includes such causes of suffering as destruction of property, deprivation of necessities of life, enforced labor, &c.) is cruel and criminal. The full measure of guilt attaches to a party who without adequate reason perpetrates a needless act of cruelty. Such an act is a crime against civilization, which is without palliation.

9. It would appear, therefore, in determining the criminality of an act, that there should be considered the wantonness or malice of the perpetrator, the needlessness of the act from a military point of view, the perpetration of a justifiable act in a needlessly harsh or cruel manner, and the improper motive which inspired it.

ROBERT LANSING.

JAMES BROWN SCOTT.

ANNEX III

RESERVATIONS BY THE JAPANESE DELEGATION

April 4, 1919

The Japanese Delegates on the Commission on Responsibilities are convinced that many crimes have been committed by the enemy in the course of the present war in violation of the fundamental principles of international law, and recognize that the principal responsibility rests upon individual enemies in high places. They are consequently of opinion that, in order to re-establish for the future the force of the principles thus infringed, it is important to discover practical means for the punishment of the persons responsible for such violations.

A question may be raised whether it can be admitted as a principle of the law of nations that a high tribunal constituted by belligerents

can, after a war is over, try an individual belonging to the opposite side, who may be presumed to be guilty of a crime against the laws and customs of war. It may further be asked whether international law recognizes a penal law as applicable to those who are guilty.

In any event, it seems to us important to consider the consequences which would be created in the history of international law by the prosecution for breaches of the laws and customs of war of enemy heads of states before a tribunal constituted by the opposite party.

Our scruples become still greater when it is a question of indicting before a tribunal thus constituted highly placed enemies on the sole ground that they abstained from preventing, putting an end to, or repressing acts in violation of the laws and customs of war, as is provided in clause (c) of section (b) of Chapter IV.

It is to be observed that to satisfy public opinion of the justice of the decision of the appropriate tribunal, it would be better to rely upon a strict interpretation of the principles of penal liability, and consequently not to make cases of abstention the basis of such responsibility.

In these circumstances the Japanese Delegates thought it possible to adhere, in the course of the discussions in the Commission, to a text which would eliminate from clause (c) of section (b) of Chapter IV both the words "including the heads of states," and the provision covering cases of abstention, but they feel some hesitation in supporting the amended form which admits a criminal liability where the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing acts in violation of the laws and customs of war.

The Japanese Delegates desire to make clear that, subject to the above reservations, they are disposed to consider with the greatest care every suggestion calculated to bring about unanimity in the Commission.

M. ADACHI.
S. TACHI.

ANNEX IV

PROVISIONS FOR INSERTION IN TREATIES WITH ENEMY GOVERNMENTS

ARTICLE I

The *Enemy* Government admits that even after the conclusion of peace, every Allied and Associated State may exercise, in respect of any enemy or former enemy, the right which it would have had during the war to try and punish any enemy who fell within its power and who had been guilty of a violation of the principles of the law of nations as these result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.

ARTICLE II

The *Enemy* Government recognizes the right of the Allied and Associated States, after the conclusion of peace, to constitute a High Tribunal composed of members named by the Allied and Associated States in such numbers and in such proportions as they may think proper, and admits the jurisdiction of such tribunal to try and punish enemies or former enemies guilty during the war of violations of the principles of the law of nations as these result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience. It agrees that no trial or sentence by any of its own courts shall bar trial and sentence by the High Tribunal or by a national court belonging to one of the Allied or Associated States.

ARTICLE III

The *Enemy* Government recognizes the right of the High Tribunal to impose upon any person found guilty the punishment or punishments which may be imposed for such an offence or offences by any court in any country represented on the High Tribunal or in the country of the convicted person. The *Enemy* Government will not object to such punishment or punishments being carried out.

ARTICLE IV

The *Enemy* Government agrees, on the demand of any of the Allied or Associated States, to take all possible measures for the purpose of the delivery to the designated authority, for trial by the High Tribunal or, at its instance, by a national court of one of such Allied or Associated States, of any person alleged to be guilty of an offence against the laws and customs of war or the laws of humanity who may be in its territory or otherwise under its direction or control. No such person shall in any event be included in any amnesty or pardon.

ARTICLE V

The *Enemy* Government agrees, on the demand of any of the Allied or Associated States, to furnish to it the name of any person at any time in its service who may be described by reference to his duties or station during the war or by reference to any other description which may make his identification possible and further agrees to furnish such other information as may appear likely to be useful for the purpose of designating the persons who may be tried before the High Tribunal or before one of the national courts of an Allied or Associated State for a crime against the laws and customs of war or the laws of humanity.

ARTICLE VI

The *Enemy* Government agrees to furnish, upon the demand of any Allied or Associated State, all General Staff plans of campaign, orders, instructions, reports, logs, charts, correspondence, proceedings of courts, tribunals or investigating bodies, or such other documents or classes of documents as any Allied or Associated State may request as being likely to be useful for the purpose of identifying or as evidence for or against any person, and upon demand as aforesaid to furnish copies of any such documents.