Commission on Responsibilities

M. Cherif Bassiouni


World War I was started by the Austro-Hungarian Empire over the assassination of Archduke Ferdinand by a Serb nationalist in Sarajevo. The event gave Germany an opportunity to declare war on August 2, 1914. Two days later it invaded Belgium and France, bringing the British Empire, tsarist Russia, Italy, and later the United States into the conflict. These allies and Japan, Greece, Poland, Romania, and Serbia were called the Entente Powers, but France, the British Empire, Italy, Japan, and the United States referred to themselves as the Great Powers. Germany's allies, called the Central Powers, were the Austro-Hungarian Empire, the Turkish Ottoman Empire, and Bulgaria. The conflict was, until then, the bloodiest in history, resulting in more than 21 million casualties, with 8.5 million dead in slightly more than four years. During the conflict chemical weapons were used for the first time, and as a result of the harm they caused, their use was banned in 1925. Both sides committed violations of the laws and customs of war, particularly the Central Powers, and the Germans and Turks.

The hostilities ended with the signing of an armistice in a railroad car at Compiegnes, France, on November 11, 1918 (a date still celebrated in the United States as Veterans Day), and a formal peace conference and treaty soon ensued. On January 25, 1919, the Preliminary Peace Conference in Paris established the Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties, which would deliberate on just punishment for the Germans and their allies. The Commission's mandate was to investigate individual criminal responsibility for the "authors of the war" and for violations of the laws and customs of war. The mandate included drawing up a list of persons to be prosecuted for such crimes, irrespective of how "highly placed" they were, and establishing procedures for "a tribunal appropriate for the trials of these offenders." The mandate also included what it referred to as a "cognate or ancillary to the above." It was the first time in modern history that such an investigatory commission was established on an international scale and with such a broad mandate.

The Commission consisted of fifteen representatives from the ten Entente Powers who were for the most part senior governmental officials from ministries of foreign affairs, many with a legal background and senior military officers. Each delegation had a support staff of military and legal experts.

The Commission's establishment preceded the signing of the official peace treaty that occurred on June 28, 1919, at the Versailles Palace. The Treaty of Versailles did not come into force until January 1920, a year after the Commission was established. The Commission's work, however, was based on the assumption that the peace treaty would contain provisions for the prosecution of those whom it was able to identify as criminally
responsible for the conflict. This was the understanding of the Entente Powers after the Preliminary Peace Conference in Paris and as reflected in the Commission's mandate. The Central Powers, however, had other expectations, arising from the actual language of the earlier 1918 armistice, namely, immunity.

The Treaty of Versailles contained four articles relating to the Commission's work: Article 227 on the criminal responsibility of Kaiser Wilhelm, Articles 228 and 229 on the prosecution of those who violated the laws and customs of war contained in the 1907 Hague Convention No. IV and its Annexed Regulations, and Article 230, which obligated all the Central Powers to surrender for trial those persons wanted for prosecution pursuant to Articles 228 through 229.

The peace treaty, however, did not contain an explicit provision on the prosecution of Turkish officials with respect to the large-scale killing of Armenian civilians during World War I. The Commission nevertheless considered the matter "cognate or ancillary" to other aspects of its mandate, namely violations of the laws and customs of war by the Germans. Accordingly, it examined the responsibility of Turkish officials for what it called "crimes against the laws of humanity."

The Commission's work, which commenced shortly after its establishment, resulted in a preliminary report on March 29, 1919, and a final report on May 18, 1919.

The Commission's work had three legal tracks. The first was determining if the Kaiser bore responsibility for initiating war in Europe. Because no legal prohibition existed against the resort to war as an instrument of national policy, the decision to address the Kaiser's responsibility in the Treaty of Versailles (Article 227) was essentially a political one. This provision was drafted by a member of the British Empire's delegation to the peace conference whose political astuteness is reflected in the language of Article 227. The alleged crime was defined as "the supreme offence against international morality and sanctity of treaties." Because no such defined crime existed in international law, or for that matter in the national laws of almost all countries in the world, it was easy for The Netherlands to give the Kaiser political asylum and he was never prosecuted. This outcome did not displease Europe's monarchies, many of which were related to Germany's. Other than Belgium and France, there were few governments that did not support the preservation of the customary international principle of law granting immunity to a head of state. This is why the Commission's chairman, Secretary of State Robert Lansing, had originally opposed the prosecution of the German head of state, but he was overruled by the Commission's majority.

The U.S. position subsequently changed. American support for the Kaiser's prosecution was the result of a political quid pro quo—the peace conference's recognition of the Monroe Doctrine, thus giving the United States hegemony over the Southern Hemisphere. As a result of this political deal, a new historic development occurred, namely the personal criminal responsibility of a head of state for the newly established international crime contained in Article 227. The precedent paved the way for the Nuremberg Charter to unequivocally deny immunity to a head of state for the three
crimes within its jurisdiction—a position followed by the later International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).

The second track was more conventional and in better keeping with the Commission's mandate and expertise. It related to assessing the violations of the laws and customs of war by Germany and its allies, and preparing a list of persons who would be prosecuted in accordance with Articles 228 and 229. Government delegates on the Commission submitted their own lists of alleged war crimes and their accused perpetrators. The Commission as a whole reviewed these submissions and issued findings as to the facts alleged and the charges against the alleged perpetrators. In doing this, it asked governments to submit documentation to support their allegations. The Commission did not, however, independently investigate the facts; it merely reviewed the allegations and evidence presented by delegates and, when necessary, requested additional evidence. Consequently, it acted more as a gatherer and reviewer of allegations by the governments represented on the Commission than as an investigative organ, as these bodies are known in national criminal justice systems.

In the relatively short period between February and May 1919, the Commission drew up a list of situations in which war crimes were alleged to have been committed by Germans, and named or identified the alleged perpetrators. The categories of crimes charged included: systematic terrorizing of civilian populations, mass and individual murders of civilians, mistreatment of the civilian population, the use of civilians as human shields for the military, torture, rape, displacement of the civilian population, collective punishment, looting of private and public property, pillaging of private property, and the killing and mistreatment of prisoners of war (POWs). The Commission's list of alleged perpetrators, all Germans, exceeded twenty thousand. The Commission did not take into account any similar acts allegedly committed by the Entente Powers against the Central Powers. Also, Articles 228 and 229 of the Treaty of Versailles applied only to the defeated Central Powers. After World War II the Allies, who included all but two of the Great Powers' allies from World War I, adopted this same one-sided approach, thus leading to the label "victors' vengeance" with respect to post-conflict judicial proceedings.

Although the allegations of war crimes committed by German forces were for the most part substantially accurate, the large number of persons alleged to have committed war crimes was probably exaggerated. This may be why the Commission subsequently reconsidered the original number and lowered it to 895. This significant reduction also occurred for political reasons, as well as careful consideration of the time, effort, and costs associated with prosecuting such a large number of individuals.

The Allies' political will to carry out the prosecutions of 895 war criminals based on the findings of the Commission was, however, short-lived. Three years later no tribunals had been established and no prosecutions conducted. In 1922 the Commission abandoned the prospects of such action and asked Germany to assume responsibility for prosecuting its own war criminals. Germany agreed to this scenario and passed a
special law for that purpose; in 1923 it prosecuted some 22 individuals on the Commission's scaled down list of 895. Belgium and France expressed outrage, as did the British public, but as time passed, support for postconflict justice waned. Then, as in the twenty-first century, public outrage over crimes of war is short-lived.

The Commission's files on the twenty-two individuals accused of war crimes constituted the basis of the prosecution conducted in Leipzig before the German Supreme Court. Because the work of the Commission was, by nature, more focused on preliminary findings rather than a thorough and complete investigation of the facts, it was easy for the defense at the Leipzig trials to argue against the charges and, at times, even ridicule them. The German public considered those prosecuted to be scapegoats for a defeated Germany and some viewed them as heroes. The German *Reichsgericht* (Supreme Court) nevertheless conducted its proceedings with fairness, and the judges were not partial to the accused, in fact convicting nineteen of them.

The third track was an extension of the second one, namely the prosecution of Turkish officials for crimes against the laws of humanity for the annihilation of its Armenian population. From a legal positivist's perspective, it was as much of a stretch as was the idea of prosecuting the Kaiser for the crime of violating the "sanctity of international treaties." But, in support of the concept of crimes against the laws of humanity, it must be said that the facts warranted the extension of the then existing law of armed conflict on the protection of the civilian population in a state at war, to apply to the same depredation when committed by a state against its own population during time of war. Because the 1907 Hague Convention and its Annexed Regulations prohibited killing the enemy's civilian population, it was reasonable to extend these prohibitions to a state committing the same violations against its own civilian population, provided that such actions were war-related. The gap in protecting civilians during time of war needed to be filled, particularly because the killing of the Armenians was done in such an egregious manner and on such a large scale that it could not be ignored (the estimated numbers of those killed range from 200,000 to 1,000,000). For the Commission, as for the drafters of the Nuremberg Charter some twenty-five years later, the facts drove the law.

The Commission wished to include what was then called "the Armenian massacre" among its list of crimes for which Turkish officials were to be prosecuted. However, there was no legal basis to do so pursuant to the 1907 Hague Convention and its Annexed Regulations because the victims were Turkish nationals and not the nationals of another state with which the Turkish Ottoman Empire was at war. The Commission developed an appropriate, although artful, legal argument based on both the language and spirit of the 1907 Hague Convention's Preamble. The Preamble had been drafted by a Russian diplomat, Fyodor Martens; the portion of it that the Commission cited was named "Martens' clause."

The premise of the Preamble of the 1907 Hague Convention is that international law reflects the human values that have emerged from civilization, and that this is what the term "laws of humanity" refers to. It thus follows that not everything falling under the category of laws of humanity could have been agreed on by state parties for inclusion in
the 1907 Hague Convention and its Annexed Regulations. Therefore, the Preamble affirms that what is included in the specific provisions of the Hague Convention is only a portion of the laws of humanity, namely that portion which the signing nations had agreed to. Consequently, when other wartime practices emerge that constitute a violation of the laws of humanity, they would be considered part of the prohibited conduct contained in the original Convention. This represented a new development.

On the basis of such reasoning, the Commission concluded that the widespread and systematic killing of Armenian civilians in 1915 as part of a policy of persecution against the civilian population of a certain ethnic/religious background constituted a crime against the laws of humanity by analogy to war crimes. The assumption was that, if one of the purposes of the Law of Armed Conflict was to protect innocent civilians during time of war, then no distinction should be made based on the nationality of the victims. This was a humanistic perspective ahead of its time. In fact, it has continued opposed by those who believe that power and not law should control international affairs.

The Commission's majority agreed that Turkish officials, whether military or political, should be prosecuted for crimes against the laws of humanity on the same basis as Germans were to be prosecuted for war crimes. However, two delegations strongly dissented, namely the United States and Japan, insisting that their minority opinions be published as part of the Commission's final report. The legal argument presented by these two delegations was the notion that crimes against the laws of humanity was predicated on natural law and not positive law and therefore could not be recognized as a valid interpretation of existing international law.

Despite this opposition, the recommendation of the majority could have been carried out, but the western allies of the Entente Powers subsequently struck a political deal with Turkey, as reflected in the 1923 Treaty of Lausanne, which granted amnesty to Turkish officials for the period from 1914 to 1922. For political reasons, the Entente's western allies needed Turkey to be on their side: to serve as a buffer with the newly established Union of the Soviet Socialist Republics (USSR) that had come about as a result of the 1917 communist revolution against tsarist Russia. The about-face of the western allies concerning the criminal responsibility of Turkish officials is reflected in the 1923 peace treaty between the Entente Powers and Turkey, the Treaty of Lausanne, which replaced the 1920 Treaty of Sevres that was not ratified. The latter contained a provision establishing the criminal accountability of Turkish officials before the Entente Powers' tribunals pursuant to Articles 228 and 229 of the Treaty of Versailles. The 1923 Treaty of Lausanne, the agreement that entered into force, did not however contain such a provision. Instead, it included a special protocol that gave amnesty to all Turkish officials for the time period of the Armenian massacre. At the signing of the Treaty of Lausanne, 118 Turkish officials were in British custody, with most of them held in Malta; they were subsequently released.

On August 8, 1945, the four major Allies (France, the United Kingdom, the United States, and the USSR) signed the London Agreement that established the International Military Tribunal (IMT) at Nuremberg; its Article 6(c) defines crimes against humanity.
Although unstated in the London Agreement, Article 6(c) was based on the legal reasoning developed by the 1919 Commission with respect to crimes against the laws of humanity. This conclusion is supported by the fact that the definition of crimes against humanity in Article 6(c) requires the need for a connection between these crimes and other crimes within the jurisdiction of the IMT, including war crimes as defined in Article 6(b). The 1919 Commission had posited that crimes against the laws of humanity were an extension of war crimes arising from the laws and customs of war, and in 1945 that concept became part of international law.

The work of the 1919 Commission thus resulted in (1) reversing the customary rule of immunity for heads of state for international crimes, later referred to as "crimes against peace" in the IMT and Tokyo War Crimes Tribunal (or IMTFE) and as "aggression" in the UN Charter; (2) establishing the principle of international criminal responsibility for internationally proscribed crimes (with enforcement before international or national judicial bodies and, in this case, through the prosecution of twenty-two German military personnel before the Supreme Court of Germany sitting at Leipzig); and (3) providing the legal foundation for a new international crime, "crimes against the laws of humanity" (though the Commission failed to prosecute anyone for this crime, its efforts gave rise to the emergence of a customary rule of international law that was more clearly and fully defined in the Charter of the IMT and the Statute of the IMTFE).

All these developments can be traced back to the historic efforts of the 1919 Commission in formulating the concept of crimes against the laws of humanity. In addition, the establishment of international criminal investigatory commissions can be traced to the 1919 Commission. Both the 1943 UN War Crimes Commission established to document the Axis Powers’ war crimes in Europe and the 1945 Far East Commission established to document Japanese war crimes in the Far East were, in large part, modeled on the 1919 Commission. In 1992 the Security Council followed a different model when it established, in Resolution 780, the Commission of Experts to Investigate Violations of International Humanitarian Law. The Security Council Commission on Yugoslavia was the only international body mandated to investigate violations by all parties to a conflict.

The work of the 1919 Commission, Articles 227 through 230 of the Treaty of Versailles, and the subsequent 1923 Leipzig trials did not perhaps fulfill the international community’s expectations, but they made history and established precedents on which the international community built new advances in international criminal justice.

BIBLIOGRAPHY


M. Cherif Bassiouni