THE MANNER OF REFLECTION OF THE ISSUE OF WAR AUTHORS' RESPONSIBILITY IN THE TREATY OF VERSAILLES

Lavinia Andreea Bejan, PhD Student, PhD Fellow SOPHRD/159/1.5/133675 Project, Faculty of History, "Al. Ioan Cuza" University of Iași

Abstract: The present paper aims at analyzing the manner in which the groundbreaking proposals of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, created at the end of the First World War in order to inquire into (among others) the breaches of the laws and customs of war, the responsibility of both states and individuals for such acts, and the creation of an international court to deal with the established offences, have been taken into consideration during the peace negociations in Versailles. To this aim, the paper intends to offer a broad analysis of both the proposals of the Comission that have been integrated in the Versailles Peace Treaty and of those that haven't, but more importantly it aims at clarifying some of the political and legal issues that prevented the adoption of all the proposals of the Commission in the international treaty. Therefore, matters such as state and individual responsibility at the end of the First World War, the manner in which the Great Powers chose or were able to enforce the provisions of both the Proposal and the subsequent treaty, or what has become of the proposal regarding the creation of an international court to deal with breaches of the laws and customs of war are all matters that shall be clarifyed in the following pages.

Keywords: laws and customs of war, individual responsibility in international law, First World War, Treaty of Versailles, international tribunal

A brief overview of the findings of the Commission

At the end of the First World War, a Commission that would inquire into the responsibilities related to the war was constituted by the Preliminary Peace Conference, in its plenary session on January 25, 1919. Clarifications and proposals on five categories of issues have been assigned to its fifteen members: the responsibility of the authors of the war, the establishment of the facts representing breaches of the laws and customs of war that were committed by the losing states of the conflagration, the degree of responsibility for these offences attaching to individuals belonging to the enemy forces, however high in rank, the constitution and procedure of a tribunal appropriate for the trial of the mentioned offences, as well as any other matters related to those above that the Commission finds useful and relevant to be taken into consideration[1].

In what concerns the responsibility of the authors of the war, the Commission established clearly that it 'lies wholly upon the Powers which declared war in pursuance of a policy of aggression', meaning that it 'rests first on Germany and Austria, secondly on Turkey and Bulgaria', the Report concluding that the Central Powers and its allies premeditated the war, making it 'unavoidable', and that Germany and Austro-Hungary also deliberately violated the long-established neutrality of Belgium (guaranteed since 1839) and Luxemburg (guaranteed since 1867). Also, the Commission found that there is 'abundant evidence of outrages (...) committed (...) against the laws and customs of war and of the laws of

[1] *Report of the Commission on the Responsibility of the Authors of the War*, March 29, 1919

humanity', 'in spite of the explicit regulations, of established customs and of the clear dictates of humanity', which 'could devise for the execution of a system of terrorism carefully planned and carried out to the end'. In this sense, the Report contains a non-exhaustive list of 32 types of crimes committed, among which murders and massacres, 'systematic terrorism', killing of hostages, torture and deliberate starvation of civilians, rape and abduction for the purpose of forced prostitution, imposition of collective penalties, deliberate bombardment of undefended places, deliberate bombardment of hospitals, use of deleterious and asphyxiating gases, and of explosive or expanding bullets, and other inhuman appliances, ill-treatment of wounded and prisoners of war and so on.

Regarding the degree of responsibility for these offences attaching to particular members of the enemy forces, the Commission held that 'there are grave charges that must be brought and investigated by a court against a number of persons', and that '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', which 'extends even to the case of heads of state'. Although the members of the Commission were aware of the alleged immunity and inviolability of a state sovereign, they considered that 'this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental'; moreover, an immunity of such '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', conclusion which would 'shock the conscience of civilized mankind'. Therefore, the Commission stated that the persons belonging to enemy forces, however high their position may have been, without distinction of rank, including Chief of States, who have been found guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.

In what regards the constitution and procedure of an appropriate tribunal, the Commission establishes, first of all, two classes of culpable acts: acts which provoked the world war and accompanied its inception (in respect of which the Commission advises not to be charged against their authors and made the subject of proceedings before a tribunal), and violations of the laws and customs of war and the laws of humanity. For the trial of the charges related to these violations, the Commission recommended the establishment of a high tribunal, who would apply in its proceedings 'the principles of the laws of the nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience' (a provision that appeared in the second half of the nineteenth century, as a residual provision in the Conventions related to the laws and customs of war, generally known as the 'Martens clause'). The tribunal would have had the power to determine its own procedure, to pronounce sentences to such punishments as may be imposed for similar offences by any court in any of the 12 states represented in the tribunal (The United States of America, the British Empire, France, Italy, Japan, Belgium, Greece, Poland, Portugal, Romania, Serbia and Czecho-Slovakia), or in the country of the convicted person. For the purposes of selecting the cases for trial before the tribunal, directing and conducting the prosecutions and so on, a Prosecuting Commission composed of five members would have been established (one from each of the five states who were also each appointing three members in the tribunal, namely the USA, the British Empire, France, Italy and Japan). The Prosecuting Commission and the Tribunal were going to have priority over the national courts in dealing with the offenders. Thus, the Commission recommended to the Paris Peace Conference not only the establishment of a high tribunal according to these suggestions, but also the inclusion in the peace treaty of certain provisions that would ensure, among others, the recognition by the enemy governments of the jurisdiction of the national courts and of the high tribunal, the exclusion from amnesty of the alleged perpetrators and their surrender to be

tried, the adoption by each of the Allied and Associated governments of such legislation as may be necessary in order to support the jurisdiction of the international court, and to assure the carrying out of its sentences (every belligerent had the power and authority to try the individuals allegedly guilty of the crimes established by the Commission, if they have been taken prisoners or have otherwise fallen within its power, and also had the power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases). In this sense, the Commission even drafted a set of provisions to be included in the peace treaties with the enemy countries[2].

The provisions regarding responsibility in the Treaty of Versailles

Although much expert research had been undertaken on the topics the Paris Peace Conference (officially held between January 18, 1919 and January 21, 1920) had to deal with, little thought had been given to the actual organization and procedure of the conference itself, and issues have been decided following a rather pragmatic approach, to decide upon them as and when they proved ready for discussion, which determined the main political settlements to have been reached in detail 'by a piecemeal process and not according to an overall design and plan'[3].

In what concerns the issue of responsibility, due to significant disagreement within the Commission itself regarding the appropriateness of the creation of an *ad hoc* High Tribunal (two of the five main states involved only adopted the Report of the Commission under their specific reservations, namely the USA[4] and Japan[5], states who shared the view that the prosecution of the perpetrators of international crimes should be dealt with before domestic courts alone), the Allied Powers did not follow the recommendations of the Commission[6] when it came to drafting the peace treaty. Not fully, we would appreciate, yet completely ignoring the creation of an international court to deal with the proposed offences.

Nevertheless, the Treaty of Versailles (June 28, 1919) addressed the issue of responsibility in two different manners: individual responsibility, which discusses in Part VII, regarding Penalties, and the influence of the Commission is quite obvious in the adopted provisions, and state responsibility, in Part VIII, regarding Reparations, 'one of the most contentious issues of the peace conference'[7].

In what concerns penalties, Article 227 of the peace treaty states that the Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. In this sense, a special tribunal (composed of five judges, one appointed by each of the following Powers: the United States of America, Great Britain, France, Italy and Japan) was going to be constituted to try the accused, and, in its decision, the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality (also, it will be the duty of this tribunal to fix the punishment it deems appropriate). Also, the peace treaty provides that the German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the

[2] *Report of the Commission on the Responsibility of the Authors of the War*, March 29, 1919, Annex IV
[3] John Ashley Soames Grenville, Bernard Wasserstein (eds.), *The Major International Treaties of the Twentieth Century: A History and Guide with Texts*, Vol. I, Routledge, 2001, p. 88
[4] *Report of the Commission on the Responsibility of the Authors of the War*, March 29, 1919, Annex II
[5] *Report of the Commission on the Responsibility of the Authors of the War*, March 29, 1919, Annex III
[6] Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues*, Springer, 2008, p. 95
[7] J. A. S. Grenville, B. Wasserstein, *op. cit.*, p. 91

laws and customs of war, and such persons shall, if found guilty, be sentenced accordingly (provision which will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies). Moreover, the German Government was to hand over to the Allied and Associated Powers all persons accused of having committed an act in violation of the laws and customs of war[8], and the persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers were going to be brought before the military tribunals of that Power[9]. What remained of the proposals of the Commission regarding the establishment of an international court is the provision that persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers were going to be brought before military tribunals composed of members of the military tribunals of the concerned states[10], which is, in fact, one of the proposals of the United States during the debates in the Commission, argued for in the formulated reservations[11].

It is fair to assess, therefore, that the Treaty of Versailles marks an important step in the establishment of the concept of individual responsibility for international crimes, recognizing that individuals can be held individually criminally responsible for acts in violation of the laws and customs of war under international law[12]. Some clarifications are necessary, especially in what concerns Article 227 and the subsequent 'supreme offence against international morality and the sanctity of the treaties' committed by the German ex-Emperor. First of all, the violation of the rules regulating the conduct of war - since the end of WWI known as 'war crimes' - may very well be committed by private persons, unlike other categories of norms, that can only be committed as acts of state (for instance, in contemporary law, norms prohibiting resort to war). Second of all, the 'offense' imputable to the German ex-Emperor referred in the first instance to the violation of Germany's obligation to respect the neutrality and of Belgium and Luxemburg. Thirdly, this particular norm of conventional international law, Article 227 of the Treaty of Versailles, was based on the presumption that an individual, clearly determined by this norm, had, in his capacity as head of state, 'violated international morality and international law, and it provided that an international tribunal should inflict a penalty, to be determined by the tribunal itself, on this individual'[13]. Hence, this provision turned, for this particular case, the norms of international morality into legal norms, attaching to the violation of the rules of international morality a penal sanction and, in addition, it attached to the violation of certain treaties an individual penalty. From all of these results that 'Article 227 made an individual responsible for a violation of rules of international law which he committed in his capacity as organ of a state', and, moreover, it 'imposed criminal responsibility for violations of international law upon an individual, with retroactive effect'[14], since these norms were not yet norms of international law at the time the invoked offences were committed. In the words of Hans Helsen: 'the norms of international law, the violation of which Article 227 of the Treaty of Versailles declared to be punishable offences, did not establish any individual responsibility'; 'the violations of law for which William II was made responsible had the character of acts of state'; 'the norms of international law, the violation of which the Treaty of Versailles declared as individually punishable, established the responsibility only of the state, and that means collective, not individual responsibility'. Basically, individual criminal responsibility for acts of state was only established with the

[8] *Treaty of Versailles*, June 28, 1919, Article 228
[9] *Ibidem*, Article 229
[10] *Ibidem*
[11] *Report of the Commission on the Responsibility of the Authors of the War*, March 29, 1919, Annex II
[12] C. Damgaard, *op. cit.*, pp. 96-97
[13] Hans Kelsen, *Principles of International Law* (1952), reprinted by The Lawbook Exchange, Ltd., 2003, p. 132
[14] *Ibidem*

consent of the state for whose acts individual criminal responsibility was established, consent which Germany gave by ratifying the peace treaty, consent which was 'essential'[15]. Although the states' representatives at the Paris Peace Conference disregarded the proposal of not criminally sanctioning the acts that provoked the world war and accompanied its inception, such as the premeditation of a war of aggression and the invasion of states with a guaranteed neutrality, they did, however, in the text of the peace treaty, provide for the creation of a tribunal to deal with the 'supreme offence against international morality and the sanctity of the treaties' committed by the German ex-Head of State.

In what concerns Germany's responsibility for the war as a state, Part VIII of the peace treaty, regarding Reparations, included from the very beginning the provision according to which 'the Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies'[16], provision commonly referred to as the 'war-guilt clause'. Although, more than any other clause in the treaty, it was to cause lasting resentment in Germany, it was inserted in order to provide a clear basis on which reparations could be exacted, and to limit the overall sum[17], therefore to justify the collection of reparations[18]. In fact, no other issue caused more acrimony among the states present at the negotiations than the issue of reparations. While accepting a peace based on President Wilson's Fourteen Points, including the French definition of the terms on which restoration should be made, the Germans did agree to pay compensation for the damages caused, yet how the damage was to be assessed and whether Germany was supposed to pay for all of it were issues subjected to the debates and interpretation of the participants in the peace talks[19]. Therefore, at the time of the signing of the armistice, and even in the spring of 1919, the German public assumed that they could expect a relatively tolerable peace settlement, despite the territorial losses it involved, since the armistice negotiations were based on Wilson's Fourteen Points, considered by the German diplomats to be a binding prerequisite of international law for the impending peace negotiations[20], expressing a 'statement of American ideals and aspirations'[21], 'a post-war international structure that would translate (Wilson's - A/N) preferences for a democratic order into specific programs of action'[22].

At the Peace Conference, the discussions regarding reparations proved to be extremely difficult: establishing a too large amount could have led Germany not to sign the treaty, and one within Germany's reasonable capacity to pay was very likely not to satisfy the public opinion in France and in the British Empire, on which prime ministers Clemenceau and Lloyd George were depending[23]. In this context, the USA tried to limit Germany's liability, basing it rather on its ability to pay than on the total amount of the allies' claims; to this purpose, the American representative in the Reparations Commission proposed that a formula be adopted

[15] *Ibidem*, pp. 132-133
[16] *Treaty of Versailles*, June 28, 1919, Article 231
[17] Ruth Henig, *Versailles and After, 1919-1933*, Second Edition, Routledge, 1995, p. 21
[18] Louise Chipley Slavicek, *The Treaty of Versailles*, Infobase Publishing, 2010, p. 19
[19] R. Henig, *op. cit.*, pp. 20-21
[20] Wolfgang J. Mommsen, *Max Weber and the Peace Treaty of Versailles*, in *The Treaty of Versailles: A Reassessment after 75 Years*, eds. Manfred F. Boemeke, Gerald D. Feldman, Elizabeth Glaser, Digitally Printed Edition, Cambridge University Press, 2006, p. 536
[21] Norman A. Graebner, Edward M. Bennett, *The Versailles Treaty and Its Legacy The Failure of the Wilsonian Vision*, Cambridge University Press, 2001, p. 23
[22] *Ibidem*, p. 12
[23] J. A. S. Grenville, B. Wasserstein, *op. cit.*, p. 91

requiring Germany to admit a moral and theoretical responsibility for the entire cost of the war, while accepting an actual liability only for civilian damage (except for the case of Belgium, the neutrality of which had been breached, and which was to receive her full war costs)[24], and this is the formula incorporated in the Treaty of Versailles.

The outcomes of the Treaty of Versailles regarding responsibility

The wording of Article 231 ('the war-guilt clause'), despite the fact that it wasn't intended to be considered by itself, but only to justify the collection of reparations, was 'ill-considered', and contributed to the undermining of the treaty's credibility[25], this portrayal of Germany as 'the war's villainous instigator' leading to enormous resentment among Germans (starting with the 1920's, more and more scholars began to question the claim made by the Paris Peace Conference that the conflict had been 'imposed' by the German aggression)[26]. It is very possible, though, that Germany would have resented any treaty dictated by the Allies, even one with more lenient terms[27]. Max Weber pessimistically, yet righteously noted in 1919 that 'if, apart from the compensation of Belgium, Germany is to pay reparations under the pretence of damages caused by war and thus by actions of both parties, then every last working man in Germany, who is aware of this, will become a revisionist'[28].

In what concerns individual responsibility as established in the Treaty of Versailles, although it would be fair to say that the American vision won, against the proposals regarding the establishment of an international tribunal to deal with the violations of the laws and customs of war. However, no military tribunals were ever set up in accordance with the specific provisions of the peace treaty, and the set up of a tribunal to deal with the 'supreme offence against international morality and the sanctity of the treaties' committed by the former German Emperor became obsolete once Netherlands refused to extradite him, on grounds that this offence charged against him had a political nature, and was, thus, not punishable under Dutch Law. Also, although the Allies and the Associated governments did submit lists of alleged war criminals to be brought to trial, Germany refused to extradite its own nationals, deciding, instead, to leave the matter in the hands of the German Supreme Imperial Court, the Reichsgericht, who conducted a series of trials in Leipzig, acquitting six of the 12 (out of 45 alleged criminals listed by the Allies) persons brought to justice[29]. In what regards the sanctions, suffice it to mention that the highest one was of four years of imprisonment, for sinking a hospital-ship, followed by attacking the survivors in the lifeboats. When the Allied Commission took notice of this result, while monitoring the trials, it recommended that no further cases should be brought in front of the Leipzig Court, and that the provisions of the Treaty of Versailles should be used instead, yet no further cases were prosecuted at all. Despite the disappointing outcome of the Leipzig trials, the fact that they were even held constitutes additional evidence of the existence of the principle of individual criminal liability for war crimes under international law[30], and the facts that similar trials took place also in other countries that participated in the WWI (such as Turkey) supports this thesis even more.

[24] R Henig, *op. cit.*, p. 21
[25] J. A. S. Grenville, B. Wasserstein, *op. cit.*, p. 91
[26] L. C. Slavicek, *op. cit.*, p. 19
[27] Corona Brezina, *The Treaty of Versailles, 1919: A Primary Source Examination of the Treaty That Ended World War I*, The Rosen Publishing Group, Inc., 2006, p. 47
[28] Stefan Wolff, *The German Question since 1919: An Analysis with Key Documents*, Praeger Publishers, 2003, p. 21
[29] C. Damgaard, *op. cit.*, p. 96
[30] *Ibidem*, p. 97

The adoption through an international treaty of provisions regarding individual criminal liability under international law (for the first time) is in itself of utmost importance, and the according principle has been continuously developed since the end of WWII, starting with the London Charter of the Nuremberg International Military Tribunal (1945). Nowadays, international criminal law has gained its well-deserved place, as several institutions and mechanisms are working continuously on its further development.

ACKNOWLEDGEMENT: This paper is supported by the Sectoral Operational Programme Human Resources Development (SOP HRD), financed from the European Social Fund and by the Romanian Government under the contract number POSDRU/159/1.5/S/133675.

Bibliography:

1. *Report of the Commission on the Responsibility of the Authors of the War*, March 29, 1919
2. *Treaty of Versailles*, June 28, 1919;
3. Brezina, Corona, *The Treaty of Versailles, 1919: A Primary Source Examination of the Treaty That Ended World War I*, The Rosen Publishing Group, Inc., 2006;
4. Damgaard, Ciara *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues*, Springer, 2008;
5. Graebner, Norman A., Edward M. Bennett, *The Versailles Treaty and Its Legacy The Failure of the Wilsonian Vision*, Cambridge University Press, 2001;
6. Grenville, John Ashley Soames; Bernard Wasserstein (eds.), *The Major International Treaties of the Twentieth Century: A History and Guide with Texts*, Vol. I, Routledge, 2001;
7. Henig, Ruth, *Versailles and After, 1919-1933*, Second Edition, Routledge, 1995;
8. Kelsen, Hans, *Principles of International Law* (1952), reprinted by The Lawbook Exchange, Ltd., 2003;
9. Mommsen, Wolfgang J., *Max Weber and the Peace Treaty of Versailles*, in *The Treaty of Versailles: A Reassessment after 75 Years*, eds. Manfred F. Boemeke, Gerald D. Feldman, Elizabeth Glaser, Digitally Printed Edition, Cambridge University Press, 2006;
10. Slavicek, Louise Chipley, *The Treaty of Versailles*, Infobase Publishing, 2010;
11. Wolff, Stefan, *The German Question since 1919: An Analysis with Key Documents*, Praeger Publishers, 2003.