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PUNISHING WARMONGERS FOR THEIR “MAD AND CRIMINAL PROJECTS” – BISMARCK’S PROPOSAL FOR AN INTERNATIONAL CRIMINAL COURT TO ASSIGN RESPONSIBILITY FOR THE FRANCO-PRUSSIAN WAR

Benjamin E. Brockman-Hawe*

The idea of punishing aggressive war is routinely presented as having been first conceived of in the wake of the First World War. This conventional narrative is incorrect; the intellectual seed for the project had begun to take root long before, in the reactions to the interstate conflicts of the nineteenth century. This article explores one of the most significant moments from aggression’s unappreciated ‘pre-history’; Chancellor Bismarck’s pursuit of a trial before an international criminal court of the Franco-Prussian War’s (1870-1) French ‘intellectual originators and instigators.’ Although the proposal ultimately failed to attract the political and public support necessary for its implementation, it prompted in its own time an unprecedented discussion on the viability of international criminal responsibility for aggression and international criminal courts. The proposal later took on new life as both a precedent and an anti-precedent as these ideas resurfaced periodically after 1870.

The goal of this paper is to restore Bismarck’s proposal to its rightful place in the story of the crime’s development. At stake is more than historic fidelity; contemporary expectations of what international criminal law can accomplish, what circumstances should or could accompany international criminal law’s invocation, and what the parameters of the crime of aggression should be are shaped by such histories. As the 2010 Kampala Amendments to the Rome Statute are now a single accession away from accumulating the requisite number of ratifications to come into effect, raising the prospect that the International Criminal Court will imminently be tasked with adjudicating the first

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I am grateful as well for the guidance of Professor David Wetzel at UC Berkeley, whose work on the diplomacy of the Franco-Prussian War was among the most valuable to me, and whose helpful responses and good will in the early stages of drafting deflected me from what would have been time-consuming and unprofitable lines of inquiry. Finally, I have also to thank Professor Jonathan Steinberg of the University of Pennsylvania for his kindness in sharing with me the benefit of his immense knowledge of Bismarck when this paper was just starting life.

aggression case in over seventy years, the need for reflection on these issues has taken on unusual salience.

Few wars can lay claim to having had as transformative an effect as that between France and Prussia in 1870-1;¹ its impact on the national political cultures of the belligerents, the conduct of armies on the field, and the hierarchy of the continent's Great Powers has been given wide coverage in the literature.² The conflict also remains a source of fascination among scholars of international law, who have framed it as a milepost that divides the history of the field into 'before' and 'after' phases. The war has been credited with creating the modern concept of neutrality,³ crystalizing the idea of the 'war crime,'⁴ inspiring the modern law of occupation,⁵ turning international opinion against reprisals,⁶ catalyzing Europe-wide efforts to organize professional organizations that would clarify the rules of warfare,⁷ including the status of irregular fighters in the law of war,⁸ altering the vector of the law of aerial warfare,⁹ and reviving interest in interstate arbitration.¹⁰ Despite the thoroughness with which the war's legal and historic twists and turns have been mapped, one significant event remains obscure, even among specialist historians: the proposal by

1. Consistent with common usage, 'Prussia' will be used throughout this paper to refer to the North German Confederation, of which Prussia was the predominant member, collectively with the South German states of Baden, Bavaria and Wuerttemberg, all of which mobilized for war against France.

2. Among its many effects, the war resulted in the emergence of a unified and powerful Germany, comprised of the North German Confederation and southern German-speaking states, and enriched by the annexation of Alsace and two-thirds of Lorraine. JONATHAN STEINBERG, BISMARCK: A LIFE 301-11 (2011). By 1898 over 7,000 books had been written about the war. Col. John Lorimer, *Why Would Modern Military Commanders Study the Franco-Prussian War?*, 5 DEFENSE STUDIES 108, 119 (2006). Among the most notable contemporary works dealing with the war are the following: MICHAEL HOWARD, THE FRANCO-PRUSSIAN WAR: THE GERMAN INVASION OF FRANCE, 1870-1871 (1962); GEOFFREY WAWRO, THE FRANCO-PRUSSIAN WAR: THE GERMAN CONQUEST OF FRANCE IN 1870-1871 (2003); DAVID WETZEL, A DUEL OF GIANTS – BISMARCK, NAPOLEON III, AND THE ORIGINS OF THE FRANCO-PRUSSIAN WAR (2001); DAVID WETZEL, A DUEL OF NATIONS – GERMANY, FRANCE, AND THE DIPLOMACY OF THE WAR OF 1870-1871 (2012).

3. MAARTJE ABBENHUIS, AN AGE OF NEUTRALS: GREAT POWER POLITICS, 1815-1914, 124-126 (2014).

4. Daniel Marc Segesser, 'Unlawful Warfare is Uncivilised': *The International Debate on the Punishment of War Crimes, 1872-1918*, 14 EUR. REV. HIST., 215, 224, n.2 (2007).

5. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 39 (2nd ed. 2012); Sibylle Scheipers, *The Status and Protections of Prisoners of War and Detainees*, in THE CHANGING CHARACTER OF WAR 394, 403 (Hew Strachan & Sibylle Scheiper eds., 2011); Daniela L. Caglioti, *Waging War on Civilians: The Expulsion of Aliens in the Franco-Prussian War* 221 PAST AND PRESENT 161, 189 (2013).

6. ALEX J. BELLAMY, MASSACRES AND MORALITY: MASS ATROCITIES IN AN AGE OF CIVILIAN IMMUNITY 73-74 (2012); GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 171 (1980).

7. ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500-2000, 242-3 (2014); PAUL LAITY, THE BRITISH PEACE MOVEMENT 1870-1914, 52 (2002); BENVENISTI, *supra* note 5, at 39; MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960, 39 (2002); Irwin Abrams, *The Emergence of the International Law Societies*, 19 THE REV. OF POL. 361, 367 (1957).

8. I. P. Trainin, *Questions of Guerrilla Warfare in the Law of War*, 40 AM. J. INT'L L. 534, 540 (1946).

9. Roger F. Williams, *Developments in Aerial Law* 75 U. PENN. L. REV. 139 (1926); Elbridge Colby, *Aerial Law and War Targets* 19 AM. J. INT'L L. 702, 708 (1925).

10. Martin Ceadel, *The Alabama Claims, the Geneva Arbitration of 1872, and their significance in Britain*, in GENÈVE ET LA PAIX: ACTEURS ET ENJEUX: TROIS SIÈCLES D'HISTOIRE: ACTES DU COLLOQUE HISTORIQUE TENU AU PALAIS DE L'ATHÉNÉE, LES 1-2-3 NOVEMBRE 2001, at 101, 109 (Roger Durand, Jean-Daniel Candaux & Antoine Fleury, eds., 2003).

Prussia's "Iron Chancellor," Otto von Bismarck, for the prosecution before an international criminal court of French opinion-makers, for the international crimes of aggression and incitement to aggressive war.

Bismarck's proposal—on those rare occasions where it has surfaced as part of the public conversation surrounding the punishment of international crimes—has until now been treated more as an afterthought than with any real insight or analysis.¹¹ This study provides an enriched perspective by: reviewing the details of the proposal, analyzing the motives that prompted the Chancellor to champion prosecutions before an international criminal court, exploring how some among Bismarck's audience perceived the scheme, and tracing out the longer historical legacy of the initiative.

* * *

The origins and course of the war is a story quickly told. The expulsion of Queen Isabella II from Spain in 1868 left a vacuum in leadership that could only be filled by another monarch. Prince Leopold of Hohenzollern-Sigmaringen, at the urging of Wilhelm Friedrich Ludwig (William I), Emperor of Prussia, and his chief minister Bismarck, accepted the offer and moved to assume the throne. News of Leopold's candidature provoked a severe reaction in France, where the move was viewed as an aggrandizement of Prussian power at the expense of French influence and prestige. Napoleon III and his ministers reacted by whipping up anti-Prussian sentiment in government circles and in the press. A diplomatic mission, bearing threats of war unless the candidacy was disavowed, was dispatched to meet with William. The mission was a success, in that Leopold withdrew his candidacy and William retracted his support. But the French pressed for a commitment that William refrain from endorsing the Prince in the future—effectively a demand that the Prussian King forbid his candidature. William refused, feeling that his personal honor was at stake. After announcing that he considered the matter closed, he broke off further direct talks with the French representative, but left open the possibility of further inter-governmental negotiations.

Matters might have proceeded on that basis, but Bismarck, with the support of Chief of General Staff of the Prussian Army Helmuth von Moltke, released an account of this meeting to the press deliberately calculated to inflame passions; he declined to report William's conciliatory gestures, and made it seem as though the French Ambassador had been snubbed by the King and that relations between the Powers had been terminated as a result. Napoleon, with the blessing of the French Council of Ministers, declared war on July 19, 1870.¹²

The French severely underestimated Prussian military speed, efficiency, and tactics, and one by one their armies were overwhelmed or pinned down. The first phase of the war culminated in Napoleon's surrender at Sedan in early September, from

11. For post-war works that briefly mention the proposal, see *infra* notes 95-104.

12. For more on the events leading up to the war, see generally DAVID WELCH, JUSTICE AND THE GENESIS OF WAR, 84-91 (1993); WETZEL, A DUEL OF GIANTS, *supra* note 2.

whence he was packed off to Kassel-Wilhelmshöhe to spend the rest of the war in ostentatious captivity.¹³ As the Prussian forces approached Paris, news of Napoleon's defeat provoked a riot in the French capital that toppled the Bonaparte regime. The Imperial Court fled as a new "Government of National Defense" (GND) assumed political responsibility in the French capital and proclaimed a Third Republic.¹⁴ Paris was encircled by Prussian troops fourteen days later, largely cutting off GND officials and Parisians from the world. Those who wished to travel or communicate across Prussian lines had to rely on the indulgence of the invaders or engage a balloonist to carry post or persons.¹⁵ But the city remained defiant despite its isolation. The Paris press fulminated against the invaders as the new government pledged to surrender "neither a clod of our territory nor a stone of our fortresses" to the enemy,¹⁶ declared a *guerre à outrance*, and encouraged attacks on Prussian forces by irregular troops (unprivileged belligerents or *francs-tireurs*).¹⁷

It is against this backdrop—Bonapartists in exile, Napoleon III a prisoner, Paris fully invested but unyielding—that Bismarck articulated his plan for prosecutions. "I have," he announced as he sat down to dinner on October 14, 1870, "a lovely idea in connection with the conclusion of peace. It is to appoint an International Court for the trial of all those who have instigated the war, newspaper writers, deputies, senators, and ministers."¹⁸ After acknowledging that Napoleon III or Adolphe Thiers (President of the Third Republic) might find themselves on the dock, he explained his vision of the tribunal: "My idea was that each of the Great Powers should appoint an equal number of judges, America, England, Russia and so forth, and that we should be the prosecutors."¹⁹ He was skeptical, however, that the Russians or the British would participate, and in their absence the court might "be composed of the two nations who have suffered most from the war, that is to say, of Frenchman and Germans."²⁰ As he so often did, he tasked his press secretary (and later biographer) Julius Busch with introducing the idea through the papers.²¹ The proposal was published in the *North-German Correspondent* in late October 1870:

13. Napoleon surrendered not as head of state, but in his personal capacity, leaving the countries on a war footing. WETZEL, A DUEL OF NATIONS, *supra* note 2, at 79.

14. ALICE L. CONKLIN, SARAH FISHMAN, ROBERT ZARETSKY, FRANCE AND ITS EMPIRE SINCE 1870, 34-38 (2011). The dethroned Empress Eugénie fled to England, while several other members of the former Imperial court escaped to Brussels. Heidi Mehrkens, *The Politics of Waiting: The Imperial Couple, Napoleon III and Eugénie*, in MONARCH AND EXILE: THE POLITICS OF LEGITIMACY FROM MARIE DE MÉDICIS TO WILHELM II 230, 233 (Philip Mansel & Torsten Rott, eds., 2011). See also ABBENHUIS, *supra* note 3, at 136-137.

15. These events are ably covered by WETZEL, A DUEL OF NATIONS, *supra* note 2, at 26-99, and WAWRO, *supra* note 2, at 230-256.

16. JAMES HARVEY ROBINSON, READINGS IN EUROPEAN HISTORY: A COLLECTION OF EXTRACTS FROM THE SOURCES CHOSEN WITH THE PURPOSE OF ILLUSTRATING THE PROGRESS OF CULTURE IN WESTERN EUROPE SINCE THE GERMAN INVASIONS 545 (1906).

17. WETZEL, A DUEL OF NATIONS, *supra* note 2, at 86, 101, 112, 150-153, 218; HOWARD, *supra* note 2, at 249-252.

18. MORITZ BUSCH, BISMARCK: SOME SECRET PAGES OF HIS HISTORY 252 (1898).

19. *Id.*

20. *Id.*

21. *Id.* at 276. For a brief description of Busch's career prior to 1870 and his working relationship with Bismarck, see ROBERT H. KEYSERLINGK, THE PRESS AND BISMARCK IN IMPERIAL GERMANY 91-92 (1977).

If a universally acknowledged and codified system of international law existed, it would be sure to contain provisions for the adequate punishment of such persons as should, on clear legal evidence, be convicted of having willfully originated or instigated an aggressive war. It has been already proposed to establish a European Areopagus [Court of Appeal or permanent inter-European legislative body] invested with the right of condemning without appeal all who, moved by a mere inordinate passion for war or love of strife, or urged by a thirst for universal empire, should assail peaceful nations in furtherance of their own mad and criminal projects. What an amount of wretchedness might have been spared the human race had it been possible to call to account contemnors of human rights in every class of society, and to publicly visit them with condign punishment. It must be confessed that no country has ever suffered more than Germany from the injustice and rapacity of other nations. During the Thirty Years' War she saw her plains invaded by her neighbors, who, after sucking out the marrow of the land, retreated laden with booty to their homes. From 1806 till 1813 Germany was again the victim of unheard-of wrongs and ineffable sufferings. And yet but one of the authors of her manifold miseries [Napoléon I] paid the penalty of his crimes in being relegated, like another Prometheus, to a solitary and distant rock.

The necessity and justice of making the authors of a war, and not, as hitherto, merely their subordinates and tools, responsible for their own acts before the world, have suggested the idea in Governmental circles of stipulating as a condition of peace between France and Germany that the intellectual originators and instigators of the present war shall not escape with impunity. Among the responsible parties are included the entire Executive which devised the invasion of Germany: the statesmen who approved it; the Ministers by whom it was recommended; the orators who labored for, demanded, and welcomed it; the journalists whose constant text was war, and who discounted the triumphs of the coming campaign. The verdict of 'Guilty' or 'Not Guilty,' and the penalty to be inflicted, would be left to a jury composed of citizens of neutral states, supposing those States to lend the plan their concurrence; or, in case of their refusal, the jurymen might be taken from the two belligerent nations themselves. The institution of an international jury for the punishment of peace-breakers is regarded in Governmental circles as likely to furnish no unsatisfactory guarantee for the future peace of Europe.²²

* * *

Bismarck's announcement is striking for a number of reasons. First, proposing the criminalization and punishment of aggression and incitement to aggressive war was out of step with the arc of nineteenth-century international law. Between the *jus ad bellum* and the *jus in bello* it was the former that had been left by nineteenth-century

22. No title, THE NORTH-GERMAN CORRESPONDENT (London, England) Oct. 22, 1870, at 1 (available in the British Library). From there, the (second paragraph of) the proposal was republished by the global press. Reprinted as *Incidents of the War*, THE TIMES (London, England), Nov 1, 1870, at 5. In the United States the proposal first appeared on the front page of the *Supplement to Harper's Weekly* of December 3, 1870.

The term 'Areopagus' was used variously to refer alternatively to the idea of a standing international court of arbitration, or the idea of a governing body akin to the modern United Nations. For an example of the former usage see *Our difficulty with the United States*, 32 BANKERS' MAGAZINE 296 (1872). Examples of the latter are noted in JAN MATIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING 109 (2014).

scholars and statesmen to “wither on the bough,”²³ and what limits on the use of force that did exist lacked the force of law, operating instead as a “blend between legal and moral/political considerations.”²⁴ In contrast, what we now call international humanitarian law was experiencing a renaissance, albeit confined to scholarly and diplomatic circles. New treaties curtailing a few of the more egregiously harsh practices of war were widely ratified by European states, including the 1864 Geneva Convention, which formalized protections for the wounded, including the protection of medical personnel,²⁵ and the 1868 Declaration of St. Petersburg, which outlawed as excessively cruel the use of certain categories of exploding bullets.²⁶ These treaties broke new ground, defined obligations with relative precision, and stamped the new rules with explicit international and legal imprimatur. It was the laws of war, in short, that had captured intellectual momentum and diplomatic imagination prior to 1870.

Bismarck’s proposal was also out of sync with developments on the battlefield. The French army, government, and public had constantly abused the Red Cross emblem adopted at Geneva as the official sign of protected army medical personnel, military hospitals and ambulances, and Prussian soldiers were repeatedly wounded or killed by prohibited bullets.²⁷ Upon assuming power, the GND compounded these violations by strenuously encouraging *francs-tireurs*, in contravention of (Prussia’s understanding of) international law.²⁸

In the face of widespread and clear violations of the laws of war, why pursue the prosecution of those who incited and perpetrated the conflict instead of battlefield violators? One likely reason is that prosecuting the latter would have necessarily

23. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 20 (1994). See also Davis Brown, *Contemporary International Law on the Decision to Use Armed Force*, in THE ASHGATE RESEARCH COMPANION TO MILITARY ETHICS 38 (James Turner Johnson & Eric D. Patterson, eds., 2015) (“By the turn of the twentieth century, *jus ad bellum* was virtually non-existent in positive international law.”); PETER HOUGH, UNDERSTANDING GLOBAL SECURITY 39 (3d ed. 2013).

24. Oliver Corten, *Formalization and Deformalization as Narratives of the Law of War*, in NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND THE AMERICAN EXPERIENCES 251, 261 (José María Beneyto & David Kennedy eds., 2012); see also James T. Johnson, *Ideology and the Jus Ad Bellum: Justice in the Initiation of War*, 41 J. AM. ACADEMY OF RELIG. 212, 221 (1973) (“There is in international law no longer a ‘just war doctrine,’ in the classic sense, by the time of the Franco-Prussian War of 1870.”); DAVID KENNEDY, DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 242 (2008) (“In the end, law governing the decision to go to war languished for a century after the decline of natural law – until it was revived by the United Nations Charter as the modern ‘law of force.’”).

25. GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD, Aug. 22, 1864, 18 Martens 440, reprinted in 1 AJIL 90 (1907) (Supp.), available at <http://www.icrc.org/ihl.nsf/FULL/120?OpenDocument>.

26. DECLARATION RENOUNCING THE USE, IN TIME OF WAR, OF EXPLOSIVE PROJECTILES UNDER 400 GRAMMES WEIGHT. ST. PETERSBURG, Nov. 29/Dec. 11, 1868, 1 AM. J. INT’L. L. Supp. 95 (1907), available at <http://www.icrc.org/ihl.nsf/FULL/130>.

27. PIERRE BOISSIER, FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS 247-54 (1985); KARL ABEL, LETTERS ON INTERNATIONAL RELATIONS BEFORE AND DURING THE WAR OF 1870, 488 (1871). See also National Archives [hereinafter NA], Foreign Office [hereinafter FO] 881/1897, No. 283 Count Bismarck to Count Bernstorff (January 9, 1871) (complaining of French violations of the laws and customs of war).

28. No. 283, *supra* note 27. See also Lester Nurick & Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 AM. J. INT’L. L. 573-74 (1946). See also SIBYLLE SCHEIPERS, UNLAWFUL COMBATANTS: A GENEALOGY OF THE IRREGULAR FIGHTER 88-91 (2015). *Francs-tireurs* would also have been considered illegal fighters by the standards adopted four years later in the (non-binding) Brussels Declaration, which subsequently formed the basis for the 1907 Hague Rules on the Laws and Customs of War on Land. Sibylle Scheipers, *The Status and Protections of Prisoners of War and Detainees*, in THE CHANGING CHARACTER OF WAR 394, 404 (Hew Strachan & Sibylle Scheipers eds., 2011).

implicated war-powers at a time when tensions between Bismarck and the military were in high relief and military resources were stretched thin.²⁹ October found Bismarck, Moltke, and the latter's General Staff superficially at odds over strategy, but at a more fundamental level circling around the question of who should direct the war effort.³⁰ Bismarck insisted that the immediate application of the most brutal tactics would quickly bring the French to heel. He pushed for all *franc-tireurs* to be summarily shot or hanged, to punish all non-cooperating French villages with the death of every male inhabitant, for French children who spat at Prussian troops to be shot, and for Paris to be bombarded as soon as it was surrounded.³¹ He complained when he was excluded from military conferences, and openly criticized the conduct of the war when his suggestions were not followed.³² The military, for its part, dismissed Bismarck's operational counsels as "infantile" or needlessly bloodthirsty and refused to fulfill them, and ignored Bismarck's demands that he attend operational meetings.³³ In spite of his protests that the realms of political and military conduct should be completely divorced from one another, Moltke was vocal in his opposition to the Chancellor's efforts to negotiate with Bonaparte loyalists.³⁴

Inter-departmental friction was not the only barrier to war crimes trials. Bismarck's plan would also have imposed a significant logistical burden at a time when the Prussian military was overtaxed. The Prussians were holding hundreds of thousands of French prisoners (regular and irregular soldiers) in camps; these men needed to be fed and otherwise provided for.³⁵ Sorting through the captured to identify those possibly guilty of war crimes whose cases were fit for prosecution on an international stage would have been a herculean undertaking with the great body of Prussian forces spread thin across French territory and preoccupied with an ongoing war. In addition to the complex mechanics of the endeavor, the military leadership would have also

29. See generally Stig Förster, *The Prussian Triangle of Leadership in the Face of a People's War: A Reassessment of the Conflict Between Bismarck and Moltke, 1870-71*, in *ON THE ROAD TO TOTAL WAR: THE AMERICAN CIVIL WAR AND THE GERMAN WARS OF UNIFICATION, 1861-1871*, 115-40 (Stig Förster & Jörg Nagler eds., 1997).

30. WETZEL, A DUEL OF NATIONS, *supra* note 2, at 148-55; HOWARD, *supra* note 2, at 271, 279; GORDON A. CRAIG, *THE POLITICS OF THE PRUSSIAN ARMY 1640-1945*, 209 (1955).

31. WAWRO, *supra* note 2, at 278-79; HOWARD, *supra* note 2, at 351-52, 280; BUSCH, *supra* note 18, at 254 (entry for October 14, 1870) (quoting Bismarck: "Every village in which an act of treachery has been committed should be burnt to the ground, and all the male inhabitants hanged.").

32. WETZEL, *supra* note 2, at 150, 158; HOWARD, *supra* note 2, at 351. At the very same dinner at which he proposed the court, the Chancellor complained that Moltke, "whose profile resembles more and more every day that of a bird of prey," was unresponsive to his plans. BUSCH, *supra* note 18, at 254 (entry for October 14, 1870). See also *THE WAR DIARY OF THE EMPEROR FREDERICK III, 1870-1871*, 155-56 (A. R. Allinson trans., 1926) [hereinafter *FREDERICK III*] (entry for October 12, 1870) ("Generals von Moltke and von Roon on the one side, Count Bismarck on the other, are often at loggerheads, the gist of their mutual reproaches being that the departments are kept separated by too hard and fast a line and not enough reciprocal interchange of information practiced.").

33. Leonhard Garf von Blumenthal, *JOURNALS OF FIELD-MARSHAL COUNT VON BLUMENTHAL FOR 1866 AND 1870-71* 197 (Major A. D. Gillespie-Addison trans., 1903) (entry for November 21, 1870); CRAIG, *supra* note 29, at 206-09; see also WETZEL, A DUEL OF NATIONS, *supra* note 2, at 150, 157; *FREDERICK III*, *supra* note 32, at 170 (entry for October 26, 1870). Moltke eventually legalized harsh measures other than summary execution against *francs-tireurs*. ISABEL V. HULL, *ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY* 118 (2005).

34. CRAIG, *supra* note 30, at 208.

35. RACHEL CHRASTIL, *ORGANIZING FOR WAR: FRANCE, 1870-1914* 34 (2010); see generally Manfred Botzenhart, *French Prisoner of War in Germany, 1870-71*, in *ON THE ROAD TO TOTAL WAR: THE AMERICAN CIVIL WAR AND THE GERMAN WARS OF UNIFICATION, 1861-71* 115-40 (Stig Förster & Jörg Nagler eds., 1997).

been required to invest significant intellectual capital in the project. Moltke and his advisers would have had to weigh in on a number of key legal questions, including how to define the crimes at issue so that Prussia's position in future conflicts would not be prejudiced, the acceptability of a superior orders defense, and how to conduct the trials in accordance with military law.

It is unimaginable that a proposal by Bismarck implicating such a significant reallocation of military personnel and intellectual capital would have been embraced by Moltke in the toxic atmosphere of mutual hostility and disdain that permeated Prussia's campaign headquarters in October 1870. By contrast, acts of aggression, unlike war crimes, implicated only the political decisions of the French, and the logistics of arranging for international trials for aggressors—from the negotiations attendant to the creation of an international court, to the selection of defendants and the initiation of prosecutions—could be handled almost exclusively through the exercise of his own foreign affairs powers.

Bismarck may also have been nudged in the direction of aggression prosecutions by a gesture, just a few years previous, towards trying the crime. In 1864, Archduke Ferdinand Maximilian von Hapsburg was appointed monarch of Mexico by Napoleon III.³⁶ His rule was short lived; in 1867, the Archduke found himself unable to hold his government together after his patron withdrew the French army from the country.³⁷ That year, Maximilian was deposed and court-martialed by the Republican forces he had displaced. The charges against him included;

- (1) "having offered himself as the principal instrument of the French government to carry out certain plans of intervention, which were to disturb the peace of Mexico, by means of a war, unjust in its origin, illegal in its form, disloyal and barbarous in its execution; . . . in order to destroy the constitutional government of the nation established by the people . . . [and] transform the republic into a monarchy;" (2) "having, with an armed force, disposed of the lives, rights, and interests of the Mexican people." (3) "having made war against the Mexican Republic." and (4) "having made, in his own name, a filibustering war, inviting and enlisting foreigners from all nations."³⁸

Archival sources confirm that the Chancellor had attentively followed events in Mexico for years and learned details of the prosecution through the Prussian minister in

36. FREDERIC HALL, LIFE OF MAXIMILLIAN I, LATE EMPEROR OF MEXICO, WITH A SKETCH OF THE EMPRESS CARLOTA 69-70 (1868).

37. *Id.* at 220.

38. The indictment against Maximilian is reprinted in HALL, *supra* note 36, at 216-23. Maximilian was tried and punished pursuant to the "Law of Juarez" (passed in 1862), which covered crimes against the state, crimes against public peace and order, and crimes against the laws of nations. *Id.* at 222. The latter category included the crime of "induc[ing] citizens of the Republic . . . to serve another power, or to invade its territory" (Article 2(4)). Among crimes against the state there was listed; "Invitation made by Mexicans, or by foreign residents in the Republic, to the subjects of other powers, to invade national territory, or change the form of government which has been given to the Republic." (Article 1(3)); "Any kind of complicity in exciting or preparing the invasion, or in favoring its realization and end." (Article 1(4)); "in the places occupied by the invader, organizing any shadow of a government." (Article 1(5)). A copy of the Law of Juarez is available in HALL. *Id.* at 243-252. Maximilian's defense rested on the unconstitutionality of the court, his immunity from prosecution as a former head of state and current prisoner of war, the legality of his actions as monarch in the context of what he insisted was a *civil*, as opposed to interstate, war, and the rejoicing that greeted announcements of his (non-aggressive) seizure of power. *Id.* at 262-84.

Mexico City.³⁹ A record of the Chancellor's reaction to the trial has not yet been found, but it must have made an impression, as the prosecution of a monarch by a foreign state was virtually unheard of.⁴⁰ Whether Maximilian's trial influenced Bismarck's calculations three years later cannot be established with any certainty. But the timing of the two aggression-related developments, as well as the Chancellor's interest in Mexican affairs, strongly suggests a link.

The proposal is also surprising for the fact that the Chancellor had not previously exhibited any appetite for individual punishment. Just one month prior to suggesting trials for the war's instigators, he had opined to a Prussian newspaper that

[t]he statesman has neither the authority nor the obligation to assume the office of judge. . . . Political principles do not even permit us to think of taking revenge for the present war, of which [Napoleon III] was the author. Were we to entertain such an idea, then it is . . . on every single Frenchman that we should wreak . . . vengeance; for the whole of France, with her thirty-five million inhabitants, showed . . . approval of, and enthusiasm for, this war.⁴¹

What prompted the seeming shift from a policy of tolerated impunity to one of pursuing accountability for France's opinion-makers?

From the earliest days of the war, Bismarck's greatest anxiety was that one or more of Europe's other Powers would intervene, and that Prussia would be consequently deprived of the opportunity to deal a crippling blow to France.⁴² Bismarck recognized that the longer the conflict continued, the more likely such undesirable intervention became. October, however, found his efforts to isolate the conflict running up against headwinds. First, Russia's unilateral denouncement of the Black Sea clauses of the Treaty of 1856 in late October added to the generally noxious atmosphere permeating international relations, and necessitated the convocation of a European Congress.⁴³ The possibility that the situation in France would be placed on the agenda, or that a French representative mingling amongst Europe's diplomats might find a foreign patron willing to intercede on France's behalf weighed heavily on Bismarck's mind.⁴⁴ In short, in October the Russians had cracked open the door to intervention, and the need to expedite the peace negotiations had correspondingly amplified.⁴⁵

39. Bismarck observed as his Prussian minister in residence, Baron Anton von Magnus, cultivated closer than expected ties with the French-backed Emperor. KONRAD RATZ, *EL OCASO DEL IMPERIO DE MAXIMILIANO VISTO POR UN DIPLOMÁTICO PRUSIANO: LOS INFORMES DE ANTON VON MAGNUS A OTTO VON BISMARCK, 1866-1867* 218-57 (2014); Frank G. Weber, *Bismarck's Man in Mexico: Anton von Magnus and the End of Maximilian's Empire*, 46 *HISP. AM. HIST. REV.* 53 (1966).

40. See generally A. Francis Steuart, *Monarchs Tried by Enemies*, 32 *JURID. REV.* 82 (1920).

41. BUSCH, *supra* note 18, at 140, 186-87 (Busch wrote these words, which were "very characteristic of the Chancellor's manner of thinking," for publication in the Prussian press.).

42. WETZEL, *supra* note 2, at 20.

43. The Treaty of 1856 (or Treaty of Paris) ended the Crimean War and prohibited all nations from building and maintaining a naval fleet in the Black Sea. For more on the effects of the Russian abrogation on Great Power politics. See William Mulligan, *Britain, the 'German Revolution', and the Fall of France, 1870/1*, 84 *HIST. RES.* 310 (2011).

44. WETZEL, *supra* note 2, at 168-74; W. E. Mosse, *The End of the Crimean System: England, Russia and the Neutrality of the Black Sea, 1870-1*, 4 *HIST. J.* 164, 166 (1961). Prussia was aware of Russian intentions as early as mid-September. *Id.* at 166-67.

45. Later, Bismarck ensured that the French did not participate in the Congress by delaying the delivery of the

Unfortunately, since the Prussian victory at Sedan, peace talks had stalled. During September and October Bismarck negotiated with the newly formed GND as well as the deposed Second Empire, seeking a counterpart from either government—it seems to have mattered very little to him which, so long as it could deliver on its promises—willing to surrender Alsace and most of Lorraine, and refrain from pressing demands that would prejudice the Prussian military advantage.⁴⁶ But none of the factions with whom he dealt were willing to acknowledge France's defeat and accept the military and political consequences, including territorial cession, Prussians felt this naturally entailed.

The GND was the first party with which Bismarck treated. In mid-September, the newly appointed French Minister of Foreign Affairs Jules Favre met with Bismarck at Ferrières. Favre struggled to persuade his Prussian counterpart that Prussia's quarrel had been not with France, but with Napoleon III, that relations between the two Powers could therefore proceed on a peacetime footing, and that an indemnity, as opposed to cession, would mark a fitting end to the war.⁴⁷ But, Favre argued, in order to proceed on this basis, and in so doing spare Prussian troops from continued French sorties and the rigors of a debilitating winter, Bismarck would need to forgo the imposition of the most onerous conditions of peace, including territorial cession. The Chancellor would also need to agree to an armistice that would allow the GND to hold elections which, Favre was certain, would confirm the public's desire for peace and legitimate the new government in its pursuit thereof.⁴⁸ This armistice should be unconditional, as France would neither surrender any forts, nor concede her right to provision Paris during the ceasefire.

Bismarck was unconvinced. He had already concluded that the future security of Prussia necessitated that France cede territory.⁴⁹ Furthermore, France was in no position to think that Prussia wanted "peace at any price"; the occupiers, Bismarck correctly asserted, were positioned to dictate terms, and at any rate Prussia "would rather suffer now than pass the burden to our children."⁵⁰ An armistice might be arranged, but Bismarck insisted on equivalent sacrifices on the part of France, including the handover of French territory and French forts, specifically the forts surrounding Paris, in the event the city was to be replenished.⁵¹ At any rate, Bismarck did not believe that elections would bear out Favre's conviction that France had no appetite for prolonging the war; at one point he confronted the French Minister with a recently published caricature from the *Journal pour rire* depicting Prussia as a dying elderly man being threatened and mocked by a French soldier, exclaiming "here is the

invitation to participate to the GDP, throwing up procedural barriers to French participation, and playing to the insecurities of the French representative such that he decided not to attend the conference. *Id.* at 174-75. But in October 1871 these solutions were in the future, and the problem of avoiding intervention remained acute. *Id.*

46. WETZEL, A DUEL OF NATIONS, *supra* note 2, at 74-75, 133.

47. JULES FAVRE, GOUVERNEMENT DE LA DÉFENSE NATIONALE 165-69 (1871).

48. *Id.* at 165-67.

49. *Id.*

50. *Id.* at 168.

51. WETZEL, A DUEL OF NATIONS, *supra* note 2, at 109. See also FIELD MARSHAL HELMUTH VON MOLTKE, THE FRANCO-GERMAN WAR OF 1870-71, 129 (3d ed. 1992).

proof of your peaceful and moderate intentions[.]”⁵² The negotiations at Ferrières collapsed, each side walking away perceiving the others’ assumptions as flawed and demands as outrageous.

Subsequent attempts at negotiation with the GND fared no better. On October 8, Bismarck proposed a four week ‘semi-armistice,’ which the provisional Paris government could use to prepare for elections, as well as a forty-eight hour armistice in which to hold them. This was offered without any requirement of a territorial or military *quid pro quo*, though Paris would not be permitted to resupply.⁵³ Favre refused to even consider the offer, responding that there would be “no armistice until the last German has been driven from French soil.”⁵⁴ The GND’s obduracy frustrated the Chancellor immensely; at one point, an emotional Bismarck shrieked at Favre, “Think about it! Find a basis for peace, *propose* something!”⁵⁵ The rejection of what was, from Bismarck’s perspective, a very generous offer confirmed in his mind that the French intended to use an armistice only as an opportunity to continue the war, and were not serious in their bids for peace.⁵⁶

Pourparlers with the deposed Empress Eugénie, exiled in London, had also run into the ground by late October. Early in her exile, the Empress had refused to take any action that might undermine the GND, and had even signaled her support for the provisional government to other Powers.⁵⁷ By early October, she had abandoned this approach and dispatched a representative to Prussian military headquarters in Versailles authorized to offer the neutralization, but not the cession, of Alsace and Lorraine, and the relinquishment of the French colony in Cochinchina.⁵⁸ But in her personal communications with the Prussian King, she requested outrageous terms of peace; a fourteen day armistice, the provisioning of the Army of the Rhine, and the declaration of her title as Regent of France, all while offering exactly nothing offered in return.⁵⁹ Her terms were rejected, and the thread of negotiations with the Empress was not picked up again until late January, when she relented (too late, as it would turn out) on the question of the surrender of territory.⁶⁰

52. FAVRE, *supra* note 47, at 181-2. Favre dismissed the illustration as the sort of trivial “bad taste of pencil” that French politicians had long been subjected to, and suggested that the views reflected were not held by French statesmen. *Id.*

53. WETZEL, A DUEL OF NATIONS, *supra* note 2, at 113-4.

54. WAWRO, *supra* note 2, at 246.

55. *Id.* at 254. Moltke, who was content to allow the Parisians to starve over a period of months and felt no pressure to hasten the conclusion of the war, was more detached. “M. Favre has not yet come out from Paris again, and as he quite lately declared that . . . not a stone of French fortress should be surrendered, and as, besides this, the Parisians have, throughout the campaign, read news only of victories, they must be somewhat surprised to hear quite different proposals on a sudden. I should not be astonished to hear that they had murdered him.” LETTERS OF FIELD-MARSHAL COUNT HELMUTH VON MOLTKE TO HIS MOTHER AND HIS BROTHERS 193 (Clara Bell & Henry Fischer trans., 1891) (letter of September 21, 1870).

56. WAWRO, *supra* note 2, at 254.

57. COMTE MAURICE FLEURY, 2 MEMOIRS OF THE EMPRESS EUGÉNIE 537-8 (1920).

58. *Id.* at 55-58.

59. WETZEL, A DUEL OF NATIONS, *supra* note 2, at 125-8, 131-3; *see also* HAROLD KURTZ, THE EMPRESS EUGÉNIE, 1826-1920, 257 (1964).

60. Mehrkens, *supra* note 14, at 238.

In this way mid-October found Bismarck confounded on all sides by French representatives stubbornly refusing to accept the harsh consequences of defeat. As Lord Lyons, British Ambassador at Paris, put it: "it would no doubt be prudent for France to resign herself to sacrifices which ill-fortune in war had made necessary; but there was no one in France who appeared to be willing to incur the odium of even suggesting such a course"⁶¹ No doubt it was, at least in part, the exasperation and anxiety of dealing with parties who, "in spite of every new defeat, [grew] more obstinate in their resistance and more mendacious,"⁶² magnified by anxieties over imminent foreign intervention, that pushed Bismarck toward his scheme for ascribing blame for the war. In the Chancellor's ideal scenario, the threat of prosecutions would work a coercive effect on the French plenipotentiaries, the idea being that the first government to agree to peace on Prussia's terms would find in Bismarck a willing partner in consolidating its own authority by scapegoating its rival on an international stage while remaining itself immune to prosecution.⁶³ In the event that neither of the rival factions took the bait, the international criminal court could be established without French participation, and by virtue of the grandiosity of the international forum, the unprecedented nature of the charges, and the high profile of the defendants, the resulting trials would at any rate project Prussian authority and impress upon all of Prussia's enemies in France the point of their absolute defeat.

Bismarck might also have conceived of the larger European community as the audience for his trials. Verdicts placing responsibility for the war squarely on French shoulders might have reduced the likelihood of foreign intervention on behalf of France by Powers nervous that the annexation of two French provinces would destabilize the European balance of power. With an eye towards the longer term, he might also have been interested in exculpating Prussia from charges that its own policies had fomented the conflict. Indeed, one of Bismarck's earlier speeches to the Prussian Landtag (delivered in December 1850) indicates that the Chancellor had significant insight into the importance of establishing a *casus belli* that would remain persuasive throughout the period of national reflection that typically follows a war. "It is easy for a statesman," he said "to ride the popular wave and sound the trump of war by his cozy hearth, or to intone thunderous speeches from a platform such as this, leaving it to the musketeer bleeding in the snow to settle whether his policies

61. NA, FO 881/1897, No. 14, Lord Lyons to Earl Granville (sent October 18, 1870, received October 22, 1870) (reporting on a conversation between himself and the French General Bourbaki).

62. FREDERICK III, *supra* note 32, at 169 (entry for October 26, 1870).

63. Note in this regard that Bismarck was reported by Busch to have initially conceived of the international criminal court as available to try Thiers and Napoleon both, but that by the time the proposal was printed in the *Correspondent* the much more open-ended formula of "intellectual originators and instigators" was being used to designate Prussia's targets. Either of France's two competing party-claimants to the mantle of leadership could have argued that the other fell within the meaning of this term.

Bismarck took every opportunity to play the two governments off each other. At his meeting with Favre at Ferrières, Bismarck showed the GND representative evidence that he was concurrently engaged in negotiations with the Bonaparts. FLEURY, *supra* note 57, at 531. During negotiations with Thiers in early November, Bismarck dismissed the Republican's argument that an unconditional armistice would be in Prussia's interests, as it would confirm the legitimacy of a party with whom Prussia could treat, by declaring that "so far from not having a Government with whom to treat, he had two – one at Paris and one at Wilhelmshöhe." NA, FO 881/1897, No 163, Lord Lyons to Earl Granville (sent November 10, 1870, received November 12, 1870).

win glory or end in failure. Nothing simpler—but woe unto the statesman who at such a time fails to cast about for a cause of war that will stand up once the war is over.”⁶⁴

In addition to the pedagogical and coercive imperatives of prosecutions, it is almost certain that Bismarck’s proposal also was also rooted in a retributive impulse. There is good reason to believe that the proposed prosecution of “the journalists whose constant text was war, and who discounted the triumphs of the coming campaign” was rooted in the punitive sentiments Bismarck had long harbored for the press.⁶⁵ From his early days as a public official onwards, he was sensitive to criticism by journalists and editors, who he viewed as uninformed and contemptible when commenting on affairs of state.⁶⁶ To discourage attacks, he would file endless libel suits against those that had, in his view, exceeded their purview.⁶⁷ He was always, however, comfortable orchestrating massive government propaganda campaigns to shape public opinion when it suited his needs, as when he needed to fan the flames of anti-French sentiment back home.⁶⁸ In short, the Chancellor was intuitively aware of the role of the press as a mediator between the state and the citizen, understood that a warpath could be paved and maintained by militant newspapers, and embraced the opportunity to counterattack in response to perceived media excesses.

That the role of the French papers in undermining the peace negotiations was never far from Bismarck’s mind at this time is nowhere clearer than in the record of his September negotiations with Favre. At one point, the Chancellor interrupted the French Minister, who had suggested that the French people had being dragged into war against their will, to discuss his “old grudges,” including “the attitude of the press, the cheers of the *Corps Législatif*, and the bellicosity and enthusiasm with greeted the declaration of war.”⁶⁹ Bismarck subsequently questioned the Minister, who had suggested that the “courageous,” “generous,” and “intelligent” population of Paris would support a pro-peace government in an upcoming election, “what then is meant by the violence of your press, the offensive caricatures, all the taunts, all the bluster against us?”⁷⁰ A similarly revealing exchange took place during the September negotiations over the surrender of Sedan with French General Emmanuel Félix

64. GERHARD RITTER, *THE SWORD AND THE SCEPTER – THE PROBLEM OF MILITARISM IN GERMANY, VOLUME I: THE PRUSSIAN TRADITION 1740-1890* 244 (Univ. of Miami Press 1969).

65. NORTH-GERMAN CORRESPONDENT, *supra* note 22.

66. He would later remark that when dealing with the press “[e]very . . . attack must be smashed, every insult must be avenged.” KATHARINE LERMAN, *BISMARCK* 203 (2004). The Prussian parliamentarian Christoph von Tiedemann reminisced of Bismarck and his relations with the press that “[h]e was always prepared to repay a pin-prick with a knife thrust. It cannot be denied that his joy of combat often led him to fire upon sparrows with a cannon.” Keyserlingk, *supra* note 21, at 64-65. When frontal assaults failed, Bismarck was not above bribery. FRITZ STERN, *GOLD AND IRON: BISMARCK, BLEICHRODER, AND THE BUILDING OF THE GERMAN EMPIRE* 263 (1977).

67. Robert H. Keyserlingk, *Bismarck and Freedom of the Press in Germany – 1866-1890*, 11 *CANADIAN J. HIST.* 25, 27-28 (1976).

68. *Id.*

69. FAVRE, *supra* note 47, at 167.

70. *Id.* at 175. Favre replied that the same agitations existed on the other side of the Rhine. *Id.*

de Wimpffen. A never-ending war, Wimpffen argued, could only be avoided if Prussia was generous in the terms of surrender she would accept.⁷¹ When Bismarck challenged this, pointing France's history of aggressive wars, Wimpffen replied that it was not appropriate to judge France by the utterances of contemporary "irresponsible journalists."⁷² The French people, he claimed, were not the warmongers they may once have been under Louis XIV or the first Napoleon. But Bismarck would have none of it. The present war, he said, proved the opposite. "The reasoning and thinking men of the people . . . did not desire this war, but they gave way without a struggle."⁷³ Moreover, "it was those men, who in your country [France] make governments and depose them, the agitators and journalists" that Prussia "wishes to punish."⁷⁴ The war was their fault, and it was "on their account that we must march on Paris."⁷⁵

Bismarck was correct in his assessment that the Paris press had embraced the war wholeheartedly. It had also, despite the overwhelming strength of the Prussian position, downplayed news of military defeats, instead reporting on the righteousness of the French cause, the demoralized state and moral bankruptcy of the Prussian forces, the adequacy of the city's defenses, and what amounted to rumors of foreign intervention; all sources of hope for the beleaguered French population.⁷⁶ To the extent that the papers encouraged the French public in its unrealistic expectations, and by extension emboldened his negotiating counterparts, Bismarck's exasperation doubtless grew with each self-righteous gazette from Paris that crossed his desk through the fall season.⁷⁷ How satisfying it would be, his thinking must have been, to grind up one manipulator of public opinion (the French press) in the gears of another (a new international court).

* * *

Bismarck's choice of forum to air his proposal—the *North-German Correspondent* was an English-language weekly "founded with a view to influenc[e] the English

71. BRUNO GARLEPP, GERMANY'S IRON CHANCELLOR 146 (Sidney Whitman trans., 1897).

72. *Id.*

73. *Id.*

74. *Id.* at 146-47.

75. *Id.* at 147; see also HOWARD, *supra* note 2, at 220.

76. Hazel C. Benjamin, *Official Propaganda and the French Press during the Franco-Prussian War*, 4 J. MOD. HIST. 214, 222-29 (1932).

The French press was widely perceived to be responsible for prolonging the conflict by presenting a distorted picture of events. On October 12 Moltke wrote of the defeat of the French Army of the Loire: "Will this unhappy country discern at last that it is conquered, that its condition is worse every day? But I have no doubt that news of a victory is even now being published." LETTERS OF FIELD-MARSHAL, *supra* note 55, at 196. Prince Frederick III, writing in his journal in the aftermath of the Battle of Chevilly, which was a rout for the French, stated his belief that "such arrant liars are the French, they will find a way to picture yesterday as another victory and celebrate it as such," and after the defeat of the Army of the Loire pronounced that he was "still afraid nothing will ever teach the deluded, pig-headed Parisians, and that they prefer to wait for famine to come." FREDERICK III, *supra* note 32, at 143 (entry for October 1, 1870), 154 (entry for October 12, 1870). Sackville West, dispatched at the behest of Lord Lyons, British Ambassador at Paris, to assess sentiment in France's *départements*, reported that "the provincial press . . . has done much to provoke [savage and reckless] sentiments, and is doing all it can to render an honorable peace impossible." NA, FO 881/1895, Inclosure 2 in Lord Lyons to Earl Granville (sent October 15, 1870, received October 19, 1870).

77. *Id.* See also WETZEL, A DUAL OF NATIONS, *supra* note 2, at 153.

press”—as well as his decision to do so without his name attached suggests that he was testing the waters to see how his proposal would be received.⁷⁸ There is nothing in the national archives of the US or Great Britain to suggest that either country was ever formally approached about potentially participating in an international criminal court. Nor, for that matter, is there any evidence that the idea was ever entertained in British or US government circles on the basis of the *Correspondent* article. If these neutral Powers considered the proposal, their views, like the reason for the silence of the diplomatic record, remain submerged.

The response of the English-language press was also muted, though a small number of papers did examine the merits of the plan. While a few papers found the prospect of punishing the Bonapartes appealing, most dailies and weeklies were cool to the idea.⁷⁹ Perhaps apprehensive about the fate of their *chroniqueur* brethren in France, a number of papers directed their scorn at the attempt to reach the war's 'intellectual instigators.' The *Liberal Daily News*, for example called attention to the line-drawing problem it perceived by invoking the specter of a cadaver synod for long deceased French luminaries:

How is the vivacious *Correspondenz* to revenge itself on all the poets, statesmen, soldiers, and priests who have died since they hinted at something about taking possession of the Rhine? What is to be done to Alfred de Musset, for example, who wrote the silly verses which were so opportune a cry for the Empire when it resolved upon war? What is to be done to de Morny, who helped to build up the Empire on principles which, in the end, made war necessary? What is to be done to old Mocquard, who worked so diligently at all those schemes of the Empire which were involved in those principles? Indeed, if we are to go back step by step to the originators of the war, what is to be done to the potentates who formed the Holy Alliance, which made war upon

78. BUSCH, *supra* note 18, at 56.

79. The *Western Daily Press*, without taking sides on the question of responsibility for the war, supported Prussia's "singular proposal" and argued that the high number of casualties demanded "fix[ing] upon some individual, or set of individuals, the odium of the great crime." *The Grand Inquest*, WESTERN DAILY PRESS (Bristol England), Nov. 1, 1870, at 2.

Reynold's Newspaper, a London-based anti-royalist weekly with a circulation of 350,000, came out strongly in favor of Bismarck's "capital proposition," at least to the extent that it would result in the deaths of the Bonapartists, Napoleon and Eugénie in particular:

[W]e presume that the ex-Emperor and Empress, with their surroundings, are comprised amongst what is termed the "entire executive;" for, if not, the chief culprits escape the punishment that would overtake their tools and subordinates. It is deplorable to read the accounts contained in foreign journals of poor peasants being summarily show because they attempted to defend their little gardens or hen-roosts from being pillaged by Prussian marauders; of young men being executed because they dared to fire a shot in defense of their country; of old men, women, and children thrust out of their homesteads, to perish of cold and hunger, by the implacable invaders; and of countless other horrors that have overtaken the unfortunate French people, — and know all the while that the persons who originated all this misery and distress are far from the scene of devastation, and living in ease, comfort, and luxury elsewhere. . . .

We shall never have an end of wars and warfare until those who cause them are treated as outcasts and outlaws. To hang up Napoleon on a gibbet as high as there whereon Haman swung, would be a most useful lesson to both monarchs and their satellites.

More Imperialist Intrigues, REYNOLDS'S NEWSPAPER (London, England), Nov. 6, 1870. For circulation information see 'Reynolds News,' available at <http://www.bradford.ac.uk/library/special-collections/collections/reynolds-news/>.

France, which paid them back, which took more than belonged to it, and so on, and so on . . . ?⁸⁰

The scheme was consequently dismissed as “a harmless joke” on the part of the *Correspondent*.⁸¹ In the United States the *Boston Daily Advertiser* reached the same conclusion; that if the scheme were implemented, everyone from Napoleon downward, including high profile French artists and composers whose works merely celebrated the *l'esprit national*, as well as the humble caricaturist, who had “egg[ed] on that spirit of contemptuousness for Prussia which popularized the war,” would find themselves in the dock. This presumptively absurd result was treated as beneath serious consideration.⁸²

The response of the *Bristol Times and Mirror* is particularly notable for the breadth and sophistication of the objections raised. The author argued that whatever responsibility the French Cabinet bore for instigating the war, it did not “confer an exclusive right to the other side to proffer indictments against France” especially since “planning possible campaigns in France was [also] the favourite recreation in Prussian military circles.”⁸³ The line between a belligerent “resolved on making war and [that] assumed the initiative” and one that “so far from trying to avert [it], prepared to meet attack with attack” was too thin to justify prosecution of one side by another.⁸⁴ Prussia, the author emphasized, was wrong to assume that “all the offenders would be found west of the Rhine, however slight the *prima facie* evidence might be for putting others at the east of it upon their trial.”⁸⁵ Keeping with the theme of double standards, the paper pointed out that Prussia was an unsuitable herald for the suggested evolution in international law; Wilhelm I, as “a believer in the Divine rights of rulers

80. DAILY NEWS (London, England), Nov. 2, 1870, at 5 (the author also quipped that “[i]f proof of intellect be required, there will escape many a member of the recent [French] Government, and perhaps the most talkative of the present Government [of National Defense].”). Alfred de Musset (1810–1857) was a French poet and playwright. ‘Alfred de Musset’, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/biography/Alfred-de-Musset>. Charles-Auguste-Louis-Joseph, duke de Morny (1811–1865) was a president of the *Corps Législatif* from 1854 until the end of his life. ‘Charles-Auguste-Louis-Joseph, duke de Morny’, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/biography/Charles-Auguste-Louis-Joseph-duc-de-Morny>. Jean-François Constant Mocquard (1791–1864) was a former senator who served as Napoleon’s Chief of Staff between 1848 and 1864. See generally DENIS HANNOTIN, JEAN-FRANÇOIS-CONSTANT MOCQUARD, 1791-1864: CHEF DU CABINET DE NAPOLEON III (2014).

The *Daily News* often received guidance from British Foreign Secretary Granville, though there is nothing in his surviving correspondence to the paper’s editor, Frank Hill, to indicate that this article reflected the position of the Foreign Office. See NA, PRO 30/29/426; see also LUCY BROWN, VICTORIAN NEWS AND NEWSPAPERS 177-81 (1985).

81. DAILY NEWS (London, England), Nov. 2, 1870, at 5.

82. *Summary of European News*, BOSTON DAILY ADVERTISER, Dec. 6, 1870, at 3. In the US, the second paragraph of the proposal also appeared in the NEW YORK TRIBUNE, but without commentary. *Proposed German Punishment*, NEW YORK TRIBUNE, Nov. 14, 1870, at 2.

83. *A New Peace Preservation Scheme*, BRISTOL TIMES AND MIRROR (Bristol, England), Nov. 7, 1870, at 2.

84. *Id.*

85. *Id.* A few other papers pointed to Prussian hypocrisy. See *Punishment of Peacebreakers*, WATERFORD DAILY MAIL (Waterford, Ireland), Nov. 9, 1870, at 3 (“[I]f trials are retrospective] what will become of Count Bismarck?”); GLASGOW EVENING POST (Glasgow, Scotland), Oct. 31, 1870, at 2 (“[I]f such a trial is to take place, how will Bismarck escape arraignment?”).

. . . would be the last to entertain or submit to an international jury for the trial of peace-breakers.”⁸⁶

The *Bristol Times*’ objections were not solely grounded in moral criteria. The paper pointed out that ascertaining who among the French was genuinely guilty and their degree of responsibility would be challenging. It then posed a series of questions that illustrated just how undertheorized the proposed international criminal prosecutions were: assuming fair and accurate guilty verdicts were possible, “what would be the nature and object of the punishment?” Would the guilty be exiled? Would their punishment be reformatory or retributive? Was there an authority in existence “capable of enforcing the execution of the sentences pronounced?”⁸⁷ Finally, the proposed court, if called into existence, would raise “delicate and dangerous” questions concerning relations “between Sovereigns and Governments and their peoples.”⁸⁸ Even if prosecutions discouraged sovereigns from inter-state conflict in the future, it would be at the high cost of exacerbating intra-state tension:

Hitherto a subject has been amenable only to his sovereign and the laws of his own country; but loyalty itself might under such inquiry be a crime in the eyes of an international tribunal, and treason a virtue; so that in setting up a judicial court for those who break the peace between national and nation there would be a danger of breaking the peace within narrower limits by creating discord between the ruled and their rulers.⁸⁹

* * *

Establishing the proposed international court with the participation of a neutral Great Power in 1870-71 would have required either a groundswell of public support or the patronage of at least one non-Prussian diplomat-advocate willing to shepherd it to completion. But the proposal never found its international footing, and in the end, there were no war responsibility trials. Questions of personal accountability were not taken up during the negotiations of the Armistice (signed January 1871) or Definitive Treaty of Peace (signed May 1871), and ultimately only traditional collective punishments of territorial surrender and indemnity were imposed on France.⁹⁰

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* THE OBSERVER’S Prussia correspondent, who would have considered the scheme “a mere hobby of some political theorist” if not for its placement in the *North German Correspondent*, came closest to highlighting the ex post facto problem that would doubtless have been raised at trial. While expressing no opinion as to the merits of the proposal, the author noted the transformative effect the prosecutions would have on international law. Puzzling over Prussia’s intentions, the author speculated (generously) that the German government “really desire[d] . . . to codify the whole system.” *Prussia*, THE OBSERVER (London, England), Oct. 27, 1870, at 5. Reprinted at *Proposed International Criminal Trial of the French War Instigators*, THE BELFAST NEWSLETTER (Belfast, Ireland), Nov. 1, 1870, at 2.

90. ROBERT I. GIESBERG, THE TREATY OF FRANKFORT: A STUDY IN DIPLOMATIC HISTORY SEPTEMBER 1870-SEPTEMBER 1873, 273, 283 (1963) (containing the text of both treaties, as well as some draft terms). No notes were taken during the Armistice negotiations, but Favre did discuss them in his memoirs. See WETZEL, DUEL OF NATIONS, *supra* note 2, at 185 (citing Jules Favre, 2 *Gouvernement de a Defense Nationale* 362-417 (1871-75)). See also the memoirs of M. le Comte D’Herisson, Journal of a Staff-Officer in Paris during the events of 1870 and 1871, 300-29 (1885).

In late January 1870 a rumor made the rounds in Paris that Bismarck and Moltke insisted that the French, as

While Bismarck's proposal received a chilly reception, in the decades following the Franco-Prussian War, international criminal law entered a period of accelerated (but unobtrusive) development. In 1872, Swiss jurist Gustave Moynier, disappointed by the conduct of the belligerents in the Franco-Prussian War, proposed the creation of an international criminal court to adjudicate claims of violation of the 1864 Geneva Convention.⁹¹ The Great Powers collectively took up the idea of internationalized penal proceedings five years later as they formulated their response to the notorious "Bulgarian horrors;" they pushed the Ottoman government (in vain) to accept the establishment of an 'international commission' with explicit authority to "find out the culprits, [] superintend the examinations, and [] insure punishment" of "the perpetrators of the massacres and other excesses," and take part in a revision of the sentences against guilty parties that had already been announced by the Ottoman authorities.⁹² In 1893, a Franco-Siamese Mixed Court was established to try a Siamese governor, Phra Yot, who stood accused of war crimes.⁹³ Finally, as the world approached the end of the nineteenth-century, the Powers twice more took steps to punish violations of international law; international military tribunals were established

a prerequisite to negotiations, surrender General Ducrot, who was accused of violating the terms of his parole as a POW by escaping to Paris, for trial before a joint French-German court of honor. *War Notes*, MORNING POST, Feb. 11, 1871, at 6. I have not found any official document to indicate that Bismarck returned to his idea of an international trial at this time; in all probability, the rumor was rooted in the fact that the Emperor had explained to Favre during the armistice negotiations in late January that military matters should be decided between commanders, and that the impugned Ducrot, one of the few high-ranking generals at Favre's disposal, would not be an acceptable negotiating counterpart. FREDERICK III, *supra* note 32, at 285 (entry for January 26, 1870). Per subsequent press reports, a Prussian inquiry subsequently exonerated Ducrot. *News from Paris*, DAILY NEWS, Feb. 23, 1871, at 2.

91. Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 INTERNATIONAL REVIEW OF THE RED CROSS 57 (1998).

92. Turkey No. 2 (1877), Correspondence Respecting the Conference at Constantinople and the Affairs of Turkey: 1876-1877 (Harrison and Sons), Annexes 2, 3, 4 and 5 to Compte-Rendu No. 8, in Inclosure 4 to No. 135, Marquis of Salisbury to the Earl of Derby (sent December 23, 1876, received January 6, 1877).

The International Commission proposed in response to the Bulgarian atrocities was inspired by a similar body established in 1860, comprised of representatives from the Ottoman Empire, Britain, France, Prussia, Austria and Russia, and dispatched to Ottoman Syria to "determine the responsibility of all persons concerned" in a spate of inter-ethnic attacks. After several months designing the courts before which participants in and instigators of the disturbance would be tried, observing local proceedings, setting prosecutorial policy, and reviewing the verdicts handed down by Ottoman judges *en masse*, the Syria Commissioners pushed their mandate to its limit by setting aside a local verdict and considering a particularly controversial case on its merits, self-consciously assuming the role of judges in the process.

The Commissioners were unable to agree on the type of evidence that should be considered, whether the evidence showed the accused was guilty, which theory of liability should apply, what defenses might apply and whether a capital sentence should be handed down. They ultimately retreated from their 'judicial' role without reaching a decision in the controversial case, leaving it for the political branches of their various governments to reach a compromise. They did, however, continue to exercise supervisory and administrative powers over the transitional justice process. The *bona fides* of the international commission as an international criminal court are ambiguous, as the powers and independence of the Commissioners were inconsistently conceived and nebulously defined among the participating states. Benjamin Brockman-Hawe, 'Constructing Humanity's Justice: Accountability for 'Crimes Against Humanity' in the Wake of the Syria Crisis of 1860' in HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW: VOLUME 3, at 181-291, 210-28 (Morten Bergsmo, Cheah Wui Ling, Song Tianying & Yi Ping eds., 2016).

93. Benjamin E. Brockman-Hawe, *A Supranational Criminal Tribunal for the Colonial Era: The Franco-Siamese Mixed Court* in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 50-76 (Kevin Heller & Gerry Simpson eds., 2013).

in Crete (1898) and China (1900) to try those responsible for outbreaks of mass inter-ethnic violence.⁹⁴ Bismarck's proposal thus prefigured the turn towards international and individualized justice of the latter third of the nineteenth-century and beyond.

But Bismarck's scheme ultimately amounted to more than a mere harbinger of events to come. A few of Bismarck's twentieth-century successors invoked the 1870 scheme in the course of making their own contributions to the development of international criminal law, infusing his proposal with an intellectual vitality and legacy that is virtually unique among the aforementioned nineteenth-century precursors.⁹⁵ Subsequent generations, shaped by new ideologies and changed political contexts, treated the proposal variously as a catalyst for inspiration, an ironic precedent, or as a metric for gauging the wisdom of the justice endeavors of their day.

In 1898, Busch's *Bismarck: Secret Pages of His History* appeared and reacquainted readers with the Chancellor's plan.⁹⁶ The book was widely read, and the relevant passages stimulated the Chairman of the Society for the Promotion of Permanent and Universal Peace to call for the establishment of "a National Court, a Christian Court, . . . to sit in judgment upon those who fomented discord among nations" at the Society's annual meeting.⁹⁷

During the First World War the proposal was discussed several times in the press. First, the anonymous Austrian author of an epistle in *The International* blaming the French for the First World War used the proposed court as an example of the sorts of extreme measures the French habitually provoked others into consideration. It was "owing to the intimidating effect of their chauvinism," that Bismarck had wished the creation of "an international court for such braggarts, before whom all jingos [bellicose patriots] would have to appear before a war."⁹⁸ After the war, the proposed court was positioned by authors from various Allied countries as an example of why Germans responsible for the war could and should be tried. In 1919, *The Auckland Star* (New Zealand) reviewed several Bismarck's decisions during the 1870

94. R. John Pritchard, *International Humanitarian Intervention and Establishment of an International Jurisdiction over Crimes against Humanity: the National and International Military Trials in Crete in 1898* in INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES, PROSPECTS 1-87 (John Carey et al. eds., 2003); Benjamin E. Brockman-Hawe, *Accountability for "Crimes against the Laws of Humanity" in Boxer China: an experiment with international justice at Paoting-Fu*, 38U. PENN. J. INT'L L. (forthcoming 2017).

Each of the aforementioned gestures towards international justice contributed to the development of a vocabulary of international criminal law, and (as I have argued elsewhere) shaped public expectations of accountability as well as the ways that subsequent generations of problem solvers thought about how to deliver on those expectations. But they seldom directly influenced the discussions associated with the field's most critical twentieth century formative moments, in particular the adoption of the plan to try Kaiser Wilhelm II and his circle in the 1919 Versailles Treaty, and the 1945 decision to try high ranking Nazi officials before an Allied tribunal. The International Commission for Paoting-Fu, established in Boxer China (1900) for the trial of four pro-Boxer officials who had encouraged violence against Western and Chinese Christians, is the exception among the aforementioned experiments. It was invoked by the US legal advisers to the Paris Peace Conference in 1919 for the proposition that international law permitted only political, as opposed to legal, punishment for international crimes. David Hunter Miller and James Brown Scott, 1 MY DIARY AT THE CONFERENCE OF PARIS, WITH DOCUMENTS 86 (1924).

96. BUSCH, *supra* note 18.

97. 'Annual Meeting of the Peace Society, at Exeter, October 18th, 1898' in Office of the Peace Society, 25 THE HERALD OF PEACE AND INTERNATIONAL ARBITRATION – A MONTHLY JOURNAL 160 (no year).

98. Anonymous, *J'accuse Anatole France*, in IX THE INTERNATIONAL 372 (December 1915).

negotiations. After noting the cynicism with which Bismarck—who the paper blamed for the Franco-Prussian conflagration—had called for the establishment of an international court to affix blame on “innocent [French] journalists and blameless Ministers,” the author declared his appreciation that the “wheel of fate [had] come [] full circle,” as well as his hope that Allies would “make a harder peace” than Bismarck’s.⁹⁹ Finally, in an article appearing in *The Living Age* (New York), popular essayist Francis Gribble made the case for trying highly placed government and military officials, popular writers, ecclesiastics, and “men of science” who had instigated the war and contributed to its associated barbarities.¹⁰⁰ “[T]here the programme is,” he wrote of the 1870 plan, “a German programme, and a good one, excluding respect of persons [amnesties], and contemplating the arraignment of an Emperor and his advisers; and the case for adopting it is infinitely stronger now than it was at the time when it was sketched.”¹⁰¹

At least one participant in the post-WWI ‘Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties’, convened by the Entente Powers at the Paris Peace Conference in January 1919, was aware of Bismarck’s proposal. James Brown Scott, one of two legal advisors to the US delegation, argued against trying the Kaiser before an international court. Trials, he contended, too often created martyrs whose families, with popular support, ultimately inherited their authority. History had shown time and again that regime change could only come about through exile and oblivion. As for the proposed prosecution of Napoleon III, in light of the European experiences with Mary Queen of Scots, Charles I, and Louis XVI, all of whom were tried but whose descendants regained the throne, it was “better for the world that the suggestion of Bismarck ha[d] not been followed.”¹⁰²

Bismarck’s proposal also became part of the conversation surrounding the post-WWII trials of Nazis. The reproduction of the proposal in the American Bar Association’s eponymous Journal in 1947 prompted one of many harangues against the Nuremberg trials in the right-wing *Chicago Daily Tribune*.¹⁰³ For this commentator, the 1870 proposal served as a yardstick against which the Allied trial program was assessed and found wanting. The chief American architects of the trials—former Secretary of War Stimson and Supreme Court Justice Jackson (also chief prosecutor at Nuremberg)—according to the *Tribune*, compared unfavorably to Bismarck, as the Chancellor at least had the wisdom to anticipate that “a war guilt finding would exacerbate relations between France and Germany, so that hate would find expression in another war,” and abandon his plans for a trial.¹⁰⁴ Moreover, Bismarck’s proposed

99. *Bismarck’s Tactics*, THE AUCKLAND STAR, Feb. 1, 1919, at 13.

100. Francis Gribble, *Peace without Amnesties*, 12 THE LIVING AGE 385 (1918).

101. *Id.* at 388.

102. James Brown Scott, *The Trial of the Kaiser*, in WHAT REALLY HAPPENED AT PARIS: THE STORY OF THE PEACE CONFERENCE, 1918-1919, BY AMERICAN DELEGATES 231, 247 (Edward House & Charles Seymour, eds., 1921).

103. *A German View of “War Guilt” in 1870*, 33ABA JOURNAL 115 (1947); *Genesis of the War Crimes Trials*, CHICAGO DAILY TRIBUNE, Mar. 16, 1947, at 20.

104. *A German View of “War Guilt” in 1870*, *supra* note 103. The author of the *Tribune* article was unable to keep up a consistent argument as to why the 1870 trials never happened. A few sentences before those reproduced in this

trials enjoyed a superior moral position to those held at Nuremberg; the possibility of French participation in 1870 meant the defeated would have had “a voice in judging their leaders in a disastrous war,” a charity that was not extended to post-war Germany.¹⁰⁵

* * *

The modern international criminal lawyer cannot help but reflect on this tale with some sense of sadness. For champions of international accountability, the events of 1870 represent a missed opportunity. In contrast with Moynier’s relatively conservative suggestion, made only in the aftermath of the Franco-Prussian War, for the establishment of an international court with jurisdiction over violations of the Geneva Convention, Bismarck’s scheme was no mere academic flight of fancy. Rather, by virtue of its source, the proposal amounted to actual *state* endorsement of an international criminal court, with explicit and exceptional authority over broadly conceived crimes of aggression. Trials, had they taken place, would have credited the precedent in the minds of nineteenth-century international lawyers steeped in a positivist legal culture that emphasized state practice as an indicia of law’s existence. In turn, guilty verdicts might have set rules governing the use of force, and inaugurated a new era of judicial and individualized punishment. Indeed, one may query what, if Bismarck’s desired epilogue to the War come to fruition, the field might look like today; how would an early experience prosecuting aggressors distant from the very top leadership positions of the state, including members of the press, have changed later agendas? Might some of the shortcomings of the Kampala Amendments to the Rome Statute—their failure to include a crime of incitement to aggressive war and entrenchment of an expectation that only the most influential among a state’s highest leadership would be prosecuted for their crimes against peace—have been avoided?¹⁰⁶

For those of a more cynical persuasion, there is much to unpack as well; Bismarck’s shrewd use of the language of international accountability in an effort to strong-arm the French into capitulating to his demands, as well as the uses made of the (non-) precedent by two generations of anti-accountability advocates in the United States, does not fit with the idealistic and progressive narrative of international criminal law’s development that dominates the field today. One thing all will be able

paper, he argued that it was the fact that the Chancellor “could not count on the English and the Russians to cooperate in a judicial lynching” that derailed his plans.

Glenn Hoover, professor of economics at Mills College in California, also mentioned the proposal in *passim* in his anti-prosecution *Outlook for “War Guilt” Trials*. Glenn E. Hoover, *The Outlook for “War Guilt” Trials*, 59 *POLITICAL SCIENCE QUARTERLY* 40, 42 (1944).

105. *Id.* Criticism of the IMT was common before, during, and (for years) after its operation. See e.g. RICHARD HARWOOD, *NUREMBERG AND OTHER WAR CRIMES TRIALS—A NEW LOOK* 56 (1978).

106. MICHAEL KEARNEY, *PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW* 242 (2007) (arguing that such a move is imperative if we are to fulfill the promise made in the wake of the Second World War that its horrors would not be repeated); Mark Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 *CASE W. RES. J. INT’L L.* 291, 314 (2009) (maintaining that “there is room for including upper and senior ranks [in the Rome Statute] in a way that falls outside of the absolutely high leadership requirement but does not begin to approach mass punishment.”).

to agree on, however, is that the story deserves to be remembered, and should not be allowed to slip into obscurity.