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Book Reviews

William A. Schabas. ***The Trial of the Kaiser.*** Oxford: Oxford University Press, 2018. Pp. 432. £24.99. ISBN: 9780198833857

An unsettling urge is taking hold of scholars of international law – unsettling insofar as it leaves the rest of us adepts of the dark arts looking dull. Call it 'Philipping out', 'Neffritis' or 'feeling Lowe', leading lights of our benighted epistemic community are writing books that the *bon père de famille* and woman on the Clapham omnibus can enjoy. Books on international law. Books with pictures, no less. The good news, it seems, is that the compulsion comes accompanied by the skill. Said books have to date been gems from which international lawyers too can profit. To the list of fortunate victims of the bug can now be added William Schabas, whose *The Trial of the Kaiser*, released in the centenary year of the end of the war to end all wars, should prove an entertaining and rewarding read for specialists, non-specialists and non-international lawyers alike.

Compared to the place of Nuremberg in the international legal and wider imagination, the drive in the wake of World War I to try Wilhelm II of Hohenzollern, former kaiser of the defeated German Empire, for his purported role in the commencement and conduct of the war is little known. It was not always so. The day after the formal opening on 19 January 1919 of the Paris Peace Conference, at which the victorious Allied Powers, chief among them the USA, the UK, France and Italy, along with a host of Associated Powers, settled on the terms of peace with which the defeated Central Powers would be presented, the headline of the *Manchester Guardian* read: 'Peace Conference Opened. … First Questions: Punishment of Kaiser.'[1] British Prime Minister David Lloyd George had campaigned for parliamentary re-election in late 1918 on the slogan 'Hang the Kaiser!', a sentiment that chimed with the popular song of the year before entitled 'We're Going to Hang the Kaiser under the Linden Tree'. (The sheet music for this demotic ode to retributive justice adorns the cover of Schabas' book). The determination to try the kaiser, who in the dying hours of the war had sought and been granted asylum in the Netherlands, found its legal embodiment in Article 227 of the Treaty of Peace with Germany, better known as the Treaty of Versailles.[2] The provision envisaged, however, not formal prosecution for crimes under international or national law but, rather, trial for 'a supreme offence against international morality and the sanctity of treaties' before a 'special tribunal', composed of judges from each of the four main Allies and Japan, 'to 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'. How Article 227 emerged and how its implementation was thwarted by the refusal of the Netherlands to accede to the request by the Allied and Associated Powers foreshadowed in the provision 'for the surrender to them of the ex-Emperor in order that he may be put on trial' form the central thread of Schabas' deftly spun history, the legal, diplomatic and domestic political narrative of which is lent humanity and colour by a *dramatis personae* of adroitly sketched characters, subplots rich in incident, an authorial eye for the quirky and telling fact and the immediacy of dialogue.

[1] *Manchester Guardian* (20 January 1919), at 1.

[2] Treaty of Peace between the Allied and Associated Powers and Germany 1919, UKTS No. 4 (1919), Cmd 153.

On the basis of extensive and meticulous research and discerning selection of primary materials from a range of archives, Schabas charts the evolution of the formal plan to try the kaiser from inception to inclusion in the Treaty of Versailles to oblivion. The reader is led from the earliest discussion of the idea by the French and British imperial governments jointly and severally, as respectively advised by two leading professors of international law and a committee of enquiry appointed by the attorney general, and their agreement with the Italian government that the kaiser 'should be brought to trial before an International Court' (at 17–22, 38–67); through the polarized debates over the emerging legal framework within the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties (Commission on Responsibilities) of the Preliminary Paris Peace Conference (at 99–173); to the agreement of the 'Council of Four', or 'Council of Virgins' (the subject, at 175, of the best line in the book), comprising the heads of government and, in one case, of state of the four main Allied Powers, to try the kaiser before a 'special' international tribunal for an offence 'not to be described as a violation of criminal law' (at 174–197); and to the finalization of the draft text of Article 227 of the Treaty of Versailles, its presentation to, and rebuff by, the German government and its reasoned defence by the Allied Powers, which insisted on its acceptance by Germany, which, in turn, signed the Treaty on 28 June 1919 (at 198–212). After this follows an account of what at best were the half-hearted efforts to implement Article 227 against a backdrop of waning enthusiasm, dissension and amateurism among the British governing classes, the inaction of the other Allied Powers (of whom the USA had signalled by 1920 its intention not to ratify the Treaty), the opposition of the royal houses of Europe and the intransigence of the Netherlands (at 213–292). The tale is one familiar from other historical contexts to international criminal lawyers – namely, a radical idea born of crisis, of profound moral indignation, of a perceived state of exception and of a momentary alignment of key political actors; the tempering of an initial transcendent faith in the flame of a principled concern for the rule of law and the crumbling of consensus on the diamantine reality of national interest; the qualified success or failure of the venture; and the inheritance of the idea's legacy by the next generation. *En route*, the reader is treated to the failed escapade of a quixotic American colonel keen to kidnap the kaiser from his plush Dutch exile (at 80–98) and to telling portraits of a thoroughly unpleasant Wilhelm II (at 24–29, 37, 247–251, 291), who emerges as a distempered martinet, casually rabid anti-Semite and coward.

Unlike the wretched recruits fated to dig trenches in 1914–1918, Schabas has unearthed some nuggets. Genuinely eye-opening is his analysis of the references in the 1919 report of the Commission on Responsibilities, consistently paired with the expression 'the laws and customs of war', to 'the laws of humanity', to which the US delegation objected in light of the principle *nullum crimen sine lege* (at 148–155). On the basis of a close reading of the reports and proceedings of Sub-Commissions I and III, of the work of the Drafting Committee and of the debates of the plenary Commission on Responsibilities, he reveals the later authors of the influential 1948 history of the United Nations War Crimes Commission to be wrong in their reading of the report of the Commission on Responsibilities as juxtaposing two categories of offences – namely, violations of the laws and customs of war and violations of the laws of humanity, the latter supposedly the forerunner to the crimes against humanity over which the Nuremberg tribunal was vested with jurisdiction.[3] Rather, Schabas shows, in referring to 'outrages against the law and customs of war and the laws of humanity' and to '[v]iolations of the laws and customs of war and the laws of humanity' the drafters of the report of the Commission on Responsibilities

[3] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Law of War* (1948), at 35–37.

intended no more than to stress for general consumption, by allusion to the Martens clause in 1899 Hague Convention II and 1907 Hague Convention IV,[4] that 'what is contrary to the laws and customs of war is contrary to the laws of humanity inasmuch as it inflicts unnecessary suffering' (at 151, quoting Edouard Rolin-Jaequemyns). There was apparently 'no serious suggestion' that 'acts other than classic war crimes', such as those listed in Chapter 2 of the Commission's report, 'had been contemplated' (at 153). The revelation, which squares with the fact that the Commission drafted no list of 'crimes against the laws of humanity' comparable to that for war crimes (at 153), will prompt at least one international lawyer to revise their own account of the Commission's work on point.[5] At the same time, Schabas acknowledges that 'the possibility of an extension of international law to atrocities perpetrated by a country against its own population was … being considered at the time of the First World War', and he notes the condemnation in 1915 by the UK, Russia and France of the Ottoman Empire's massacres of Armenians as 'crimes against humanity and civilization' (at 154).

To all of this Schabas brings a refreshing tone of understatement. The unsuccessful plan to try the kaiser is not billed as the first rays of a dawning millennium in which state officials quake in fear of the triumphant vindication of global criminal justice. Rather, as well as being 'a good story', the failed attempt to put the kaiser on trial 'marks the first international debates about perplexing issues of international law that retain their salience', debates in which '[a] number of riddles stand out', some of which, 'a century later, remain unsolved' (at 4–5). (The three 'riddles' highlighted by Schabas [at 5–9] are the immunity from foreign and international criminal jurisdiction of serving and former heads of state, the crime of aggression and the retroactive application of criminal law.) The same debates, continues Schabas with typical measure, 'also make useful contributions to other issues of international criminal law' (at 9), by which he means the desirability and desirable composition and procedure of an international criminal court. All told, Schabas concludes, the abortive trial of the kaiser 'may have been an inauspicious beginning, but it was hardly the end of a failed idea' (at 9).

The book is at its humane and fascinating best in its scrupulously even-handed recounting of the competing views as to the legality and legitimacy of trying the kaiser before an international tribunal for offences unknown to customary international law as it then stood – namely, launching an aggressive war and violating treaties guaranteeing the neutrality of Belgium and Luxembourg. Here Schabas lets the protagonists speak for themselves in finely poised passages of dialogue drawn from minutes of meetings and in quotations from written statements. Some of the material is memorable. Referring to Georges Clemenceau's summation of the debate in the Council of Four on 2 April 1919, Schabas recalls a line to which he returns at the very end of the book (at 316):

> And Clemenceau, always ready with an aphorism, added: 'The first tribunal must have been summary and brutal, yet it was the beginning of something great.' (at 180)

Of the differing opinion expressed by Italy's Vittorio Orlando at a meeting of the Council of Four on 8 April 1919, Schabas relates:

> 'I don't disagree that practical necessity forces us to create new law', continued Orlando. 'But we should be wary of the consequences of violating established principles. We could find ourselves faced with difficulties which we won't know how to resolve because we are no longer sure of our principles.' (at 189)

4 Convention (II) concerning the Laws and Customs of War on Land 1899, UKTS No. 1 (1901), Cd 800; Convention (IV) concerning the Laws and Customs of War on Land 1907, UKTS No. 9 (1910), Cd 5030.

5 See Roger O'Keefe, *International Criminal Law* (2015), at 137–138, relying on United Nations War Crimes Commission, *supra* note 3, at 35–37.

Later Schabas reproduces the limpid statement of principle in Germany's formal reply to the penal provisions of the Treaty of Versailles, to which Max Weber contributed, in which it is said simply that, '[i]f a violation of the law is to be atoned for, the proceedings themselves must be legal' (at 205).

Yet for all his narrative restraint, Schabas does not pull his scholarly punches. In particular, he provides a pointed corrective to those who characterize Article 227 of the Treaty of Versailles as a rejection of the availability before international criminal tribunals of head of state immunity, beginning:

> Although the Americans and the Japanese went along with their European allies in agreeing to hold the trial, they never really accepted the claim that the victors were entitled to put the Emperor on trial without Germany's consent. That helps to explain why Article 227 is in the Treaty of Versailles. German acceptance of the trial of their former Emperor was a *sine qua non* for prosecution by the Allies. That Germany agreed to a trial of its former Emperor by signing and ratifying the Treaty of Versailles considerably weakens the claim that Article 227 represents a watershed in international law as far as the immunity of [a] Head of State concerned. (at 5)

He chides, albeit gently, a Pre-Trial Chamber of the International Criminal Court, which 'selectively cit[es] one paragraph in the Report of the Commission on Responsibilities' (at 6; see also 119),[6] and Judge Eboe-Osuji, sitting at the time on a Trial Chamber of the same court (at 6; see also 119),[7] for relying on the Commission's proceedings 'to support arguments that Heads of State have no immunity before international criminal tribunals' (at 6; see also at 119). Schabas writes:

> This is surely overstating things, given the importance of the dissenting views and the total neglect of the Report by the real lawmakers, the Council of Four. The Report of the Commission is often greatly misunderstood. ... There was no agreement in the Commission about any of the key issues. The suggestion that the Report influenced the content of Article 227 is unconvincing. The debates paint a picture of profound controversy within the Commission, not one of emerging consensus. (at 119–120)

If only Judge Eboe-Osuji, now president of the Court, and three of his colleagues on the Appeals Chamber had subsequently heeded these words in *Al-Bashir*, in which, to add insult to injury, they refer extensively to Schabas' book.[8] Perhaps some prefer a good story to an inconvenient truth.

Overall, *The Trial of the Kaiser* hints phlegmatically at the ambivalent role of international law in great affairs of state. Rarely if ever before could governments at both the national and

[6] Schabas cites Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Al-Bashir* (ICC-02/05-01/09-139-Corr), Pre-Trial Chamber I, 13 December 2011, para. 23.

[7] Schabas cites Decision on Defence Applications for Judgments of Acquittal, Reasons of Judge Eboe-Osuji, *Prosecutor v. Ruto and Sang* (ICC-01/09-01/11-2027-Red-Corr), Trial Chamber V(A), 5 April 2016, para. 263.

[8] See Judgment in the Jordan Referral re Al-Bashir Appeal, Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmánski and Bossa, *Prosecutor v. Al-Bashir* (ICC-02/05-01/09-397-Anx1-Corr), Appeals Chamber, 6 May 2019, para. 124, having quoted extensively from the proceedings of the Commission on Responsibilities and its relevant sub-commission and repeatedly cited Schabas' book (paras 102–123), conveniently omitting the latter's criticism of the earlier reasoning to the same effect of the Pre-Trial Chamber in *Al-Bashir*, *supra* note 6, and of Judge Eboe-Osuji in *Ruto*, *supra* note 7.

international levels have sought so much guidance on how to proceed from professionals versed in, and advising on the basis of, international law – guidance that was ignored, confused or dismissed by the politicians, who nonetheless debated the appropriate course of action by sustained reference to international law, as understood or opportunistically framed by them. It is an object lesson in occupational humility, imparted in modest style.

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Honor Brabazon (ed.). ***Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project.*** New York: Routledge, 2016. Pp. 214. £93.99. ISBN: 9781138684171

In this book, Honor Brabazon and her co-authors advance the debate on the nature of the relationship between law and neoliberalism. Since scholarship on the subject first took off in the early 2000s, considerable attention has been dedicated to tracing the intellectual influences of neoliberal theorists, identifying what is distinctive about the political ideology of neoliberalism and documenting and dissecting neoliberalism's manifestation as economic policy and practices of governmentality. By now, critical writing on neoliberalism has achieved the status of something like a sub-speciality in the social sciences and humanities. Yet, as Brabazon impresses in her introduction to the volume, 'the role of law in the neoliberal story has been relatively neglected, and the idea of neoliberalism as a juridical project has not been considered' (at 1).[1] Part of the explanation for this scholarly shortcoming may be that, for a number of years, the anti-statist, free market rhetoric of neoliberal politicians was taken at face value by many analysts. Neoliberalism was commonly equated with a politics of economic *laissez-faire*, and there was a tendency to 'reduce neoliberalism to a bundle of economic policies with inadvertent political and social consequences'.[2] When reference was made to law and regulation in the neoliberal context, overwhelmingly, the story was one of deregulation, conferring the impression that the neoliberal project was one in which law had a limited role to play. It has taken years of engagement with, and exposition of, the writings of the intellectual architects of neoliberalism for this narrative to be flipped and for it to be widely recognized that neoliberalism cannot sensibly be understood as a withdrawal of the state from the market or as an abdication of government regulation.

More recent scholarship on neoliberalism has advanced considerably in terms of elaborating what is 'neo' about *neo*liberalism, as compared with earlier iterations of liberal thinking on the

[1] This edited collection is the first book to address this topic in depth. However, a small group of legal academics has begun to turn their attention to the significance of law in the neoliberal project in recent years. Two notable contributions are a special issue of *Law and Contemporary Problems* (Grewal and Purdy, 'Introduction: Law and Neoliberalism', 77 *Law and Contemporary Problems* (2014) 1) and a new edited collection edited by Ben Golder and Daniel McLoughlin published the year after Brabazon's volume in 2018 (B. Golder and D. McLoughlin, *The Politics of Legality in a Neoliberal Age* (2018)).

[2] Brown, 'Neoliberalism and the End of Liberal Democracy', 7 Theory and Event (2003), available at http://muse.jhu.edu.ezproxy.lib.gla.ac.uk/article/48659.