

Ian Mitchell's Law-related BOOK RECOMMENDATIONS

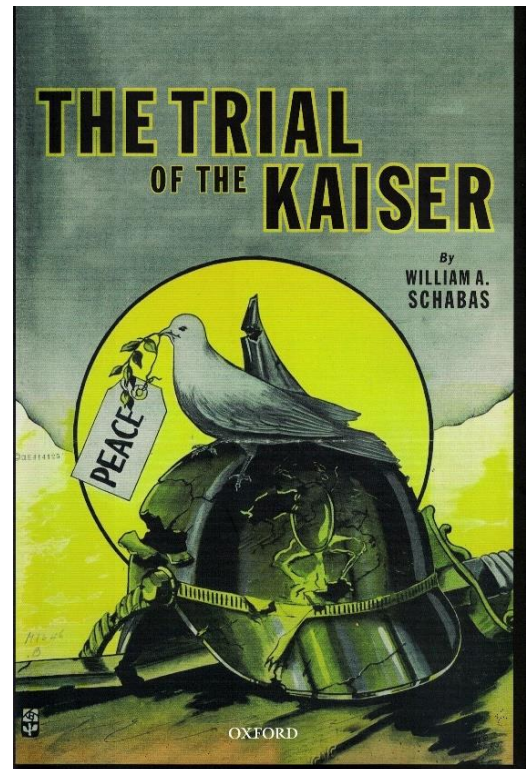
36 – *Trial of the Kaiser*
(17 March 2019)

THE TRIAL OF THE KAISER

Author: William A. Schabas

Publisher: [Oxford University Press](#), 2018
(available on *Amazon*, [click on cover image for link](#))

Descriptor: Account of the flight of the Kaiser into Holland in 1918 and the debates, at the Paris peace conference, about whether he should be put on trial for war crimes. Explains why he wasn't.



RusRoL relevance: *STATUS meets CONTRACT, big time! But with some surprising results. The conflict started when the Kaiser's Chancellor called the interantional guarantee of Belgian neutrality a "scrap of paper". STATUS pooh-poohed CONTRACT then, but the aim of the victors was to teach STATUS to respect CONTRACT as they saw it.*

Reason to read: Describes how and why the Allies decided, eventually, to try the Kaiser for war-crimes, crimes against humanity, the violation of Belgian neutrality, planning aggressive war and other such offences against the post-Napoleonic international order—and also why they failed. It shows how the attempt bore fruit in 1945 when it framed discussion about how the Nazi leaders should be dealt with at Nuremberg. The debate in 1919 centred on Article 227 of the Versailles Treaty, which included the so-called “war guilt clause”. This book illuminates much about the Allies’ peace negotiations from a rarely examined angle. However, it is an angle that is increasingly relevant in the twenty-first century with the rise of terrorist “crimes against humanity” and the way they are dealt with by modern governments.

Main talking points:

1. The 1914-18 war was caused by the continued assertion of STATUS by the three Empires of eastern Europe at a time when the smart money was moving into CONTRACT as the governing principle in international relations. Austria-Hungary wanted to assert its superiority over Serbia; Russia its influence as against Austria-Hungary; and Germany its *uberdom* over *alles in die* Euro-Slavic *welt*. It was Britain’s insistence on CONTRACT as far as Belgian neutrality was concerned—ironically supported by its own, admittedly more loosely organised, Empire—that

put the first spanner in the German works. Later, Anglo-American insistence on international law of the sea, which precluded unrestricted submarine warfare (another form of CONTRACT) helped to wreck the military machinery which underpinned the structure of German imperial STATUS. On 9 November 1918, two days before the Armistice, General Groener said to the Kaiser at his headquarters at Spa in Belgium, “Sir, you no longer have an army. The army will march home in peace and order under its leaders and commanding generals, but not under the command of Your Majesty, for it no longer stands behind Your Majesty.” (p. 25) The Kaiser responded by saying to one of his aides, “Who would have thought it would come to this? The German people are a pack of bastards.” (p. 26)

2. After the German collapse, the Allies tried to define the CONTRACTual terms which they thought Germany should have observed in relation to the war, even though it had not been embodied in any form of law when the war started. The Americans were strongly opposed to this approach. The US Secretary of State, Robert Lansing, resisted the politically correct (to use an anachronistic but apposite phrase) urges of the more sanctimonious Allies. He objected to the phrase “the laws of humanity”, which had been introduced into international legal discourse by Friedrich (Fyodor) Martens, the Estonian (Russian) lawyer, when he drafted part of the 1899 Hague Convention of the Law and Customs of War on Land. It was intended to be a grand declaration that would outlaw brutality by invoking the eternal principles of “civilised” humanity. Lansing saw it differently. “What do you mean by the ‘laws of humanity?’” he asked Ernest Pollock, the British Solicitor General. The Belgian representative piped up: “What is contrary to the laws and customs of war is contrary to the laws of humanity.” (p. 151) Pollock then suggest that instead they refer to “the *principles* of humanity”, rather than the laws. Lansing was having none of it: “I am not content with the word ‘humanity.’” The American delegation argued, with justice, that “laws” can be found in “books of authority”, whereas “principles of humanity... vary with the individual.” (p. 152) International law cannot be based on personal morality.
3. Beyond this was the question of whether the Hague Convention applied. Legally, it came into operation in a specific conflict only when *all* belligerents were signatories. In 1914, Serbia wasn’t one. Did that fact legitimise German mistreatment of Belgian nuns, for example, or the machine-gunning of survivors from U-boat sinkings?
4. Behind that again was a question that has vexed international lawyers for centuries, and which continues to vex them to this day: should there be a distinction in military conduct between dealing with “civilised” and “uncivilised” peoples? Since the evolution of chivalry, Christian societies have made a distinction between “civilised” peoples and “uncivilised” ones. You could be savage with “savages”, but you had to treat Belgian nuns with humanity, as you did British civilians rowing away in lifeboats from sinking vessels. You were not allowed to rape the former not machine-gun the latter. These restraints did not apply to Moslems or other non-Christians. Until the time of Peter the Great, Russians had been categorised as “uncivilised” on this basis. The question in 1919 was into which category “the Hun” fell.

Incidental interest: The book opens with a melancholy account of the Kaiser’s attempt to flee Belgium just before the Armistice. Early on the morning of Sunday 10 November 1918, the Emperor left his GHQ at Spa, without saying goodbye to the generals who had served him so loyally, or even

leaving them a note. STATUS moves when and whither STATUS pleases. His Majesty set off in the royal train, which was “an elegant assemblage of ten carriages in white and gold livery, staffed by footmen, butlers, chefs and other servants, and an entourage of officials and other advisers” (p. 26). He was seeking safety in the country of a relative and namesake, Queen Wilhelmina of the Netherlands. But a Dutch border guard refused to let him cross into Holland without a pass. An officer in the Kaiser’s suite said, “The German Emperor is here and must pass through the barrier.” The guard told him and his master to wait. “Then 59 years old, never before in his life had Wilhelm been given orders by a railway attendant.” (p. 28)

The atmosphere of glory departed—of STATUS destroyed—is similar to that which suffused the railway-based wanderings of his cousin Nicholas II twenty months before. Abandoned by everyone who had mattered the day before, the ex-Tsar sat in an opulent carriage of the Royal train in a siding at Pskov while personal attendants scurried about keeping the illusion of STATUS alive for a few days longer. Out of the windows Nicholas could see nothing but a uniform whiteness which extended to the horizon. He ordered steam to be raised for Petrograd, imagining that he still had freedom of movement on the railway network. He quickly discovered that he did not. First, he had to take a circuitous route, then he learned that the railway workers at Bologoye on the Moscow line refused to let him to proceed towards the capital. Nicholas returned to Pskov, where kommissars arrived to arrest him. He tried to maintain his previous dignity by inviting them to dine with him. But they refused. Nobody was interested in being patronised by an ex-Tsar, however good the food. It was much the same with Wilhelm, except—and this is the main point of this book—he managed to get through to a country which had a long tradition of giving sanctuary to refugees. It is ironic that, over the centuries, most of them had been fleeing rulers like Wilhelm or Nicholas.

Thought(s) provoked:

1. There is an interesting clash between family feeling and family STATUS preservation at regal level. The British government was extremely dissatisfied by the Dutch refusal to hand over the Kaiser for trial by some sort of, as yet unspecified, international tribunal. The charges were to be crimes against humanity, including the breach of treaty obligations such as to Belgian neutrality. Germany—as inheritor of the international obligations of Prussia—had also signed the 1839 Treaty of London guaranteeing Belgian neutrality. (At the time, it had been intended as a bulwark against *French* expansionism.) Up to July 1917, King George V had been happy to offer asylum to his deposed cousin, ex-Tsar Nicholas II of Russia. It was only when the King was advised by his secretary, Lord Stamfordham, that to harbour an anti-democratic “tyrant” would adversely affect the morale of the troops in the trenches that the invitation was withdrawn. (What are we fighting for, boys? Sanctity of treaties or the safety of Tsars who shoot people like us?) In Holland, Queen Wilhelmina gave the Kaiser refuge from his “pack of bastards”. But he must have been quaking in his jackboots when he remembered the fate of Cousin Nicky and his family. One wonders what Lord Stamfordham would have advised King George if Nicky had managed to get to Britain and the Soviet government—perhaps as a condition of diplomatic recognition in 1924—had asked for the handing over of “Nicholas Romanov, Citizen” so that he could be put on trial for crimes against his people?

2. There is an interesting contrast between the way the German Chancellor, Theobald von Bethmann-Hollweg, dismissed the Treaty of London as “a scrap of paper” (p. 10) and Neville Chamberlain’s speech at Croydon Airport when he returned from Munich saying, “Here is the paper which bears his [Hitler’s] name upon it as well as mine.” We know from Reinhard Spitzzy (who, as Ribbentrop’s ADC, was present at the Munich negotiations) that Hitler dismissed that document with Bethmann-Hollweg-like contempt. Soon after Chamberlain left Germany, Spitzzy says, “I overheard Ribbentrop making derisory remarks about the Munich Agreement... To my absolute horror Hitler responded in a half-whisper: ‘Oh, don’t take it all so seriously. That piece of paper is of no significance whatsoever.’”¹ STATUS never considers itself bound by CONTRACT. (“Only little people pay taxes.”) In 1914, Bethmann-Hollweg could not believe that Britain would take its diplomatic CONTRACT with Belgium so seriously as to indulge in the ultimate act of political STATUS, which is to go to war. Conversely, Chamberlain did not believe that Hitler could be so unbusinesslike as to treat a CONTRACT which he had personally signed as so much waste paper.
3. Today the debate about how to treat “uncivilised” people—by which is meant those who do not respect the laws and customs of civilian conflict—principally concerns terrorists. Britain attempted to deal with IRA bombers humanely by trying them in regular courts as if they were ordinary criminals. Russia, by contrast, afforded Chechen rebels the STATUS of enemy combatants by destroying Grozny and killing tens of thousands of Chechens in a broadly pre-chivalric manner. The former is an expression of a belief in social CONTRACT, while the latter is an assertion of regional STATUS. This dilemma was extensively debated in 1919, but to little practical effect. In 1945, both solutions were adopted: Dresden and Hiroshima were flattened and the senior savages of Germany and Japan were tried at Nuremberg and in Tokyo.

Style: Dull, academic, not very reader-friendly. Rather too much office history, about meetings, memos and internal arguments.

Publishing quality: So-so, but with some good photographs (including the one below).

Smile(s): There is one amusing story, which concerns an American ex-Senator, Luke Lea, who took a serious line on war guilt. He was a “big, handsome” Southerner who had been the youngest member of Congress when elected for Tennessee in 1911. When defeated in the 1917 election, he decided to raise a volunteer regiment of National Guardsmen from Tennessee and North Carolina and head off to Europe to make an impact there. Lea had been a serious law student at university (he edited the *Columbia Law Review*) and seems to have had strong views about international law.

By Christmas 1918, with the Kaiser already ensconced in a chateau near Utrecht, Colonel Lea (how he got that rank so quickly is not explained) was serving with a US artillery regiment in north-east Belgium. An old Tennessee friend, Captain Leland MacPhail, found him one day sitting drinking wine

¹ *How We Squandered the Reich*, Reinhard Spitzzy (tr. G.T. Waddington, 1997), p. 254

with the French priest he was billeted with and studying maps illegally obtained from the French Army. When MacPhail asked where his friend had obtained the maps, Lea replied: “I disremember.”

When MacPhail then asked why he was studying them, as well as a Baedeker travel guide, Lea replied, “I’ve been considering a little project and I’d be mighty pleased of you’d join me.”

What was the project?

“I was thinking of motoring up to Holland and kidnapping the Kaiser.” (p. 83)

The “magnificent seven” Lea recruited for this exploit included one Marmaduke Clokey, who intended that they travel in style. He located a Winton Six limousine and, when that broke down, an eight-cylinder Cadillac, which they stuffed with cigars and concealed guns.

At the briefing before they all set off, Lea revealed his plan: “We’ll nab the old gentlemen, fellows, and we’ll turn him over to the United States Government. They’ll be legally obliged to string him up.” (p. 84)

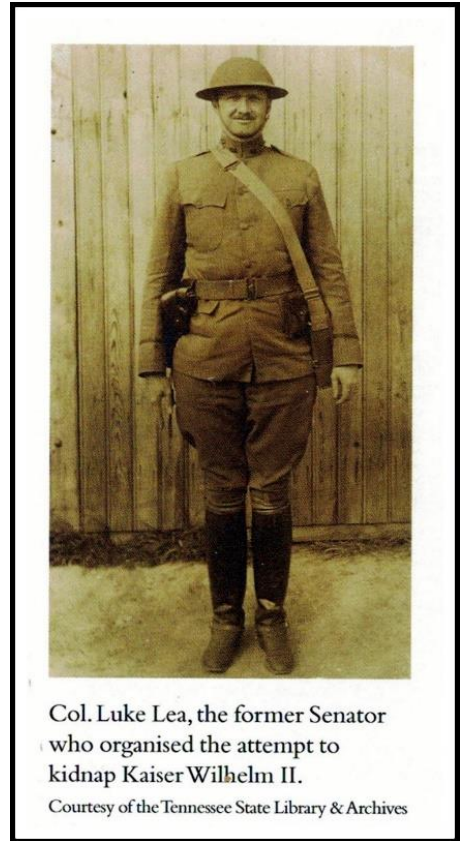
Though the party succeeded in gaining entry to the chateau, the Kaiser’s heavily armed Dutch guards refused to conduct them into the royal presence after the great man “declined to grant any audience to any uninvited persons” (p. 90). STATUS doesn’t tolerate informality. But CONTRACT depends on private enterprise, and Capt. MacPhail got his revenge by “helping himself to a souvenir” when he pocketed “a bronze ashtray adorned with a pipe-smoking dog that bore the monogram, W.I., presumably meaning Wilhelm Emperor.” (p. 92)

Best of all, the *Washington Times* managed to make a witty conjunction of CONTRACT and STATUS when it splashed a story reporting the exploit: Ex-Senator tries to kidnap Ex-Kaiser.

Author: Professor Schabas, who comes from Canada but works now in Britain, has been called “the world expert on the law of genocide and international law.”

Link(s): At this link you can watch Professor Schabas talking at Glasgow University about the non-trial and its context in international law: <https://www.youtube.com/watch?v=9tc9Zj93qts>

Overall recommendation level: FAIRLY HIGH – if you skim the “office memo” bits



About the reviewer: Ian Mitchell is the author of four books, including *Isles of the West* and *The Justice Factory*. He is writing a comparative study of Russian and Western constitutional history to be called *Russia and the Rule of Law*—hence the “RusRoL Relevance” section at the top. He can be contacted at: ianbookrec@gmail.com. For other reviews in this series, see [Ian Mitchell’s Book Recommendations](#).