

THE PROPOSED TRIAL OF THE FORMER KAISER

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The treaty of peace with Germany contains many novel features. One of them is that which provides for a special tribunal to try the ex-Emperor for a "supreme offense against international morality and the sanctity of treaties." This, of course, is a very different thing from a proceeding against a nation to penalize it for disregard of its international obligations, or to enforce against its will the provisions of a treaty. The former Emperor is to be prosecuted simply as a wrong doer.

Vattel asserts that, as all nations have an interest in maintaining the faith of treaties, they have also a right to unite in enforcing their observance, if they are violated without fair cause.¹ But William of Hohenzollern is no longer at the head of the German peoples. He has no power, now, to enforce any treaty. He stands as a private individual at the bar of the world.

Whether there is such a thing as international morality is a question on which juries are divided in opinion. Some of them recognize it not only as existing, but as the proper name for what is commonly called international law.² Others consider it as something affecting all governments, but destitute of any claims to enforcement, except as a consequence of an implied agreement. Be this as it may, any such agreement necessarily involves the recognition of certain principles as to which its aid is invoked. There must be an acceptance of those principles, as furnishing a rule of conduct.

If then we assume that international law, whether properly so called or not, is an existing entity, it must be granted that there are ascertainable principles, some of which, at least, necessarily form part of it. These may be principles which, in the nature of things, are of universal application. One such is that a person shall not be punished for committing an act which at the time it was committed was not subject to such punishment. This we have derived from the early Roman law, as expressed in the Twelve Tables. Cicero, referring to this short code, declares that one of the best of its provisions, as handed down from the fathers, was that they would not permit laws to be passed to throw any new liability upon private persons, particularly selected,

¹ Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle* (Washington, 1916) 433.

² See Merignhac, *Droit Public International* (Paris, 1905) ch. iv, 18.

"since this is the force of law that it be known and commanded as to all."³ It is no more and no less a rule of international law, than of national law. It is the shield of every man against unjust attacks on his personal security.

Livingston, in his draft of a code of crimes and punishments for Louisiana, states its effect thus:

"Offenses are those acts and omissions which are forbidden by positive law, under the sanction of a penalty."⁴

"No act or omission done or made before the promulgation of the law which forbids it, can be punished as an offense.

"The legislature alone has the right to declare what shall constitute an offense; therefore it is forbidden to punish any acts or omissions, not expressly prohibited, under pretence that they offend against the laws of nature, of religion, morality, or any other rule, except written law."⁵

Beccaria lays it down that

"the laws only can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact. No magistrate then, (as he is one of the society) can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws."⁶

Most of the framers of the Treaty of Versailles belong to governments which have put these principles into national penal codes. Thus France provides that no contravention of duty, no wrong, no crime, can be punished by penalties which were not pronounced by the law before they were committed.⁷

So in the East, Siam in her recent draft of a penal code begins by declaring that

"a person shall only be punished for an act done by him if such act be declared to be an offense and the punishment is defined by the law in force at the time of the doing of such act. No other punishment than that defined by law shall be inflicted."⁸

The United States regards this rule of government as so important that it has incorporated it into its Constitution by expressly forbidding either the States or the United States to pass any bill of attainder or

³"*Quum legis haec vis sit, ut sit scitum et jussum in omnes.*" *De Legibus*, III, 19.

⁴Livingston, *Criminal Code* (1833) 375.

⁵*Ibid.*, 366.

⁶Beccaria, *Essay on Crimes and Punishments* (1809) 18.

⁷*Code Penal*, art. 4.

⁸Penal Code of Siam, sec. 7

ex post facto law, and in the Fifth and Fourteenth Amendments to the Constitution, by guaranteeing every one against deprivation of life, liberty, or property without due process of law, and securing to each the equal protection of the laws.

The Supreme Court of the United States has defined a bill of attainder as "a legislative act which inflicts punishment without a judicial trial."⁹ A treaty for an attainder of a particular person is an instrument of that character. It is, if valid, a law by the express terms of the Constitution and the supreme law of the land. It would, if valid, affect the person attainted in the way prohibited. It is both an *ex post facto* law and a bill of attainder.

True, the treaty is not an Act of Congress. But it is an act of the United States of the same intended force as if Congress had enacted it.

"The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substances, not shadows. Its inhibition was levelled at the thing, not the name."¹⁰

But, to examine the foundation of the proceeding, what authority have the Signatory Powers to entertain jointly jurisdiction of a breach of international law, occurring during the late war? Each Power can prosecute in its own courts for such a breach, if sufficient to constitute a crime against itself. The United States has in its Constitution an express recognition of international law as a governing law in the United States.¹¹ "A right secured by the law of nations to a nation or its people, is one the United States as the representatives of this nation are bound to protect."¹² Therefore acts done in the territory of the United States or on the high seas in violation of the law of nations, to the injury, say, of Belgium, the United States might prohibit by a prospective law, enforceable in its own courts. It has done so, though with some misgivings, by the treaty of 1862 with Great Britain for the suppression of the slave trade. It joined there with that Power in creating three mixed courts for the condemnation of slavers and to secure the ultimate trial in their own national courts of offenders against the treaty. On each of these courts each government was to appoint a judge and an arbitrator. Such officers were appointed and the courts organized, but no criminal trial before any of them was ever had. There was a general impression in the United States that it was quite doubtful whether such a tribunal could render an effective judgment, and in 1870, by an additional convention, all three courts were abolished.¹³

⁹ *Cummings v. Missouri* (1866, U. S.) 4 Wall. 277, 323, 18 L. ed. 356.

¹⁰ *Ibid.*, 325.

¹¹ Art. I, sec. 8.

¹² *United States v. Arjona* (1887) 120 U. S. 479, 487, 7 Sup. Ct. 628.

¹³ 2 Moore, *International Law Digest* (1906) 469, 946.

A similar fate befell the mixed court set up later in Samoa. But a judicial proceeding under any such treaties would be fundamentally different from a prosecution here, in an American court of justice, under a retrospective statute. The machinery of justice would not be the same. The subject of complaint would not be the same. The special court to try the ex-Emperor, which it is proposed to create, would represent, not a particular sovereign, but a group of sovereigns. A sovereign prosecutes criminals as infractors of his rights. For what infraction of sovereignty would five Great Powers unite in complaining? What sovereign would be offended, and how?¹⁴

If by following the lines of thought there brought up for consideration, it be concluded that an alliance or league can, on sound principles, be established, which shall have cognizance, in tribunals of its own, of offenses against the law of nations; and that absolute sovereignty, in the evolution of human government, no longer exists, except as a metaphysical doctrine of no practical importance; other difficulties arise as to the effect on the United States of our constitutional provisions regarding criminal trials.

In the courts of Continental Europe the accused in a criminal proceeding can generally be compelled to be a witness against himself. Our Constitution forbids any such examination "in any criminal case." Will this not apply, so far as the United States is concerned, to any case brought by it jointly with other Powers? In many, if not most governments, the evidence in criminal trials is largely composed of written depositions. Can the United States be represented by a judge, in such a proceeding, who can take into account such depositions, when our Constitution provides that in all criminal prosecutions the accused shall "be confronted" with the witnesses against him? Can such a "special court" frame rules for itself which shall give part of the judges liberty to decide on evidence which others of the judges are forbidden by the laws of their own countries to consider?

The rules of evidence applied by such a tribunal would either be new rules altogether or old rules taken from those in force in some one or other of the nations before whom the accused may be prosecuted. Shall hearsay evidence be thus admitted? Must the proof be such as to exclude any reasonable doubt as to the guilt of the accused? Can he be admitted to testify in his own behalf?

But the ex-Emperor may be called to account by his own nation in courts of its own. The Convention which adopted the new German Constitution prepared last June a bill to create a German court for the special purpose of determining the responsibility to Germany of all German officials who started, prolonged or lost the war. Should such a court be organized and the ex-Emperor tried before it and acquitted,

¹⁴The writer discussed these questions at some length in *The Vesting of Sovereignty in a League of Nations* (1919) 28 YALE LAW JOURNAL, 209.

Article 228 provides that he could be tried again for the same things in a military court held under authority of one or more of the victorious Powers. Could he be so re-tried in the special court of the Great Powers, created by the treaty in Article 227? Or is the defence of *nemo debet bis vexari pro eadem causa* excluded there?

Difficulties must also arise as to the details of procedure. In civilized countries the general practice in criminal prosecutions is to have a preliminary investigation by some prescribed authority into the facts on which the liability of the accused depends. If it appears to that authority that a prosecution should be instituted, an "act of accusation" or an indictment or information is prepared, and the accused brought before the court and arraigned to answer the charges so formulated.

Under the treaty with Germany, the proceedings for the prosecution of the former Kaiser begin with the arraignment. It declares that

"The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties."

The Signatory Powers call on him to answer a charge which they make, and one expressed in a form which gives slight indication of what particular acts of wrong doing are to be the subject of the prosecution. They would thus, in effect, constitute themselves a grand jury, were it not that they have entered into no preliminary inquiry as to his guilt. They assume it to be manifest.

To support this, the precedents set up by the Congress of Vienna in dealing with Napoleon are invoked. That Congress declared that Napoleon, by his return from Elba, had placed himself outside of civil and social relations, and that, as an enemy and disturber of the peace of the world, he had delivered himself over to public prosecution for crime.¹⁵ The Congress of Vienna was not a body entitled to the confidence of all nations; but it is enough to say that its action toward Napoleon had the support of a voluntary delivery of himself into the custody of one of the participating Powers.

On this point Vattel has a word of caution which is worth citing. All nations, he says, have

"a right to unite in order to humble him who shows that he despises them, who openly plays with them, who violates, and tramples them under his feet. This is a public enemy, who saps the foundations of the repose of nations and of their common safety. But we ought to take care not to extend this maxim to the prejudice of the liberty and independence which belong to all nations. When a sovereign breaks his treaties or refuses to fulfil them, this does not immediately imply that he considers them as vain names, and that he despises the faith of treaties: he may have good reason for thinking himself dis-

¹⁵ 13 De Martens, *Recueil des Traitées et Conventions conclus par Russie* (St. Petersburgh, 1905) 271, 272.

charged from his engagements, and other sovereigns have not a right to judge him."¹⁶

When for instance, we landed American troops at Vera Cruz, in April, 1914, the Gadsden treaty with Mexico was in force. It provided that any disagreement arising between the two governments should, if possible, be settled so as to preserve peace, and if the two governments should not be able to agree, a resort should not be had to hostility of any kind, until that government which deemed itself to be aggrieved should have maturely considered whether it would not be better that the difference should be settled by arbitration. It may now fairly be presumed that our government, in April, 1914, was in possession of secret information leading it to apprehend what, in effect, soon happened, the breaking out of a world war and an effort to involve Mexico in hostilities against the United States. We, at all events, were not justly to be accused of breaking the Gadsden treaty, until the decisive facts had been clearly settled. It might have appeared to our government to be a necessary act of self defence, even under Webster's description of this right, in the negotiations over the affair of the *Caroline*, as

"confined to cases in which the necessity of that defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹⁷

When in May, 1919, the draft of the treaty was presented to Germany, there went with it an official summary. In this paper, what is now in the treaty under the head of *Penalties*, in connection with Article 227, appears under the head of *Responsibilities*, and the arraignment of the ex-Emperor is stated to be "not for an offense against criminal law, but for a supreme offense against international morality and the sanctity of treaties."

It would seem probable that these changes in the terms of the summary were made in the hope of avoiding some of the objections which have been above suggested against his prosecution for crime. If the charge had been an offense against criminal law, he could have asked under what rule of that law he was accused. As it stands the proceeding is more of the nature of an inquiry into the ex-Emperor's moral responsibilities in a Court of Conscience. Thus viewed, it finds at least some color of support in Grotius. If, he says, the cause of a war was unjust, though the war was declared in due form, all the acts of injustice which spring out of it are unjust, and the consequent losses must be made good by the authors of the war, and the military commanders under them, who did the deeds of wrong, and all the troops who concurred in a common act, such as the burning of a city, to

¹⁶ 1 Vattel, *op. cit.*, 433.

¹⁷ 2 Moore, *op. cit.*, 412.

which each was a contributory cause.¹⁸ Vattel, while disapproving any such doctrine as to the immediate doers of the wrong, and deeming them protected by the orders of their superiors, holds that the king who makes an unjust war is liable personally to indemnify all who have suffered damage from it, and cannot throw it off on his nation.¹⁹ This recognition, however, of a civil liability on his part does not imply that this liability is to be considered as a punishment for his personal wrong. It simply sends the damage which he has done ultimately where it belongs, that is, home to himself. The injured nations, who may compel him to answer for it, are simply collecting a debt which has always been legally collectible. It is in its nature a debt, not a fine. It rests on the responsibility of a wrong doer for the consequences of the wrong. It is not a creature of statute, but a liability, which, if it exists at all, is imposed by the general obligations of human society.

The United States, except as a Signatory Power, has not committed itself to the support of the project of a trial of the ex-Emperor. The Commission on Reparations appointed by the Peace Conference to examine into it, were divided in opinion. Secretary Lansing presented an unfavorable minority report, at an early stage of the Conference, in which he cited *Schooner Exchange v. McFadden*.²⁰ In Italy a parliamentary commission, appointed to consider the whole treaty, came to a similar result, in a report presented September 11, 1919, from which we quote the following:

“Crimes attributed to the former emperor were not contemplated in any penal code. Nobody can be called to answer and be punished for acts which when committed did not constitute a crime contemplated by law. The society of nations may establish for the future the criminal status of offenses against international morals or disregard of treaties, lay down the procedure for judging the culprit and provide for the penalty. But Count Hohenzollern’s accusers cannot appoint judges; and it is impossible to ask Holland to extradite her guest for political crimes not within the purview of present treaties. The former emperor must be placed in a condition where he can do no further harm, but the eternal ideals which guarantee public and private law must be saved.”

The Allied and Associated Powers do not claim the authority of precedent. In their dispatch, sent in June as an answer to the German exceptions to the proposed prosecutions, they speak thus:

“The present treaty is intended to mark a departure from the traditions and practices of earlier settlements, which have been singularly inadequate in preventing the renewal of war. The allied and associated powers, indeed, consider that the trial and punishment of those

¹⁸ Grotius, *de Jure Belli ac Pacis* (1625) Bk. III, ch. x.

¹⁹ 2 Vattel, *op. cit.*, 158ff.

²⁰ (1812, U. S.) 7 Cranch, 116, 3 L. ed. 287.

proved most responsible for the crimes and inhuman acts committed in connection with the war of aggression is inseparable from the establishment of that reign of law among nations which it is the agreed object of the peace to set up.

"As regards the German contention that the trial of the accused by tribunals appointed by the allied and associated powers would be a one-sided and inequitable proceeding, the allied and associated powers consider that it is impossible to intrust in any way the trial of those directly responsible for the offensive against humanity and international right to their accomplices in their crimes. Almost the whole world has banded itself together in order to bring to naught the German plan of conquest and dominion. The tribunals they will establish will therefore represent the deliberate judgment of the greater part of the civilized world. They cannot entertain the proposal to admit to the tribunal representatives of countries which have taken no part in the war. The allied and associated powers are prepared to stand by the verdict of history as to the impartiality and justice with which the accused will be tried.

Finally, they wish to make it clear that the public arraignment under Article 227, framed against the German ex-Emperor, has not a judicial character as regards its substance; but only in its form. The ex-Emperor is arraigned, as a matter of international policy, for a supreme offense against international morality, the sanctity of treaties, and the essential rules of justice.

"The allied and associated powers have desired that a judicial form, a judicial procedure, and a regularly constituted tribunal should be set up, in order to assure to the accused his full rights and liberties in regard to his defence; and in order that the judgment should be of the most solemn judicial character."

It will be noticed that here the arraignment of the ex-Emperor is described as a matter of international policy. Its character, according to this, is in substance a political use of a political means.

The fact that the ex-Emperor has sought an asylum in Holland constitutes, in principle, no insuperable obstacle to maintaining a prosecution against him. Holland has a legal right to surrender him,²¹ and if she should decline to do this, the institutions of most of the Powers would permit a trial to be had in his absence, after due notice to appear, on a proceeding for contumacy.

²¹ For a full discussion of the authorities, see 2 Calvo, *Le Droit International* (5th ed. Paris, 1896) sec. 949ff.