

July 2021

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Recommended Citation

J. W. Kelley, Criminal Responsibility for War, 17 Dicta 11 (1940).

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Criminal Responsibility for War

By J. W. Kelley*

IN THE early months of 1919, when the twenty-six Allied and Associated Powers were represented in Paris, a Commission of fifteen members was chosen to punish by criminal proceedings the persons responsible for the World War.

On the cause of the war the Commission was unanimous, finding it to have been due to Austria-Hungary aided and abetted by Germany. The Commission found the person principally responsible was the ruler of these powers, therefore the 227th article of the Treaty of Versailles contains the following, in the nature of an indictment found by all the fifteen members of the Commission, proceeding after the manner of a grand jury.

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

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following powers: namely, the United States of America, Great Britain, France, Italy and Japan.

The Allied and Associated Powers will address a request to the government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.

The government of the Netherlands then occupied the position of an American state when asked to surrender a fugitive upon extradition. On January 15, 1920, the Supreme Council addressed an official demand to Holland "to deliver into their hands William of Hohenzollern, former Emperor of Germany, in order that he may be judged." This communica-

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tion contained an imposing lecture reminding Holland of "her international duty to associate herself with other nations as far as her means allowed in undertaking, or at least not hindering, chastisement of the crimes committed."

The Dutch Minister of Foreign Affairs, replying to the demand of the Allied Powers, called attention to the fact that Holland was not a party to the Treaty of Versailles and, having been a neutral in the war, was in no way bound to associate itself with the twenty-six other nations which secured the indictment against the Kaiser.

The Dutch also called attention to the fact that there was no tribunal in existence at the time of the World War for the trial and punishment of persons engaged in it.

The Holland reply also contained a delicate hint that enlightened persons, such as composed the Supreme Council, must easily perceive that any tribunal set up after the commission of an act, for the purpose of making that a crime which was not a crime when committed, was scarcely in conformity with law and procedure as understood by modern civilized nations.

This reply was received and considered by the Council of Ambassadors, successors to the Supreme Council, which was dissolved five days after the first communication was sent to the Dutch government. In the name of all the Allies the Council of Ambassadors dispatched a rather lengthy communication to the host of the fugitive Kaiser, exhorting Holland to make common cause with them in the punishment of her guest. It was stated in this note that the members of the Council could not "conceal their surprise" at not finding in the Dutch reply a single word of disapproval of the crimes committed against international morality.

On March 5, 1920, the Allies received a reply to this second note, suggesting that the Dutch government was mindful of its obligations to humanity but that its soil had, from immemorial times, been a sanctuary for fugitives guilty of politi-

cal offenses, and adding that its understanding was that military courts punished acts done contrary to the laws of war and that if in the future some arrangement was made by the Society of Nations for punishing criminally the vanquished in war for offenses committed upon the soil of other nations, Holland might see fit to take a different view.

Matters had now reached an empassé. In the Treaty of Versailles, article 227-A has this to say:

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law.

The foregoing was agreed to by the German government when its representatives signed the treaty. This was not contrary to the accepted practice of International Law. A military court may try and punish offenders against the laws of war in a proper case after hostilities have ceased. In our own country Henry Wirz, commandant of the Confederate Prison at Andersonville, Georgia, during the Civil War, was tried by a military commission sitting in the city of Washington, and executed by hanging in November, 1865. It seemed clear to everyone connected with the case of the Kaiser that it was one thing to try him by a military court and another to set up a tribunal after the offense was committed, for the specific purpose of punishing what had not been punishable before. In the case of *U. S. v. Hudson*, 7 Cranch 32, this point was decided in our own country, Judges Marshall and Story being on the court at the time.

It was hardly possible to proceed against the Kaiser in a military court. Generals Pershing, Foch, Haig, and Diaz, of the United States, French, English, and Italian forces, were the only commanders qualified to sit in such a trial, a proper military tribunal being composed of persons of equal rank to the accused. Soldiers do not readily convict commanders of opposing forces. They foresee the day when they, by the chances of war, might be tried in the same way. The possibility of a criminal trial of the Kaiser, in his absence, being out

of the question, the Society of Nations had recourse to another paragraph of article 228 of the treaty, which is:

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

After the ratification of the treaty, a list of commanders of armed forces, accused of the commission of crimes against the laws of war, was served by special messenger upon the German Chancellor of Berlin, demanding the extradition of the persons named. This list contained about nine hundred names.

There was no court indicated in the treaty in which these nine hundred persons could be tried and the lawyers of the German government took advantage of this situation by offering the use of the German courts for that purpose, the proposition being as follows:

The German Government is willing to instruct the German legal authorities immediately to take proceedings based upon the material to be transmitted against all the Germans who are named by the Entente as guilty of offences against the laws and usages of war. It will suspend all the laws which might stand in the way of such proceedings, and will go so far as to suspend the existing amnesty laws.

Furthermore, the Allied and Associated Governments which are concerned in each particular case will be given the right directly to participate in the proceedings.

The lawyers of the Allied Powers read the second paragraph of article 228 again and perceived from its terms that while the German government agreed to "hand over" any persons named for trial, there was no agreement as to where the trial should be, and it was insisted by the German government that the meaning of the paragraph was that the Allies should prosecute the accused in the German courts, themselves acting as prosecutors.

So plausible was this rejoinder that under date of February 13, 1920, the Council of Ambassadors made this item a matter of record.

The prosecution which the German Government itself purposes immediately to institute in this manner is compatible with Article 228 of the Peace Treaty, and is expressly provided for at the end of its first paragraph.

As far as the venue was concerned, the German lawyers seemed to have decidedly the best of it.

The Council of Ambassadors then got to work and from the many cases before them, picked out forty-six test cases, each nation selecting the cases in which it had a special interest. Neither the United States nor Japan attempted to prosecute anyone. The American sense of humor, in which the Japanese, being apt in imitation, apparently shared, prevented our being involved in the farce. Of course nothing came of the prosecutions.

On the 18th of December, 1920, the League of Nations approved the report from one of its committees to the effect that "there is not yet any international penal law recognized by all nations."

The above quoted statement still remains true. Among the many blunders committed at Versailles was the failure to provide for the punishment, by international criminal law, of the rulers of countries responsible for the violation of treaties by armed force and the crimes against international morality. This omission leaves persons who plunge nations into war without cause or justification to be judged merely by their own countrymen and, as in the case of the Kaiser, if they flee from their own country they escape judgment. The machinery set up by the League of Nations and the Court of International Justice is entirely futile in this important respect.

The Allied and Associated Powers could have enacted an International Penal Code to make certain wrongful acts by rulers of nations "a crime and affix a punishment to it and declare the Court that shall have jurisdiction of the offense." *U. S. vs. Hudson, supra.* The prospect of the death penalty would go a long way to prevent upstart dictators from recklessly plunging the world into war. Any American backwoods legislature could have handled this problem more intelligently than it was dealt with at Paris.

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Dated at Denver, Colorado, this 17th day of October, A. D. 1939.