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## INTERNATIONAL LAW

### Applied to The TREATY OF PEACE

Considering the terms of the Treaty of Versailles, as they relate to the actual settlements, from the standpoint of International Law, it may be affirmed that no modern treaty of peace has done this system such violence; certainly not the cynical treaty of Vienna of 1815. For the treaty, in spite of the wickedness of its settlements, left us some progressive principles of the utmost value, notably that of the freedom of international rivers. Further, its labors in behalf of the abolition of the slave-trade were surely worthy of the world's approval.

In the Treaty of Versailles, however, it is difficult to find a single progressive principle established, while rule after rule of the law of nations heretofore recognized as instituted for the protection of all states, is ignored or violated where it conflicts with the purposes of the respective Allied and Associated Powers.

The validity of title founded in conquest is not abolished, as it might have been, and as the world was led to believe it would be; embodied as it was in the preliminaries to negotiation. The recognition of the secret treaties, confirming the rights of conquest, stood in the way of this benign possibility.

The plebiscite, designed to prevent the handing of peoples around like flocks of the field, was not established as a principle of the law of nations, as the world was also led to expect it would be. There is only a very restricted application of it in the terms, and with respect to some territories, it is denied altogether.

Neither is the right of option, designed for the protection of individuals of minorities, established. It is permitted in some instances of cession, but withheld altogether in others.

As to the Covenant of the League of Nations, it is a reactionary institution rather than a progressive one, in that it ignores the whole modern trend toward the establishment of international relations upon the foundations of law, rather than upon compromise and expediency. The Covenant of the League of Nations looks to the establishment of superintendence over international relations by political as distinguished from legal methods. There is not a single reference to international law in the whole Covenant that points to any definite plan whatever for the progressive improvement and extension of that law. In neither the Council of the League of Nations nor in any body to function under it, in the proposed settlement of disputes, is there any provision for the limitation of their actions within the settled principles of law. It is possible for the League of Nations to take up and carry on the achievements of the last two decades, starting where the Hague Conferences left off and looking to the progressive development of law and the substitution of judicial settlements for mere arbitration based on compromise, but such an intention is nowhere manifested in the Covenant. In fact there appears to be almost a complete abandonment of the lessons of the past.

Not only does the Treaty of Versailles fail to lend its great sanction to the establishment of progressive principles, but it sets aside, so far as future validity is concerned, many principles wrung only with the most laborious effort from a self-interested world. Thus the rules instituted for the protection of private property on land and in territorial waters, and even that protecting the private property of prisoners of war, are swept aside. The settled distinctions with respect to belligerent rights of destruction, and those limiting the exercise of belligerent force within lawful bounds, are confounded. The effect of the outbreak of war on treaties is thrown into greater confusion than ever by reason of inconsistent and contradictory action.

In the stipulation for the trial and punishment of those German nationals found guilty of violations of the laws of civilized warfare a wholesome step forward has been taken calculated to sustain these laws in the times to come and to promote their observance.

It was not necessary to the placing of the severest burdens upon Germany to have declared that Germany must accept the responsibility for causing all loss and damage to which the Allied and Associated governments and their nations have been subjected; for, as pointed out in the discussion of the article, the laws of war plainly distinguish between lawful and unlawful loss and damage. The amount of unlawful loss and damage for which Germany is responsible, in view of her utterly barbarous methods of carrying on war, probably far exceeds any sum which may ultimately be received. To have adhered to these laws in assessing reparation—as it is proposed to invoke the law in the infliction of punishments—would have done incalculable service

toward the effective establishment of these restraints upon warlike violence.

In the failure of the Allied and Associated governments to take this course, they have established a precedent which future belligerents will fail to act upon in freeing themselves from heretofore fixed limitations upon the use of force. It must be borne in mind that one of the sources of International Law is just such a great international congress as that assembled at Versailles; it is these gatherings mainly that make and unmake its principles. Such congresses are therefore under a very solemn responsibility to the future of the world.

In the preface to Prof. William E. Hall's scholarly treatise on International Law, which has run through many editions, is the following remarkable prophecy, penned in 1889:

"Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of states. The area within which it reigns beyond dispute has in that time been infinitely enlarged, and it has been greatly enlarged within the memory of living men. But it would be idle to pretend that this progress has gone on without check. In times when wars have been both long and bitter, in moments of revolutionary passion, on occasions when temptation and opportunity of selfishness on the part of neutrals have been great, men have fallen back into disregard of law and even into true lawlessness. And it would be idle also to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which have accumulated during the last half century and more will all be given their answers at once. Some hates, moreover, will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that if the next war is unscrupulously waged,

it also will be followed by a reaction towards increased stringency of law. In a community, as in an individual, passionate excess is followed by a reaction of lassitude and to some extent of conscience. On the whole the collective seems to exert itself in this way more surely than the individual conscience; and in things within the scope of international law, conscience, if it works less impulsively, can at least work more freely than in home affairs. Continuing temptation ceases with the war. At any rate it is a matter of experience that times, in which international law has been seriously disregarded, have been followed by periods in which the European conscience has done penance by putting itself under straiter obligations than those which it before acknowledged. There is no reason to suppose that things will be otherwise in the future. I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist."

Only the first half of this prophecy has been fulfilled; in the pursuit of material and illogical objects by the Allied and Associated governments the opportunity to realize the latter half has been postponed to a later time.

The sweeping aside of all restraints by the victors must cause something of a shock to those who read the articles of the treaty in the belief that the character of imposed peace has changed.

It is to be hoped, however, that with the cooling of passions and the coming of sober second thought to the world the influence of the great international jurists of the United States, of France, of Italy and of Great Britain will reassert itself toward the readjustment, restatement and restoration of the principles of International Law, as the only foundation upon which the relations of nations can rest in definite security.

The following analysis is, of necessity, a mere outline, in which the articles of the treaty are paraphrased in the interest of brevity; only a work of volumes would permit of a thorough discussion of the multifarious phases of the settlement and their relation to and effect upon the law of nations:

# INTERNATIONAL LAW AND THE TREATY OF PEACE

NOTE.—The paragraphs in light face type are the official text of the treaty; the paragraphs printed in black face type embody the law applicable to each preceding paragraph of the treaty.

## THE TREATY

Part I. The Covenant of the League of Nations.

The High Contracting Parties, in order to promote international co-operation and to achieve international peace and security,

By the acceptance of obligations not to resort to war,

By the prescription of open, just and honorable relations between nations.

By the firm establishment of the understandings of international law as the actual rule of conduct among governments, and

By the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another.

Agree to this Covenant of this League of Nations.

Not only does the Covenant fail to provide any means for the "firm establishment of the understandings of international law," but the treaty itself appears to discard many vital principles of the customary as well as of the conventional law of nations. (See Comment opposite Articles 282-287.)

Article I. Members of the League shall be those signatories named in the Annex and also such of those named (as invited) as shall accede without reservation by a declaration deposited with the secretariat within two months of the coming into force of the treaty.

Thirty-two States, dominions, and colonies mentioned in the Annex as signatories are declared members (though China, one of the states mentioned, refused to sign) and thirteen others are named as those invited to become members, making forty-five in all.

In 1910, Oppenheim, the eminent English successor to Westlake as Whewell Professor at Cambridge, asserted (Vol. I, *Int. Law*, pp. 162-64) that there were then in Europe seventy-four states possessing international personality and therefore members of the Family of Nations. He included the twenty-four German states and free towns. He cites twenty-one states in the Americas, one in Africa and one in Asia. As to China, Siam, Afghanistan and Thibet he denied to them

the status, asserting that they possess international personality only for some purpose. His list embraced ninety-seven. None of the British dominions or colonies is mentioned as possessing the essential attributes of an international person qualified for association in the Family of Nations. (See W. Allison Phillips, *The Peace Settlements, 1815 and 1919*. *Edinburgh Review*, July, 1919, as to exclusion of German states from the Holy Alliance.

Any fully self-governing state, dominion or colony may become a member if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations and shall accept such regulations as may be prescribed by the League as to its military and naval forces and armaments.

This paragraph confounds all previously accepted principles with respect to International personality and sovereignty. If it connotes the assumption *ipso facto* by such dominion or colony of a bona fide free and independent status, there is nothing inconsistent, but then it would cease to be a dominion or colony. Thus the British empire would be broken up.

Half and part-sovereign states says Oppenheim (Vol. I, pp. 529-530) may be parties to international negotiation, but so-called Colonial states, as the Dominion of Canada, can never be parties to International negotiation. Thus viewed from the standpoint of the Law of Nations, the Dominion of Canada, the Commonwealth of Australia, New Zealand and the Union of South Africa are British territory. (*Ibid* Vol. I, p. 231.)

No genuine League of Nations can be founded upon such basic inequalities. These inequalities appear not only in the organic structure from the outset but they appear with respect to the treatment of subsequently admitted members.

Any member may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of withdrawal.

The effect of notice of intended withdrawal would be immediately to transfer to the League the power of inquiry into and decision upon the whole body of international relations of the notifying state. Nor does it appear that time would bar any case.

In a particular case a state may, of its own

free will, submit to an outside authority for decision the question of its fulfillment or nonfulfillment of certain obligations, without derogating in any way from its sovereignty; but to transfer the right of final decision over the whole of its foreign relations is to yield the very essence of external sovereignty. Such state would occupy the position of ward to the outside authority. (See 1 Halleck, Ch. III, Sec. 1; Bluntschli, Sec. 64; Vattel, Ch. 1; Manning, p. 93; Hall, Sec. 1; 1 Westlake, Ch. 3.)

Article 2. The action of the League shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

Article 3. The Assembly shall consist of representatives of members of the League. It shall meet at stated intervals and from time to time as occasion may require, and at its meetings may deal with any matter within the sphere of action of the League or affecting the peace of the world. At meetings of the Assembly each member of the League shall have one vote and not more than three representatives.

It will be observed that the Assembly, which is a representative body, in principle at least, is not required to meet within any definite period as is the Council (infra Article 4). Although apparently clothed with concurrent power, it is in vital respects subordinate to the smaller Council. The basis of legal equality in any League of Nations necessarily requires equality in voting. (See Scott, *The Hague Peace Conferences*, Vol. 1, p. 37.)

Article 4. The Council shall consist of representatives of the Principal Allied and Associated Powers (the United States, Great Britain, Italy, France and Japan), together with four other members to be selected by the Assembly from time to time in its discretion. Belgium, Brazil, Spain and Greece are named provisional members.

It will be noted that the principle of equality disappears at this point, the five Great Powers constituting themselves an indefeasible majority. Yet every attempt at organizing a League of Nations must start from and keep intact the independence and equality of all civilized states. (Oppenheim (1919), *The League of Nations*, p. 33.)

With the approval of a majority of the Assembly, the Council may name additional members whose representatives shall have fixed places in the Council.

The Council shall meet from time to

time as occasion may require and at least once a year, and it may deal with any matter within the sphere of action of the League or affecting the peace of the world.

The enlargement of the Council can take place only by unanimous consent of the Council, with the approval of a majority of the Assembly. Self-interest will always adjust and readjust the balance in the Council.

Any member not represented on the Council shall be invited to send a representative to sit as a member at any meeting during the consideration of matters specially affecting the interests of such member.

Although a state whose affairs are under consideration by the Council may have a representative thereon, the rule of unanimity excludes the vote of this added representative. (Infra Article 5.) Such representative is therefore not an equal in fact.

At meetings of the Council each member represented shall have one vote and not more than one representative.

While there is equality in the vote of the Council, the principle is nullified by inequality of representation.

Article 5. Except where otherwise provided, decisions of the Assembly and the Council shall require agreement of all members represented at the meeting.

Matters of procedure, including appointment of committees to investigate particular matters, may be decided by a majority present.

That is to say, there must be agreement as to such representatives present.

The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States.

This would constitute the President of the United States the presiding officer of both bodies temporarily, at least.

Article 6. The permanent secretariat shall be established at the seat of the League. The secretariat shall comprise a Secretary General and such other secretaries and staff as may be required.

The first Secretary-General shall be the person named in the Annex; thereafter he shall be appointed by the Council with the approval of a majority of the Assembly.

Secretaries and Staff shall be appointed by the Secretary General with the approval of the Council.

The Secretary General shall act in that

capacity at all meetings of the Assembly and of the Council.

The expenses of the Secretariat shall be borne by members in accordance with the apportionment of expenses of the International Bureau of the Universal Postal Union.

As to the possible magnitude of the personnel, see *infra* Comment opposite Article 282.

Article 7. The seat of the League is established at Geneva. The Council may decide at any time to establish the seat elsewhere.

All positions under or in connection with the League including the secretariat, shall be open equally to men and women.

Representatives of members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

Diplomatic privileges and immunities include extra-territoriality, that is, immunity from local law, civil and criminal, in foreign countries, such immunities extending to the agent's residence and to those in his suite. Owing to the inviolability attaching by the law of nations to the person of a diplomatic agent, a crime committed against him is punished with exceptional severity by the laws of all states. (U. S. vs. Hand, 2 Wash. 435)

The diplomatic immunities extended to all officials of the League must be considered as deriving from the respect due to the sovereignty of the League as a distinct political entity, as the immunities of an ambassador flow from the respect due to the person of the sovereign whom he represents.

Yet Article 7 appears to extend the principle far beyond its application even in the case of ambassadors in clothing these officials with the status apparently anywhere "when engaged on the business of the League." Diplomatic immunities do not attach under the law of nations to ambassadors passing through third countries. They can claim no more than courteous treatment. (1 Westlake, pp. 273-275; 1 Oppenheim, pp. 469-470; 1 Twiss, Sec. 222; 1 Wharton, Sec. 97; 4 Moore, Sec. 643.)

By the Treaty of Berlin, 1878, and the Treaty of London, 1883, instituting the Danube Commission, the principle of inviolability was recognized as between the signatories as attaching to the respective representatives, their archives, etc. But it was not contemplated as of universal application, as in the present instance where League offi-

cial will be sent into the territories of non-members.

The buildings and other property occupied by the League or its officials or by representatives attending its meetings shall be inviolable.

Article 8. The members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common motion of international obligations.

The Council, taking into account the geographical situation and circumstances of each state, shall formulate plans for such reduction for consideration and action of the several governments.

Such plans shall be subject to reconsideration and revision at least every ten years.

After these plans shall have been adopted by the several governments the limits of armaments fixed therein shall not be exceeded without the concurrence of the Council.

Members agree that the manufacture by private enterprise of munitions of war is open to grave objections. The Council shall advise how the evil effects can be prevented.

Members undertake to interchange full and frank information as to the scale of their armament, their programs and of their industries adaptable to warlike purposes.

The deduction is a fair one that "the geographical situation and circumstances" to be taken into account in reduction of armaments create an exception in favor of the Great Powers, whose far-flung empires may be thought to require large military and naval establishments. And the Great Powers, constituting a dominant force in the Council, will formulate plans for themselves as well as for other states.

The hegemony of the Great Powers in the League is silently recognized throughout the Covenant. Yet historically a Great Power of today is not necessarily a Great Power of tomorrow. Spain, Portugal and Sweden were Great Powers in 1815. Germany, Austria-Hungary and Russia were great Powers in 1914.

And, it may be asked, who will keep in order those who are to keep the world in order?

Article 9. A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Article 1

and 8 relating to military and naval questions.

This would undoubtedly be a military commission whose functions would include superintending disarmament of states newly admitted as well as directing the forces necessary to vindicate international obligations.

Article 10. Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.

This Article embraces two distinct obligations in the first sentence: viz., "To respect" the territorial integrity and existing political independence of member states, and to "preserve" the same as against external aggression.

A state undertaking to respect the territorial integrity of another contracts to refrain from doing anything that shall in any way impair or impeach that territorial integrity, including its possessions, dependencies, colonies, protectorates, leased territories, spheres of influence and hinterlands. All of these terms express degrees of territorial rights. (1 Westlake Ch. 6.)

Under existing principles of the law of Nations states are under a general duty to respect the territory and independence of all other states. This duty connotes the right of all states to complete immunity from interference by others. But there are exceptions to this general rule recognized by the law. A state may lawfully decline to respect the territory and independence of another (1) in self-defense, (2) in accordance with treaty stipulations, (3) on grounds of humanity, and (4) in behalf of an oppressed population. (Davis 4 ed. p. 104, Woolsey Sec. 43; Wheaton sec. 36; Snow p. 57; Hall Sec. 88; Lawrence Sec. 74-89; 1 Moore p. 73.)

The acceptance of the obligation "to respect" the territorial integrity and existing political independence of member states means therefore a mutual engagement not to interfere on grounds of humanity or to assist an oppressed people or otherwise within the territorial limits of member states. This obligation would probably forbid extending a recognition of belligerency to revolting peoples within the territories of member states.

The second obligation in the first sentence of Article 10 is that to preserve as against external aggression the territorial integrity and existing political independence of mem-

ber states; so that there is not only the duty to abstain from giving any recognition or assistance to a revolting portion of a member state, but there exists the duty to aid in putting down such revolt should some other state assist the revolting portion.

It is plainly a renewal of the proposition of the Holy Allies at the Congress of Aix-la-Chapelle, 1818, to stereotype the state possession, which was promptly rejected by Lord Castlereagh as impossible of achievement until existing wrongs had been righted... (Allison's Life of Castlereagh, Vol. 5, p. 66.)

Article 11. Any war or threat of war, whether immediately affecting members or not, is hereby declared a matter of concern of the League, and the League shall take any action deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any member forthwith summon a meeting of the Council.

What, it is pertinent to ask, constitutes a threat of war? The extent and variety of acts and situations embodying a threat of war defy enumeration. It is impossible even to catalogue acts and causes of war. One instance of a threat of war, in that it is a hostile act, may be cited: namely, any premature recognition of belligerency or of independence extended to a people struggling to be free. (Hall, pp. 39-42; Woolsey, Sec. 180; Davis, 4th ed. pp. 277-278).

The term "threat of war" is absolutely undefined in the terminology of the law of nations. It may be construed to embrace any degree of friction in international negotiation and authorized intervention by the League.

It is the friendly right of each member to bring to the attention of the Assembly or Council any circumstance whatever affecting international relations which threatens to disturb international peace or good understanding.

It is presumed that the right of the Assembly or Council to obtrude itself into the ordinary diplomatic negotiations between states would not be needlessly exercised, yet the right is apparently contemplated if the negotiations do not move smoothly. The possession of the untrammelled right of negotiation is the test of independence. (Manning pp. 93-100; Westlake, Chap. VII; 1 Halleck, Ch. IV., Sec. 1.)

Article 12. Members agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to



inquiry by the Council, and they agree in no case to resort to war until three months after the award by arbitrators or the report by the Council. In any case the award by arbitrators shall be made within a reasonable time and the report of the Council shall be made within six months after submission.

The obligation embodied in this Article has been assumed generally by the civilized states of the world in bilateral treaties; and since 1899 the Permanent Court of Arbitration at The Hague has been successfully occupied with a great variety of disputes. It is true that in a great majority of these bilateral treaties, "questions of honor and vital interest," that is, political questions, are excepted and reserved. There are certain political questions that are admittedly not arbitrable, as, for example, with us, one involving the validity of the Monroe Doctrine.

The principle of delay has been similarly embodied in bilateral treaties, providing for commissions of inquiry in place of reference to arbitration, though it has not been extensively applied as yet, except by the United States in the so-called Bryan treaties of 1913-1914.

Article 13. Members agree that whenever a dispute arises between them which they recognize as suitable for submission to arbitration, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration.

Disputes as to interpretation of treaties, as to questions of international law, as to the existence of any fact which, if established, would constitute a breach of international obligation or as to the extent and nature of reparation to be made for such breach are declared to be suitable for arbitration. For the consideration of any such dispute the Court of Arbitration to which such case is referred shall be the court agreed on or stipulated in any convention between the parties. Members agree to carry out the award in good faith, and not to resort to war against a member complying therewith. In the event of failure to carry out such award the Council shall propose what steps should be taken to give effect thereto.

This Article puts "teeth" in the conventions of 1899 and 1907 establishing the Permanent Court of Arbitration at The Hague. This Court has heard and determined many grave controversies, but its determinations have been founded largely upon compromise and expediency rather than upon the application of the principles of law. It was due to an existing sense of the inadequacy of this

Court as a means for building up a body of legal decisions that the American delegation to The Hague Conference of 1907 was able to bring about the adoption of a draft convention for the institution of a Court of Arbitral Justice. The matter of representation alone prevented it from being put into immediate operation, a difficulty easy of solution today.

The convention establishing the Permanent Court of Arbitration appears to be the only one of the dozen or more of beneficent conventions signed at The Hague in 1907 that is recognized by the Principal Allied and Associated Powers as possessing any binding force or as worthy of survival. (See Article 287.) There appears to be a distinct break with the past twenty years' development of law and judicial processes as the pre-eminently desirable means toward the establishment of peace, and an espousal of the doctrine of force.

Article 14. Council shall formulate and submit to members of the League for adoption plans for a Permanent Court of International Justice.

The convention referred to (*supra*, opposite Article 13) is ready at hand, having been accepted by all the civilized states of the world. (See Scott, *The Hague Conferences*.)

Article 15. Members agree that any dispute likely to lead to a rupture, not submitted in accordance with Article 13, will be submitted to the Council. Any party may effect submission by giving notice to the Secretary General. The parties will communicate to the Secretary General statements of their case with all relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council will endeavor to effect a settlement, and if successful a statement shall be made public, giving the facts and explanations. If the dispute is not settled the Council, either unanimously or by majority vote, shall publish a report and recommendations. Any member of the League or Council may do likewise.

If the report of the Council is unanimously agreed to by members other than the representatives of one or more parties to the dispute, such members will not go to war with any party complying with the recommendation.

If the Council fails to reach a report unanimously agreed to by members other than those in dispute, members reserve the right to take such action as they consider necessary for the maintenance of right and justice.

This Article attempts to deal with disputes other than those known as "justiciable," dealt with in Article 13. It is realized that some of these questions are beyond amicable solution. They are outside the realm of law and no principle of law or possibility of compromise can give hope of settlement. In such circumstances the League apparently sanctions a resort to war, after conciliation through the medium of the Council has failed. The principles embodied in Article 12, 13 and 15 are sound; the objection lies in the methods of their application.

What provision is made, it may be asked, for cases of self-defense against sudden attack, as for example, a border raid? Must the state assailed submit passively until the Council has deliberated upon the question of "external aggression" or upon conciliation? The right of self-defense appears nowhere to be recognized in the sense that it has heretofore existed. (Hershey, 144-146, and notes.)

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and make no recommendations.

It will be observed that as to whether or not a dispute arises out of a matter "which by international law is solely within domestic jurisdiction" is for the Council to find. There is a great variety of things a state may do in pursuance of its territorial supremacy, or domestic jurisdiction, which have international effect, and which may or may not infringe the rights of other states. Thus all persons, including aliens, within the territorial limits of a state are subject to the jurisdiction of that state, yet the state to which the alien owes allegiance may rightfully protect him abroad and compel a standard of treatment recognized by International Law. (See Borchard, *Diplomatic Protection*, etc.) So all exercises of domestic jurisdiction having international effect may be held to involve international concern. Knowing that "It is the duty of a good judge to extend his jurisdiction," it is conceivable that much exercise of domestic jurisdiction having international effect might ultimately pass under the control of the Council in the application of this Article.

The Council may in any case refer the question to the Assembly, and it shall be referred to the Assembly at the request of either party, if such request be made within fourteen days after the submission of the dispute to the Council. The Assembly shall have all the powers of the Council

conferred in this Article and in Article 12, provided that a report made by the Assembly be concurred in by members in The Council and a majority of other members of the League other than the parties to the dispute.

The apparent concurrent power of the Assembly will be seen by this Article to have disappeared, requiring the concurrence of the Council to effectuate its action, thus leaving the Council the preponderantly powerful authority in the scheme.

Article 16. Should any member resort to war in disregard of its covenants under Articles 12, 13 and 15, it shall ipso facto be deemed to have committed an act of war against all other members of the League, which hereby undertake to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking state and the nationals of any other state.

It shall be the duty of the Council in such case to recommend to the several governments concerned what effective military, naval or air force the members shall severally contribute to the armed forces to be used to protect the Covenants of the League of Nations.

It is for the Council (or the Assembly with the consent of the Council under Article 15) to decide when the contingency arises under which the duty of invoking and applying measures of commercial warfare falls upon members.

The terms "resort to war" must be held to include defensive and offensive warlike violence, as well as war legally declared and war in its material sense. (*The Three Friends* (1896) 166 U. S.) The obligations under this paragraph are clear and definite.

The duty of commercial boycott appears to arise ipso facto with a determination by the Council as to a "resort to war"; the duty to contribute armed forces appears to rest on a decision of the League ad referendum.

Members of the League agree, further, mutually to support one another in financial and economic measures in order to minimize the loss and inconvenience resulting, and that they will afford passage of troops through their territories.

Whether or not a member contributes to the armed forces he shall contribute his share toward the financial burdens assumed by those states employing their forces against the recalcitrant state, and become a passive ally at least to the extent of permitting the passage of troops across his territory. Such

assistance constitutes war quite as fully as though troops were furnished.

Any member of the League which has violated any covenant may be declared no longer a member by unanimous vote of the Council excluding the vote of the member in disfavor.

Article 17. This Article extends the force of Articles 12 to 16 inclusive to non-members of the League, who shall be invited to accept the obligations of membership for the purpose of the dispute.

Upon such invitation the Council shall immediately institute an inquiry.

This paragraph clothes the Council with jurisdiction over all matters affecting or held to affect international relations arising in non-member states, with or without the approval of such non-members. It necessarily involves a denial of the heretofore accepted principles of the equality and independence of states.

There is no limit to the measures that may be taken.

If both parties to the dispute be non-members and decline to accept the obligations of membership, the Council may take such measures and make such recommendations as will prevent hostilities and result in settlement.

On the whole this Article reduces those non-members desiring to retain sovereignty and independence to the same condition of wardship to the Council as is produced in the cases of members other than the Principal Allied and Associated Powers.

The power to be assumed by the Council appears to be that of unlimited intervention. Consent to the exercise of the power may be inferred as to signatories, but it can not be inferred as to non-signatory or non-member states. The principle of independence would vanish from the law of nations under this Article.

Article 18. Every treaty or international engagement entered into hereafter by any member shall be forthwith registered with the Secretariat and published. No such treaty shall be binding until so registered.

Article 19. The Assembly may from time to time advise the reconsideration of treaties which have become inapplicable.

Article 20. Members severally agree that the covenant abrogates all obligations and understandings inter se which are inconsistent with the terms thereof, and that they will not hereafter enter into inconsistent engagements. Any member bound

by inconsistent obligations shall take immediate steps to procure release therefrom.

The execution of this Article is left to the conscience of the members; there is no provision for scrutiny into existing treaties of alliance and other conventions serving special aims, nor is there any criterion by which inconsistency may be determined to exist. Thus the Anglo-Japanese Alliance, with respect to the special interests of those two states in Asia, announces as an object the preservation of peace. It may be contended by the High Contracting Parties that no incompatibility exists; that it is in fact a "regional understanding" for securing the maintenance of peace. (See Article 21.)

It is clear that different standards will be applied as between the Principal Allied and Associated Powers on the one hand, and the small states on the other.

Article 21. Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration, or regional understandings like the Monroe Doctrine, for securing the maintenance of peace.

In the first part of this sentence all bilateral and multi-lateral treaties of arbitration are recognized as possessing continuing binding force. (See comment opposite Article 282-287.)

As to the Monroe Doctrine, it is not a regional understanding; it is a mere unilateral declaration of state policy which has never received the recognition of any state as a rule of international law. It is, however, founded upon the right of self-preservation, which right is recognized by international law. (1 Phillimore, Secs. 210-220; 1 Twiss, Secs. 106-108-110; 1 Halleck, Ch. IV, Secs. 1-7, 18-27; Wheaton, Sec. 60; Woolsey, Secs. 17-37; Davis p. 93.)

The term "regional understanding" is new in diplomatic language and has no history from which a definition may be drawn. It would appear, however, to embrace a vast field of bilateral and multilateral treaties, conventions and agreements relating to geographical areas and to the various degrees of existing territorial rights. The aggression of all powerful states upon weaker ones, establishing protectorates, spheres of influence, spheres of interest and hinterlands, and exacting territory on lease, has been clothed invariably in language emphasizing the anxiety of the aggressor for the maintenance of peace and the extension of protection. Such is the language of diplomacy, and if accepted literally, all such agreements, founded upon force and fraud alone, are validated. (See

1 Westlake, 121-142, for discussion of minor territorial rights.)

This Article evidences merely a continuation of the stereotyping process, seeking to bind down mighty natural forces that no human power can hold in check. As a pertinent illustration of regional understanding the Lansing-Ishii agreement of 1917 reorganizes the "special interests" of Japan in China, on the ground of contiguity; if the principle of equality has any validity whatever China is equally entitled to a recognition of special interests in Japan upon the same ground.

These understandings are not like the Monroe Doctrine, which harbors no aggressive designs, but from the materialistic European and Asiatic points of view, the Monroe Doctrine is in the same category.

Article 22. To those colonies and territories which have ceased to be under the sovereignty of the states which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there shall be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this covenant. The best method of effecting this purpose is to entrust the tutelage of such peoples to advanced nations, as mandatories on behalf of the League.

These peoples are perfectly able to stand alone if protected against despoilment and degradation at the hands of aggressive powerful states.

The character of the mandate must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

After the laudable sentiments of the preceding paragraphs this is intended to prepare the reader for certain exceptions, made necessary in view of the existence of definite obligations in secret treaties and arrangements for the distribution of the spoils of war.

Certain communities of the former Turkish empire have reached a stage of development where their independence can be provisionally recognized, subject to the rendering of administrative advice and assistance by a mandatory.

This refers to Asia Minor and conforms to the age-long British policy of dominating the road to India. The principal community referred to is Hedjaz, which is thus created as a vassal state of Great Britain.

Other peoples, especially those in Africa, must be placed under a mandatory responsible for administration, order, morals, the prohibition of the slave-trade and liquor traffic, and the prevention of military organization among the natives.

There are territories, such as Southwest Africa and certain of the South Pacific islands which, owing to sparseness of population, remoteness from civilization or contiguity to the territory of the mandatory, can best be administered as integral portions of its territory.

This is the paragraph that conceals but conforms to secret arrangements for the disposition of German southwest African colonies to France and certain Pacific island possessions to Japan.

It is a mere mandate for annexation.

In every case the mandatory shall render to the Council an annual report in reference to the territory committed to his charge.

The degree of authority, control or administration to be exercised by the mandatory shall, if not previously agreed upon, be explicitly defined by the Council.

With the possible exception of Belgium the four Principal Allied Powers, who sit in the Council, will alone retain possession of the German colonies. They will, therefore, report to themselves annually and define their degrees of control, occupying the dual relation of principal and agent in this trust.

A permanent commission shall be constituted to receive and examine annual reports and advise as to the observance of mandates.

Such a commission can not perform a serious function.

Article 23. Subject to and in accordance with conventions existing or hereafter agreed upon the members of the League:

(a) Will endeavor to maintain fair and humane conditions of labor for men, women and children in all countries;

(b) Will undertake to secure just treatment of native inhabitants under their control;

(c) Will entrust the League with general supervision over agreements relating to traffic in women and children, and in opium and other dangerous drugs;

(d) With supervision of trade in arms in countries in which it may be necessary;

(e) Will make provisions to secure freedom of communications and transit and equitable treatment for commerce of all members;

(f) Will endeavor to take steps for the prevention and control of disease.

This program, when considered in connection with Articles 24 and 282 *infra*, reveals a magnitude of labors and a diversity of administrative power, the logical development of which would abolish all conceptions of sovereignty and independence among nations.

Article 24. There will be placed under the direction of the League all existing international bureaux if the parties to such treaties consent. All such bureaux hereafter established shall be placed under the direction of the League.

The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission placed under the League's direction.

(See Comment opposite Article 23, 282.)

Article 26. Amendments to this covenant will take effect when ratified by members whose representatives compose the Council and by a majority of the members whose representatives compose the Assembly. No amendment shall bind a member which signifies dissent, but in such case it shall cease to be a member.

It will be observed that there are no limits to the powers which the Council may assume under this Article, nor are there any limitations upon the powers of the Council in the whole covenant comparable to an international bill of rights.

The structure contemplates not an association of equals, but the subordination of the many to the authority of the few. The overruling authority is not a diplomatic assembly but a small group in which unequal representation exists, combining and confusing legislative, executive and judicial power. The distinction may be clarified by a quotation from Dr. James Brown Scott's *The Hague Peace Conferences*, Vol. 1, pp. 35-36:

"It must not, however, be forgotten that great—indeed radical and essential—differences exist between a parliament and a diplomatic assembly. A parliament legislates for a nation, and by means of proper representatives, it legislates for various component parts of the nation. International conferences in which the nations of the world are represented, recommend to the nations represented, or legislate *ad referendum*. A parliament presupposes subordination; a conference equality. A parliament binds the dependent; a conference recommends to the equal and independent nations. The parliament, by means of majorities, decrees or issues a

law; the conference, by means of unanimous agreement presents to the nations represented, a *draft* which, when ratified by the nations, becomes by the approval of the internal and constitutional organs, the law of the ratifying nation. When ratified by the nations as a whole it becomes *jus inter gentes*, that is, international law in the strict sense of the word. At most the decree or resolution of a majority binds the majority; it does not, and under existing conditions, it can not well control an individual state."

Oppenheim, in his three lectures on the League of Nations (*Supra*, p. 36) in 1919, declared it essential that the League start from the beginning made by the two Hague Conferences. This the Peace Conference failed utterly to do.

Annex I. Original Members of the League of Nations Signatories of the Treaty:

The United States of America	Nicaragua
Belgium	Panama
Bolivia	Peru
Brazil	Poland
British Empire	China
Canada	Cuba
Australia	Ecuador
South Africa	France
New Zealand	Greece
India	Guatemala
Haiti	Portugal
Hedjaz	Roumania
Honduras	Serb, Croat, Slovene State
Italy	Siam
Japan	Czecho-Slovakia
Liberia	Uruguay
States invited to accede to the Covenant:	
Argentine Republic	Persia
Chili	Salvador
Columbia	Spain
Denmark	Sweden
Netherlands	Switzerland
Norway	Venezuela
Paraguay	

Annex II. First Secretary General of the League of Nations:

The Honorable Sir James Eric Drummond, K. C. M. G., C. B.

Part II. Boundaries of Germany.

Part III. Political Clauses for Europe.

#### SECTION I.—BELGIUM.

Article 31. Germany recognizes and consents to the abrogation of the Treaty of Neutralization of April 19, 1839, and undertakes to recognize and to observe any conventions which may be entered into by

the Principal Allied and Associated Powers or any of them, in lieu thereof.

The first part of this Article apparently takes cognizance of the continuing force of the principle enunciated by the London Conference of 1871, to the effect that it is an essential principle of the public law of Europe that no state may release itself from the obligations of a multilateral law-making treaty, or modify the terms thereof, except with the consent of the other contracting parties, previously obtained.

The latter part of the Article looks to some new arrangement whereby Belgium's territorial situation is to remain permanently fixed as a buffer state on the west coast of Europe, in which arrangement, however, it is anticipated that the United States, as one of the Principal Allied and Associated Powers, may not take part.

Article 32. The condominium of Prussia and Belgium over Moresnet neutre is replaced by the passage of this territory under the single sovereignty of Belgium.

This is in effect annexation of Moresnet neutre by Belgium, with the consent of the Powers.

This territory has been in dispute since 1815 because of lack of agreement as to the boundary treaty of that date between the Netherlands and Prussia.

The renunciation of the territory in favor of Belgium excludes the possibility of a plebiscite, and it does not appear that the inhabitants are given any right of option.

Articles 33-34 stipulate for the cession of Prussian Moresnet and Eupen and Malmedy to Belgium, in which, within six months the inhabitants may indicate in writing a desire to see the whole or a part of the territory remain under German sovereignty. The League of Nations will decide as to any action taken.

Anciently and until the close of the 18th century it was the universal practice of successful belligerents, in cases of conquest and forced cession, to subject the inhabitants in such conquered or ceded territory forthwith to the new allegiance, regardless of their wishes or preferences. It is no longer permissible, however, to hand such populations around, in view of the development of political principles which recognize the sovereignty of the people as the governing factor in the political and social life of civilized states. This development has given rise to the plebiscite, under which the people may indicate en masse their wishes as to the disposition of the territory. (Funck-Brentano et Sorel (1887), 157 f. and 335 ff.; 1 Rivier, 210.)

Although the plebiscite was invoked as early as 1552 by Henry II of France, after the capture of Toul, Metz and Verdun, its fixed position in international practice begins in the French revolutionary period. Inconsistent though it may seem, the United States has evinced little approval of the doctrine in its own practice.

In the Articles of the treaty referred to it must be assumed that the final disposition of the territories ceded to Belgium will be in accordance with the expressed wishes of the inhabitants, though no pledge is given that such will be the case, nor is the disposing authority expressly bound to observe such wishes.

Article 35. Provision is made herein for the appointment, within fifteen days after the coming into force of the treaty, of a commission to delimit the boundaries of the German territories going to Belgium.

If the final disposition of these territories is to depend upon plebiscites it seems needless to have provided for a formal delimitation of boundaries in advance.

Article 36. With the actual transfer of sovereignty "over the territories referred to above"—that is, upon the coming into force of the treaty by ratification—"German nationals habitually resident in the territories will definitely acquire Belgian nationality, ipso facto, and will lose their German nationality. But German nationals who became residents in the territories after August 1, 1914, shall not obtain Belgian nationality without a permit from the Belgian government.

Complementary to the right of plebiscite in the mass of a population, looking to the protection of the political rights of a people with respect to their territory, there has developed for the protection of the minority in case of transfer of territory, the so-called right of option, under which the individual may retain his old allegiance, if he so desires, by the formal recording of that election. (3 Moore, Digest, Secs. 379-380; Boyd vs. Thayer, 143 U. S. 135.)

The Article opposite contains the remarkable provision that German nationals habitually resident in the ceded territory will become Belgian nationals immediately upon the actual transfer of sovereignty to Belgium, and will lose their German nationality. Since allegiance to Germany thus ceases Germany's right and obligation to protect them likewise ceases. That is one of the practical effects.

Article 37. However, within two years German nationals over 18 years of age, in

such territories will be entitled to opt for German nationality, option by the husband including the wife, and by the parents, including their children under 18 years of age.

Persons thus opting "must within the ensuing twelve months transfer their place of residence to Germany."

They may retain their immovable property in the territories and may carry with them their movable property free from export or import taxes, with respect to such property.

It appears that German nationals who have become involuntary Belgian nationals may exercise the option to divest themselves of Belgian nationality within two years after the coming into force of the treaty and become German nationals again, the German nationality laws to the contrary notwithstanding.

There is a provision of the German laws which declares that a German national acquiring allegiance elsewhere automatically forfeits his German nationality. It is difficult to understand how one who has forfeited a particular nationality may opt for it; yet since the acquisition of new nationality by Germans in this case is involuntary, it may properly be viewed as void from the standpoint of German domestic law.

As has been pointed out (*supra* opposite Article 30) the inhabitants of conquered or ceded territory may not be compelled to accept the new allegiance against their will. Nationality is a judicial status and is essentially voluntary. We have contended for the principle in various manifestations from the foundation of this government, until at length it has become fixed in the law of nations. (3 Moore's Digest, Sec. 439; Scott, Cases 375.)

To force a new allegiance even upon the outcast German, and merely temporarily, as in this case, is none the less a violation of the law of nations.

Even the Congress of Vienna, that reactionary gathering which divided the spoils of Europe in 1815, did not attempt such a thing. On the contrary in Article VII of the Treaty of Paris of 1815, it is declared that in all countries which shall change sovereigns, a period of six years shall be allowed to the inhabitants, of whatsoever condition or nationality, "to dispose of their property, if they should think fit to do so, and to retire to whatever country they may choose."

The present treaty requires those opting for German nationality, within the ensuing twelve months, to "transfer their place of residence to Germany," which appears to mean that they shall quit the soil of Belgium physically and return to Germany... Whether

they can emigrate to the United States or to some other place is doubtful, at least before they have transferred their residence to Germany.

The provision with respect to their immovable property appears to accord with enlightened practice.

Article 39. Belgium will assume a portion of the public debt on account of such territories to be calculated on the basis.

(a) Of the ratio of the average for the three years of 1911, 1912 and 1913 of revenues of the ceded territories and the average for the same years of the revenues of the German empire, or

(b) Of the same ratio in its application to the German state to which such ceded territory belonged as of August 1, 1914, to be determined by the Reparation Commission.

In cases of conquest or cession, such as this, the rule is embraced in the maxim, *res transit cum suo onere*; that is to say, the conqueror succeeding to the rights must also assume the burdens running with the territory. However, there are exceptions in practice. As to the public debt he need not share in that portion imposed for the prosecution of the war; and the calculation of the debt to be assumed by Belgium properly refers to the pre-war period. The portion to be assumed conforms to enlightened practice.

Nothing is said, however, concerning other contractual obligations running with the territory, and it must be inferred that these are assumed subject to the law with respect to same. (1 Moore, p. 334; 1 Westlake, p. 75; Scott, Cases, 85.)

However, Belgium shall acquire all property and possessions situated in such territory, belonging to the German empire and states, including the private property of the former German emperor and other royal personages, free from any obligation to make compensation or to allow credit for same in the financial statement.

An invasion of the law of inviolability of private property occurs in the Article in question and that relates to the taking over by Belgium of the private property of the former German emperor and other royal personages, along with public property. A century ago no distinction was made between the private property of the sovereign and the domains of the state. Napoleon, for example, appropriated the private property of the Elector of Hesse-Cassel.

Though the property of a monarch is assimilated to that of the state, and as such devolves on the successor, the private prop-

erty of a sovereign or other head of the state in his personal capacity, is under the protection of the principle of the inviolability of private property quite as fully as that of the individual subjects. (Phillipson, *Termination of War*, etc., p. 321.)

#### SECTION II.—LUXEMBURG.

Articles 40-41. Germany renounces the benefit of various treaties with Luxemburg and recognizes its withdrawal from the German Zollverein; agrees to the termination of the regime of neutrality and accepts in advance any arrangements to be made by the Allied and Associated Powers continuing the Grand Duchy as a buffer state. Germany also recognizes the Grand Duchy as sharing in the commercial advantages to be enjoyed by the Allied and Associated Powers.

This is a purely political arrangement, designed to take Luxemburg from under the influence of Germany's commercial and political system.

#### SECTION III.—LEFT BANK OF THE RHINE.

Articles 42-44. Fortifications either on the left bank of the Rhine or on the right bank to the west of a line drawn 50 kilometers to the east of the Rhine is forbidden, as are military manoeuvres and the assembly of armed forces in such area.

Violation of these terms shall be regarded as a hostile act against the Powers signatory of the treaty, and as calculated to disturb the peace of the world.

In this arrangement, looking to the prevention of Germany ever again possessing a strategic frontier against France, it will be observed that all states signatory of the treaty, including those neutral in the Great War, should they ratify it, are to be bound by this provision. It is in effect the neutralization of such portion of Germany under a world guarantee.

#### SECTION IV.—SAAR BASIN.

Article 45. As compensation for the destruction of coal mines in the north of France and as reparation Germany cedes to France in full and absolute possession, with exclusive rights of exploitation, unencumbered and free from all debts and charges, the coal mines of the Saar Basin. It will be for Germany to indemnify the proprietors.

This Article disregards, utterly the rights of private property to the extent that the Saar Basin mines are privately owned, and is in effect an act of confiscation in violation of

the spirit of law. (See Comment, Article 74.)

Article 46. The extent of Franco's rights in the Saar Basin mines is set out by reference to Chapter I of an Annex. French ownership is extended to deposits for which concessions may or may not have been granted, whether private or public property, with the right of working, not working or transferring the right to work the mines; all accessories and subsidiaries, including plant and equipment, by-product plants, electric lines, buildings, dwellings, schools, hospitals, and all other property enjoyed by the present owners, go with the mines to France, free from all debts and charges. Germany must pay over any sums due employes on account of pensions for old age or disability.

Workmen of French nationality may be introduced into the region and they shall have the right to belong to labor unions.

France shall have the right to establish and maintain schools for its employes, and of giving instruction in the French language. It may also maintain hospitals, dispensaries, and other charitable and social institutions.

France shall enjoy complete liberty with respect to the distribution, dispatch and sale prices of the products of the mines.

It does not appear that German workmen have a right to belong to labor unions.

The government of the Saar Basin is provided for in Chapter II of an Annex referred to in Article 46. It will be entrusted to a Governing Commission of five members chosen by the Council of the League of Nations, to include a citizen of France, a native of the Saar Basin who is not a citizen of France, and three members belonging to three countries other than France or Germany; appointed annually. One of the five will be designated as Chairman and he will act as the Executive.

The Commission shall have all the powers hitherto belonging to the German Empire, Prussia and Bavaria in such region, and shall be charged with the protection abroad of the interests of the inhabitants. Nevertheless it is declared the existing nationality of the inhabitants remain unaffected, unless they choose to acquire a different nationality.

What, it may be asked, is the political status of German nationals under the Governing Commission? Their nationality is said to be unaffected, yet nationality implies allegiance and allegiance involves the right



and duty of protection. (Hershey, *Essentials of Pub. Int. Law*, p. 236.) The protection of German nationals is given over to the Governing Commission. Germany may not exert herself anywhere in their behalf. No hindrance is placed in their way against departing from the country or acquiring a new nationality; in fact, these clauses, including ample safeguards with respect to their private property, are of customary liberality.

The inhabitants may elect local assemblies, every inhabitant over the age of 20 years having the right to vote, without distinction of sex. Such inhabitants as may desire to leave the territory may do so without restriction as to property.

The Governing Commission is supreme in interpreting the scheme under which it is instituted, the decisions to be taken by majority.

The inhabitants may elect local assemblies, but it is nowhere set out what the degree of influence such assemblies will have in the ordering of the domestic concerns.

Article 47. The ultimate fate of the Saar Basin is here dealt with by reference to Chapter III of an Annex. In this chapter it is set out that at the termination of a period of fifteen years the population of the Saar Basin may have a plebiscite, the vote to be taken by communes or districts on the three following propositions:

(a) Maintenance of the regime of the Governing Commission; (b) Union with France; (c) Union with Germany.

All persons without distinction of sex, more than 20 years of age, resident in the territory at the date of the signature of the present treaty, will have the right to vote. Other conditions may be made by the League of Nations. The League shall decide on the ultimate sovereignty, taking into account the wishes of the inhabitants thus expressed. If the League decides in favor of Germany in whole or in part, the rights of France shall be repurchased in gold, the price to be fixed by a commission of three, one of whom shall be nominated by France, the second by Germany, and the third by the League of Nations, who shall be neither a Frenchman nor a German. The League of Nations will take all decisions by majority.

It is not quite plain why the "repurchase" of the Saar Basin by Germany should have been made contingent upon a plebiscite. The population is overwhelmingly German, and since the qualified voters are those only over 20 years of age who were "resident in the territory at the date of the signature of

the present treaty," that is, June 28, 1919, no amount of colonization by France can overcome that fact.

The question arises, however, may those who have meantime removed from the Saar Basin back to Germany, enjoy the privileges of taking part in the plebiscite? They would seem to be qualified if more than 20 years of age, since the provision designates "all persons," etc., yet it is not clear.

The League shall decide, "taking into account the wishes of the inhabitants as expressed by the voting," with respect to the final disposition of the territory. There is no obligation to respect the results of the plebiscites; it is merely to be taken into account along with other things.

Nothing is said of the rights of German labor. France, as the one big employer in the territory, dominating practically every business and enterprise, is free wholly to substitute French for German labor, through which the entire German population might be compelled to emigrate. In such a contingency it might then become important to settle whether absentees, who were resident in the Saar Basin in 1919, had the right to take part in the plebiscite.

Article 48. This deals with the fixing of boundaries of the Saar Basin.

Article 49. Germany renounces in favor of the League of Nations, in the capacity of trustee, the government of the territory defined above.

A unique question of sovereignty arises from this Article. It is stated that Germany renounces in favor of the League of Nations as trustee only the government of the Saar Basin, and it is contemplated that German sovereignty subsists, since provision is made for "renunciation of sovereignty or cession" by Germany ultimately, in the event the League of Nations decides to award the whole or a part of the territory to France.

Yet the political or governmental authority over a territory is the very essence of sovereignty, and by the provisions of Chapters II and III this authority, internal as well as external, is vested in the Governing Commission. It is even charged with the protection abroad of German nationals, inhabitants of the territories. It may thus be contended that Germany has parted with sovereignty over the Saar Basin. If such a condition as the suspension of sovereignty is a legal possibility it may be that such occurs in the Saar Basin. (1 Moore, pp. 252-254.)

In whatever terms the treaty seeks to describe the transaction, however, it appears to be a simple case of disguised cession, on all

fours with the so-called leased territory of the European powers and Japan in China, the restoration of such territories depending upon certain and uncertain contingencies. The Saar Basin case differs, of course, in the fact that a third state, and not the cessionary is given exclusive rights of exploitation. (1 Westlake, 133-139; Hershey, pp. 184-185.)

#### SECTION V.—ALSACE-LORRAINE.

The High Contracting Parties recognizing the moral obligation to redress the wrong done by Germany in 1871, both to the rights of France and to the wishes of the population of Alsace-Lorraine, which were separated from their country in spite of the solemn protest of their representatives at the Assembly of Bordeaux, agree upon the following Articles:

Article 51. The territories of Alsace and Lorraine are retroceded to France.

As set out in the preamble the taking of Alsace-Lorraine by Germany in 1871, constituted a moral, not a legal wrong; that is to say, title to the territory of another state founded in conquest is quite as legal and unimpeachable as if founded upon voluntary cession. It is a principle that violates our modern sense of justice, but it is nevertheless a settled one.

It is to the credit of the High Contracting Parties that they recognized the moral obligation to redress this wrong, both to the rights of France as sovereign over the territory, and to the wishes of the people. If this measure were applied universally the moral principle would thereby attain the position of a legal one, since the basis of all law is universal acquiescence or assent. The High Contracting Parties have not only failed to seize the opportunity to legalize the principle against conquest and the rights of peoples to choose their own way of obedience by the universal application of these principles, but they have destroyed and nullified the force of this instance of its application in settlements which repudiate these principles (see Part IV, Sec. 8, Articles 156-158); nor is any intimation given in the treaty that existing instances of the subjection of peoples to alien governments against the will of such peoples constitutes a moral wrong. (See Sec. VI, Article 147.)

Article 53. The political status of the inhabitants of Alsace-Lorraine is fixed in this Article by reference to an Annex which makes the following decisions:

As from November 11, 1819, the following persons are ipso facto reinstated in French nationality:

(1) Persons who lost French nationality under the treaty of 1871 and acquired German nationality.

(2) The legitimate descendants of those referred to above, except those whose descendants in the paternal line include a German who emigrated into Alsace-Lorraine after July 15, 1870.

(3) All persons born in Alsace-Lorraine of unknown parents or whose nationality is unknown.

It will be observed that the treaty here attempts to determine the French nationality of the inhabitants without in any way consulting their wishes. It institutes three broad classes of persons whose nationality is changed arbitrarily. Those in the classes have nothing to say in the matter.

The first class "reinstated" in French nationality includes all those who, upon the cession of Alsace-Lorraine to Germany in 1871, declined to avail themselves of the right to opt for French nationality under Article II of the Treaty of Frankfurt, but chose to remain and acquire German nationality.

It is conceivable that many of this class are satisfied with their acquired German nationality and are thus involuntarily transferred to a new allegiance.

And so in the second class, the descendants of the first class, it is probable that many will not willingly renounce their German allegiance.

These persons are denied the right to opt for German nationality.

The Annex also sets out the following classes as eligible to opt for French nationality:

(1) All persons whose ascendants include a Frenchman or a French woman who failed to opt for French nationality in 1871.

(2) All foreigners, not German nationals, who become citizens of Alsace Lorraine prior to August 3, 1914.

(3) All Germans domiciled in Alsace-Lorraine since July 15, 1870, or who had an ascendant so domiciled.

(4) All Germans, domiciled or born in Alsace-Lorraine, who served in the Allied or Associated armies.

(5) All persons born in Alsace-Lorraine before May 10, 1870, of foreign parents and the descendants of such persons.

(6) The husband or wife of any person whose French nationality may have been restored in the three classes referred to above, or who may have claimed and obtained French nationality in accordance with the preceding provisions.

The rule that the nationality of the wife

and children follow that of the husband and rather is apparently ignored. The anomalous situation is thus made possible that a French national, residing in French territory, may have a wife who is an alien to him and to her own children.

Subject to the above exceptions no Germans born or domiciled in Alsace-Lorraine shall acquire French nationality, even though they are citizens of Alsace-Lorraine, except by the normal process of naturalization, on condition of having been domiciled from a date previous to August 3, 1914, and of submitting proof of three years' unbroken residence.

The treaty, while arbitrarily restricting the right of option to limited classes and to a particular nationality (French) does not attempt to set aside the principle of naturalization.

France will be solely responsible for their diplomatic and consular protection from the date of application for naturalization.

The practice of enlightened states, which may be said to conform to the law, in respect of protection abroad of declarant aliens, is that such protection is asserted to the full extent in countries other than those of origin. As against their native countries no such rights are claimed in view of the continuing allegiance of such declarants up to the moment of complete acquirement of a new nationality. The rule rests upon a sound and logical foundation. (3 Moore, pp. 893, 895.)

However France proposes to override it as against Germany, in behalf of German nationals who have declared their intention to become French citizens. It is safe to say that the position can only be maintained by a stronger as against a weaker state.

Considering the nationality provisions generally with respect to Alsace-Lorraine, it will be seen that a plebiscite has not been considered, although Germans may predominate in the territories; nor is option freely granted. Large classes of persons are made French citizens by the fiat of the treaty and other restricted classes are declared eligible to claim French citizenship. None is declared capable of choosing any other nationality. Those in whom German nationality continues are marked out by the treaty with equal definiteness.

The utter absence of observance of the doctrines of plebiscites and option, and of uniformity in dealing with like situation may be seen by comparison with Articles 36-37, whereby German nationals resident in the territories ceded to Belgium acquire Belgian nationality ipso facto, and lose their German

nationality; however, within two years German nationals there may opt for German nationality.

Article 55. This deals with the public debt of Alsace-Lorraine by reference to Article 255, Part IX of the treaty, which sets out that since Germany refused to assume any of the public debt of Alsace-Lorraine in 1871 France shall receive the territories free and quit of all public debts, nor shall any credit be given for same on the reparation account.

In principle, therefore, there is no difference between the conquest and the reconquest, so far as the conduct of the victors is concerned. Each takes all it can get over and above the reparation account.

Article 56. In conformity with the provisions of Article 256, Part IX, France shall enter into possession of all property and estate in the territories belonging to the German empire, the German states, as well as the Crown property and the private property of the former German emperor and other German sovereigns, without any payment or credit on account of same.

See Comment, Article 39.

Article 58. Provision is made for "repayment in marks of the exceptional war expenditure advanced during the course of the war by Alsace-Lorraine, or by public bodies in Alsace-Lorraine on account of the empire in accordance with German law, such as payment to the families of persons mobilized, requisitions, billeting of troops and assistance to persons who have been evacuated."

Thus France not only does not assume any portion of the German debt in connection with Alsace-Lorraine, but there is to be repaid the sums Alsace-Lorraine, in common with all parts of the empire, was called on to expend as indicated.

Article 59. France will collect on its own account Imperial taxes of every kind leviable and not collected at the time of the armistice, November 11, 1918.

Article 60. Germany shall restore without delay to Alsace-Lorrainers all property, rights and interests belonging to them on November 11, 1918, situated in German territory.

Article 62. Germany undertakes to bear the expense of all military and civil pensions earned in Alsace-Lorraine on November 11, 1918, and to pay annually the sums to which persons resident in Alsace-

Lorraine would have been entitled under German rule.

Article 63. Germany's liability for injury and damage is declared by reference to Part VIII (Reparation), as follows:

"The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."

The Allied and Associated Governments require and Germany undertakes to make compensation for all damage done to the civilian population of the Allied and Associated Governments and to their property during the period of the belligerency of each by such aggression by land, by sea and from the air, and in general, all damage as defined in Annex I, hereto.

Damages have been calculated on the premise that since Germany was the aggressor, she precipitated and carried on an unlawful war, and should therefore be responsible for all damage of whatsoever kind, whether resulting from the operations of herself and her allies, or from the measures of the Allied and Associated Governments. While it is within the power of a successful belligerent to impose any terms he wishes the law of nations nowhere makes any distinction between a just and an unjust war, nor between a lawful and an unlawful war. In view of the law, since each sovereign nation may alone determine the demands of its welfare and interest, it is the right of each to determine when its exigencies require a resort to war. Since 1899 (The Hague, Convention No. 4) a distinction has been made between a war lawfully declared and one not thus declared.

From a moral standpoint a war may be unjust and unrighteous, as that precipitated by Germany unquestionably was, but it can not be unlawful, since it is the supreme and final appeal of all states in the protection of their well-being.

It has been argued, and not without force, that by reason of the obligations assumed by Germany toward Belgium under the treaty of Neutralization of April 19, 1839, it became legally impossible for Germany to carry on war against Belgium; and that Germany may not therefore claim the benefits of the laws of war ordinarily obtaining; that is to say, in the case of Belgium, Germany is not entitled to deny responsibility for such destruction, fines, contributions, requisitions and other

warlike acts as are within the compass of the lawful rights of belligerents.

Taking into consideration this exception there is no principle of public international law that enlarges the legal responsibility of one of the belligerents because it was the aggressor. In fact it is generally impossible to determine with accuracy whether or not a particular state was or was not the aggressor. It is clear in the Franco-Prussian war of 1870-71, in the Anglo-Boer war of 1900 and in the Turco-Italian war of 1912, but no one has yet determined whether Russia or Japan was the aggressor in 1904. (See *The Peace Problem* (1916) John Bassett Moore.)

In order to avoid as far as possible the evils of society it is agreed, says Vattel, to regard every lawfully declared war as just on both sides. (Halleck, *International Law*, 4th ed., Vol. 1, p. 571.)

This statement of the law has undergone no change up to the present. Out of this view has necessarily sprung the law of neutrality.

War brings into operation a great variety of laws defining rights and duties of belligerents and neutrals, and among its rights accruing to a belligerent is that to inflict any damage upon his enemy, which has a military object. There are certain specific limitations upon a belligerent's means of injuring his enemy, both at sea and on land, designed to prohibit needless and wanton injury and damage. However, it may be asserted as a general principle of the laws of war that all damage and injury inflicted in pursuit of a military object are lawful. (Lawrence, 4th ed., Sec. 206, p. 549; Spaight, 112).

The Annex then declares:

"Compensation may be claimed from Germany under Article 232 above in respect of the total damage under the following categories:

(1) Damage done to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war, including bombardments or other attacks on land, on sea or from the air, and all direct consequences thereof, and of all operations of war by the two groups of belligerents wherever arising.

Civilians are under the protection of the laws of war, but their immunity from direct and intentional injury is dependent upon peaceable and non-hostile conduct. It is one of the marked moral achievements of the last century that the great divisions of populations of belligerent states into combatants and non-combatants, with definite law regulating their rights and duties, have been made.

Whence, civilians, taking no part in hostilities may not lawfully be made the object of direct injury. Nevertheless their injury or killing as a mere incident to the carrying out of a lawful military operation involves no responsibility. For example, enemy munition plants are lawful objects of attack "if in such attacks death should ensue to all or the employees, men, women and children, no liability whatever would rest upon the government of the attacking force. So, too, the incidental deaths of civilians in cases of bombardment of defended towns, villages, buildings and places involve no liability. (Holland, p. 30; Spaight, pp. 140-180).

It has never been settled what constitutes a "defended" place; but it has been contended by eminent authority (Westlake, Collected Papers) that the presence of a single soldier or company of soldiers might be sufficient to constitute a defended place. If this be so, it may be said that in the present great war hardly a city, town or village in any of the belligerent states was undefended, so great were the proportions of the populations taken into the armies.

As to the immunity of non-combatants, it may be asked, to what degree, if any, was this immunity compromised in the present Great War in view of the universal mobilization of man, woman and child-power behind the armies of the respective belligerents?

The following principles of law are settled:

(a) That acts of war, including bombardments and other attacks on land and from the air, involve no legal liability whatever so long as they have a military object and are not directed against an undefended place.

(b) That attacks at sea against public armed enemy vessels involve no liability; that attacks upon unarmed merchantmen, not guilty of flight or resistance, are illegal and do involve liability. But even where flight or resistance has been overcome there is a legal obligation to provide for the safety of crew and passengers.

The placing upon a vanquished belligerent of responsibility for all damage and injury resulting from the operations of the victor is a mere exercise of power in the nature of indemnity; it can not be construed as reparation.

(2) Damage caused by Germany and her allies to civilian victims of acts of cruelty, violence and maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, or exposure at sea or of being forced to labor) wherever arising, and to the surviving dependents of such victims.

(2) Damage by Germany and her allies caused to civilian victims by acts of cruelty, violence or maltreatment, may properly give rise to legal responsibility, where such acts of cruelty, violence or maltreatment were not permissible—and many of such are—under the laws of war. For example, the right of reprisal upon a rebellious population in a militarily occupied district, may lawfully involve extreme violence, even to the shooting of civilians and the destruction of whole towns. (Spaight, 465-470.)

It is the right of a belligerent state to imprison, intern and deport enemy civilians, particularly male persons of military age, and to use reasonable disciplinary measures against them for cause.

Legal responsibility properly lies in the matter of exposure at sea in view of the settled principle requiring provision for the safety of crew and passengers of a captured vessel.

(3) Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims, of all acts injurious to health or capacity to work or to honor, as well as to surviving dependents of such victims.

As to acts injurious to health or capacity to work such conditions might follow the exercise of lawful violence, as reprisals against a disobedient or resisting population in a militarily occupied territory. Family honor is clearly under the inviolable protection of the laws of war. (The Hague, 1907, Convention 4, Art. 46).

(4) Damage caused by any kind of maltreatment of prisoners of war.

(4) There is no legal liability in cases of damage resulting from reasonable disciplinary measures in which the victim was culpable.

(5) As damage caused to the peoples of the Allied and Associated Powers all pensions and compensation in nature of pensions to naval and military victims of the war, whether mutilated, wounded, sick or invalided, and to the dependents of such victims.

(5) This is a mere exercise of power by the victor over the vanquished in the nature of indemnity.

(6) The cost of assistance by the governments of the Allied and Associated Powers to prisoners of war and their families and dependents.

It is customary among belligerents to compute the respective costs of maintenance of prisoners of war, including salaries allowed officers, and to settle any balance at the peace.

The provision is in the nature of indemnity where it exceeds this custom.

(7) Allowance by the governments of the Allied and Associated Powers to the families and dependents of mobilized persons and persons serving with the armed forces.

This is a mere exercise of power in the nature of indemnity.

(8) Damage caused to civilians by being forced by Germany or her allies to labor without just compensation.

(8) The services of civilians in militarily occupied territory may be requisitioned, nor does the law require more than that a receipt for such services shall be given. The receipt does not imply liability on the part of the giver to redeem it. (2 Westlake, 270; Bordwell, 319; Spaight, 402-405.)

(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated Powers or their nationals, with the exception of naval and military works or materials, which have been carried off, seized, injured or destroyed by acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations.

This provision ignores the whole body of settled law with respect to allowable damage and destruction. Such legal destruction includes:

(a) All destruction of naval and military works, including shops, railroads and equipment, munition plants, barracks and all buildings used by armed forces (other than hospitals).

(b) Destruction of private property incidental to bombardment.

(c) Destruction of property of military value to prevent it falling into the hands of the enemy.

(d) Destruction of property to facilitate an attack or to impede pursuit.

To summarize, it may be said that all destruction which serves a military end, and is not purely wanton, is lawful. (Spaight, 111 et seq., 418.)

As to property carried off or seized, the law makes a distinction between public movables, that is, government-owned property, and private property. The former is confiscable under the laws of war the latter is not. (Spaight, 411, 412; 2 Westlake, 103-104; Bonfils Nos. 1191-1193).

Yet even private property may be seized and converted by a belligerent if it is noxious, that is to say, if it is of a character lending itself peculiarly to warlike use; so,

too, private property may be taken under the right of requisition. (Spaight, 199-200).

(10) Damage in the form of levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population.

(10) Levies (contributions and requisitions) and fines are lawful measures of war. Levies in service, in supplies and in cash are lawful if undertaken for the needs of the army, or in lieu of or in addition to taxes, for the support of the administration of occupied territory, provided that they are in proportion to the resources of the territory; and provided further that they are not levied for mere purposes of plunder.

Fines are a lawful measure against the disobedience of a population in a militarily occupied territory, if responsibility for disobedience be collective. It is the mildest manifestation of the right of reprisal. (Spaight, 383, 408-410.)

Article 64. Regulations concerning the control of the Rhine and the Moselle are laid down by reference to Part XII of the treaty. Part XII, Chapter IV, provides among other things that Germany shall cede to France tugs and vessels registered in German Rhine ports, including fittings and gear, installations, berthing and anchorage accommodations, docks, warehouses, plants, etc., whether publicly or privately owned, in an amount to be decided by an arbitrator to be appointed by the United States, "due regard being had to the needs of the parties concerned." The value of such property shall be set off against the total sums due from Germany.

This is purely an economic advantage in the nature of indemnity. It is repugnant to the spirit of the law at least to the extent that private property exists in such tugs, vessels, etc. (See Comment, *infra*, Article 74.)

Article 65. This Article gives to France certain economic advantages in the ports of Strasburg and Kehl under the Central Rhine Commission, to be presided over by a Frenchman.

This is in the nature of indemnity.

Articles 66-67. Railway and other bridges across the Rhine within the limits of Alsace-Lorraine throughout their length become French property, as do all Imperial railways and tram concessions, entailing no payment on the part of France.

This is in the nature of indemnity. No obligation with respect to uniformity of tolls appears to rest upon France in connection with the use of these international bridges.

**Articles 68-71.** Additional economic advantages are given to France, including exemption from customs duties on natural or manufactured products of Alsace-Lorraine entering Germany and the import into Alsace-Lorraine of certain goods from Germany free from internal duties in Germany; supply of electric current to Alsace-Lorraine by Germany; prohibition of German participation in enterprises in Alsace-Lorraine; renunciation of German rights regarding trade in potash sales.

These are in the nature of indemnity.

**Article 74.** The French government reserves the right to retain and liquidate all the property, rights and interests which German nationals or societies controlled by Germany possessed in Alsace-Lorraine on November 11, 1918. Germany will compensate her nationals thus dispossessed. The product of these liquidations shall be applied in accordance with the stipulations of Sections III and IV of Part X of the treaty.

Section III (Article 296) provides for the settlement through clearing offices to be established by each of the High Contracting Parties of the following classes of debts:

(a) Debts due before the war from a national of an Allied or Associated power, residing within its territory, to a national of Germany or her allies, residing in its territory.

(b) Debts payable during the war to nationals of Allied or Associated powers, payment of which was suspended by the war.

(c) Any interest accrued before or during the war on securities issued by Germany or her allies.

(d) Any capital sums which have become payable in respect of securities issued by Germany or her allies.

The High Contracting Parties will prohibit all settlements otherwise than through the clearing offices; they will be respectively responsible for the payment of such debts as were due from their nationals. (Debts due by inhabitants of invaded territory will not be thus guaranteed, nor does the guarantee extend to a debtor who was insolvent before the war or whose property was liquidated under emergency legislation).

This Article and its references (Sections III and IV of Part X) commit the Allied and Associated governments to the confiscation of all private property of German nationals, whether situated in their own territories or in the territories taken from Germany, and

restitution of or compensation for all private property of nationals of Allied or Associated Powers in German hands. It is true that it is declared that Germany will compensate her nationals who are thus dispossessed, but in view of the extent of the various indemnities imposed it is doubtful that this declaration can ever be fulfilled. It is therefore, at best, disguised confiscation.

From antiquity to the dawn of the 19th century it was the custom of a belligerent to seize and convert the private property of nationals of his enemy, while the private enemy individual might be dealt with after the desires of the captor. In the last century, however, a settled distinction in the law has differentiated the private unarmed enemy person and his property from the public armed enemy person and public property, on the principle that war is a relation between states and not between individuals. The former, classified as non-combatant, is entitled to protection in his person and property; the latter, classified as combatant, may be made the object of direct hostile action. As to public property, all movables of the enemy government are liable to confiscation. Private property is under the protection of written law, declaring it to be inviolable. (The Hague, 1907, Convention IV, Article 46). This must be understood to be qualified, however, by certain definite exceptions. (See Comment on Article 63, sub-section 9).

Private settlements of debts between a national of an Allied or Associated Power and a national of Germany or her allies is assimilated even after peace to trading with the enemy and will involve "the same penalties as are at present provided" in such legislation. All legal processes for the private recovery of such debts will be prohibited.

Creditors shall give notice to the Clearing Office within six months of debts due to them.

Any person having claimed payment of an enemy debt which is not admitted in whole or in part shall pay to the Clearing Office, by way of fine, interest at 5 per cent on the part not admitted, during the pendency of such claim.

A person "having unduly refused to admit the whole or part of a debt claimed from him" shall pay, by way of fine, 5 per cent of the amount "with regard to which his refusal shall be disallowed."

Clearing offices shall be responsible for the collection of such fines, which "will be credited to the other Clearing Office, which shall retain them as a contribution toward the costs" of the office.

A Mixed Arbitral Tribunal is set up as

a court of appeal as between disagreeing Clearing Offices.

This would require an Act of Congress to carry it into execution.

As to the universally recognized rule of law forbidding the confiscation of private enemy debts, see, *infra*, Comment opposite Article 302.

Section IV. (Article 297) sets out the following with respect to the private property, rights and interests of German nationals situated in Allied and Associated countries:

(a) Germany shall immediately discontinue all war measures (including liquidation and transfer) taken against the property, rights and interests of nationals of Allied and Associated Powers, such nationals to enjoy full rights in accordance with Article 298.

(b) The Allied and Associated governments reserve the right to retain and liquidate all property, rights and interests belonging to German nationals, or companies controlled by them within their territories, colonies, possessions and protectorates, including the territories ceded. German nationals shall not be able to dispose of such property nor to subject it to any charges.

German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power shall not be liable to such deprivation of their private property.

It appears under this sub-section that the United States is empowered to seize, in addition to the private property situated in the United States of German nationals resident in Germany already sequestered by the Alien Property Custodian, the private property of all German nationals resident in the United States. An Act of Congress would, however, be necessary as a condition precedent to the exercise of that power.

"What we have said of the detention of the enemy's person also holds good with respect to the right to seize and confiscate all enemy property found within the territory of the other belligerent at the commencement of hostilities. In former times this right was exercised with great rigor, but it has now become an established, though not inflexible rule of international law, that such property is not liable to confiscation as prize of war. This rule, says Chief Justice Marshall (*Brown vs. United States*, 8 Cranch, R. 123) "like other precepts of morality, of humanity and even of wisdom, is addressed the judgment of the sovereign—it is a guide which he follows or abandons at his will; and, although it can not be disregarded by him without

obloquy, yet it may be disregarded." (*Hallock*, 4th ed., Vol. 1, p. 587).

The power to confiscate enemy property cannot be exercised by the United States, however, except by the direct authority of Congress. (*Brown vs. United States*, 8 Cranch, R. 123). The extent of authority existing in the absence of such legislation is to sequester using reasonable care to conserve such property for its owners, under an obligation to restore it or its equivalent at the peace as we have done through the law creating the Alien Property Custodian. Even this right is generally qualified by treaty. (See Treaty with Prussian, 1828, 2 Malloy, p. 1496).

The far-reaching effect of this policy is likely to hamper American investments all over the world.

(c) Nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury to their property, rights or interests, including any company in which they are interested, due to war measures of liquidation or transfer; and they may be compensated out of private property of German nationals in the hands of Allied and Associated governments. Germany will receive credit on the reparation account as to any balances, which shall be paid to the Reparation Commission.

(i) Germany undertakes to compensate her nationals thus deprived of their private property by the Allied and Associated Powers.

(j) The amount of all capital taxes levied on property of Allied and Associated nationals by Germany after November 11, 1918, shall be refunded.

See Comment opposite Article 74.

By Sections a and b (Article 298) Germany undertakes to restore to nationals of Allied and Associated Powers their property, rights and interests as they existed prior to the war, and not to subject such property, rights and interests to any measures not applied equally to property of German nationals.

By Annex, paragraph 1, under Section IV, Germany confirms all acts of Allied and Associated Powers with respect to the property of German nationals.

By paragraph 2, Germany agrees that no claim or action shall be brought against any Allied or Associated Power or person on account of acts or omissions with respect to German property.

By paragraph 10, Germany will, within six months, deliver to each Allied or Associated Power, all securities, certificates,



deeds or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligation of any company incorporated in accordance with the laws of that power. She will further furnish any information desired concerning property of her nationals so situated.

On the whole, it may be said that in the pursuit of large indemnities the Allied and Associated governments have in these Articles repudiated principles, which, in the language of Spaight, the eminent English publicist, constitute the Magna Charta of war law. (War Rights on Land, p. 374). And since the remaining great powers have concerted in its repudiation it may be asserted that they have brought to naught the enlightened and laborious work of a century in this regard.

By the concluding paragraph of the Annex the foregoing provisions are declared to apply to industrial, literary and artistic property.

This provision appears, with respect to some of the signatories, to make a "scrap of paper" of the "Revised Berne Convention" for the protection of copyrights, signed November 13, 1908, and other similar treaties. (See Comment Article 286).

#### SECTION VI.—AUSTRIA.

Article 80. Germany acknowledges and will respect strictly the independence of Austria within frontiers to be fixed and agrees that the independence is inalienable.

Provision in the new German Constitution for a seat for an Austrian delegate in the German Reichsrat was held by the Principal Allied and Associated Powers to be violative of this obligation "to respect" Austrian independence. (Compare with the mutual obligation "to respect" the territorial integrity and existing political independence, under Article 10.) The racial characteris-

tics of what is left of Austria are predominantly German, the subject peoples of the old dual monarchy having been accorded the right of self-determination. Yet the achievement of German unity is forever forbidden. This ignores the inexorable lessons of history and makes for Irredentism.

#### SECTION VII.—CZECHO-SLOVAK STATE.

Articles 81-83. Germany recognizes the independence of the Czecho-Slovak state and renounces all rights and title over a portion of Silesian territory therein described. See Comment under Article 36.

Article 84. German nationals habitually resident in territories recognized as forming part of the Czecho-Slovak state will obtain Czecho-Slovak nationality *ipso facto* and lose their German nationality.

Article 85. Within a period of two years German nationals over 18 years of age habitually resident in such territories may opt for German nationality; "within the same period Czecho-Slovaks who are German nationals and are in a foreign country will be entitled, in the absence of any provision to the contrary in the foreign law, and if they have not acquired the foreign nationality by complying with the requirements laid down by the Czecho-Slovak state."

See Comment under Article 37.

Article 86. The Czecho-Slovak state agrees to embody in a treaty with the Allied and Associated power provisions for the protection of inhabitants differing from the majority in race, language or religion.

See Treaty of Berlin, 1878, Articles 5, 25, 35 and 44, recognizing conditional independence of Bulgaria, Roumania, Servia and Montenegro. (Martens, N. R. G. 2nd Ser. III, p. 449).

This implies the right, and perhaps the duty of intervention.

(To be continued.)