RECONSTRUCTION AND INTERNATIONAL LAW

THERE is a general disposition to assume that four years of dreadful war have so altered men's minds and characters and the underpinnings of organized society, that the world will be quite a different place from that which our observations and our studies have made familiar. This belief does not altogether carry conviction to my mind. The civilized world was threatened with an evil domination and combined to defend itself. This instinct and combination for defense are as old as the Greek Republics. For a generation to come the world will see less movement because of the war's exhaustion; it will have less money to spend and must economize; it will have higher taxes and therefore higher costs of production; here and there it will experience such change of governmental forms as should insure larger self-government.

But such results of war do not imply a change in human or even in national character. Peoples will continue to have that degree of control over their own destinies which their own character expresses and demands. The slavish nature will continue to live under a despot, whether he be called czar or head of a committee. The free spirit will continue to live under free institutions, because by self-knowledge and self-control he deserves them; and the title of the executive head of his state, whether king or president, is a matter of indifference. For realities and not forms are what count. Readjustment of existing principles to new conditions may be necessary, therefore, while reconstruction in the sense of the evolution of new principles and their application to a new world order, is unnecessary and unlikely.

It will be objected here that the French Revolution was a turning-point in the world's life, and that the present situation is comparable to that. I reply that it was not the upheaval in France that really counted, but the new philosophy which preceded the Revolution and brought it on; moreover, that there is nothing of a similar nature at the present, except perhaps the German theory of state

morality, and that has been discredited. The distinction is between a political philosophy which succeeded and revolutionized the world, and a political philosophy which has failed and will disappear.

Let us apply the doctrine that the old order has not fundamentally changed to the relations of states with one another. National animosities and jealousies and rivalries will not disappear in the coming era. Progress does not imply throwing away the fruits of the past. War will not be done away with, but only be made more difficult. And the rules of war will not greatly change, but the violation of those rules will be straightway punished. This is the ideal to work toward, remembering that the Law of Nations, like other law, in fact more fully than other law, is a growth and not a creation. If a weakness appears, we strive to remedy it, we do not seek to replace the entire fabric.

The principles of international law in time of peace are not so seriously controverted as to menace the world's progress. By a series of conventions ratified by the more important states and gradually covering all the relations of states in time of peace, we may hope to build up a code of rules, clearer, more comprehensive, perhaps more just than that body of usage heretofore recognized. Much progress has already been made in this direction.

It is the rules which govern the relations of states in time of war which are troublesome. In war there are three separate sets of interests involved, those of the two belligerent parties and of the neutral world.

Each of these three possesses rights and owes duties which are of very vital importance. Each accordingly will strain every nerve so to interpret any mooted question as to favor its own interest. Now in most wars the belligerents and neutrals have to give and take. There is such balance between them that neither can enforce his own view without concession. Hence it is accurate to say that the great body of law relating to war has grown slowly out of century-long discussions and compromises between belligerent and neutral.

We are just emerging from a war where two features, quite at variance with this growth process, confront us. For one thing, the neutral influence has been relatively so weak that it could not main-

tain its rights. For another, we have had to deal with a belligerent who has recognized as binding no rules or obligations which he deemed disadvantageous to his arms. His breach of the law, on the admitted principle of retaliation, has led at times to the same breach by his enemy. From this double attack upon the laws of war as accepted prior to 1914, chaos has resulted. What we want, therefore, is to get back to an earlier and better status and to devise some expedient for the future, which shall make the violation of its laws less likely, because more certainly and immediately punished.

My conception, then, of reconstruction and international law, is of the old system of law with new teeth, so that somehow some time a calculated breach, by individual or by state, will find a penalty. In order to understand the serious nature and extent of the problem, at this point I desire to catalogue and to classify the violations of law and the variations from accepted usage which this war has witnessed.

And first as to war on land. The war began with the unprovoked invasion of Belgium. There were two approaches to France, one across a common frontier, the other over neutral territory. The one was carefully guarded and fortified; the other fairly open to attack. The one to the south was broken by the Vosges Mountains, was shorter than the Belgian front and less suited to the wide sweeping advance of a huge modern army. The route through Belgium, on the other hand, was level and well supplied with rail and highway communication. It was preferred by the great German staff on the score of military convenience. Now to attack a friendly state with which one has no quarrel, simply because it is convenient to do so, is the unpardonable sin, the sin against the Holy Ghost. That Germany was itself one of the guarantors of Belgian neutralization, intensified a crime, it did not originate it.

The general principles which cover the rights of neutrals are laid down in one of the Hague Conventions, V, 1907. Articles 1, 2 and 10 read as follows:

Art. 1. The territory of neutral Powers is inviolable.

Art. 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Art. 10. The fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act.

This convention was ratified by Germany, November 27, 1909. It merely stated with precision a rule which was perfectly well established and long operative. There can be, therefore, no shadow of doubt that Germany's crossing of Belgium to get at France was a breach of international law and of treaty. If the resistance of Belgium to invasion can not be regarded as a hostile act, as the article just quoted declares, then no state of war resulted and the German army was not entitled to consider Belgium an enemy state, and its territory occupied, with the rights which occupation gives the invader. This, however, is rather a matter for curious speculation than of practical importance, for when the whole country was overrun and local sovereignty crushed, the will of the German occupants was alone in a position to be enforceable.

Generally speaking, the principle which governs occupation is that occupied territory is governed by martial law in terms of the local law, that is, by the will of the commander working through local officials as far as possible, over country which by the actual constant presence of invading troops is not under the control of the legitimate sovereign. The 1907 Convention IV respecting the laws and customs of war on land, ratified by Germany, November 27, 1909, recognizes this principle, and even goes beyond it, in declaring that "the high contracting parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders." With this proviso, the Convention lays down rules which I have space only to summarize, in the most essential particulars.

The inhabitants of an occupied territory shall be considered combatants if they carry arms openly and respect the laws of war, even if they have not had time to organize as militia.

Prisoners of war may be set to work if the work is not excessive and does not relate to the operations of war. They shall be clothed and fed as well as the troops of the captor. All their personal belongings remain their property.

It is prohibited to employ poison; to refuse quarter; to employ means of destruction calculated to cause unnecessary suffering—explosive bullets, for instance; to make improper use of a flag of truce or the badges of the Geneva Convention; to destroy enemy's property, unless imperatively demanded by the necessities of war; to attack or bombard by whatever means, towns, villages, dwellings, or buildings which are undefended; to pillage, even when a place is taken by assault; to use projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases; to use bullets which expand or flatten easily in the human body; to force information from the inhabitants of occupied territory..

I add two significant articles verbatim:

Art. 46. Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property can not be confiscated.

Art. 50. No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible.

And finally comes Art. 56:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

As to the use of expanding bullets, there is no convincing and overwhelming evidence of it on the part of either belligerent. Our own country did not sign that agreement and therefore can not claim protection under it. Probably soldiers in every army occasionally whittle their cartridge tips and make them soft-nosed.

But barring this prohibition, every other rule which has been cited, according to a mass of evidence which has been gathered, has been violated by the German Army apparently with the connivance or at the order of its high officers. Except in retaliation, there is no proof of the breach of these rules by the Entente Powers.

And then as to war on the sea.

The very first act of naval war in the contest was the laying of floating contact mines in the high seas by the Germans, presently imitated by the Entente Powers. The Hague Convention VIII, 1907, thus legislates in this matter:

It is forbidden "to lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them;" "to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;" "to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."

Germany signed the Convention, subject to a reservation of this last provision. But from August 7th she relied largely upon mines of the two earlier classes to keep the British fleet in check, without observing the rule as to such construction as made them innocuous when unwatched or drifting. This was the entering wedge of the mined area or war zone practice, which grew to great proportions in the hands of both belligerents in the course of the war. The laying of mines in the high seas area is not alone a violation of the convention just cited; it is also an exercise of sovereign control over waters outside those territorially owned, which violates neutral rights. The United States Government, the strongest neutral then existing, naturally protested against British as well as German action, not accepting the theory that retaliation in kind at the cost of the neutral could be justified. This is perhaps the only limitation of "the freedom of the seas" which this war has shown to be clearly open to criticism.

To make this clear it may be well at this point in the narrative to group together the other complaints which our government while neutral pressed against the Entente Powers. They relate to blockade, to methods of search, to the enlargement of the contraband list, to extraction of enemy persons from neutral ships on the high seas, and to a limitation of trade with other neutrals or rationing. When we became belligerents we shared in applying the last named restriction. It was a novel and unpleasant though perhaps unavoidable feature of the war.

Our criticism of the British blockade of German ports was two-

fold: first, that on account of the submarine menace it was conducted so far from the German coast as to bring its legality in question; second, that it was not applied to the trade between Sweden and Germany's Baltic ports and was therefore discriminatory, whereas the first essential of a legal blockade is that it must affect all neutrals alike.

As to contraband, there was constant enlargement of the list, there was constant shifting of commodities from the class of what is only occasionally or exceptionally contraband to that which is absolute. Owing to the growth of scientific adjuncts to modern war, there is scarcely an article or substance which may not have relation to it. Contraband is not covered by any Hague Convention; moreover, the Declaration of London, which attempted to lay down the rules of naval war, was not ratified by Parliament and was, therefore, in this war not in effect. One must resort to the naval prize codes of the various states to learn its definition. Thus the German Prize Code in force in 1915, Arts. 22 and 24, declares that "to the list of absolute and of conditional contraband must be added such other articles and materials as have been expressly declared" to belong in these classes by the German Empire. The British Admiralty went on the same principle. Though exasperating this enlargement of the contraband list from time to time is not unfair, because new methods or substances come into use. Thus, rubber was placed as late as 1909 amongst commodities which could not be called contraband in the abortive Declaration of London, and by 1914 on truck, ambulance and airplane wheels it had become of first rate importance in war.

There were a few cases of the removal of German reservists and other subjects from neutral ships on the high seas, the offense which in the Trent affair during our Civil War led so nearly to a break with England. This practice was so clearly illegal, however, that it was not persisted in and in most cases the captives were surrendered.

The British right to search we did not question, but the delays incident to this were complained of, often including the landing and investigation of the entire cargo on mere suspicion. So likewise was the assumption that much of our trade with Holland and with Sweden and Norway was really with Germany, on the theory of the con-

tinuous voyage. To avoid this suspicion, Holland devised a system by which all imports were billed to a single agency which guaranteed non-exportation. And yet the home-grown equivalent of the importation might be exported, and trouble resulted. Switzerland and Holland were dependent very largely upon Germany for coal, and Germany drove a hard bargain, compelling foodstuffs in exchange. Then, as all supplies the world over grew scarce, the Entente demanded its share of any exportable food. And, finally, when the United States entered the war, it supplied the needs of its partners before it fed the neutral, and had only a meager allowance for the latter, thus between two millstones.

The various causes of complaint which have been mentioned led to animated diplomatic interchanges, too long deferred by Mr. Bryan, but pushed with skill by Mr. Lansing. They might easily have grown into a serious situation. For when the British authorities said, if you think yourselves wronged, appeal to our courts, we replied, "Your courts are bound by Orders in Council and are not free therefore to do exact justice. You are governed by military necessity at sea just as fully as the Germans are on land." Then the air was cleared by the judgment of the British court in the *Zamora* case, the Judicial Committee of the Privy Council, the highest court having jurisdiction in Admiralty. This is a matter of such importance as to warrant a moment's notice, for it showed the real gulf existing between German and British standards of justice.

The *Zamora* was a Swedish vessel loaded with copper which, under the circumstances, was contraband. But instead of trying the case and condemning the cargo, the authorities, acting under an Order in Council, which represents naval necessity, requisitioned it. Thus there came about a conflict between international law and an executive order. As to this the court declared repeatedly in no uncertain voice that international law was paramount.

The idea that the King in Council, or indeed any branch of the Executive, had power to prescribe or alter the law to be administered by courts of law in this country was not in harmony with the principles of our Constitution.

A prize court must of course deal judicially with all questions which come before it for determination, and it would be impossible

for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

If the court is to decide judicially in accordance with what it conceives to be the law of nations, it can not, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its function as a prize court, and justify the confidence which other nations have hitherto placed in its decisions.

It will be noticed that none of the British acts of which our government complained affected the life or limb of any American citizen; property alone was involved, owing to what we held to be a mistaken idea of a belligerent's rights as against neutral trade. Far otherwise was it with German methods at sea. Except for occasional forays, her surface fleet was kept behind barriers. Her raiders and Pacific squadron in time were wiped out. There remained only her under-water boats to blockade, to search for contraband, to prey upon enemy's commerce and repress the neutral.

The U-boat is flimsily built, of small stowage capacity, and necessarily handicapped in doing cruiser work. Consequently, it has claimed a preferential position, enjoying all the rights of a cruiser without its obligations. This the neutral has denied. If it is used for blockade, such blockade must be made effective by the continuous presence of sufficient ships to make access to the ports or coasts blockaded extremely difficult. This was never the case. The occasional appearance of a submarine, coupled with dire threats of sinking if neutral ships resort to certain specified areas, does not constitute a valid blockade.

So with contraband. Visitation, search, seizure, safe disposal of the personnel, this orderly sequence of events must precede condemnation by a court. In only a few cases before this war have neutral ships carrying contraband been destroyed.

Destruction of the enemy's merchantmen for want of ports open to prizes is a harsh but legitimate penalty, always subject, however, to such disposition of passengers and crew as humanity demands. Otherwise the act of sinking is murder. That happened in the case of the

Lusitania. But the German sinking without warning of numberless neutral ships was infinitely worse. For in such case to murder is added the illegal destruction of neutral property without that search which is essential to discover nationality, destination and loading.

When this issue was fairly joined with the United States there could be but one outcome. A state which permits its subjects to be murdered and their property destroyed without armed protection, fails to perform its duty as a state and is no longer entitled to the allegiance of its citizens. Thus war was inevitable. Whatever idealistic motives may have also had weight, the war was fundamentally one of self-defense.

This, then, is an outline of the many serious violations of the rules of war by land and by sea, perpetrated largely by one of the belligerents, which have marked the last four years, and the reconstruction of international law involves the plain question, how a repetition of these war crimes can be forever prevented. The answer I think is twofold, by the prevention of war itself and by the punishment of the crimes.

Two movements have gone on side by side for as many generations, for the abolition of war and the humanization of war. They assume that offenses will come, and then try either to find a workable substitute for war as a means of settlement, or, if resort must be had to war, try to minimize its evils by stringent rules laying down how non-combatants and their property shall be treated, how combatants must treat one another and what precisely are the rights and duties of the outsider, the neutral nations.

The punishment of war crimes is necessary for the humanization of war, because this latter depends upon laws, and laws must be enforced under penalty. These crimes are against the person and against property; the party answerable for them may be a government or an individual. When a state is guilty, as for instance our own country would be if by act of Congress unjust war should be levied, the only penalty possible is a pecuniary one, an indemnity. Practically, an indemnity can be levied and collected only as the result of successful war. And it is difficult to determine the justice of a war to assess the guilt of a whole country, except on the evi-

dence of historical investigation. We, therefore, have the illogical, the painful, fact to face, that only the loser pays an indemnity, whether he be in the right or in the wrong. The individual can be held responsible more easily, yet even in his case the tendency will be to punish losers only. Hence the ideal system must place both trial and punishment in neutral hands.

There is another way of checking war crimes, namely, by retaliation, by treating your enemy as he treats you. This is not by way of revenge, but is what Professor Lieber calls "protective retribution." One violation of law is punished by the commission of another. Thus the poison gas weapon of the Germans in the recent war was met by gas more poisonous still. Denial of quarter is punished by the refusal of quarter in turn. If the war criminal is captured, of course he bears the penalty in his own person. But if he is not in his enemy's power, that enemy under the principle of retaliation may punish any one whom he has captured. This is not a satisfactory method of penalizing crime, though it is legal and better than nothing.

I would suggest that war crimes are against the person and against property; that the penalty might be similarly a pecuniary one or a personal one; that its nature and degree follow the usage of the country of the defendant, and that if possible a system be worked out whereby investigation of alleged crimes may be speedy, and certain punishment be visited upon conviction. Such a plan is not a novelty. Certain writers have advocated it, and the Carnegie Commission argues its necessity in that terrible catalogue of war crimes which it lists in its report on the atrocities of the Balkan Wars. If no such plan can be made operative, and if in subsequent wars the same disregard of the rules should be evident as in this war, then the laws of war are no better than a dead letter. But I look for a commission to investigate and punish German war crimes, as one outcome of the Peace Conference.

The other movement, for the substitution of some kind of judicial procedure for war as a means of settling differences between states, has been the dream of the ages. A vast literature has grown up concerning it. Societies exist to further it. And real progress has

been made through the special arbitration of hundreds of international disputes, by courts chosen *ad hoc*. Few of these disputes, however, would have resulted in war, even if not thus settled, because they were relatively unimportant. What is wanted is a substitute for war, not a mere substitute for diplomacy, which most arbitration is. Nevertheless, there is a judicial quality in arbitration which is not sufficiently recognized by the advocates of a world court which shall have jurisdiction over all questions. Thus, the award of the King of the Netherlands in 1831 in the Northeastern boundary dispute with Great Britain, was really a suggestion of compromise, not a decision on facts and questions submitted. It was, therefore, rejected by both parties to the treaty of submission.

When two states agree to arbitrate a particular dispute, it is the presumption that they contemplate losing as well as winning the case, and that they prefer to lose it rather than to use force. But in all the proposals of a general arbitral system prior to the last century, except Kant's, whether called Court or Congress or League, the judgment given was to be executed, if necessary, by force. It is just in this particular that the two systems differ radically. And therefore in studying any new proposal which aims at the replacement of war by some substitute for it, one must always inquire what are the means of enforcing a verdict. If they exist, there may result war to prevent war; but this risk must be run. Fundamentally this is the justification of war, that it is the attempt to execute a judgment though that judgment is self-pronounced. When the judgment is pronounced by some extra-national court or league, the power to execute must still be provided. Otherwise the system is a failure, and the court an object of contempt.

In an orderly, well-policed community, law is enforceable because the agents of the law are organized and armed. The opponents of law and order are unorganized and usually forbidden to carry arms. Must it not be the same if a number of states pool their forces for the sake of international order; military power must be surrendered by the individual state and concentrated in the hands of the league. Is it too much to say that the first essential of success, if a league of states attempts to judge and to police international

society, is that the military power in its hands shall be relatively predominant? This means that the members may retain only force enough for domestic control; that they surrender their great standing armies and their systems of universal conscription, their fortresses and their arsenals, so that if a member state does resort to war, its preparations shall take a year or more. Disarmament, delay in ability to strike, centralized power, and the consciousness of the solidarity of the many states in league against the one independent, these seem to me to be the prerequisites to a workable scheme of combination against war. Here it may be noted that if a state surrenders its system of universal service, the officer class automatically is forced into civil life, with a consequent change of ideals; moreover, that the great munition factories beat their swords into plowshares; and lastly that war, though not impossible, is certainly made more difficult. If we would be honest, perhaps this final conclusion is all that we have a right to expect.

But besides the military power of execution lodged in the hands of a league, it must have economic pressure at its command also. If one contemplates an international boycott loyally carried out it is a tremendous weapon. Ships are refused entrance to all ports; all traffic is cut off; raw materials are denied; there are neither mails nor cables nor personal intercourse; as by a stroke, the national body is paralyzed.

Perhaps too much stress has been laid upon the ability of a league, aspiring to substitute law for force, nevertheless to have force at its command. President Wilson, as the apostle of such a league, has suggested the value of friendship as its foundation. But a political society is a very peculiar thing. It is compounded of racial and historical prejudices, of trade rivalries, of lingual and geographical limitations, of anything but friendships. Friendship is hardly a status in itself; it grows rather out of other factors, like trade which is mutually profitable, like political interests which are identical. Is it better to preach a gospel of perfection, or to found your system on things as they are?

To understand the proposed League Constitution we must begin with Mr. Wilson's fourteenth point, because the armistice is based

upon his program and peace is patterned after the armistice: "A general association of nations must be formed, under specific covenants, for the purpose of affording mutual guarantees of political independence and territorial integrity in great and small states alike." And his number four demands, "Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety."

This is disarmament, which is good, coupled with a league for the preservation of the *status quo*, which is not so good. The object of a league was amplified in Mr. Wilson's Fourth of July address, to "check every invasion of right and serve to make peace and justice more secure by affording a definite tribunal of opinion to which all must submit and by which every international readjustment, that can not be amicably agreed upon by the peoples directly concerned, shall be sanctioned." This rather vaguely implies territorial changes in states, if sanctioned by the league, and removes the reproach that the war will result in a world stabilized but hidebound.

On September 27, 1918, came further enlightenment: The league must be part of the peace settlement. It is necessary to guarantee the peace. It must involve impartial justice; must consult a common interest; must exclude selfish economic combinations; must also exclude special alliances and economic rivalries and hostilities. Passing by the futility of this last phrase (for states without economic rivalry are states that are dead), it is noteworthy that nowhere does Mr. Wilson's league program call for the settlement of disputes by any judicial process.

In a similar strain, the day the armistice was signed, Lloyd George said: "A large number of small nations have been reborn in Europe, and these will require a League of Nations to protect them against the covetousness of ambitious and grasping neighbors." But on the 5th of January he had gone beyond this purely political conception of a League, saying, "A great attempt must be made to establish by some international organization an alternative to war as a means of settling international disputes."

This was also in Lord Curzon's mind, June 26, 1918: "We must try to get some alliance or confederation or conference to which these

states shall belong, no state in which shall be at liberty to go to war without reference to arbitration, or to a conference of the League, in the first place."

Lord Robert Cecil goes very much farther, urging that a League was essential to the relief of starving peoples, to the regulation of railways, posts and wires. He laid upon it also "public health and the protection of women and juveniles in industry" and the guidance of backward peoples.

A year earlier the French Chamber of Deputies resolved that victory must bring "durable guarantees for peace and independence for peoples, great and small, in a League of Nations such as has already been foreshadowed."

And there are many contemporary expressions of approval of the League principle, but equally vague as to what the details shall be.

The program of Mr. Taft's League to Enforce Peace, however, is not vague; it is quite specific in advocating the tribunal idea, in backing it with force, so as to insure delay at least, and in promoting world progress as well as world peace.

These various programs show the extremes of opinion which the League discussion has brought out. They also convince one that some kind of a League is really probable. It is now or never. It is the psychological moment. But is it to be chiefly machinery for the education and protection of the new states which the peace may create; or may there be coupled with this a kind of international uplift movement!

The first is wise, provided it does not copy the Holy Alliance. That league in 1815, in the name of Christianity, to perpetuate religion, peace and justice, tried to stabilize European political society in the interest of absolutism; it even planned to extend its influence to this continent. This League must not similarly, in the name of peace and justice, try to stabilize the world in the interest of democracy. It would be an identical blunder. For when, to use the prevalent phrase, self-determination of a people has formed a state, that state is endowed with sovereignty and independence and, like maturer states, has the right to be let alone. Its future must be determined by itself, not by others.

As for the second ideal, a socialized international society of states built up on a basis of altruism rather than on reciprocal benefits—it is built upon the sand. A proposal that all war debts on the victors' side shall be pooled and then redistributed on the basis of population or national wealth, has been seriously made and is a valuable commentary on the new gospel. Moreover, it is practical politics today, to emphasize nationalism as against internationalism. Nationalism is the consciousness of race and desire of sovereignty; we see it in its finest expression in Bohemia. Internationalism, on the other hand, exalts social welfare and class interest above the race and the state. That way lies Bolshevism. The one is antidote to the other.

At the other extreme is a League which shall offer a reasonable way of keeping the peace between states by providing a tribunal for judging their differences, with fair assurance that the award can be executed; by setting up a system of conciliation in disputes which are not justiciable; by a self-denying renunciation of war between the members; by making delay certain and settlement probable after an issue is joined. But it does not absorb the sovereignty of individual states; they retain their sovereignty. It does not attempt to govern the world, but to make the world more peaceable.

Of these two ideals, my own judgment, or perhaps it is prejudice, inclines to the less ambitious program just indicated. It places responsibility for conduct where it belongs, within the state, and not in a league outside it. Its working would be easier, its breakdown less dangerous. But perhaps the outcome may be somewhere between the two extremes, stressing for the moment the need of enforcing the terms of peace and of giving a fair start to the backward peoples which have just achieved statehood.

And here it may not be amiss to place together the desirable features of a rational International League, in accord with the principles above advanced, but somewhat more specifically.

Its members retain their sovereignty, each one, but by treaty for an experimental period, confer certain powers upon a central body.

These powers are partly administrative, partly judicial, but not

legislative. Legislation should require further treaty cooperation in each new proposal.

The administrative powers are to be used, first, to protect newly formed states; second, to enforce other conclusions of the Peace Treaties, such as disarmament; third, to carry out decisions of the League.

Its judicial powers are to conciliate or judge disputes between members and more widely to substitute law for force in international relations, so far as possible.

Disarmament must reduce the strength of the individual members and thereby relatively increase the *strength* of the central body, i.e., the sum of the military units put at its disposal.

The League must also have the power of boycotting as one of its weapons, but otherwise is not an economic union.

Its field is political; it relegates social problems to the member states. For instance, women's and children's labor in Japan or Brazil, seamen's wages in India and the United States, can not be regulated from a League capital without disaster.

It is a loose union for the prevention of war; with no ulterior aims beyond this; a limited but a safe conception.

This was written before the first draft of the League Constitution was given out at Paris, and even yet the last word has not been said. Judging it in the light of the principles tentatively set forth above, it would seem to have avoided much that would be dangerous and to embody much that is hopeful and valuable. Its members retain their sovereignty. Much stress is laid upon disarmament and the control of private munition factories. Defense against external aggression is contemplated, but the right of a state to change its own condition is not questioned. As between members of the League, disputes are to be submitted either to arbitration or to inquiry by the Executive Council before resort to war; this implies a certain delay. Such submission to arbitration is voluntary, however, while the resort to inquiry at the hands of the Council is obligatory, an international league boycott being the penalty for non-compliance. The Council may also use force. These provisions are obscure and need rephrasing.

If the dispute is between a League member and an outside state, such state is forthwith to be asked to join the League for the purpose of settling the difference, but whether it does so or refuses, the Executive Council may use its judgment in trying to keep the peace, acting in accordance with League principles. This is vague and unsatisfactory.

Then there is a novelty in placing German colonies and backward states under the protection of advanced powers which are called Mandatories. The only provision for social welfare is in Article XX. "The high contracting parties will endeavor to secure and maintain fair and humane conditions of labor for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend; and to that end agree to establish as part of the organization of the League a permanent bureau of labor." This does not call for uniformity of conditions, and is probably both meaningless and harmless.

Of course, it is too early to criticize textually. Nor has reference been made to other subjects treated in the Constitution, but which are not germane to the special purpose of this paper. In general, it seems to the writer that the effectiveness of the League machinery for checking war depends upon the impression of solidarity which the League produces, and that this solidarity will depend too largely upon the make-up of the Executive Council. But read in connection with the disarmament stipulations, the judicial provisions should be reasonably, perhaps absolutely, workable.

These, then, are the two principal changes which international law should find impressed upon its system as a result of the great war, a league of states which retain their sovereignty but agree to get the judgment of the whole body in some way before resorting to war; a method of investigation and punishment which would make the violation of the laws of war highly dangerous.

There are now two or three other particulars in which the old law of nations may have new light cast upon it as a result, or by-product, of the war. If a tribunal, under whatever auspices it comes into being, adjudges international causes, it will need a code of law, and it will also tend to build one up. The code with which it will

set out is one of usage supplemented by treaty compact. It may lack precision, but is workable nevertheless. In time the demand for a Code of International Law will create one, not as a whole, but in parts—diplomatic intercourse, for instance, or maritime jurisdiction, or the laws of war on sea. Meanwhile, the court itself by dint of judicial decisions will add to and clarify the law which it administers. This double process of growth is a better, more reasonable, form of code-building than codification covering the whole field and jeopardizing its results by attacking in one engagement all the burning questions. This method of growth through the arbitral decisions of the last half century, has already been marked. Thus jurisdiction over seals' swimming free in the high seas has been denied to the country of their origin. The Alabama arbitration enlarged neutral duty and defined due diligence in its performance. Light was thrown upon the question of how territorial waters shall be measured, in the Alaska and Newfoundland cases. It is not necessary to multiply examples.

Another question which the events of the war have brought into prominence and which the future law might possibly take cognizance of, relates to armed intervention in the affairs of a state with which one is not at war, on the plea of self-defense. The condition of portions of Russia illustrates what is meant. The forces of anarchy, of chaos, have gained the upper hand. Life and property of native and of alien are in jeopardy. The obligations of the old state are disregarded. Moreover, the spirit of misrule, like a religion, is being spread as widely as possible over the world. Our own country, Uruguay, Argentina, Mexico, are objects of attack, besides contiguous states. Shall resistance to these noxious doctrines be defensive only, or may they be attacked at their source? We justify the presence of our troops in Russia at this moment on the ground of self-defense, as an outcome of war. But if no declared war existed, and organized society found itself attacked out of a clear sky, under the new dispensation, what is society to do? Here is war no less real and dreadful because unregularized. If a league of states exists to keep the peace, with powers to settle disputes and to police the world granted to it, the anarchical menace, if anything, should call those powers out.

Yet, on the other hand, if we incorporate into the new League the right of intervention in the affairs of individual states for any purpose whatsoever, we run a serious risk; we play the rôle of the Concert of Europe; we weaken the educative power of responsibility. To frame a formula for the conduct of a League of Nations, which shall be broad enough to crush anarchy anywhere, yet restricted enough to guarantee to each state sovereignty and independence, will require high statesmanship.

I have spoken of the educative power of state responsibility. In theory this should be a result of independence. But on our own hemisphere we see too many examples of the failure of the rule. Through the Monroe Doctrine we have shielded our neighbor republics from foreign intervention, doing it for our own sake and often resented by them. We mean well by them. Certain of their qualities we admire. But excepting half a dozen of the better developed, the Latin American states, from their want of order and of education and of self-control, are a menace to our world. Shall they and their problems, like Bolshevism, come before the League for treatment? Or shall an American league be set up for local treatment, to assume both responsibility and control? Or more probably still, shall this old world and this new one muddle along very much as they have since the beginnings of history, gaining here a little and there a little, the law of their relations changing with the law of their progress, the moral uses of dark things revealed, to those who can see, by Divine Providence.

When a criminal breaks the law and at last is caught and punished, we do not say that the law has broken down; we say rather that it has been enforced, that the law works. So is it with the law which governs the relations of states. It has been cruelly violated. There were times when the criminal seemed immune. But his punishment has begun. Every restitution, every penalty, every act of atonement, is proof that the law he scorned is stronger than he. Its grasp is firmer, its future is brighter than before, and its field is greater. Like the last runner in a relay we have reached the line, and the line is justice.

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