SOME LEGAL QUESTIONS OF THE PEACE CONFERENCE

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ROBERT LANSING

Secretary of State of the United States

BEFORE THE

AMERICAN BAR ASSOCIATION

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I realize that any subject which has to do with the Peace Conference possesses at this time a peculiar interest not only to members of the legal profession but in fact to men of every avocation and every nationality. At the same time to treat of these subjects dispassionately and without inviting the charge of undue prejudice is by no means an easy task. We are still so near the Great War and its dreadful consequences, so near the complex questions which were considered and decided by the Paris Conference, that it is practically impossible to form a true perspective of the proceedings of the Conference or to give even a relative value to the things that it accomplished.

A man, however learned he may be or however high a reputation he may have gained as a statesman or political thinker, can not speak with certainty of the future. Emphatic or intemperate utterances in favor of or against the settlements reached by the nations represented at Paris ought not to be made; and, if made, they will assuredly not receive the unqualified approval of men of broad vision and judicial mind. It is unfortunate that the difficulties and obstacles which had to be overcome or avoided by the negotiators can not be fully explained at this time. If they could be, I believe that many of the objections to the Treaty would vanish or at least not be urged by those who have been vehement in their denunciation of some of its provisions. I am sure that it is ignorance or at least incomplete knowledge which has induced much of the criticism of those who are otherwise familiar with our foreign affairs. I prefer to believe this to be the cause, rather than to charge them with intellectual dishonesty or with being governed by their emotions or by motives unworthy of anyone who seeks to be just in forming an opinion.

In discussing the legal questions, which are suggested by the Peace Conference or are directly raised by the Treaty of Peace, it is my purpose to do so as impartially as possible. Of the two classes the

suggested questions rather than the definite questions presented by the provisions of the Treaty are to my mind the most important. They may lack the preciseness of a formulated provision but they invite the especial consideration of those who are interested in the philosophy of law and its interpretation into a standard of international conduct.

It is manifest that this war has given an impetus to what is commonly termed Internationalism, though it would be more proper to call the communistic doctrine Mundanism. This pseudo-Internationalism seeks to make classes or in some cases individuals the units of world organization rather than nations. It is the enemy of Nationalism which is the basis of world order as we know it. It is a real, though not always an open, enemy of national independence and of national sovereignty. Its more radical adherents demand class allegiance and discourage or denounce national allegiance. In its extreme form it purposes to remove national barriers and to overthrow national governments whether democratic or monarchic in form. This is not a new communistic doctrine or theory but it never became an actual menace to the present social order until the successful revolution in Russia fell into the hands of the Bolsheviks. Spreading from this center of unrest and disorder the movement has today assumed proportions which command the serious consideration of every civilized people. In certain lands the economic conditions and state of wretchedness resulting from the war have been peculiarly favorable to its growth. However safe this country may be from the more pernicious forms of this doctrine and however confidently we may rely upon the sound common sense of the American people, we cannot ignore the dangerous possibility that moderate forms may under certain influences develop into extreme and threaten our political institutions. We ought to realize that the world can not be organized on both Mundanism and Nationalism. The political cleavage must be between nations or between classes. We must choose between these two conceptions of world order.

I have no doubt what the final verdict will be unless thoughtful men fail in their duty. It will be for Nationalism, not the evil form of Nationalism which was the bane of the eighteenth and nineteenth centuries, but the democratic form which will develop in the present century and become the cornerstone of the new order.

I have referred to Nationalism in this connection because the Treaty of Peace by its terms and method of negotiation makes the nation the unit of responsibility and of right. The Treaty is an agreement between sovereign states and imposes obligations upon nations, not upon individuals. Thus, it announces to mankind that the nationalistic idea is to be preserved as the basis of society and that nation will deal with nation as in the past.

This fact is of importance from the legal standpoint, since it shows that international law, and not world law affecting individuals, is to continue as the standard of intercourse between governments and peoples. With such an evidence of the will of mankind and with such an assurance that Nationalism will not be abandoned, we can proceed to rebuild our international system and codes upon sure foundations.

In times of peace there have been three ways of composing international controversies, namely, diplomatic settlement, mediation, an aid to diplomatic settlement, and judicial settlement. The Treaty of Versailles has not changed these three methods. They exist in the Covenant of the League of Nations which declares for arbitration, international inquiry and mutual understanding. The peaceable settlement of a controversy between nations thus falls within the sphere of legal justice or the sphere of diplomacy, since mediation or inquiry is an adjunct to an amicable arrangement between the parties to a dispute, and therefore is diplomatic in character.

The Covenant has gone far in developing a new process of diplomatic adjustment of such differences as have been heretofore the frequent causes of war between the disputants, but its only contribution to the advancement of international arbitration is to make it in a measure partially compulsory, and to provide that "plans for the establishment of a permanent Court of International Justice" should be formulated and submitted to the members of the League by the Council. It is with this latter provision that jurists should be particularly concerned for the usefulness of this instrument of settlement depends upon the proper constitution of such a tribunal and the practical method of procedure before it.

Many of us, who have had experience before international courts and commissions, have realized the inadequacy and unsatisfactory character of the present system of arbitration and the imperfect, if not objectionable, method of procedure which has been followed.

Appreciating now as we did not before the evil purposes which the Powers of Central Europe had so long secretly cherished, it is remarkable that The Hague Convention of 1907 developed as far as it did a workable system for the judicial settlement of international disputes. I have no sympathy with those who criticize or condemn the accomplishment of that great assembly of distinguished statesmen and jurisconsults who formulated an instrument and a method, by which justice could be applied to nations as national judiciaries have applied it to individuals. It is ignorance of the difficulties of their task or in some cases I fear a less justifiable reason which has induced unfavorable comment of or contemptuous indifference to the real achievements of The Hague Conferences.

The creation of The Hague Court was a tremendous forward step in the prevention of international wars in that the signatories to the organic convention committed themselves to the standing policy that justice should be the controlling principle in all relations between nations and that its application to concrete cases by an impartial tribunal ought to supersede the ancient and barbarous method of trial by combat. I desire to register here my personal appreciation of the great service which was rendered by The Hague Conferences of 1899 and 1907 in furnishing the world a definite system of international judicature. Along the general lines of The Hague Convention the nations should build a new and more substantial structure eliminating those weaknesses and undesirable features which were the consequence of the improper motives of certain powers, particularly the German Empire, and of their false conception of their national interests. It would be folly to cast aside all that has been achieved and attempt to create something entirely different. In our desire to make this new era a better one than the one from which we have emerged, we must not let idealism run away with common sense or assume that we possess a mentality far superior to our predecessors. Past methods are not all worthless because they failed to accomplish their objects in the extraordinary and abnormal circumstances which resulted in the World War. I do not believe that any human agency could have prevented the conflict through which we have passed so long as greed and ambition were the supreme impulses of the German Autocracy. If the German Government had not been inspired by these evil motives and had not believed that it possessed the physical

power to gratify its desires, who is prepared to say that The Hague Convention of 1907 would not have furnished a sufficient instrument to settle peaceably controversies which might without it have produced international wars?

The fact is that under present conditions, even with Autocracy vanquished and Democracy triumphant, we have to face the same problems, though modified by a better conception of the truth and a less ruthless disregard of right. It is, I believe, a better world, but by no means a perfect world. Though less threatened by the sinister influence of national avarice we are not free from it entirely. I do not know that the world will ever be until it is spiritually regenerated. As I see it there is only one principle for the direction of international intercourse which will under present conditions command the universal approval of nations, and that is the principle of justice, not in the general and abstract sense, but in the restricted sense of legal justice.

Justice in the broad sense is attractive to the reformer and the idealist. As a Nation we ought and doubtless will be guided by it in our relations with other nations. But, when we come to formulate our foreign policies upon the belief that justice in the abstract is a dominant force in the regulation of world affairs, we are building on a foundation which, however desirable, is by no means certain. We must recognize the fact, unpalatable though it may be, that nations to-day are influenced more by selfishness than by an altruistic sentiment of justice. The time may come when the nations will change their present attitude through a realization that uniform justice in foreign as well as in domestic affairs is the highest type of expediency, but that time has not yet come, and, if we are wise, we will not deceive ourselves by assuming that the policies of other Governments are founded on unselfishness or on a constant purpose to be just even though the consequences be contrary to their immediate interests.

Yet, while abstract justice cannot be depended upon as a firm basis on which to constitute an international concord for the preservation of peace and good relations between nations, legal justice offers a common ground where the nations can meet to settle their controversies. No nation can refuse in the face of the opinion of the world to declare its unwillingness to recognize the legal rights of other nations or to submit to the judgment of an impartial

tribunal a dispute involving the determination of such rights. The moment, however, that we go beyond the clearly defined field of legal justice we enter the field of diplomacy where national interests and ambitions are today the controlling factors of national action. Concession and compromise are the chief agents of diplomatic settlement instead of the impartial application of legal justice which is essential to a judicial settlement. Furthermore the two modes of settlement differ in that a judicial settlement rests upon the precept that all nations, whether great or small, are equal, but in the sphere of diplomacy the inequality of nations is not only recognized but unquestionably influences the adjustment of international differences. Any change in the relative power of nations, a change which is continually taking place, makes more or less temporary diplomatic settlements, but in no way affects a judicial settlement.

However then international society may be organized politically for the future and whatever machinery may be set up to minimize the possibilities of war, I believe that the agency which may be counted upon to function with certainty is that which develops and applies legal justice. Every other agency, regardless of its form, will be found, when analyzed, to be diplomatic in character and subject to those impulses and purposes which generally affect diplomatic negotiations. With a full appreciation of the advantage to be gained for the world at large through the common consideration of a vexatious international question by a body representing all nations, we ought not to lose sight of the fact that such consideration and the action resulting from it are essentially diplomatic in nature. It is, in brief, the transference of a dispute in a particular case from the capitals of the disputants to the place where the delegates of the nations assemble to deliberate together on matters which affect their common interests. It does not—and this we should understand—remove the question from the processes of diplomacy or prevent the influences which enter into diplomacy from affecting its consideration. Nor does it to an appreciable extent change the actual inequality which exists among nations in the matter of power and influence.

On the other hand, justice applied through the agency of an impartial tribunal clothed with an international jurisdiction eliminates

the diplomatic methods of compromise and concessions and recognizes that before the law all nations are equal and equally entitled to the exercise of their rights as sovereign and independent States. In a word, international democracy exists in the sphere of legal justice and, up to the present time, in no other relation between nations.

Let us then with as little delay as possible establish an international tribunal or tribunals of justice with The Hague Court as a foundation; let us provide an easier, a cheaper, and a better procedure than now exists; and let us draft a simple and concise body of legal principles to be applied to the questions to be adjudicated. When that has been accomplished, and it ought not to be a difficult task, if the delegates of the Governments charged with it are chosen for their experience and learning in the field of jurisprudence, we will, in my judgment, have done more to prevent international wars through removing their causes than can be done by any other means that has been devised or suggested.

I have but just returned from six months spent in the settling of controversies between nations through the medium of a great international conference, which followed the customs and practices of diplomacy as they will unquestionably be followed by all deliberative bodies representing the nations. I believe that I know and understand the currents and countercurrents which impelled action and influenced decisions in that conference. It is not my purpose to review the conduct of those negotiations or to imply more than that they were diplomatic in character. But with this experience vividly in mind I can not too strongly assert that international justice interpreted and applied by an impartial court can do more to prevent future wars than any agency, single or collective, operating in the sphere of diplomacy.

The mind of the world was never more receptive to the idea of applied justice. Mankind has endured such terrible woes from injustice and lawlessness that they seek above all things the restoration of the rule of law and justice. The governments can not ignore this universal demand. They should not. They can not too soon set up the machinery and let it get to work in the settlement of the controversies which continue to arouse apprehension and concern

among those who seek to see a sure foundation laid for a permanent peace.

To adopt an international code of principles for the guidance of an international court of justice is, I believe, as essential as the creation of the court itself. After every great international war changes in methods and weapons have compelled a revision of the rules of warfare. The principles have not changed so much as their application to new conditions. The changes that will have to be made after this war, which for magnitude and ingenuity in the destruction of life and property surpassed all previous wars, are numerous and radical. In the past governments have employed their armies and navies against one another as champions of their respective nations. The noncombatants of the populations have formed a class which was without military value and which was on that account free from hostile attack. But to-day each able-bodied individual in a state, though not serving in the armed forces of a belligerent, is a distinct asset in the prosecution of a war. The workman in the shop, the peasant in the field, the miner underground, the sailor on the merchant ship, are necessary factors in the prosecution of a war as they never were before. This Great War has been a war of peoples, and not a war of armies and navies alone. Whole nations have been mobilized in the supreme effort to vanquish their enemies. How this manifest fact will affect the rules for the immunity and protection of noncombatants is a question which will require very careful consideration.

The introduction of the submarine, the aeroplane, and the dirigible, made possible by the invention of the internal-combustion engine, the use of the wireless telegraph and telephone, and the employment of lethal gases, of supercannon and possibly of aerial torpedoes make obsolete many rules formerly observed but now ignored.

What is to become of the rules of blockade as they existed prior to 1914? Are we to continue the farce of distinguishing between articles contraband and noncontraband? What will be the rights and duties of neutrals after the experience of the last five years? Will there be and can there be such a thing as neutrality when a war involves many nations and shatters the commercial and social order of the whole earth? These are some of the problems which will have to be solved by those who will be charged with redrafting the rules of war on land and sea.

New and puzzling questions are also presented as to the application of principles of right in times of peace. The employment of aircraft and undersea vessels in commerce and communication, the regulation of the use of wireless telegraphy, the rights as to the operation of ocean cables, and other subjects of like nature should be fully discussed before the principles of international law are put into final codified form. Then, too, there is another group of subjects as to which definite principles should be laid down in order that the present uncertainty and confusion of rights may be removed. Among these subjects are the right of expatriation and naturalization, the precise nature of business domicile, the right to retain title to ocean cables cut or diverted during a war, and others which it is needless to recite, as enough has been stated to show the importance of the task which lies before the conference charged with the codification of the principles of law applicable in time of peace and the rules of conduct in time of war.

The system of mandatories under the League of Nations as provided in the Covenant, which to the casual observer appears simple in principle and application, is a novelty in political authority which the more it is studied from the legal standpoint the greater the number of problems which it presents.

The determination of the possession of the sovereignty over territory is essential to the determination of international rights and obligations. In the case of territory subject to a mandatory, the question therefore arises as to who possesses the sovereignty of such territory. Certainly not the mandatory which derives its authority solely from an agreement conferring upon it a limited exercise of sovereign rights. Is it then the League of Nations which possesses the full sovereignty, the exercise of which is delivered in part only to an agent or trustee? That would seem to be the logical answer, and yet consider the questions which that answer raises. Does the League of Nations possess the attributes of an independent state so that it can function as a possessor of sovereignty over territory? Is the League then a ~~supernatural~~ supernational world state clothed with world sovereignty? If the League possesses the sovereignty, can it avoid responsibility for the misconduct of its agent, the mandatory? If the League is not capable of possessing sovereignty, then who does possess it, who is responsible for the acts of the mandatory; and upon what ultimate authority does the League base the issuance of a mandate?

I might present a score of other questions of a similar nature which with those propounded will have to be definitely answered some time if the mandatory system comes into operation. To-day these questions are academic and may be considered technical and no doubt by many are so considered, but it may not be long before they become concrete and very practical. It is not an overstatement to say that nine-tenths of all international controversies arise over questions pertaining to the possession of sovereignty and the conflict of sovereign rights. I do not think that mandatories and the source of their authority can escape from the test of the legality of their exercise of sovereign rights. The system must be philosophically and logically worked out from the legal point of view or it will result in confusion. I do not say this in disparagement of the system, but only as a reminder that often that which appears simple is exceedingly complex when analyzed. It is needless, however, to say this to a body of jurists whose experience has taught them that difficulties are only too often hidden in a statute or a treaty provision, which seems at first plain and easy of enforcement. Personally, I believe that a definite legal formula can be found to bring the mandatory system into harmony with the conception of sovereignty, and the determination of international rights and obligations. But I am not prepared at this time to propound a theory to meet fully the situation, which possesses novel features, to say the least.

In addition to the variety of questions thus raised in connection with the idea of mandates, the principles governing the establishment of international servitudes will require careful study in order that they may be more clearly formulated than they have been in the past. While there have been in certain instances rights of way over territory, the rules applicable to them have not been as fully defined as in the case of the common use of international waterways and of special rights in territorial waters. The new theory of servitudes on land differs from the old, which was based on expediency and mutual advantage, in that the new depends on an assertion of right which arises from an asserted principle that a nation ought not to be against its will barred from the sea, the common property and highway of mankind, and thus deprived of the opportunity to engage in ocean-borne commerce. How far this principle should go in support of the right to free ports and land transit is a question which

must be answered with due regard to the rights of territorial sovereignty and national safety.

I might expand the list of subjects for consideration suggested by the Treaty of Peace which will invite the learning and wisdom of those who will, I sincerely hope, be charged with the codification of the principles of international law. Even if I subject myself to the charge of repetition, let me say that I most earnestly advocate the formulation of such a code by an international conference of jurists and publicists. With a definite standard of legal rights sanctioned by the nations the administration of international relations as well as the administration of international justice will become more consistent and less a prey to expediency and political opportunism.

There is one other subject of a legal character of which I desire to speak because it has excited much general discussion at home and abroad, and been the cause of some very intemperate and ill-considered expressions of opinion. I refer to the trial of the former German Emperor. I have a personal interest in that subject because it was my lot to preside over the Commission on Responsibilities constituted by resolution of the Conference on the Preliminaries of Peace and charged, among other things, with a consideration of the action which should be taken in regard to individuals responsible for the war and for violations of the laws and customs of war.

The Commission consisted of fifteen members, two named, by each of the following powers: The United States, the British Empire, France, Italy and Japan, and one member each for Belgium, Greece, Poland, Roumania and Serbia. My American colleague was Dr. James Brown Scott. Sir Gordon Hewart, the Attorney General of England, and Sir Ernest Pollock, the Solicitor General, alternated with each other as head of the British delegation. Among the other members were the jurisconsults Larnaude of France and Rolin-Jacquemyns of Belgium, Mr. Politis, the Greek Minister of Foreign Affairs and the Right Honorable W. F. Massey, the Prime Minister of New Zealand.

The Commission took up its work through the medium of three sub-Commissions and after two months of deliberations submitted its report subject to certain reservations by the American and Japanese delegations which were set forth and explained in separate memoranda annexed to the report.

It was apparent at the very beginning of our sessions that certain members of the Commission were determined before everything else to bring the Kaiser to trial for a criminal offense before an international high tribunal of justice to be constituted for the purpose primarily of determining his guilt and imposing upon him a suitable penalty for his crimes. There were three charges which could be urged against him, namely, that he was responsible for the war, that he was responsible for the violation of the neutrality of Belgium and Luxemburg, and that he was chargeable with the flagrant violations of the laws and customs of war perpetrated by the armed forces of Germany.

The first two charges were the ones which appealed most strongly to public opinion and aroused the bitterest indignation both in Europe and America. That any individual could plunge the whole world into such years of suffering resulting in the death of millions of human beings and the waste of billions of treasure, in the disorganization of society and the bankruptcy of nations, and go scot free outraged mankind's sense of justice. From everywhere arose the cry for vengeance. It was under this pressure of popular demand and handicapped by the announced purpose of certain of its members to punish the Kaiser that the Commission began its task of studying the question of his criminal responsibility. From every point of view the question was examined and the arguments for and against his trial were considered, but in the end it was unanimously decided that a report could not be made charging the Kaiser with legal criminality for beginning the war or for invading Belgium and Luxemburg. It was recognized that he had committed a great moral crime, an unpardonable offense against humanity, but the Commission was forced to find that there was no positive law declaring acts such as he had committed to be criminal and imposing a penalty on the perpetrator. The decision was reached with reluctance because of the firm conviction that the German ruler was guilty, although his guilt was not of a nature which could be declared and punished by a judicial tribunal.

The conclusions reached by the Commission read as follows:

"1. The acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal.

"2. On the special head of the breaches of the neutrality of Luxemburg and Belgium, the gravity of these outrages upon the principles of the law of nations

and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

"3. On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures and even to create a special organ in order to deal as they deserve with the authors of such acts.

"4. It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law."

The report in this declaration emphasizes the respect of the Commission for the supremacy of law over the natural impulse to be avenged upon one who richly deserved to pay the penalty for his evil deeds.

The third charge as to "violations of the laws and customs of war" was the one on which an agreement could not be reached. The conclusion in the report is thus stated:

"All persons belonging to enemy countries, however high their positions may have been, without distinction of rank, including Chiefs of States, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."

By this conclusion it is evident that the Kaiser might be brought to trial before a court with criminal jurisdiction, although to establish his guilt as a violator of "the laws and customs of war or laws of humanity" would be no easy matter provided the principles of legal justice and the common rules of evidence were observed by the tribunal before which he was brought. That he should be declared innocent of the charge was by no means an impossibility, if his judges were impartial and not merely instruments of vengence.

To this conclusion the American members of the Commission dissented, stating their position thus in their memorandum:

"The American representatives are unable to agree with this conclusion, in so far as it subjects to crimnal, and, therefore, to legal prosecution, persons accused of offenses against 'the laws of humanity,' and in so far as it subjects Chiefs of States to a degree of responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations.

"Omitting for the present the question of criminal liability for offenses against the laws of humanity, which will be considered in connection with the law to be administered in the national tribunals and the High Court, whose constitution is recommended by the Commission, and likewise, reserving for discussion in connection with the High Court the question of the liability of a Chief of State

to criminal prosecution, a reference may properly be made in this place to the masterly and hitherto unanswered opinion of Chief Justice Marshall, in the case of the *Schooner Exchange* v. *McFadden and Others* (7 Cranch, 116), decided by the Supreme Court of the United States in 1812, in which the reasons are given for the exemption of the sovereign and of the sovereign agent of a State from judicial process. This does not mean that the head of the State, whether he be called emperor, king, or chief executive, is not responsible for breaches of the law, but that he is responsible not to the judicial but to the political authority of his country. His act may and does bind his country and render it responsible for the acts which he has committed in its name and its behalf, or under cover of its authority; but he is, and it is submitted that he should be, only responsible to his country, as otherwise to hold would be to subject to foreign countries a chief executive, thus withdrawing him from the laws of his country, even its organic law, to which he owes obedience, and subordinating him to foreign jurisdictions to which neither he nor his country owes allegiance or obedience, thus denying the very conception of sovereignty.

"But the law to which the head of the State is responsible is the law of his country, not the law of a foreign country or group of countries; the tribunal to which he is responsible is the tribunal of his country, not of a foreign country or group of countries; and the punishment to be inflicted is the punishment prescribed by the law in force at the time of the commission of the act, not a punisment created after the commission of the act.

* * * "The American Representatives also believe that the above observations apply to liability of the head of a State for violations of positive law in the strict and legal sense of the term. They are not intended to apply to what may be called political offences and to political sanctions.

"These are matters for statesmen, not for judges, and it is for them to determine whether or not the violators of the treaties guaranteeing the neutrality of Belgium and of Luxemburg should be subjected to a political sanction."

I wish to direct your attention to this last sentence because the distinction between a political sanction and a judicial sanction determines the basis of the right to impose a penalty on the head of a foreign State.

As to all individual enemies chargeable with violations of the laws and customs of war and the laws of humanity, the report recommended the creation of a high international tribunal to try such persons as were not apprehended and tried before national courts of the Allied and Associated Powers, and who were selected for trial by a Prosecuting Commission of five members, one being named by each of the five principal powers.

The scheme thus proposed for the creation of a High International Court of Criminal Jurisdiction, with its complex machinery and necessity for national legislation to give it authority, to administer

criminal laws enacted by various nations and also to interpret and apply the laws of humanity, was a novelty to which the American representatives refused to give full approval. Early in the discussions they submitted the following memorandum on the method which they favored for bringing to justice criminals of this sort:

"1. That the military authorities, being charged with the interpretation of the laws and customs of war, possess jurisdiction to determine and punish violations thereof;

"2. That the military jurisdiction for the trial of persons accused of violations of the laws and customs of war and for the punishment of persons found guilty of such offences is exercised by military tribunals;

"3. That the jurisdiction of a military tribunal over a person accused of the violation of a law or custom of war is acquired when the offence is committed on the territory of the nation creating the military tribunal or when the person or property injured by the offence is of the same nationality as the military tribunal;

"4. That the law and procedure to be applied and followed in determining and punishing violations of the laws and customs of war are the law and the procedure for determining and punishing such violations established by the military law of the country against which the offence is committed; and

"5. That in case of acts violating the laws and customs of war involving more than one country, the military tribunals of the countries affected may be united, thus forming an international tribunal for the trial and punishment of persons charged with the commission of such offences."

In their memorandum annexed to the report, the American representatives, for the sake of reaching an agreement, conceded the possible expediency of an international commission to pass upon the military crimes affecting the nations of more than one country, because, though it was not directly in accord with their idea of mixed courts-martial, it did not contradict the principle.

The American representatives did, however, oppose the extension of the jurisdiction of such a tribunal of offences against "the laws of humanity" as was recommended in the report, first, on the ground that the submission to the Commission on Responsibilities by the Peace Conference was limited in terms to offences against "the laws and customs of war," and, second, because the laws of humanity do not constitute a definite code with fixed penalties which can be applied through judicial process. The American Commissioners thus stated the second ground for their objection:

"As pointed out by the American representatives on more than one occasion, war was and is, by its very nature, inhuman, but acts consistent with the laws

and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity."

The report of the Commission on Responsibilities, with the reservations annexed, was laid before the Conference and received the immediate consideration of the Council of Four, or, as it is often called, the Supreme Council of the Allied and Associated Governments. The decision reached by the Council is contained in Articles 227 to 230 of the Peace Treaty.

Article 227 arraigns the former German Emperor for "a supreme offence against international morality and the sanctity of treaties" and provides that a special tribunal to try him shall be constituted, composed of five judges appointed respectively by the United States, Great Britain, France, Italy, and Japan. It also declares that the tribunal in its decision "will be guided by the highest motives of international policy" and shall "fix the punishment which it considers should be imposed."

Manifestly the tribunal thus created is not a court of legal justice, but rather an instrument of political power which is to consider the case from the viewpoint of high policy and to fix the penalty accordingly. And this is clearly stated in the reply of the Council to the observations of the German peace delegates on this subject. The pertinent portion of the reply reads as follows:

"They (that is, the Council) wish to make it clear that the public arraignment under Article 227 framed against the German ex-Emperor has not a judicial character as regards its substance but only in its form. The ex-Emperor is arraigned as a matter of high international policy as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice."

This course of procedure was in accordance with the suggestion made in the American memorandum that there might be a political sanction but no judicial sanction for the offences of having caused the war and violated the neutrality of Belgium and Luxemburg.

Articles 228, 229, and 230 provided that persons accused of violating the laws and customs of war should be delivered up by Ger-

many to be tried before national military tribunals of the Allied and Associated Powers, or, where the violation affected the nationals of more than one power, then before international military tribunals composed of members of the military tribunals of the powers interested.

The recommendation of the Commission as to a general mixed commission to try such cases was rejected and the proposal of the American Commissioners in the memorandum laid before the Commission during its early sessions and repeated in its reservations was adopted by the Conference.

Furthermore no jurisdiction was conferred upon any tribunal over offences against "the laws of humanity," which had been, as I have indicated, vigorously opposed by the American representatives.

It was by no means an easy task to deal with the question of expressing properly mankind's condemnation of the individual, whose inordinate vanity and greed were chiefly responsible for the dreadful misery and waste which the world has endured and from the effects of which it will suffer for many years to come. It was difficult to subordinate the natural feeling of indignation and the instinct to do vengeance to a cold, dispassionate consideration of the character of the Kaiser's acts and their relation to law and justice. Yet one of the reasons that our country entered the war was to bring lawlessness to an end. We believed that an undeviating respect for law is essential to the prosperity and happiness of society and that the rigid maintenance of law, however distasteful it may be, is an imperative duty. It was with a determination to follow these precepts, to treat impersonally and judicially the submission of the Conference, and to avoid being influenced by our own desires or by the pressure of public sentiment that we performed our duties as the American members of the Commission on Responsibilities and filed our reservations to the report of the Commission.

I have taken a good deal of your time and, I fear, have tried your patience unduly in reviewing this question of the trial and punishment of the Kaiser, and yet the deep interest which it has excited and the various opinions expressed by jurists and laymen which have been published seemed to me to entitle it to more than a passing notice.

There is also another class of legal questions which are raised by some of the provisions of the Treaty of Peace as well as by some of the

propositions advanced at the Peace Conference. They are questions which have to do with constitutional powers and constitutional limitations. I shall not even attempt to suggest the subjects falling within this class. Those to which I have referred in detail pertain essentially to the principles and generally accepted rules of the Law of Nations and to the administration of international justice. To go beyond those subjects would be to enter the wide field of Constitutional Law. Into that field I shall not venture.

In conclusion let me emphasize by repetition what I said at the beginning of my remarks, because it seems to me that the world is approaching the most critical decision that it has had to make since history began. Let me repeat: Nationalism must be maintained at all hazards. It must not be supplanted by Mundanism. It is equally imperative that within the nation Individualism should not be subordinated to Classism. Individualism has been the great impulse to progress and liberty. It is the very lifeblood of modern civilization. Individual Rights, not Class Rights, should engage our concern and invite governmental protection wherever threatened. If we, Americans, abandon Individualism we have bartered away our birthright, we have cast aside that for which our forefathers were willing to die. The same is true of Individualism among nations. It must be maintained if the peoples of the earth are to possess patriotism, love of liberty, and that generous devotion to national ideals which have made nations great and prosperous.

Peace and contentment are found in a nation where a free people live under just laws justly administered. So peace among nations will prevail when their conduct toward one another is governed by just laws and when they submit their controversies to an impartial judiciary which will decide them according to the immutable principles of justice.

To the achievement of this great good for the present and the future we should devote our thought and endeavor. To that end we should give our earnest support to Internationalism, a true Internationalism which is founded on a deep and abiding faith in Nationalism as the essential element of the present order. To-day by common purpose and by united effort much may be accomplished. If we wait for a more propitious time, that time may never come.