EDITORIAL COMMENT

THE "UNDERSTANDINGS" OF INTERNATIONAL LAW

The Preamble of the Covenant of the League of Nations contains an implied commentary on the law of nations that warrants consideration. It reads as follows:

> The high contracting parties, in order to promote international coöperation 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 the League of Nations.

Stated in other terms, international peace and welfare are to be obtained: (1) by agreements not to fight; (2) by higher standards of diplomacy; (3) by agreements as to the meaning of international law; and (4) by a more honorable regard for the sanctity of treaty obligations. The place of international law in this "constitution" for the world is subsidiary to other considerations. It is not to be regarded as the bedrock of peace and justice.

Furthermore, the language employed, namely: "by the firm establishment of the understandings of international law as the actual rule of conduct among nations" especially challenges attention. The law of nations is to be regarded first, as not having been clearly *understood;* second, as requiring to be established; and third, as being a "rule of conduct among governments".

By implication the great system of law that has been laboriously built up by judicial action and by firmly established custom and positive consent is seriously slighted in this Preamble of the Covenant of Nations. Instead of a robust and ringing assertion of the sanctity and vigor of long-established international law, we have a feeble reference to its *understandings!*

It has been difficult to find a definition of international law that

will command general acceptance. As long as divergence of views exists regarding its very nature, regarding the distinct class of interests to which it applies, and especially the character of its sanctions, any definition is subject to criticism. For example, the criticism of the Austinian school of jurists, which would relegate international law to the field of morality, makes its definition difficult.

Thus, if the idea suggested by the Preamble of the law of nations as a rule of conduct is to be interpreted in the *moral* sense, its place becomes entirely subsidiary in the great scheme for a "Covenant of the League of Nations". If, however, as is to be hoped, the intention was to imply a *legal* rule of conduct obligatory on courts and individuals as well as on "governments", the implied definition may be accepted without objection as in accord with the views of most international law publicists.

But the term "understandings of international law" is utterly objectionable and reprehensible. It affronts especially our Anglo-Saxon conceptions of a solid system of law that has grown up by custom and consent; has been judicially recognized and interpreted; and has been crystallized, not into *understandings,* but into definite principles which may be invoked successfully in any court of justice. The law of nations may have its decided limitations and defects like other bodies of law, but it is grievously and needlessly affronted when these principles are characterized as "understandings" that require firmer establishment. This certainly is not the conception of international law repeatedly approved and asserted by decisions of the United States Supreme Court, notably in the more recent case of *The Paquette Habana* (175 U. S. 677).

One is curious to know what lay behind the thought of the draftsman who penned the phrase "understandings of international law". Did he have any conception of a definite system of law—imperfect to be sure—but in the process of orderly development? Or did he conceive of international law merely as a "gentleman's agreement" on a par with "regional understandings" referred to in another part of the Covenant, and other diplomatic, political understandings? The problem is most intriguing.

It is possible that the Hague Conventions governing the conduct of war may have had something to do with this current impression of international law as a series of understandings. The failure of some of the belligerents to observe all the provisions of these conventions,

particularly the cynical contempt shown by Germany toward such understandings, led many unthinking persons to think of international law as a broken reed.

The attempt to identify the law of war with international law proper has been largely responsible, of course, for this popular scorn. The writers on this subject have not always been clear to distinguish between the true function of international law to regulate the peaceful relations of nations, and the function of war, which is the suspension—the very negation of law.

Furthermore, conventions governing the conduct of war are truly to be regarded as understandings, inasmuch as they depend entirely on the arbitrary will of commanders on the battle-field. Unlike ordinary rules of international law which may be invoked in any court of justice, the laws of war cannot be considered by any court except one imposed by the victorious belligerent. They are substantially nothing but gentlemen's agreements or understandings depending on good sense and good faith.

If Germany had won this war, one might well have despaired concerning the future of international law. The German conception of the law governing the peaceful relations of states was controlled by a blind, selfish expediency, by a Prussian interpretation of the understandings of the law of nations. It was to prevent such a catastrophe, to safeguard the sanctity of law and lift it high above the level of mere understandings that bound the great majority of nations together against an outlaw. They refused to permit any discussion concerning the fundamental rights of nations. These were to be regarded as *law* and admitting of no misunderstandings!

The Anglo-Saxon idea of jurisprudence abhors this suggestion of basing law on discussion and understanding. It conceives of law as a natural growth and evolution from custom to code, with an admixture of statute law. It spurns judge-made law, except in the sense that the court merely recognizes rules of law already accepted in one form or another by the community. It believes in a great body of basic principles properly coördinated and cemented together into one rational system. Pure international law may be imperfect and not efficiently enforced, but it is entitled to infinite respect, and is not to be regarded as controversial in character, subject to discussion and liable to a variety of interpretations and understandings.

It is possible that the Preamble of the Covenant of the League of

Nations in employing the term "understandings of international law" contemplated its recognition by some legislative action on the part of the members of the League. It is greatly to be regretted, however, that it was not explicit in its meaning and did not clearly assert the sanctity and the vigor of that great body of international law already in existence as the true foundation of the Covenant of the League of Nations.

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THE PROVISIONS OF THE TREATY OF PEACE DISPOSING OF GERMAN RIGHTS AND INTERESTS OUTSIDE EUROPE

To understand the various parts of a treaty, one must bear in mind the theory which guided in the negotiation of the whole.

This theory cannot be found expressed in the text of the Treaty of Versailles. It must be gathered rather from the preliminaries and the context and inferred from the provisions.

I assume, without argument, that the basic theory of the treaty is self-defense. Reparation for the past and protection for the future; these two principles are combined to weaken the German military power and to render it innocuous.

The process is harsh, undoubtedly, the result crushing, and some latitude is given for better treatment upon good behavior and loyal acceptance of the conditions within the League of Nations. Moreover, the power for reparation may well have been limited because of conditions deemed essential for protection. This is killing the goose which lays the golden eggs.

With these principles in mind, let us briefly examine that portion of the treaty which disposes of German rights and interests outside of Europe, with the exception of Shantung, which is discussed by another writer.[1]

Under this heading are included: first, German colonies, and second those states where Germany had secured special rights or privileges, China, Siam, Liberia and Morocco, to which Egypt should be added.

Part IV, Section I, Article 119, reads thus: "Germany renounces

[1] See *supra*, p. 687.