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OPINION ON THE
QUESTION OF UPPER SILESIA

Written at the Request of the Government of Germany

By

DAVID HUNTER MILLER

And Transmitted by the German Government to the
League of Nations, to the Governments of Great
Britain, France and Italy and
to the Vatican.

September 25, 1921



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September 25th, 1921.

Your Excellency:

On behalf of the Government of Germany you have requested my opinion on the existing juridical situation involved in the question of Upper Silesia, in so far as the same depends upon the Treaty of Versailles, the plebiscite held thereunder, and the action of the Supreme Council in requesting the Council of the League of Nations to make a recommendation as to the frontier between Germany and Poland.

First to be considered in regard to this question of Upper Silesia are the terms, the history and the interpretation of the various provisions of the Treaty of Versailles.

Nothing is better settled in International Law than the rule that in the interpretation of a treaty the declarations of the Contracting Parties and the circumstances prior to and surrounding the execution of the treaty are not only to be taken into consideration, but are of the utmost importance. The ultimate aim in the correct interpretation of any International Agreement is to arrive at the intention of the Contracting Powers. This rule of International Law is founded on reason, and in view of the circumstances surrounding the execution of the Treaty of Versailles, its application could in no case be more appropriate than in the case of the interpretation of that document.

His Excellency
the Chancellor
Dr. Wirth
BERLIN
Wilhelmstrasse, 74

It is well known that agreement as to the basis of the Peace had been reached between Germany on one hand and the Allied Powers and the United States of America on the other, during the negotiations which preceded the Armistice of November 11, 1918.

I shall refrain from quoting at length from the documents which embody these pre-Armistice negotiations; their result is perhaps nowhere better summed up than in the work entitled "A History of the Peace Conference of Paris," edited by Professor H. W. V. Temperley and published under the auspices of the Institute of International Affairs (London, 1920), where it is said (Volume I, at page 385):

"Prior to the dispatch of the note of 5th November, the German and American Governments had reached agreement upon the fundamental point that the President's address of 8th January, 1918, and his subsequent addresses, were to be the basis of the peace. The note of 5th November embodies the memorandum of the Allied Governments; and it is this memorandum which must be viewed as the documentary embodiment of the provisions of the Agreement as to the terms of peace and principles of settlement."

Turning now to the Memorandum of the Allies, quoted in the Note addressed to the German Government by President Wilson on November 5, 1918, we find the following:

"The Allied Governments * * * declare their willingness to make peace with the Government of Germany on the terms of peace laid down in the President's Address to Congress of January 8, 1918, and the principles of settlement enunciated in his subsequent Addresses."

It was the Address of President Wilson of January 8, 1918, which embodied the famous Fourteen Points. It is accordingly clear that prior to the Armistice of November 11, 1918, a distinct and perfect Agreement had been reached between the German Government on the one hand and the Allied Powers and the United States of America on the other, and that the Fourteen Points and the subsequent Declarations of President Wilson were the basis of Peace with Germany.

Indeed, this conclusion was not only admitted by all the Governments then belligerent but was thereafter so vigorously insisted upon by all the Powers represented at the Conference of Paris, that it is irrefutable and requires no further argument. In the reply of the Allied and Associated Powers to Germany, transmitted with the covering Note of Clémenceau of June 16, 1919, it was said: (Official English Translation)

“The Allied and Associated Powers are in complete accord with the German Delegation in their insistence that the basis for the negotiation of the Treaty of Peace is to be found in the correspondence which immediately preceded the signing of the Armistice on November 11, 1918. It was there agreed that the Treaty of Peace should be based upon the Fourteen Points of President Wilson’s address of January 8, 1918, as they were modified by the Allies’ memorandum included in the President’s note of November 5, 1918, and upon the principles of settlement enunciated by President Wilson in his later addresses, and particularly in his address of September 27, 1918. These are the principles upon which hostilities were abandoned in November, 1918, these are the principles upon which the Allied and Associated Powers agreed that peace might be based, these are the principles which have guided them in the deliberations which have led to the formulation of the Conditions of Peace.”

Thus, it is to the utterance of President Wilson that we must turn in order properly to know the meaning of the Treaty of Versailles, and of those utterances there are at least two which are of special importance in regard to the question of Upper Silesia.

In the address of January 8, 1918, is found the following language as Number Thirteen of the Fourteen Points:

“Thirteen.—An independent Polish State should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.”

And in the speech of February 11, 1918 is included this language of the Four Principles:

“The principles to be applied are these:

First, that each part of the final settlement must be based upon the essential justice of that particular case and upon such adjustments as are most likely to bring a peace that will be permanent;

Second, that peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now for ever discredited, of the Balance of Power; but that,

Third, every territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival States; and

Fourth, that all well-defined national aspirations shall be accorded the utmost satisfaction that can

be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe, and consequently of the world."

Therefore, it is to this language that we must turn in considering the case of Upper Silesia. No scholastic reasoning based on technicalities of expression, no ingenious attempt to pick out here and there from the Treaty of Versailles a word a phrase, in the effort to make the worse appear the better cause, can prevail as against those noble declarations of justice and of right, which have received the assent, not only of the Allied and Associated Powers and of Germany, but of the whole civilized world.

In the light of the foregoing may now be considered the circumstances of the framing of the Treaty of Versailles. It is well known that the document was wholly written by the representatives of the Allied and Associated Powers, and that Germany had no part in its drafting. True it is that certain changes from the original proposed draft of the Treaty were made as a result of the written observations of the German Delegation, and that the most important of those changes was made in relation to Upper Silesia. None the less, the changes which were made from the proposed original draft were changes written by the representatives of the Allied and Associated Powers, and in their writing and in their drafting Germany had no part. Germany was required to make the choice either of accepting or refusing the document which was presented by the Allied and Associated Powers in its final form.

It was in respect of this decision that it was stated in the Note of the 16th June 1919 above mentioned, a Note which described itself as being the "last word" (Official English Translation). "As such the Treaty in its present form must be accepted or rejected."

It is an elementary rule of human justice embodied in every system of law with which I am familiar, whether municipal or international, that under such circumstances the terms of a document are to be taken, in any case of possible doubt, most strongly in favor of the party not concerned in the drafting of the paper.

In the document presented on the 7th May, 1919, by the Allied and Associated Powers to the German Delegation, entitled "Conditions of Peace" or, in other words, in the first proposed draft of the Treaty, provision was made for the cession by Germany to Poland of Upper Silesia. This proposal evoked an earnest protest from the German delegation under the date of 29th May, 1919, a protest which is translated in the work of Professor Temperley above mentioned (Vol. II page 287) as follows:

"This (conflict of the provisions of the draft Treaty in respect to Poland with President Wilson's principles) particularly applies to Upper Silesia. The proposed separation of the greater part of this district from Germany constitutes a quite unjustifiable inroad into the geographical and economic structure of the German Empire.

Since 1163 Upper Silesia has had no political connexion with the Polish Empire. There are no national Polish traditions or memories in Upper Silesia * * * Poland cannot assert any claims for the cession of Upper Silesia, especially not such as are based on the principles of President Wilson. The districts of Upper Silesia demanded for Poland are not inhabited by an indisputably Polish population. The will of the population has been clearly expressed in the elections of the Reichstag in 1903 and 1907. * * * Furthermore, after the collapse of the German power, signs of the predominantly German character of Upper Silesia were not missing. * * * The Polish language

(High Polish) is not the language of the Upper Silesian, who speaks a Polish dialect (Wasserpölnisch). This dialect * * * is not a sign of nationality, especially not a contradiction to the consciousness of German nationality. * * * Upper Silesia owes all her intellectual and material development to German activity. * * * Germany cannot dispense with Upper Silesia, whilst Poland is not in need of it. * * * The cession of Upper Silesia to Poland is not in the interest of the Upper Silesian population. Living conditions in Upper Silesia especially in the field of health and social precautions are incomparably better than those in the adjoining Poland where legislation for the protection of the working people is only just being agitated. The cession of Upper Silesia to Poland is also not in the interest of the remaining States of Europe and of the world, for it is certain to create new elements of discord and antagonism. * * * This will greatly endanger the peace of Europe and of the world. It is in the interest of the Allied and Associated Powers themselves to leave Upper Silesia with Germany, for Germany can meet her liabilities resulting from the world war only in conjunction with Upper Silesia, and never without her. For this reason alone Germany cannot consent to a cession of Upper Silesia.”

Now, as to this German protest, it is to be observed that it very correctly takes as its basis the principles enunciated by President Wilson in the Declarations hereinabove quoted; for the German protest expressly relies upon the language of the thirteenth Point and upon the “interest of the populations concerned” mentioned in the third of the Four Principles of the speech of President Wilson of February 11, 1918.

The expressions of the German protest are of the highest importance for the reason that these expressions were

explicitly accepted by the Allied and Associated Powers as being "the basis, the reason, and the justification of the change which was made in the Treaty in respect of Upper Silesia. The precise language in this regard employed by the Allied and Associated Powers was that "the German note has established a case for rectification" (Official English Translation).

For in the note of Clémenceau of 16th June, 1919, it was said (Official English Translation) :

"At the same time in certain cases the German Note has established a case for rectification, which will be made; and in view of the contention that Upper Silesia though inhabited by a two to one majority of Poles (1,250,000 to 650,000, 1910 German census) wishes to remain a part of Germany, they are willing that the question of whether Upper Silesia should form part of Germany, or of Poland, should be determined by the vote of the inhabitants themselves."

Thus is found not only a demand by Germany that the Conditions of Peace be changed to accord with the agreed basis of the peace, but also a formal assent by the Allied and Associated Powers to that demand. Accordingly there exists an express agreement between the Parties to the Treaty confirming the pre-Armistice Agreement to the same effect pursuant to which the question of Upper Silesia must be resolved along those lines of justice and of right embodied in the declarations of President Wilson, that is to say, that firstly, there should be no cession of *German* territory, secondly, that territory not indisputably Polish should be retained by Germany, and lastly, that there should be no cession except in the interest of the populations concerned.

The formal recognition by the Allied and Associated Powers of this specific agreement with Germany, was transmitted by them to the German Delegation at the time of the transmission of the text of the Treaty itself, a text which, in so far as its provisions relating to Upper Silesia are concerned, had never before been seen by the German Delegation, a text which was transmitted with an Ultimatum, only twelve days before the signature of the Treaty. Obviously, that specific agreement between the Allied and Associated Powers and Germany must be regarded as the point of departure from which any conclusions in the matter of Upper Silesia must be reached, and as overriding *in favor of Germany* any possible doubt, ambiguity, or obscurity in the voluminous and detailed text of the Treaty itself.

So the provisions of the "Conditions of Peace" in regard to Upper Silesia were abandoned, and in lieu thereof there were inserted in the Treaty of Versailles provisions for a plebiscite in the area of Upper Silesia. But before coming to the necessary detailed examination of these Treaty provisions, it will be desirable, first: to examine the point of view, the attitude of mind, of which those Treaty provisions were drawn, and second: to make a brief summary of the result of the plebiscite in Upper Silesia held on March 20 last in accordance with the Treaty terms.

In the reply of the Allied and Associated Powers and the covering Note of the 16th of June, 1919, appears clearly the thought of the Allied and Associated Powers in regard to Upper Silesia. Their idea was that the territory was "indisputably" Polish. They said in the extract above quoted that it was Polish by two to one. They cited the figures of the German census as justifying this conclusion. The representatives of the Allied and Associated Powers relied of course in reaching these conclusions upon the information furnished to them by their experts. The in-

formation may have been correct, but the conclusions were wrong, hopelessly, vitally wrong, and were shown to be wrong by the plebiscite vote in Upper Silesia which was nearly seven to four German. But the thought of the Allied and Associated Powers, disclosed not only in the discarded provisions of the "Conditions of Peace," but also in the plebiscite provisions of the Treaty of Peace in regard to Upper Silesia, rested wholly upon those fundamentally erroneous conclusions.

It is indeed of great importance to observe that the Allied and Associated Powers based the Treaty provisions regarding Upper Silesia squarely and solely on this mistake of fact. They expressly declared that Poland had no legal claim to the cession of Upper Silesia, they expressly recognized that any claim of Poland to Upper Silesia was vitally different from a claim of Poland to any part of the territories dismembered by the Partition, and they expressly rested the provisions of the Treaty upon the emphatic assertion that "the majority of the population is indisputably Polish," an assertion which the majority of the population have repudiated with even greater emphasis.

Nothing could show more clearly the thought of the Allied and Associated Powers in this regard, and, in the light of subsequent events, nothing could show more clearly that the Allied and Associated Powers contemplated that Upper Silesia should be retained by Germany in the event of a majority vote in favor of Germany, impossible or improbable as that event may have been deemed by the Allied and Associated Powers than the following language contained in the above mentioned Reply to the German Delegation (Official English Translation):

“A considerable portion of the German answer is devoted to the question of Upper Silesia. It is recognised that the problem here differs from that in Posen and West Prussia they were (*sic*) for the reason that Upper Silesia was not a part of the Polish territories when dismembered by the Partition. It may be said that Poland has no *legal* claim to the cession of Upper Silesia: it is emphatically not true that she has no claim which could be supported on the principles of President Wilson. In the district to be ceded, the majority of the population is indisputably Polish. Every German book of reference, every school-book, teaches the German child that the inhabitants are Polish in origin and in speech. The Allied and Associated Powers would have been acting in complete violation of the principles which the German Government itself professes to accept had they left unregarded the Polish claims to this district.

“However, the German Government now contest these conclusions. They insist that separation from Germany is not in accordance with the wishes or the interests of the population. Under these circumstances the Allied and Associated Powers are willing to allow the question to be determined by those particularly concerned. They have therefore decided that this territory shall not be immediately ceded to Poland, but that arrangements shall be made to hold a plebiscite there.”

Since the substance of the above cited German protest of 29 May, 1919, is now supported by the facts, it would seem that the claim of the German protest should likewise now be realized in the result.

The plebiscite in Upper Silesia was held on March 20 last. The result was a vote for Germany of 717,122 and for Poland of 483,514. The argument might well stop here. With an overwhelming majority vote in Upper Silesia for Germany, it is difficult to imagine, *a priori*, any contention

that Germany should make any cession to Poland of the territory involved.

But in view of various arguments which have been put forth looking toward a cession by Germany of a portion of Upper Silesia, and particularly in view of the proceedings of the Supreme Council, a further brief statement of the results of the plebiscite should be made.

The only districts which gave Polish majorities of any appreciable percentage were Tarnowitz, Pless and Rybnik. In Gross-Strehlitz, the vote was substantially evenly divided. In the so-called industrial basin, there are in reality five district areas, as follows: Beuthen, (including of course the city of Beuthen which is within the area), Kattowitz (including of course the city of Kattowitz which is within the area), Königshütte, Gleiwitz and Zabrze or Hindenburg. All five of these district areas gave a majority vote in favor of Germany, as did all the other districts in the plebiscite area not specially mentioned.

While in the view that seems to me to be correct, the vote analyzed by districts has no bearing on the question involved, it has been alluded to in order to clarify the subsequent discussion. I shall, however, not dignify by any argument of mine, the absurd contention that the vote of a town, located in the centre of a district area, may somehow be disregarded in looking at the vote of the district. From any possible point of view whatever of the Treaty of Versailles, such a thought needs only its statement to complete its own refutation.

I come now to a detailed consideration of the language of the Treaty of Versailles.

By the "Conditions of Peace" (the proposed draft of May 7, 1919), Upper Silesia is to be ceded to Poland (Articles 27, 87). But by the definitive Treaty of Versailles it is provided in Article 88 as follows:

“In the portion of Upper Silesia included within the boundaries described below, the inhabitants will be called upon to indicate by a vote whether they wish to be attached to Germany or to Poland: (Here follows the boundary description.)

The régime under which this plebiscite will be taken and given effect to is laid down in the Annex hereto.

The Polish and German Governments hereby respectively bind themselves to conduct no prosecutions on any part of their territory and to take no exceptional proceedings for any political action performed in Upper Silesia during the period of the régime laid down in the Annex hereto and up to the settlement of the final status of the country.

Germany hereby renounces in favour of Poland all rights and title over the portion of Upper Silesia lying beyond the frontier line fixed by the Principal Allied and Associated Powers as the result of the plebiscite.”

Following Article 88 is an Annex of six paragraphs.

The first three of these six paragraphs of the Annex provide for the evacuation of the plebiscite area, its government by an International Commission and the powers of that Commission; those three paragraphs of the Annex are not material to this discussion.

Paragraph 4 of the Annex provides for the time of the vote, prescribes the qualifications of the voters and then continues:

“Every person will vote in the commune where he is domiciled or in which he was born, if he has not retained his domicile in the area.

The result of the vote will be determined by communes according to the majority of the votes in each commune.”

Paragraphs 5 and 6 of the Annex are as follows:

5.

“On the conclusion of the voting, the number of votes cast in each commune will be communicated by the Commission to the Principal Allied and Associated Powers, with a full report as to the taking of the vote and a recommendation as to the line which ought to be adopted as the frontier of Germany in Upper Silesia. In this recommendation regard will be paid to the wishes of the inhabitants as shown by the vote, and to the geographical and economic conditions of the locality.”

6.

“As soon as the frontier has been fixed by the Principal Allied and Associated Powers, the German authorities will be notified by the International Commission that they are free to take over the administration of the territory which it is recognised should be German; the said authorities must proceed to do so within one month of such notification and in the manner prescribed by the Commission.

Within the same period and in the manner prescribed by the Commission, the Polish Government must proceed to take over the administration of the territory which it is recognised should be Polish.

When the administration of the territory has been provided for by the German and Polish authorities respectively, the powers of the Commission will terminate.

The cost of the army of occupation and expenditure by the Commission, whether in discharge of its own functions or in the administration of the territory, will be a charge on the area.”

Another Article of the Treaty of Versailles immediately relating to Upper Silesia is Article 90, which is in the following terms:

“Poland undertakes to permit for a period of fifteen years the exportation to Germany of the products of the mines in any part of Upper Silesia transferred to Poland in accordance with the present Treaty.

Such products shall be free from all export duties or other charges or restrictions on exportation.

Poland agrees to take such steps as may be necessary to secure that any such products shall be available for sale to purchasers in Germany on terms as favourable as are applicable to like products sold under similar conditions to purchasers in Poland or in any other country.”

It will be seen that the two essential features of the provisions of the Treaty which have just been quoted are first that a vote shall be taken in the plebiscite area, and second that the final determination of the frontier between Germany and Poland shall be made by the Principal Allied and Associated Powers, or in other words, by the Supreme Council.

The Supreme Council has not definitely acted under these provisions of the Treaty of Versailles, but has referred the question of Upper Silesia to the Council of the League of Nations for a recommendation as to the frontier.

While only the bare results of the meetings of the Supreme Council are officially announced, it appears that that Body received at its session of August 9 last, a Report of British, French, and Italian experts, laying down the following three principles deduced by them from the provisions of the Treaty of Versailles:

“1. Le traité de Versailles (article 88 et annexe) a prescrit que la territoire plébiscitaire serait ‘partagé’ entre l’Allemagne et la Pologne; on ne saurait donc invoquer la majorité obtenue dans l’ensemble du territoire par une des parties pour lui attribuer la totalité de la Haute-Silésie;

2. Le traité a prescrit que, pour le tracé de la frontières germano-polonaise, il devra être tenu compte en premier lieu des vœux des habitants exprimés dans la consultation populaire et ensuite de la situation géographique et économique des localités;

3. C’est du vote par communes que l’on doit s’inspirer dans le tracé de la frontière.”

It further appears that the Supreme Council approved this Report and endeavored without success to agree upon a compromise line dividing Upper Silesia between Germany and Poland.

The view of the British, French, and Italian experts, expressed in the three principles quoted above, may therefore be said to be the basis of the discussions by the Supreme Council of the question of Upper Silesia after the plebiscite and until the time of the reference of the matter by the Supreme Council to the Council of the League of Nations.

That Report of the British, French and Italian experts, which must be admitted to have been made by eminent jurists, certainly requires the most grave consideration.

The fundamental principle of the Report of the experts is that numbered first. It is there laid down that the Treaty of Versailles (Art. 88 and Annex) provides that the plebiscite area is to be divided between Germany and Poland, and that the majority of the vote in the area as a whole is not controlling.

Above has been quoted, I think, every word of the

Treaty of Versailles which could possibly be cited in support of the first principle stated in the Report of the experts.

I shall now proceed to an examination of the correctness of the conclusions reached in the report of the experts, looking in a precise way at the words of the Treaty of Versailles.

The last paragraph of Article 88 of the Treaty of Versailles speaks of the possible cession of Germany of "the portion of Upper Silesia lying beyond the frontier line fixed by the Allied and Associated Powers as the result of the plebiscite."

It has been argued that this phrase as a whole and the use of the word "portion" in that phrase in particular, supports the view that the Treaty of Versailles contemplates a division of the plebiscite area in Upper Silesia. Clearly this is not so, and the word "portion" has no such tendency, as the whole plebiscite area of Upper Silesia is, strictly speaking, a "portion" of Upper Silesia, as is indeed expressly stated in the first paragraph of the same Article 88.

The last clause of paragraph 4 of the annex, and paragraph 5, provide that the result of the vote shall be determined by communes, and communicated by communes to the Supreme Council. I cannot give to this word "communes" the weight that seems to be attached to it in the above mentioned report of the experts.

The words of Paragraphs 4 and 5 of the Annex, and the references therein to communes, relate merely to the modalities of the voting, and not at all to the principles of self-determination stated by the Allied and Associated Powers to be the basis of the plebiscite provisions for Upper Silesia. Obviously the rule laid down that a voter must vote in the commune of his domicile or of his

birth requires the taking of the votes by communes, the counting of the votes by communes, and the reaching of the total vote by adding all of the votes taken in all of the communes. It may be repeated that all such provisions prescribe merely the necessary modalities of the vote.

The Report of the experts appears to intend to give some weight to the number of communes, as such, voting by majority one way or the other. No such conclusion can possibly be supported. Under such a theory, a mere rearrangement of voting districts might destroy the effect of any majority; and in the present case, the extraordinary results of the theory show how impossible and unsound it is; for example, it would require the ignoring of the fact that some communes contain 40,000 voters or more, and others less than 500.

Perhaps mention should be made of the expression "the frontier of Germany in Upper Silesia" (Annex Par. 5), particularly of the use of the word "in" (French text "en").

It has been argued that to speak of a frontier "in" Upper Silesia means that the plebiscite area is to be divided. No argument could be more fallacious; for even if the majority voting in the plebiscite area had been Polish, and even if the plebiscite area had been assigned to Poland, the frontier of Germany would still have been "in" Upper Silesia, as the first paragraph of Article 88 of the Treaty shows.

Indeed, any argument based on the use of the preposition "in," as against the fundamental principles of the Peace, would seem obviously to be carrying technical reasoning to an unwarranted as well as to an impossible length.

Nor does the last sentence of Paragraph 5 of the Annex

lay down any principle of division of territory, in speaking of "the geographical and economic conditions of the locality" as well as of the wishes of the inhabitants. The precise expression appears elsewhere in the Treaty (*e. g.*, Articles 95 and 97) and perhaps was inserted as embodying the following "principle" expressed by the Commission on Polish affairs of the Conference of Paris in its first Report (see page 2 of that Report, English print) :

"that rectifications of the frontier, in some places in favour of the Poles and in others in favour of the Germans, be made where the ethnic facts are outweighed by the other facts and principles involved."

That Commission on Polish Affairs sat under the following terms of reference of February 26, 1919:

"That the question of the boundaries of the Polish State shall be referred for examination and report by the Committee set up by the Preliminary Peace Conference in Paris for the consideration of Polish affairs."

Neither do the provisions of Paragraph 6 of the Annex, regarding the taking over the administration of the plebiscite area either by Germany or by Poland, as the case might be, support any argument for the division of Upper Silesia under the circumstances of the plebiscite.

Indeed, it is to be remembered that both Article 88 of the Treaty and the Annex following that Article were inserted in the Treaty of Versailles sometime between May 29, 1919, the date of the German Protest, and June 16, 1919, the date of the Reply of the Allied and Associated Powers. The provisions of the Annex are in large part simply copied in substance and, indeed, almost literally

from other portions of the Treaty (*e. g.*, Articles 95 and 97). As was shown earlier in my discussion, the thought of the Allied and Associated Powers was that the plebiscite area would certainly, by a large majority, vote Polish; and even if there was vaguely considered to exist the possibility of some rectification of the frontier of the plebiscite area after such Polish vote, in view of the circumstance that three Kreise and parts of two others in Upper Silesia had been excluded from that area, this fact, if it be a fact, could not support any argument for the division of the plebiscite area.

Nor does Article 90 of the Treaty advance the case for the division of Upper Silesia. It provides for German rights *after* a cession to Poland of Upper Silesia, if such a cession should take place. It is another indication of the view of the Allied and Associated Powers that the vote in Upper Silesia would go Polish. This Article 90 was expressly asserted in the Reply of the Allied and Associated Powers to be a concession in favor of Germany, and therefore cannot now be deemed to furnish an argument against her.

The expression in Article 90, "any part of Upper Silesia transferred to Poland," does not look toward a division of the plebiscite area, but very accurately takes note of the fact that the plebiscite area did not include the whole of Upper Silesia (Article 88); the said expression, in taking note of the sovereignty of Germany, in any event, over the German portion of Upper Silesia not within the plebiscite area, is therefore technically more correct than would have been the use of any such expression as "throughout Upper Silesia."

I have now examined in detail all of the pertinent language of the Treaty of Versailles which might possibly be used in argument in favor of the view of the experts

that the Treaty of Versailles contemplates the division of Upper Silesia between Germany and Poland; and from this detailed and technical examination it appears to me that the view of the experts is not to be supported, and that the first of the three principles stated by them must be laid aside as erroneous.

This being the case, the second and third of the above cited principles of the experts need not further be discussed.

Thus from the narrow and technical point of view of the foregoing discussion, I have shown that the argument in favor of any division of Upper Silesia cannot be supported.

But the question of Upper Silesia is not properly to be looked at from any narrow or technical point of view. It is a question involving great human and national rights, and the broad principles upon which it should justly be determined, and upon which the Parties to the Treaty of Versailles expressly agreed that it should be determined, are those announced in the utterances of President Wilson.

Turning to those utterances, we find in the Thirteenth Point, President Wilson limits the territories of Poland to those containing "indisputably Polish populations." In the address of February 11, 1918, is found the same expression, "indisputably Polish peoples who lie contiguous to one another." To call the Upper Silesians "indisputably Polish," and to award to Poland a cession from Upper Silesia as "indisputably Polish," would be such a direct contradiction of the principles upon which the Peace was negotiated, as to shock the conscience of the world.

Nor can any decision of the question of Upper Silesia by way of adjustment or compromise and as a political

makeshift be admitted. The ringing words of President Wilson above quoted forbid this in advance:

“Every territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival States.”

The indivisibility, the unity of Upper Silesia was expressly admitted by the Allied and Associated Powers. Doubtless that unity was admitted under the mistaken idea that the vote would be Polish, but it was none the less distinctly admitted. In the covering Note of June 16, 1919, signed by M. Clémenceau in behalf of the Allied and Associated Powers, the question of the Note was expressly stated to be

“whether Upper Silesia should form part of Germany, or of Poland.”

Could any statement be more clear, more precise? Here is no talk of districts, of basins, of communes, but a direct statement of the decision of the Allied and Associated Powers, imposed upon and accepted by Germany.

Indeed, the fundamental error of the Allied and Associated Powers, and possibly the reason why at the Conference of Paris they declared the unity of Upper Silesia, is frankly admitted by M. Briand, who is quoted in *Le Temps* of August 11 last as declaring:

“Et même, quand on a décidé de tenir compte des réclamations allemandes et accordé le Plébiscite, c'était avec l'idée unanime que la population était polonaise de langue et de race.”

That idea of the Allied and Associated Powers is expressed with emphasis by the learned Professor Lord, of Harvard University, who was an American territorial adviser on Polish affairs at the Conference of Paris, and who is certainly not unfavorably disposed to any just aspirations of Poland.

In the work "Some Problems of the Peace Conference" (Cambridge, U. S. A., 1920) written before the plebiscite in Upper Silesia, Professor Lord says (p. 186) :

"It (a cession of Upper Silesia) was a sacrifice that could be fairly demanded only if the majority of the population in Upper Silesia clearly and unmistakably desired union with Poland."

And again in the work "What Really Happened at Paris" (New York 1921) also written before the plebiscite, Professor Lord says (pp. 1, 80, 81) :

"It could well be argued that so great a sacrifice could not fairly be proposed unless it was certain that the majority of the population desired union with Poland."

I might pass without notice assertions which have been made as to the relative value in the plebiscite of the votes of different classes of individuals; certainly it is sufficient to cite the following just observation of M. Briand (*Le Temps*, August 11, 1921) :

"Le vote a eu lieu le 20 mars dernier. Tout le monde est d'accord pour reconnaître qu'un vote est un vote et que la voix d'un ouvrier a la même valeur que la voix d'un paysan."

Examination of the votes of different districts of Upper Silesia would only obscure the discussion of the real question. In a summary way, I have above mentioned the results of the plebiscite. There are a few districts in which there is a comparatively small Polish majority. This is wholly immaterial under the principle of self-determination.

Only for a comparatively brief period before 1163 did Upper Silesia form a part of Poland, and the Poland of seven and eight centuries ago can hardly be regarded as being in reality the Poland of later times. During perhaps three of the six centuries following, Poland was a Great Power, but, during all that time Upper Silesia remained German soil and is German soil today, as it has been for 750 years past.

Under such circumstances, the idea that portions of a State should be, so to speak, sliced off, and given to another State, at the wish of a small number of inhabitants who have crossed the frontier and live near the boundary, must be wholly rejected. Such an idea forms no part of the principles agreed upon by the Parties to the Treaty of Versailles as applicable to the case of Upper Silesia. Such an idea would not only be unjust, but as the Council of the League of Nations has itself said, would be "incompatible with the very idea of the State as a territorial and political unity."

That decision of the Council of the League of Nations was taken in the case of Sweden and Finland regarding the Aaland Islands; islands which are separated from Finland physically, and the population of which practically unanimously desired union with Sweden.

The Council of the League of Nations decided unanimously against the separation of the Aaland Islands from Finland and adopted the report of the Commission of

Jurists. This action of the Council of the League of Nations and the terms of the Report are conclusive against any division of Upper Silesia. The whole Report (Document du Conseil B.7.16 Avril 1921) is most instructive, but only a brief extract can be quoted (pp. 27, 28) :

“* * * it is just this principle of free determination (or self-determination) which is, as the Swedish memorandum states, at the bottom of the Aaland question.

* * * * *

“Let us turn to the question of principle as it stands in relation to the Aaland problem bearing in mind that Finland has existed as a State for a century with the same frontiers, in that she has given striking proof of her national strength and solidarity. It is possible to admit as an absolute rule that a minority of the population of a State which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another state or to declare its independence? The answer can only be in the negative. To concede to minorities either of language or religion or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.

“The idea of justice and of liberty embodied in the formula of self-determination, must be applied in a reasonable manner to the relations between States and the minorities they include. It is just that the ethnical character and the ancient tradi-

tions of these minorities should be respected as much as possible, and that they should be specially authorized to practice freely their religion and to cultivate their language. This postulate marks one of the most noble advances of modern civilization and, as it is clear that there can be no lasting peace apart from justice, constitutes one of the most powerful means of strengthening peace and combating hatred and dissensions both within the State and in international relations. But what reasons would there be for allowing a minority to separate itself from the State to which it is united, if this State gives it the guarantees which it is within its rights in demanding for the preservation of its social, ethnical or religious character? Such indulgence, apart from every political consideration, would be supremely unjust to the State prepared to make these concessions."

The question of Upper Silesia was referred to the Council of the League of Nations by a resolution of the Supreme Council on the date of August 12th, 1921, as follows:

"Le Conseil Suprême, avant de statuer sur la fixation de la frontière entre l'Allemagne et la Pologne en Haute Silésie, conformément à l'Article 88 du Traité de Versailles, décide, par application de l'Article 11, paragraphe 2, du pacte de la Société des Nations, de soumettre au Conseil de la Société les difficultés que présente la fixation de cette frontière et de lui demander de vouloir bien lui faire connaître la solution qu'il recommande sur le tracé de la ligne qu'il appartient au principales puissances alliées et associées d'établir.

En raison de la situation en Haute Silésie, le Conseil de la Société des Nations sera prié de vouloir bien considérer cette affaire comme étant de grande urgence."

Paragraph 2 of Article 11 of the Covenant of the League of Nations reads:

“It is also declared to be the friendly right of each member of the League to bring to the attention of the assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.”

The Council of the League of Nations has accepted the reference.

While the question of Upper Silesia before the League of Nations may perhaps be technically not a cause to which Germany is a party in the legal sense, yet it is a question in which Germany is vitally interested in every real sense, not only because of the interest of German peoples present and future, but also and particularly at this time because of the obligations of Germany to other powers.

By the very terms of the reference by the Supreme Council, the question of Upper Silesia is one which is not merely local or of European interest, but of worldwide importance; and not only is the question one which, in the judgment of the Supreme Council,

“threatens to disturb international peace or the good understanding between nations upon which peace depends,”

but is one in which the decision of the Council of the League of Nations is in reality final, so far as the Supreme Council is concerned.

In the House of Commons on August 16th last, Mr. Lloyd George declared that France, Italy, Japan and Great Britain had agreed to accept the recommendation of the Council of the League of Nations in the matter of Upper Silesia. So that recommendation of the Council of the League of Nations will require only the subsequent formal approval of the Supreme Council, pursuant to the agreement to give that formal approval, already made by the four Powers.

In the same speech of August 16th last, Mr. Lloyd George also said: (London *Times*, August 17, 1921)

“It is the most important question that has yet been referred to the League, and undoubtedly the reputation, the position, and the influence of the League will be considerably enhanced if it successfully deals with this most complicated problem. The only other observation that I should like to make about it is this. Now that it has been referred the whole question goes there and not a part of it. What I mean is that they are not bound in the least by any proposals or counter-proposals made either by the French or the Italians, or by ourselves, with a view to effecting an arrangement. There were a good many things proposed with a view to a compromise. The French are not in the least bound by any suggestion which they made with a view to meeting us.

On the other hand, the Germans are not bound by any proposal made by the Italians or ourselves, and the whole question of Upper Silesia will be dealt with on the basis of the Treaty, and will be heard by this Tribunal.”

So very properly the League of Nations is wholly free in the question of Upper Silesia. The League is not bound by any so-called attempt at compromise or by any

line drawn on a map with the idea of reconciling the conflicting political interests and aspirations of Powers not territorially concerned in this matter. Neither is the League of Nations bound by any report submitted to the Supreme Council by experts of the four Powers or by others.

On the contrary, the League of Nations is under a solemn duty to examine from the very foundation the fundamental questions of human right and justice which are involved in the question of Upper Silesia.

I need not prolong this opinion by an attempt to indicate the gravity of the question which confronts the League of Nations; not only are involved the rights of millions of peoples now living and hereafter to be born, but perhaps of greater importance, there are involved those ideals of a better world, of a new era, of a reign of justice, toward which the souls of all mankind are turned with trembling hope.

In such a case the League of Nations may well regard those aims of the League which are mentioned in the preamble of the Covenant:

“The firm establishment of the understandings of international law as the actual rule of conduct among Governments and
the maintenance of justice and the scrupulous respect for all treaty-obligations in the dealing of organized peoples with one another.”

From the foregoing examination of the question of Upper Silesia and the consequent observations thereon but one conclusion can result.

It is my considered opinion, Your Excellency, that in right, in justice and in law, Germany is indubitably entitled to retain, as an integral part of German territory, the

whole of the plebiscite area of Upper Silesia, and I am further of the opinion that the recommendation of the Council of the League of Nations to the Supreme Council in the matter of Upper Silesia should be to the effect stated.

I have the honor to remain, Your Excellency,

Faithfully Yours,

DAVID HUNTER MILLER.



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