CONTRIBUTIONS TO INTERNATIONAL LAW AND DIPLOMACY

EDITED BY

L. OPPENHEIM, M.A., LL.D.

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THE LEAGUE OF NATIONS AND ITS PROBLEMS

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THREE LECTURES

BY

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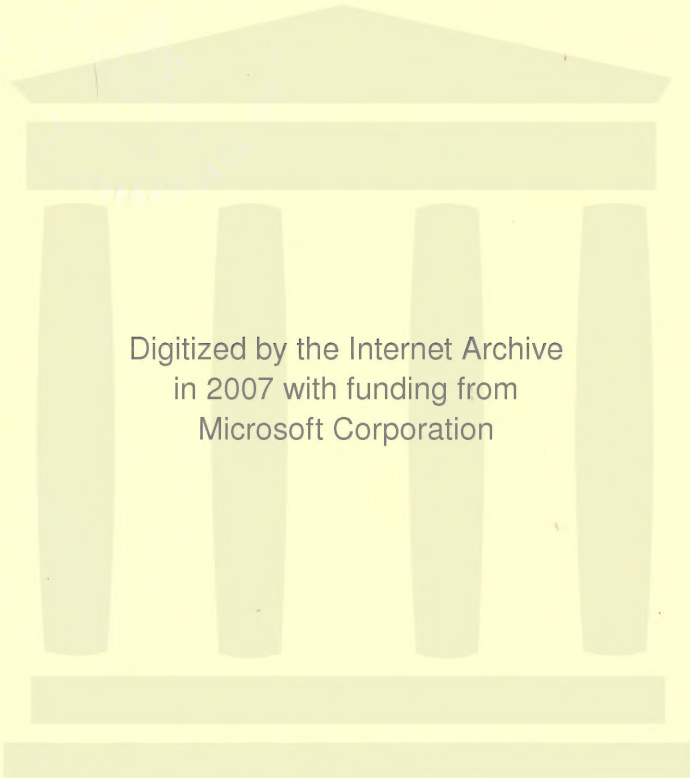

PREFACE

THE three lectures collected in this volume were prepared without any intention of publication. They were delivered for the purpose of drawing attention to the links which connect the proposal for a League of Nations with the past, to the difficulties which stand in the way of the realisation of the proposal, and to some schemes by which these difficulties might be overcome. When it was suggested that the lectures should be brought before the public at large by being issued in book form I hesitated, because I was doubtful whether the academic method natural to a University lecture would be suitable to a wider public. After consideration, however, I came to the conclusion that their publication might be useful, because the lectures attempt to show how the development initiated by the two Hague Peace Conferences could be continued by turning the movement for a League of Nations into the road of progress that these Conferences opened.

Professional International lawyers do not share the belief that the outbreak of the World War and its, in many ways, lawless and atrocious conduct have proved the futility of the work of the Hague Conferences. Throughout these anxious years we have upheld the opinion that the progress initiated

at the Hague has by no means been swept away by the attitude of lawlessness deliberately—'because necessity knows no law'—taken up by Germany, provided only that she should be utterly defeated, and should be compelled to atone and make ample reparation for the many cruel wrongs which cry to Heaven. While I am writing these lines, there is happily no longer any doubt that this condition will be fulfilled. We therefore believe that, after the map of Europe has been redrawn by the coming Peace Congress, the third Conference ought to assemble at the Hague for the purpose of establishing the demanded League of Nations and supplying it with the rudiments of an organisation.

How this could be accomplished in a very simple way the following three lectures attempt to show. They likewise offer some very slight outlines of a scheme for setting up International Councils of Conciliation as well as an International Court of Justice comprising a number of Benches. I would ask the reader kindly to take these very lightly outlined schemes for what they are worth. Whatever may be their defects they indicate a way out of some of the great difficulties which beset the realisation of the universal demand for International Councils of Conciliation and an International Court of Justice

It is well known that several of the allied Governments have appointed Committees to study the problem of a League of Nations and to prepare a scheme which could be put before the coming Peace Congress. But unless all, or at any rate all the

more important, neutral States are represented, it will be impossible for an all-embracing League of Nations to be created by that Congress; although a scheme could well be adopted which would keep the door open for all civilised States. However, until all these States have actually been received within the charmed circle, the League will not be complete nor its aims fully realised. Whatever the coming Peace Congress may be able to achieve with regard to a scheme for the establishment of the League of Nations, another—the third—Hague Peace Conference will be needed to set it going.

L. OPPENHEIM.

P.S.—While this Preface and volume were going through the Press, Austria-Hungary and Germany surrendered, and unprecedented revolutions broke out which swept the Hapsburg, the Hohenzollern, and all the other German dynasties away. No one can foresee what will be the ultimate fate and condition of those two once mighty empires. It is obvious that, had the first and second lectures been delivered after these stirring events took place, some of the views to be found therein expressed would have been modified or differently expressed. I may ask the reader kindly to keep this in mind while reading the following pages. However, the general bearing of the arguments, and the proposals for the organisation of the League of Nations and the establishment of an International Court of Justice and International Councils of Conciliation, are in no way influenced by these later events.

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First Lecture

THE AIMS OF THE LEAGUE OF NATIONS

SYNOPSIS

I. The purpose of the three Lectures is to draw attention to the links which connect the proposed League of Nations with the past, to the difficulties involved in the proposal, and to the way in which they can be overcome.

II. The conception of a League of Nations is not new, but is as old as International Law, because any kind of International Law and some kind of a League of Nations are interdependent and correlative.

III. During antiquity no International Law in the modern sense of the term was possible, because the common interests which could force a number of independent States into a community of States were lacking.

IV. But during the second part of the Middle Ages matters began to change. During the fifteenth, sixteenth, and seventeenth centuries an International Law, and with it a kind of League of Nations, became a necessity and therefore grew by custom. At the same time arose the first schemes for a League of Nations guaranteeing permanent peace, namely those of Pierre Dubois (1305), Antoine Marini (1461), Sully (1603), and Emeric Crucée (1623). Hugo Grotius' immortal work on 'The Law of War and Peace' (1625).

V. The League of Nations thus evolved by custom could not undertake to prevent wars; the conditions prevailing up to the outbreak of the French Revolution made it impossible; it was only during the nineteenth century that the principle of nationality made growth.

VI. The outbreak of the present World War is epoch-making because it is at bottom a fight between the principle of democratic and constitutional government and the principle of militarism and autocratic government. The three new points in the present demand for a League of Nations.

VII. How and why the peremptory demand for a new League of Nations arose, and its connection with so-called Internationalism.

VIII. The League of Nations now aimed at is not really a League of Nations but of States. The ideal of the National State.

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X. Why—in a sense—the new League of Nations may be said to have already started its career.

XI. The impossibility of the demand that the new League of Nations should create a Federal World State.

XII. The demand for an International Army and Navy.

XIII. The new League of Nations cannot give itself a constitution of a state-like character, but only one *sui generis* on very simple lines.

XIV. The three aims of the new League of Nations, and the four problems to be faced and solved in order to make possible the realisation of these aims.

THE LECTURE

I. Dr. Whewell, the founder of the Chair of International Law which I have the honour to occupy in this University, laid the injunction upon every holder of the Chair that he should 'make it his aim,' in all parts of his treatment of the subject, 'to lay down such rules and suggest such measures as may tend to diminish the evils of war and finally to extinguish war between nations.' It is to comply with the spirit, if not with the letter, of this injunction that I have announced the series of three lectures on a League of Nations. The present is the first, and in it I propose to treat of the Aims of the League. But, before enter into a discussion of these aims, I should like to point out that I have no intention of dealing with the question whether or no a League of Nations should be founded at all. To my mind, and probably to the minds of

most of you here, this question has been satisfactorily answered by the leading politicians of all parties and all countries since ex-President Taft put it soon after the outbreak of the World War; it suffices to mention Earl Grey in Great Britain and President Wilson in America. In giving these lectures I propose to draw your attention, on the one hand, to the links which connect the proposal for a League of Nations with the past, and, on the other hand, to the difficulties with which the realisation of the proposal must necessarily be attended; and also to the ways in which, in my opinion, these difficulties can be overcome.

There is an old adage which says *Natura non facit saltus*, Nature takes no leaps. Everything in Nature develops gradually, step by step, and organically. It is, at any rate as a rule, the same with History. History in most cases takes no leaps, but if exceptionally History does take a leap, there is great danger of a bad slip backwards following. We must be on our guard lest the proposed League of Nations should take a leap in the dark, and the realisation of proposals be attempted which are so daring and so entirely out of keeping with the historical development of International Law and the growth of the Society of Nations, that there would be great danger of the whole scheme collapsing and the whole movement coming to naught.

The movement for a League of Nations is sound, for its purpose is to secure a more lasting peace amongst the nations of the world than has hitherto prevailed. But a number of schemes to realise this

purpose have been published which in my opinion go much too far because they comprise proposals which are not realisable in our days. You know that not only an International Court of Justice and an International Council of Conciliation have been proposed, but also some kind of International Government, some kind of International Parliament, an International Executive, and even an International Army and Navy—a so-called International Police—by the help of which the International Government could guarantee the condition of permanent peace in the world.

II. You believe no doubt, because nearly everyone believes it, that the conception of a League of Nations is something quite new. Yet this is not the case, although there is something new in the present conception, something which did not exist previously. The conception of a League of Nations is very old, is indeed as old as modern International Law, namely about four hundred years. International Law could not have come into existence without at the same time calling into existence a League of Nations. *Any kind of an International Law and some kind or other of a League of Nations are interdependent and correlative.* This assertion possibly surprises you, and I must therefore say a few words concerning the origin of modern International Law in order to make matters clear.

III. In ancient times no International Law in the modern sense of the term existed. It is true there existed rules of religion and of law concerning international relations, and ambassadors and heralds

were everywhere considered sacrosanct. But these rules were not rules of an *International* Law, they were either religious rules or rules which were part of the Municipal Law of the several States. For instance: the Romans had very detailed rules concerning their relations with other States in time of peace and war; but these were rules of Roman law, not rules of the law of other countries, and certainly not *international* rules.

Now what was the reason that antiquity did not know of any International Law?

The reason was that between the several independent States of antiquity no such intimate intercourse arose and no such common views existed as to necessitate a law between them. Only between the several city States of ancient Greece arose some kind of what we should now call 'International Law,' because these city States formed a Community fostered by the same language, the same civilisation, the same religion, the same general ideas, and by constant commercial and other intercourse. On the other hand, the Roman Empire was a world empire, it gradually absorbed all the independent nations in the West. And when the Roman Empire fell to pieces in consequence of the migration of the peoples, the old civilisation came to an end, international commerce and intercourse ceased almost entirely, and it was not till towards the end of the Middle Ages that matters began to change.

IV. During the second part of the Middle Ages more and more independent States arose on the European continent, and during the fifteenth and

sixteenth centuries the necessity for a Law of Nations made itself felt. A multitude of Sovereign States had now established themselves which, although they were absolutely independent of one another, were knitted together by constant commercial and other intercourse, by a common religion, and by the same moral principles. Gradually and almost unconsciously the conviction had grown upon these independent States that, in spite of everything which separated them, they formed a Community the intercourse of which was ruled by certain legal principles. International Law grew out of custom because it was a necessity according to the well-known rule *ubi societas ibi jus*, where there is a community of interests there must be law. The several independent States had thus gradually and unconsciously formed themselves into a Society, the afterwards so-called Family of Nations, or, in other words, a League of Nations.

And no sooner had this League of Nations come into existence—and even some time before that date—than a number of schemes for the establishment of eternal peace made their appearance.

The first of these schemes was that of the French lawyer *Pierre Dubois*, who, as early as 1305, in his work 'De recuperatione terre sancte,' proposed an alliance between all Christian Powers for the purpose of the maintenance of peace and the establishment of a permanent Court of Arbitration for the settlement of differences between members of the alliance.

Another was that of *Antoine Marini*, the Chancellor of Podiebrad, King of Bohemia, who adopted the

scheme in 1461. This scheme proposed the foundation of a Federal State to comprise all the existing Christian States and the establishment of a permanent Congress to be seated at Basle in Switzerland, this Congress to be the highest organ of the Federation.

A third scheme was that of *Sully*, adopted by Henri IV of France, which, in 1603, proposed the division of Europe into fifteen States and the linking together of these into a Federation with a General Council as its highest organ.

And a fourth scheme was that of *Emeric Crucée*, who, in 1623, proposed the establishment of a Union consisting not only of the Christian States but of all States of the world, with a General Council seated at Venice.

And since that time many other schemes of similar kind have made their appearance, the enumeration and discussion of which is outside our present purpose. So much is certain that all these schemes were Utopian. Nevertheless, a League of Nations having once come into existence, International Law grew more and more, and when in 1625 Hugo Grotius published his immortal work on 'The Law of War and Peace,' the system of International Law offered in his work conquered the world and became the basis of all following development.

V. However, although a League of Nations must be said to have been in existence for about 400 years, because no International Law would have been possible without it, this League of Nations could not, and was not intended to, prevent war between its members. I say: it could not prevent

war. Why not? It could not prevent war on account of the conditions which prevailed within the international society from the Middle Ages till, say, the outbreak of the present war. These conditions are intimately connected with the growth of the several States of Europe.

Whereas the family, the tribe, and the race are natural products, the nation as well as the State are products of historical development. All nations are blends of more or less different races, and all States were originally founded on force: strong rulers subjected neighbouring tribes and peoples to their sway and thus formed coherent nations. Most of the States in Europe are the product of the activity of strong dynasties which through war and conquest, and through marriage and purchase, united under one sovereign the lands which form the States and the peoples which form the nations. Up to the time of the French Revolution, throughout the sixteenth, seventeenth, and eighteenth centuries, all wars were either wars of religion, or dynastic wars fought for the increase of the territory under the sway of the dynasties concerned, or so-called colonial wars fought for the acquisition of transoceanic colonies. It was not till the nineteenth century that wars for the purpose of national unity broke out, and dynastic wars began gradually to disappear. During the nineteenth century the nations, so to say, found themselves; some kind of constitutional government was everywhere introduced; and democracy became the ideal, although it was by no means everywhere realised.

VI. It is for this reason that the outbreak of the present war is epoch-making, because it has become apparent that, whatever may be the war aims of the belligerents, at bottom this World War is a fight between the ideal of democracy and constitutional government on the one hand, and autocratic government and militarism on the other. Everywhere the conviction has become prevalent that things cannot remain as they were before the outbreak of the present war, and therefore the demand for a League of Nations, or—I had better say—for a new League of Nations to take the place of that which has been in existence for about 400 years, has arisen.

Now what is new in the desired new League of Nations?

Firstly, this new League would be founded upon a solemn treaty, whereas the League of Nations hitherto was only based upon custom.

Secondly, for the purpose of making war rarer or of abolishing it altogether, this new League of Nations would enact the rule that no State is allowed to resort to arms without previously having submitted the dispute to an International Court or a Council of Conciliation.

Thirdly, this new League of Nations would be compelled to create some kind of organisation for itself, because otherwise it could not realise its purpose to make war rarer or abolish it altogether.

VII. The demand for a new League of Nations is universal, for it is made, not only everywhere in the allied countries, but in the countries of the

Central Powers, and it will surely be realised when the war is over, at any rate to a certain extent. It is for this reason that the present World War has not only not destroyed so-called Internationalism, but has done more for it than many years of peace could have done.

What is Internationalism?

Internationalism is the conviction that all the civilised States form one Community throughout the world in spite of the various factors which separate the nations from one another; the conviction that the interests of all the nations and States are indissolubly interknitted, and that, therefore, the Family of Nations must establish international institutions for the purpose of guaranteeing a more general and a more lasting peace than existed in former times. Internationalism had made great strides during the second part of the nineteenth century on account of the enormous development of international commerce and international communication favoured by railways, the steamship, the telegraph, and a great many scientific discoveries and technical inventions. But what a disturbing and destroying factor war really is, had not become fully apparent till the present war, because this is a *world* war which interferes almost as much with the welfare of neutrals as with the welfare of belligerents. It has become apparent during the present war that the discoveries and developments of science and technology, which had done so much during the second half of the nineteenth century for the material welfare of the human race during peace, were like-

wise at the disposal of belligerents for an enormous, and hitherto unthought of, destruction of life and wealth. It is for this reason that in the camp of friend and foe, among neutrals as well as among belligerents, the conviction has become universal that the conditions of international life prevailing before the outbreak of the World War must be altered; that international institutions must be established which will make the outbreak of war, if not impossible, at any rate only an exceptional possibility. The demand for a new League of Nations has thus arisen and peremptorily requires fulfilment.

VIII. However, in considering the demand for a new League of Nations, it is necessary to avoid confusing nations with States. It should always be remembered that, when we speak of a League of Nations, we do not really mean a League of Nations but a League of States. It is true that there are many States in existence which in the main are made up of one nation, although fractions of other nations may be comprised in them. But it is equally true that there are some States in existence which include members of several nations. Take as an example Switzerland which, although only a very small State, nevertheless comprises three national elements, namely German, French, and Italian. Another example is the British Empire, which is a world empire and comprises a number of different nations.

That leads me to the question: What is a nation?

A nation must not be confounded with a race.

A nation is a product of historical development, whereas a race is a product of natural growth. One speaks of a nation when a complex body of human beings is united by living in the same land, by the same language, the same literature, the same historical traditions, and the same general views of life. All nations are a mixture of several diverse racial elements which in the course of historical development have to a certain extent been united by force of circumstances. The Swiss as a people are politically a nation, although the component parts of the population of Switzerland are of different national characters and even speak different languages. Historical development in general, and in many cases force in particular, have played a great part in the blending of diverse racial elements into nations; just as they have played a great part in the building up of States. The demand that every nation should have a separate State of its own—the ideal of the so-called national State—appears very late in history; it is a product of the last two centuries, and it was not till the second half of the nineteenth century that the so-called principle of nationality made its appearance and gained great influence. It may well be doubted whether each nation, be it ever so small, will succeed in establishing a separate State of its own, although where national consciousness becomes overwhelmingly strong, it will probably in every case succeed in time either in establishing a State of its own, or at any rate in gaining autonomy. Be that as it may, it is a question for the future; so much is certain,

what is intended now to be realised, is not a League of Nations, but a League of States, although it is called a League of Nations.

IX. However, no League of Nations is possible unless the Central Powers, and Germany in especial, are utterly defeated during the World War, and that for two reasons.

One reason is that a great alteration of the map of Europe is an absolutely necessary condition for the satisfactory working of a League of Nations. Unless an independent Poland be established; unless the problem of Alsace-Lorraine be solved; unless the Trentino be handed over to Italy; unless the Yugo-Slavs be united with Servia; unless the Czecho-Slovaks be freed from the Austrian yoke; and unless the problem of Turkey and the Turkish Straits be solved, no lasting peace can be expected in Europe, even if a League of Nations be established.

The other reason is that, unless Germany be utterly defeated, the spirit of militarism, which is not compatible with a League of Nations, will remain a menace to the world.

What is militarism? It is that conception of the State which bases the power of the State, its influence, its progress, and its development exclusively on military force. The consequence is that war becomes part of the settled policy of a militarist State; the acquisition of further territory and population by conquest is continually before the eyes of such a Government; and the condition of peace is only a shorter or longer interval between periods of war.

A military State submits to International Law only so long as it serves its interests, but violates International Law, and particularly International Law concerning war, wherever and whenever this law stands in the way of its military aims. The whole history of Prussia exemplifies this. Now in a League of Nations peace must be the normal condition. If war occurs at all within such a League, it can only be an exceptional phase and must be only for the purpose of re-establishing peace. It is true a League of Nations will not be able entirely to dispense with military force, yet such force appears only in the background as an *ultima ratio* to be applied against such Power as refuses to submit its disagreements with other members of the League either to an International Court of Justice or an International Council of Conciliation.

X. Be that as it may, in a sense the League of Nations has already started its career, because twenty-five States are united on the one side and are fighting this war in vindication of International Law. These States are—I enumerate them chronologically as they entered into the war:—Russia (the Bolsheviks have made peace, but in fact one may still enumerate Russia as a belligerent), France, Belgium, Great Britain, Servia, Montenegro, Japan, San Marino, Portugal, Italy, Roumania, the United States, Cuba, Panama, Greece, Siam, Liberia, China, Brazil, Ecuador, Guatemala, Nicaragua, Costa Rica, Haiti, Honduras. Besides these twenty-five States which are at war with the Central Powers, the following four States, without having declared war, have

broken off diplomatic relations with Germany, namely: Bolivia, San Domingo, Peru, Uruguay.

Now there may be said to be about fifty civilised States in existence. Of these, as I have just pointed out, twenty-five are fighting against the Central Powers, four have broken off relations with Germany, the Central Powers themselves are four in number, with the consequence that thirty-three of the fifty States are implicated in the war. Only the seventeen remaining States are neutral, namely: Sweden, Norway, Denmark, Holland, Luxemburg, Switzerland, Spain, Lichtenstein, and Monaco in Europe; Mexico, Salvador, Colombia, Venezuela, Chile, Argentina, and Paraguay in America; and Persia in Asia.

It may be taken for granted that all the neutral States, and all the States fighting on the side of the Allies, and also the four States which, although they are not fighting on the side of the Allies, have broken off relations with Germany, are prepared to enter into a League of Nations.

But what about the Central Powers, and Germany in especial? I shall discuss in my next lecture the question whether the Central Powers are to become members of the League. To-day it must suffice to say that, when once utterly defeated, they will be only too glad to be received as members. On the other hand, if they were excluded, the world would again be divided into two rival camps, just as before the war the Triple Alliance was faced by the Entente. No disarmament would be possible, and with regard to every other matter progress would be equally

impossible. Therefore the Central Powers must become members of a League of Nations for such a League to be of any great use, which postulates as a *sine qua non* that Germany must be utterly defeated in the present war. If she were victorious, or if peace were concluded with an undefeated Germany, the world would not be ripe for a League of Nations because militarism would not have been exterminated.

XI. I have hitherto discussed the League of Nations only in a general way, without mentioning that there is no unanimity concerning its aims or concerning the details of its organisation. Many people think that it would be possible to do away with war for ever, and they therefore demand a World State, a Federal State comprising all the single States of the world on the pattern of the United States of America. And for this reason the demand is raised not only for an International Court and for an International Council of Conciliation, but also for an International Government, an International Parliament, and an International Army and Navy,—a so-called International Police.

I believe that these demands go much too far and are impossible of realisation. A Federal State comprising all the single States of the whole civilised world is a Utopia, and an International Army and Navy would be a danger to the peace of the world.

Why is a World State not possible, at any rate not in our time ?

No one has ever thought that a World State in the form of one single State with one single Govern-

ment would be possible. Those who plead for a World State plead for it in the form of a Federal State comprising all the single States of the world on the pattern of the United States of America. But even this modified ideal is not, in my opinion, realisable at present. Why not? To realise this ideal there would be required a Federal Government, and a Federal Parliament; and the Federal Government would have to possess strong powers to enforce its demands. A powerless Federal Government would be worse than no government at all. But how is it possible to establish at present a powerful Federal Government over the whole world? How is it possible to establish a Federal World Parliament?

Constitutional Government within the several States has to grapple with many difficulties, and these difficulties would be more numerous, greater, and much more complicated within a Federal World State. We need democracy and constitutional Government in every single State, and this can only be realised by party Government and elections of Parliament at short intervals. The waves of party strife rise high within the several States; no sooner is one party in, than the other party looks out for an opening into which a wedge can be pushed to turn the Government out. In normal times this works on the whole quite well within the borders of the several States, because the interests concerned are not so widely opposed to one another that the several parties cannot alternatively govern. But when it comes to applying the same system of Government to a Federal World State, the interests

at stake are too divergent. The East and the West, the South and the North, the interests of maritime States and land-locked States, the ideals and interests of industrial and agricultural States, and many other contrasts, are too great for it to be possible to govern a Federal World State by the same institutions as a State of ordinary size and composition.

The British World Empire may be taken as an example to show that it is impossible for one single central Government to govern a number of States with somewhat divergent interests. We all know that the British Empire comprising the United Kingdom and the so-called independent dominions, namely Canada, Newfoundland, Australia, New Zealand, and South Africa, is kept together not really by the powers of the British Government but by the good will of the component parts. The Government of the United Kingdom could not keep the Empire together by force, could not compel by force one of the independent dominions to submit to a demand, in case it refused to comply. The interests of the several component parts of the British Empire are so divergent that no central Government could keep them together against their will. Now what applies to the British Empire, which is to a great extent bound together by the same language, the same literature, and the same Law, would apply much more to a Federal State comprising the whole of the world: such a Federal State, so far as we can see, is impossible.

XII. But what about an International Army and Navy?

It is hardly worth while to say much about them. Those who propose the establishment of an International Army and Navy presuppose that the national armies and navies would be abolished so that the world Government would have the power, with the help of the International Army and Navy, at any moment to crush any attempt of a recalcitrant member of the Federal World State to avoid its duties. This International Army and Navy would be the most powerful instrument of force which the world has ever seen, because every attempt to resist it would be futile. And the Commander of the International Army and the Commander of the International Navy would be men holding in their hands the greatest power that can be imagined.

The old question therefore arises: *Quis custodiet ipsos custodes?* which I should like here to translate freely by: Who will keep in order those who are to keep the world in order? A League of Nations which can only be kept together by a powerful International Army and Navy, is a contradiction in itself; for the independence and equality of the member States of the League would soon disappear. It is a fact—I make this statement although I am sure it will be violently contradicted—that, just as hitherto, so within a League of Nations some kind of Balance of Power only can guarantee the independence and equality of the smaller States. For the Community of Power, on which the League of Nations must rest, would at once disappear if one or two members of the League became so powerful that they could disregard the combined power of

the other members. Every scheme of this movement must therefore see to it that no member of the League is more armed than is necessary considering the extent of its territory and other factors concerned. But be that as it may, an International Army and Navy is practically impossible, just as a Federal World State is impossible.

XIII. Yet while a Federal World State is impossible, a League of Nations is not, provided such league gives itself a constitution, not of a state-like character, but one *sui generis*. What can be done is this : the hitherto unorganised Family of Nations can organise itself on simple lines so as to secure, on the one hand, the absolute independence of every State, and, on the other hand, the peaceful co-existence of all the States.

It is possible, in my opinion, to establish an International Court of Justice before which the several States engage to appear in case a conflict arises between two or more of them which can be judicially settled, that is, can be settled by a rule of law. There is as little reason why two or more States should go to war on account of a conflict which can be settled upon the basis of law, as there is for two private individuals to resort to arms in case of a dispute between them which can be decided by a Court of Law.

Again, although there will frequently arise between States conflicts of a political character which cannot be settled on the basis of a rule of law, there is no reason why, when the States in conflict cannot settle them by diplomatic negotiation, they should resort

to arms, before bringing the conflict before some Council of Conciliation and giving the latter an opportunity of investigating the matter and proposing a fair compromise.

Under modern conditions of civilisation the whole world suffers in case war breaks out between even only two States, and for this reason it is advisable that the rest of the world should unite and oppose such State as would resort to arms without having submitted its case to an International Court of Justice or an International Council of Conciliation.

XIV. In my opinion the aims of a League of Nations should therefore be three :

The first aim should be to prevent the outbreak of war altogether on account of so-called judicial disputes, that is disputes which can be settled on the basis of a rule of law. For this reason the League should stipulate that every State must submit all judicial disputes without exception to an International Court of Justice and must abide by the judgment of such Court.

The second aim should be to prevent the sudden outbreak of war on account of a political dispute and to insist on an opportunity for mediation. For this reason the League should stipulate that every State, previous to resorting to arms over a political dispute, must submit it to an International Council of Conciliation and must at any rate listen to the advice of such Council.

The third aim should be to provide a sanction for the enforcement of the two rules just mentioned. For this reason the League should stipulate that all

the member States of the League must unite their economic, military, and naval forces against such member or members as would resort to arms either on account of a judicial dispute which ought to have been settled by an International Court of Justice, or on account of a political dispute without previously having submitted it to an International Council of Conciliation and listened to the latter's advice.

These should be, in my opinion, the three aims of a League of Nations and the three rules necessary for the realisation of these aims. However, it is not so easy to realise them, and it is therefore necessary to face and solve four problems: There is, firstly, the problem of the Organisation of the League; secondly, the problem of Legislation within the League; thirdly, the problem of Administration of Justice within the League; and fourthly, the problem of Mediation within the League—four problems which I shall discuss in the two following lectures.

I have only named three aims and four problems because I have in my mind those aims which are the nearest and those problems which are the most pressing and the most urgent. The range of vision of the League of Nations, when once established, will no doubt gradually become wider and wider; new aims will arise and new problems will demand solution, but all such possible future aims and future problems are outside the scope of these lectures.

Second Lecture

ORGANISATION AND LEGISLATION OF THE LEAGUE OF NATIONS

SYNOPSIS

I. The Community of civilised States, the at present existing League of Nations, is a community without any organisation, although there are plenty of legal rules for the intercourse of the several States one with another.

II. The position of the Great Powers within the Community of States is a mere political fact not based on Law.

III. The pacifistic demand for a Federal World State in order to make the abolition of war a possibility.

IV. Every attempt at organising the desired new League of Nations must start from, and keep intact, the independence and equality of the several States, with the consequence that the establishment of a central political authority above the sovereign States is an impossibility.

V. The development of an organisation of the Community of States began before the outbreak of the World War and is to be found in the establishment of the Permanent Court of Arbitration at the Hague by the First Hague Peace Conference of 1899. But more steps will be necessary to turn the hitherto unorganised Community of States into an organised League of Nations.

VI. The organisation of the desired new League of Nations should start from the beginning made by the Hague Peace Conferences, and the League should therefore include all the independent civilised States.

VII. The objection to the reception of the Central Powers, and of Germany especially, into the League.

VIII. The objection to the reception of the minor transoceanic States into the League.

IX. The seven principles which ought to be accepted with regard to the organisation of the new League of Nations.

X. The organisation of the League of Nations is not an end in itself but only a means of attaining three objects, the first of which is International Legislation. The meaning of the term 'International Legislation' in contradistinction to Municipal Legislation. International Legislation in the past and in the future.

XI. The difficulty in the way of International Legislation on account of the language question.

XII. The difficulty created by the conflicting national interests of the several States.

XIII. The difficulty caused by the fact that International Statutes cannot be created by a majority vote of the States. The difference between universal and general International Law offers a way out.

XIV. The difficulty created by the fact that there are as yet no universally recognised rules concerning interpretation and construction of International Statutes and ordinary conventions. The notorious Article 23 (h) of the Hague Regulations concerning Land Warfare.

THE LECTURE

I. In my first lecture on the League of Nations I recommended the following three rules to be laid down by a League of Nations :

Firstly, every State must submit all judicial disputes to an International Court of Justice and must abide by the judgment of such Court.

Secondly, every State previous to resorting to arms, must submit every political and non-judicial dispute to an International Council of Conciliation and must at any rate listen to the advice of such Council.

Thirdly, the member States must unite their forces against such State or States as should resort to arms without previously having submitted the matter in dispute to an International Court of Justice or to an International Council of Conciliation.

And I added that these three rules cannot create a satisfactory condition of affairs unless four problems are faced and solved, namely : The Organisation of

the League, Legislation by the League, Administration of Justice and Mediation within the League. My lecture to-day will deal with two of these problems, namely the Organisation and the Legislation of the League.

Let us first consider the Organisation of the League. Hitherto the body of civilised States which form the Family of Nations and which, as I pointed out in my first lecture, is really a League of Nations evolved by custom, has been an unorganised Community. This means that, although there are plenty of legal rules for the intercourse of the several States one with another, the Community of civilised States does not possess any permanently established organs or agents for the conduct of its common affairs. At present these affairs, if they are peaceably settled, are either settled by ordinary diplomatic negotiation or, if the matter is pressing and of the greatest importance, by temporarily convened International Conferences or Congresses.

II. It is true there are the so-called Great Powers which are the leaders of the Family of Nations, and it is therefore asserted by some authorities that the Community of States has acquired a certain amount of organisation because the Great Powers are the legally recognised superiors of the minor States.

But is this assertion correct? The Great Powers, are they really the legally recognised superiors of the minor States?

I deny it. A Great Power is any large-sized State possessing a large population which gains such economic, military, and naval strength that

its political influence must be reckoned with by all the other Powers. At the time of the outbreak of the World War eight States had to be considered as Great Powers, namely Great Britain, Austria-Hungary, France, Germany, Italy, Russia, the United States of America, and Japan. But it is very probable that the end of the World War will see the number of Great Powers reduced to six. The collapse and break up of Russia has surely for the present eliminated her from the number of Great Powers. And it is quite certain that Austria-Hungary will not emerge from the struggle as a Great Power, if she emerges from it as a whole at all. History teaches that the number of the Great Powers is by no means stable, and changes occasionally take place. Look at the condition of affairs during the nineteenth century. Whereas at the time of the Vienna Congress in 1815 eight States, namely Great Britain, Austria, France, Portugal, Prussia, Spain, Sweden, and Russia were still considered Great Powers, their number soon decreased to five, because Portugal, Spain, and Sweden ceased to be Great Powers. On the other hand, Italy joined the number of the Great Powers after her unification in 1860; the United States of America joined the Great Powers after the American Civil War in 1865; and Japan emerged as a Great Power from her war with China in 1895.

Be that as it may, so much is certain, a State is a Great Power not by law but only by its political influence. The Great Powers are the leaders of the Family of Nations because their political influence

is so great. Their political and economic influence is in the long run irresistible; therefore all arrangements made by the Great Powers naturally in most cases gain, either at once or in time, the consent of the minor States. It may be said that the Great Powers exercise a kind of political hegemony within the Family of Nations. Yet this hegemony is not based on law, it is simply a political fact, and it is certainly not a consequence of an organisation of the Family of Nations.

III. The demand for a proper organisation of the Community of States had, up to the outbreak of the World War, been raised exclusively on the part of the so-called Pacifists in order to make the abolition of war a possibility. It is a common assertion on the part of the Pacifists that War cannot die out so long as there is no Central Political Authority in existence above the several States which could compel them to bring their disputes before an International Court and also compel them to carry out the judgments of such a Court. For this reason many Pacifists aim at such an organisation of the Community of States as would bring all the civilised States of the world within the bonds of a federation. They demand a World Federation of all the civilised States, or at any rate a federation of the States of Europe, on the model of the United States of America.

If such a Federal World State were practically possible, there would be no objection to it, although International Law as such would cease to exist and be replaced by the Constitutional Law of this Federal

World State. But in my first lecture I pointed out that such a Federal World State is practically impossible. And it is not even desirable.

The development of mankind would seem in the main to be indissolubly connected with the national development of the peoples. Most peoples possessing a strong national consciousness desire an independent State in which they can live according to their own ideals. They want to be their own masters, and not to be part and parcel of a Federal World State to which they would have to surrender a great part of their independence. Moreover—as I likewise pointed out in my first lecture (pp. 18-20) —it would be impossible to establish a strong Government and a strong Parliament in a Federal World State.

However this may be, it is not at all certain that war would altogether disappear in a Federal World State. The history of Federal States teaches that wars do occasionally break out between their member States. Think of the war between the Roman Catholic and the Protestant member States of the Swiss Confederation in 1847, of the war in 1863 between the Northern and the Southern member States within the Federation which is called the United States of America, and of the war between Prussia and Austria within the German Confederation in 1866.

IV. But what kind of organisation of the League of Nations is possible if we reject the idea of a Federal State?

Neither I, nor anyone else who does not like to

build castles in the air, can answer this question directly by making a detailed proposal. It is at present quite impossible to work out a practical scheme according to which a more detailed organisation of the League of Nations could be realised. But so much is certain that every attempt at organising this League must start from, and must keep intact, the independence and the equality of all civilised States. It is for this reason that a Central Political Authority above the sovereign States can never be thought of. Every attempt to organise a League of Nations on the model of a Federal State is futile. If a detailed organisation of the League should ever come, it will be one *sui generis*, one absolutely of its own kind; such as has never been seen before. And it is at present quite impossible to map out a detailed plan of such an organisation although, as I shall have to show you later, the first step towards an organisation has already been made, and further steps towards the ideal can be taken. The reason that it is at present impossible is that the growth and the final shape of the organisation of the League of Nations will, and must, go hand in hand with the progress of International Law. But the progress of International Law is conditioned by the growth, the strengthening, and the deepening of international economic and other interests, and of international morality. It is a matter of course that this progress can only be realised very slowly, for there is concerned a process of development through many generations and perhaps through centuries, a develop-

ment whose end no one can foresee. It is sufficient for us to state that the development had already begun before the World War, and to try to foster it, as far as is in our power, after the conclusion of peace.

V. I said that this development has begun. Where is this beginning of the development to be found ?

It is to be found in the establishment of the Permanent Court of Arbitration at the Hague and the Office therewith connected. The Permanent Court of Arbitration is not an institution of the several States, but an institution of the Community of States in contradistinction to its several members. Had the International Prize Court agreed upon by the Second Hague Peace Conference of 1907 been established, there would have come into existence another institution of the Community of States.

But the establishment of International Courts would not justify the assertion that thereby the Community of States has turned from an unorganised community into an organised community. To reach this goal another step is required, namely an agreement amongst the Powers, according to which the Hague Peace Conferences would be made a permanent institution which periodically, within fixed intervals, assemble without being convened by one Power or another. If this were done, we could say that the hitherto unorganised Community of States had turned into an organised League of Nations, for by such periodically assembling Hague Peace Conferences there would be established an

organ for the conduct of all such international matters as require international legislation or other international action.

However that may be, the organisation created by the fact that the Hague Peace Conferences periodically assembled, would only be an immature one; more steps would be necessary in order that the organisation of the Community of States might become more perfect and more efficient. Yet progress would be slow, for every attempt at a progressive step meets with opposition, and it would be only when the *international* interests of the civilised States become victorious over their particular *national* interests that the Community of States would gradually receive a more perfect organisation.

VI. There is no doubt that the experiences of mankind during the World War have been quickening development more than could have been expected in normal times. The universal demand for a new League of Nations accepting the principles that every judicial dispute amongst nations must be settled by International Courts and that every political dispute must, before the parties resort to arms, be brought before a Council of Conciliation, demonstrates clearly that the Community of States must now deliberately give itself some kind of organisation, because without it the principles just mentioned cannot be realised.

Now a number of schemes for the organisation of a new League of Nations have been made public. They all agree upon the three aims of the League and the three rules for the realisation of these aims

which I mentioned in my first lecture, namely compulsory settlement of all judicial disputes by International Courts of Justice, compulsory mediation in cases of political disputes by an International Council of Conciliation, and the duty of the members of the League to turn against any one member which should resort to arms in violation of the principles laid down by the League. However, these schemes differ very much with regard to the *organisation* of the League. I cannot now discuss the various schemes in detail. It must suffice to say that some of them embody proposals for a more or less state-like organisation and are therefore not acceptable to those who share my opinion that any state-like organisation of the League is practically impossible. But though some of the schemes, as for instance that of Lord Bryce and that of Sir Willoughby Dickinson, avoid this mistake, none of them take as their starting point that which I consider to be the right one, namely the beginning made at the two Hague Peace Conferences. *In my opinion the organisation of a new League of Nations should start from the beginning made by the two Hague Peace Conferences.*

VII. However, there is much objection to this, because it would necessitate the admission into the new League of all those States which took part in the Second Hague Peace Conference, including, of course, the Central Powers. The objections to such a wide range of the League are two-fold.

In the first instance, the admission of the Central Powers, and especially of Germany, into the League

is deprecated. By her attack on Belgium at the outbreak of the war, and by her general conduct of the war, Germany has deliberately taken up an attitude which proves that, when her military interests are concerned, she does not consider herself bound by any treaty, by any rule of law, or by any principle of humanity. How can we expect that she will carry out the engagements into which she might enter by becoming a member of the League of Nations ?

My answer is that, provided she be utterly defeated and no peace of compromise be made with her, militarism in Germany will be doomed, the reparation to be exacted from her for the many cruel wrongs must lead to a change of Constitution and Government, and this change of Constitution and Government will make Germany a more acceptable member of a new League of Nations. The utter defeat of Germany is a necessary preliminary condition to the possibility of her entrance into a League of Nations. Those who speak of the foundation of a League of Nations as a means of ending the World War by a peace of compromise with Germany are mistaken. The necessary presuppositions of such a League are entirely incompatible with an unbroken Prussian militarism.

But while her utter defeat is the necessary preliminary condition to her entrance into a League of Nations, the inclusion of Germany in the League, after her utter defeat, is likewise a necessity. The reason is that, as I pointed out in my first lecture (p. 17), in case the Central Powers were excluded

from the League, they would enter into a League of their own, and the world would then be divided into two rival camps, in the same way as before the war the Triple Alliance was faced by the Entente. *The world would be proved not ripe for a new League of Nations if peace were concluded with an undefeated Germany; and the League would miss its purpose if to a defeated and repenting Germany entrance into it were refused.*

VIII. In the second instance, the entrance of the great number of minor transoceanic States into the League is deprecated because these States would claim an equal vote with the European Powers and thereby obstruct progress within the League.

It is asserted that some of the minor transatlantic States made the discussions at the Hague Conferences futile by their claim to an equal vote. Now it is true that some of these States have to a certain extent impeded the work of the Hague Conferences, but some of the minor States of Europe, and even some of the Great Powers, have done likewise. The Community of States consisting of sovereign States does not possess any means of compelling a minority of States to fall in with the views of the majority, but I shall show you very soon, when I approach the problem of International Legislation, that International Legislation of a kind is possible in spite of this fact. And so much is certain that the minimum of organisation of the new League which is now necessary, cannot be considered to be endangered by the admittance of the minor transoceanic States into the League. Progress will

in any case be slow, and perfect unanimity among the Powers will in any and every case only be possible where the *international* interests of all the Powers compel them to put aside their real or imaginary particular *national* interests.

IX. For these reasons I take it for granted that the organisation of a new League of Nations should start from the beginning made by the Hague Peace Conferences. Therefore the following seven principles ought to be accepted :

First principle : The League of Nations is composed of all civilised States which recognise one another's external and internal independence and absolute equality before International Law.

Second principle : The chief organ of the League is the Peace Conference at the Hague. The Peace Conferences meet periodically—say every two or three years—without being convened by any special Power. Their task is the gradual codification of International Law and the agreement upon such International Conventions as are from time to time necessitated by new circumstances and conditions.

Third principle : A permanent Council of the Conference is to be created, the members of which are to be resident at the Hague and are to conduct all the current business of the League of Nations. This current business comprises : The preparation of the meetings of the Peace Conference ; the conduct of communications with the several members of the League with regard to the preparation of the

work of the Peace Conferences; and all other matters of international interest which the Conference from time to time hands over to the Council.

Fourth principle: Every recognised sovereign State has a right to take part in the Peace Conferences.

Fifth principle: Resolutions of the Conference can come into force only in so far as they become ratified by the several States concerned. On the other hand, every State agrees once for all faithfully to carry out those resolutions which have been ratified by it.

Sixth principle: Every State that takes part in the Peace Conferences is bound only by such resolutions of the Conferences as it expressly agrees to and ratifies. Resolutions of a majority only bind the majority. On the other hand, no State has a right to demand that only such resolutions as it agrees to shall be adopted.

Seventh principle: All members of the League of Nations agree once for all to submit all judicial disputes to International Courts which are to be set up, and to abide by their judgments. They likewise agree to submit, previous to resorting to arms, all non-judicial disputes to International Councils of Conciliation which are to be set up. And they all agree to unite their economic, military, and naval forces against any one or more States which resort to arms without submitting their

disputes to International Courts of Justice or International Councils of Conciliation.

You will have noticed that my proposals do not comprise the creation of an International Government, an International Executive, an International Parliament, and an International Army and Navy which would serve as an International Police Force. No one can look into the future and say what it will bring, but it is certain that for the present, and for some generations to come, all attempts at creating an International Government are not only futile but dangerous; because it is almost certain that a League of Nations comprising an International Executive, an International Parliament, and an International Army and Navy would soon collapse.

X. However this may be, and whatever may be the details of the organisation of the League, such necessary organisation is not an end in itself but a means of attaining three objects, namely: International Legislation, International Administration of Justice, and International Mediation. I shall discuss International Administration of Justice and International Mediation in my next lecture, to-day I will only draw your attention to International Legislation.

In using the term 'International Legislation,' it must be understood that 'legislation' is here to be understood in a figurative sense only. When we speak of legislation in everyday language, we mean that process of parliamentary activity by which Municipal Statutes are called into existence. Municipal Legislation presupposes a sovereign power,

which prescribes rules of conduct to its subjects. It is obvious that within the Community of States no such kind of legislation can take place. Rules of conduct for the members of the League of Nations can only be created by an agreement amongst those members. Whereas Municipal Statutes contain the rules of conduct set by an authority sovereign over its subjects, International Statutes—if I may be allowed to use that term—contain rules of conduct which the members of the Community of States have agreed to set for themselves. International Statutes are created by the so-called Law-making Treaties of the Powers. But in one point Municipal Legislation and the Law-making Treaties of the Powers resemble one another very closely:—both intend to create law, and for this reason it is permissible to use the term 'International Legislation' figuratively for the conclusion of such international treaties as contain rules of International Law.

Now it would be very misleading to believe that no International Legislation has taken place in the past. The fact is that, from the Vienna Congress of 1815 onwards, agreements have been arrived at upon a number of rules of International Law. However, such agreements have only occurred occasionally, because the Community of civilised States has not hitherto possessed a permanently established organ for legislating. Much of the legislation which has taken place in the past was only a by-product of Congresses or Conferences which had assembled for other purposes. On the other hand, when legislation on a certain subject was considered pressing,

a Congress or Conference was convened for that very purpose. It will be only when the Hague Peace Conferences have become permanently established that an organ of the League of Nations for legislating internationally will be at hand. And a wide field is open for such legislation. The bulk of International Law in its present state is—if I may say so—a book law, it is customary law which is only to be found in text-books of International Law; it is, as regards many points, controversial; it has many gaps; and it is in many ways uncertain. International Legislation will be able gradually to create international statutes which will turn this book law into firm, clear, and authoritative statutory law.

XI. But you must not imagine that International Legislation is an easy matter. It is in fact full of difficulties of all kinds. I will only mention four:

There is, firstly, the language question. Since it is impossible to draft International Statutes in all languages, it is absolutely necessary to agree upon one language, and this language at present is, as you all know, French. Yet, difficult as the language question is, it is not insurmountable. It is hardly greater than the difficulty which arises when two States, which speak different languages, have to agree upon an ordinary convention. One point, however, must be specially observed, and that is: when any question of the interpretation of an International Statute occurs, it is the French text of the statute which is authoritative, and not the text of the translation into other languages.

XII. Another difficulty with regard to International Legislation is the conflicting *national* interests of the different States. As International Statutes are only possible when the several States come to an agreement, it will often not be possible to legislate internationally on a given matter, because the interests of the different States will be so conflicting that an agreement cannot be arrived at. On the other hand, as time goes on the international interests of the several States frequently become so powerful that these Governments are quite ready to brush aside their particular interests, and to agree upon a compromise which makes International Legislation concerning the matter in question possible.

XIII. A third difficulty with regard to International Legislation is of quite a particular kind. It arises from the fact that International Statutes cannot be created by a vote of the majority of States, but only by a unanimous vote of all the members of the Community of civilised States.

This difficulty, however, can be overcome by dropping the contention that no legislation of any kind can be proceeded with unless every member of the League of Nations agrees to it. It is a well-known fact that a distinction has to be made between *universal* International Law, that is, rules to which every civilised State agrees, and *general* International Law, that is, rules to which only the greater number of States agree. Now it is quite certain that no universal International Law can be created by legislation to which not every member of the League of Nations has agreed. Nothing, however,

ought to prevent those States which are ready to agree to certain new rules of International Law, from legislating *for their own number* on a certain matter. If such legislation is really of value, the time will come when the dissenting States will gradually accede. The Second Hague Peace Conference acted on this principle, for a good many of its Conventions were only agreed upon by the greater number, and not by all, of the participating States.

XIV. A fourth difficulty with regard to International Legislation is the difficulty of the interpretation of, and the construction to be put upon, International Statutes as well as ordinary international conventions. We do not as yet possess universally recognised rules of International Law concerning such interpretation and construction. Each nation applies to International Statutes those rules of interpretation and construction which are valid for the interpretation and construction of their Municipal Statutes.

Many international disputes have been due in the past to this difficulty of interpretation and construction. A notorious example is that of the interpretation of Article 23 (h) of the Hague Regulations of 1907 concerning Land Warfare, which lays down the rule that it is forbidden 'to declare abolished, suspended, or inadmissible in a Court of Law the rights and actions of the nationals of the hostile party.'

Germany and other continental States interpret this article to mean that the Municipal Law of a State is not allowed to declare that the outbreak

of war suspends or avoids contracts with alien enemies, or that war prevents alien enemies from bringing an action in the Courts.

On the other hand, England and the United States of America interpret this article to mean merely that the *occupant of enemy territory* is prohibited from declaring abolished, suspended, or inadmissible in a Court of Law the rights and actions of the nationals of the hostile party.

What is the cause of this divergent interpretation of an article, the literal meaning of which seems to be quite clear ? The divergence is due to the different mode of interpretation of statutes resorted to by continental Courts, on the one hand, and, on the other hand, by British and American Courts.

Continental Courts take into consideration not only the literal meaning of a clause of a statute, but also the intention of the legislator as evidenced by—what I should like to call—the history of the clause. They look for the intention of the draftsman, they search the Parliamentary proceedings concerning the clause, and they interpret and construe the clause with regard to the intention of the draftsman as well as to the proceedings in Parliament.

Now Article 23 (h) of the Hague Regulations was inserted on the motion of the German delegates to the Second Hague Peace Conference, and there is no doubt that the German delegates intended by its insertion to prevent the Municipal Law of belligerents from possessing a rule according to which the outbreak of war suspends or avoids contracts with alien enemies, and prohibits alien enemies from

bringing an action in the Courts. It is for this reason that Germany and other continental States interpret Article 23 (h) according to the intention of the German delegates

On the other hand, in interpreting and construing a clause of a statute, British and American Courts refuse to take into consideration the intention of the draftsman, Parliamentary discussions concerning the clause, and the like. They only take into consideration the literal meaning of the clause as it stands in the statute of which it is a part. Now Article 23 (h) is a clause in the Convention concerning the Laws and Customs of War on Land. It is one of several paragraphs of Article 23 which comprises the prohibition of a number of acts by the armed forces of belligerents in warfare on land, such as the employment of poison or poisoned arms, and the like. The British and American delegates, believing that it only concerned an act on the part of belligerent forces occupying enemy territory, therefore consented to the insertion of Article 23 (h), and our Court of Appeal—in the case of Porter *v.* Freundenberg (1915)—held that Article 23 (h) is to be interpreted in that sense.[1]

[1] By a letter of February 28, 1911, I drew the attention of the Foreign Office to the interpretation of Article 23 (h) which generally prevailed on the Continent. This letter and the answer I received were privately printed, and copies were distributed amongst those members and associates of the Institute of International Law who attended the meeting at Madrid. Since French, German, and Italian International Law Journals published translations, but the original of the correspondence was never published in this country, I think it advisable to append it to this lecture.

Be that as it may, the difficulty of interpretation and construction of international treaties will exist so long as no International Statute has been agreed upon which lays down detailed rules concerning interpretation and construction, or so long as International Courts have not developed such rules in practice. But the problem of International Courts is itself a very difficult one; it will be the subject of my third lecture which will deal with Administration of Justice and Mediation within the League of Nations.

APPENDIX

CORRESPONDENCE WITH THE FOREIGN OFFICE RESPECTING THE INTERPRETATION OF ARTICLE 23 (h) OF THE HAGUE REGULATIONS CONCERNING LAND WARFARE

LETTER FROM THE PRESENT WRITER TO THE FOREIGN OFFICE.

WHEWELL HOUSE, CAMBRIDGE,
28th February, 1911.

To
THE UNDER SECRETARY OF STATE
FOR FOREIGN AFFAIRS.

SIR,—

I venture to bring the following matter before your consideration:—

In the course of my recent studies I have been dealing with the laws and usages of war on land, and I have had to consider the interpretation of Article 23 (h) of the Regulations attached to the Convention of 1907 relating to the Laws and Customs of war on land. I find that the interpretation prevailing among all continental and some English and American authorities is contrary

to the old English rule, and I would respectfully ask to be informed of the view which His Majesty's Government place upon the article in question.

To give some idea as to how an interpretation of Article 23 (h) contrary to the old English rule prevails generally, I will quote a number of French, German, English, and American writers, the works of whom I have at hand in my library, and I will also quote the German *Weissbuch* concerning the results of the second Hague Conference of 1907.

Bonfils, *Manuel de droit international public*, 5th ed. by Fauchille, 1908, discusses, on page 651, the doctrine which denies to an enemy subject any *persona standi in judicio*, but adds:—'. . . Article 23 (h) décide qu'il est interdit de déclarer éteints, suspendus ou non recevables en justice, les droits et actions des nationaux de la partie adverse.'

Politis, Professor of International Law in the University of Poitiers (France), in his report to the Institute of International Law, Session of Paris (1910), concerning *Effets de la Guerre sur les Obligations Internationales et les Contrats privés*, page 18, says:

'Un point hors de doute, c'est, que la guerre ne peut, ni par elle-même ni par la volonté des belligérants, affecter la validité ou l'exécution des contrats antérieurs. Cette règle fait désormais partie du droit positif. L'article 23 (h) du nouveau Règlement de la Haye interdit formellement aux belligérants "de déclarer éteints, suspendus ou non recevables en justice les droits et actions des nationaux de la partie adverse."

'Cette formule condamne d'anciens usages conservés encore, en partie, dans certains pays. Elle proscrit d'abord tous les moyens —annulation ou confiscation—par lesquels on chercherait à atteindre, dans leur existence, les droits nés avant la guerre. Elle exclut, en second lieu, l'ancienne pratique qui interdisait aux particuliers ennemis l'accès des tribunaux. Elle prohibe, enfin, toutes les mesures législatives ou autres tendant à entraver au cours de la guerre l'exécution ou les effets utiles des obligations privées, notamment le cours des intérêts.

'Il y a là progrès incontestable. Et l'on doit être reconnaissant à la délégation allemande à la 2e Conférence de la paix de l'avoir provoqué.

'L'accueil empressé et unanime qu'a reçu cette heureuse initiative permet d'espérer que de nouveaux progrès pourront être réalisés dans cet ordre d'idées.

'On doit souhaiter que la disposition de l'article 23 (h), étrangère à l'hypothèse de l'occupation du territoire ennemi, soit distraite du règlement de 1907 (comme les articles 57 à 60 l'ont été du Règlement de 1899) pour être mieux placée dans une convention nouvelle, où d'autres textes viendraient la compléter.'

Ullmann, *Völkerrecht*, 2nd ed. 1908, p. 474, says:—

'Auch der Rechtsverkehr wird durch den Ausbruch des Krieges nicht unterbrochen oder gehemmt. Die nach Landesrecht frueher uebliche zeitweise Aufhebung der Klagbarkeit vom Schuldverbindlichkeiten des Staates oder eines Angehörigen gegen Angehörige des Feindes ist durch Artikel 23 (h) untersagt.'

Wehberg, *Das Beuterecht im Land- und Seekriege*, 1909, pp. 5 and 6 says:—

'Article 46 Absatz 2 bestimmt:—"Das Privateigentum darf nicht eingezogen werden." In konsequenter Durchführung dieses Satzes bestimmt der auf deutschen Antrag 1907 hinzugefügte Article 23 (h):—"Untersagt ist die Aufhebung oder zeitweilige Ausserkraftsetzung der Rechte und Forderungen von Angehoerigen der Gegenpartei oder der Ausschliessung ihrer Klagbarkeit."'

Whittuck, *International Documents*, London 1908, Introduction p. xxvii, says—'In Article 23 (h) it is prohibited to declare abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the other belligerent which is a development of the principle that the private property of the subjects of a belligerent is not subject to confiscation. This new prohibition if accepted by this country would necessitate some changes in our municipal law.'

Holland, *The Laws of War on Land*, 1908, says on p. 5 that:—'Article 23 (h) seems to require the Signatory Powers to the convention concerned to legislate for the abolition of an enemy's disability to sustain a *persona standi in judicio*.' (See also Holland, *loco citato*, p. 44, where he expresses his doubts concerning the interpretation of Article 23 (h).)

Bordwell, *The Law of War between Belligerents*, Chicago 1908, recognises on page 210 the fact that according to Article 23 (h) an alien enemy must now be allowed to sue in the courts of a belligerent, and

Gregory, Professor in the University of Iowa, who reviews Bordwell's work in the *American Journal of International Law*, Volume 3 (1909), page 788, takes up the same standpoint.

The only author who interprets Article 23 (h) in a different way

is General Davis, who in his *Elements of International Law*, 3rd edition 1908, page 578, note 1, says:—

'It is more than probable that this humane and commendable purpose would fail of accomplishment if a military commander conceived it to be within his authority to suspend or nullify their operation, or to regard their application in certain cases as a matter falling within his administrative discretion. Especially is this true where a military officer refuses to receive well grounded complaints, or declines to receive demands for redress, in respect to the acts or conduct of the troops under his command, from persons subject to the jurisdiction of the enemy who find themselves, for the time being, in the territory which he holds in military occupation. To provide against such a contingency it was deemed wise to add an appropriate declaratory clause to the prohibition of Article 23.'

It is very unfortunate that the book of General Davis is not at all known on the Continent, and that therefore none of the continental authors have any knowledge of the fact that a divergent interpretation from their own of Article 23 (h) is being preferred by an American author.

It is likewise very unfortunate that neither the English Blue-book on the Second Hague Peace Conference (see Parliamentary Papers, Miscellaneous No. 4, 1907, page 104) nor the official minutes of the proceedings of the Conference, edited by the Dutch Government, give any such information concerning the construction of Article 23 (h) as could assist a jurist in forming an opinion regarding the correct interpretation.

It is, however, of importance to take notice of the fact that Article 23 (h) is an addition to Article 23 which was made on the proposition of Germany, and that Germany prefers an interpretation of Article 23 (h) which would seem to coincide with the interpretation preferred by all the continental writers. This becomes clearly apparent from the German *Weissbuch ueber die Ergebnisse der im Jahre* 1907 *in Haag abgehaltenen Friedensconferenz*, which contains on page 7 the following:—

'Der Artikel 23 hat gleichfalls auf deutschen Antrag zwei wichtige Zusätze erhalten. Durch den ersten wird der Grundsatz der Unverletzlichkeit des Privateigenthumes auch auf dem Gebiete der Forderungsrechte anerkannt. Nach der Gesetzgebung einzelner Staaten soll nämlich der Krieg die Folge haben, dass die Schuldverbindlichkeiten des Staates oder seiner Angehörigen gegen Angehörige des Feindes aufgehoben oder zeitweilig ausser Kraft gesetzt oder

wenigstens von der Klagbarkeit ausgeschlossen werden. Solche Vorschriften werden nun durch den Artikel 23 Abs. 1 unter h für unzulässig erklärt.'

However this may be, the details given above show sufficiently that a divergent interpretation of Article 23 (h) from the old English rule is prevalent on the Continent, and is to some extent also accepted by English and American Authorities, and it is for this reason that I would ask whether His Majesty's Government consider that the old English rule is no longer in force.

I have, &c.,

(Signed) L. OPPENHEIM.

LETTER FROM THE FOREIGN OFFICE TO THE PRESENT WRITER.

FOREIGN OFFICE,
March 27, 1911.

SIR,—

I am directed by Secretary Sir E. Grey to thank you for your letter of February 28th, and for drawing his attention to the misconceptions which appear to prevail so largely among the continental writers on international law with regard to the purport and effect of Article 23 (h) of the Convention of October 18th, 1907, respecting the laws and customs of war on land.

It seems very strange that jurists of the standing of those from whose writings you quote could have attributed to the article in question the meaning and effect they have given it if they had studied the general scheme of the instrument in which it finds a place.

The provision is inserted at the end of an article dealing with the prohibited modes of warfare. It forms part of Chapter I. of Section II. of the Regulations annexed to the Convention. The title of Chapter I. is 'Means of injuring the enemy, sieges and bombardment': and if the article itself is examined it will be seen to deal with such matters as employing poison or poisoned weapons, refusing quarter, use of treachery and the unnecessary destruction of private property. Similarly the following articles (24 to 28) all deal with the restrictions which the nations felt it incumbent upon them from

a sense of humanity to place upon the conduct of their armed forces in the actual prosecution of military operations.

The Regulation in which these articles figure is itself merely an annex to the Convention which alone forms the contractual obligation between the parties, and the engagement which the parties to the Convention have undertaken is (Article 1) to 'issue instructions to their armed land forces in conformity with the Regulations respecting the Law and Customs of war on land.'

This makes it abundantly clear that the purpose and scope of the Regulations is limited to the proceedings of the armies in the field; those armies are under the orders of the commanders, and the Governments are bound to issue instructions to those commanders to act in accordance with the Regulations. That is all. There is nothing in the Convention or in the Regulations dealing with the rights or the status of the non-combatant individuals, whether of enemy nationality or domiciled in enemy territory. They are, of course, if inhabitants of the theatre of war, affected by the provisions of the Regulations because they are individuals who are affected by the military operations, and in a sense a regulation which forbids a military commander from poisoning a well gives a non-combatant inhabitant a right or a quasi-right not to have his well poisoned, but his rights against his neighbours, his relations with private individuals, whether of his own or of enemy nationality, remain untouched by this series of rules for the conduct of warfare on land.

Turning now to the actual wording of Article 23 (h) it will be seen that it begins with the wording 'to declare.' It is particularly forbidden 'to *declare* abolished, &c.' This wording necessarily contemplates the issue of some proclamation or notification purporting to abrogate or to change rights previously existing and which would otherwise have continued to exist, and in view of Article 1 of the Convention this hypothetical proclamation must have been one which it was assumed the commander of the army would issue; consequently, stated broadly, the effect of Article 23 (h) is that a commander in the field is forbidden to attempt to terrorise the inhabitants of the theatre of war by depriving them of existing opportunities of obtaining relief to which they are entitled in respect of private claims.

Sir E. Grey is much obliged to you for calling his attention to the extract which you quote from the German White Book. This extract may be translated as follows:—'Article 23 has also received

on German proposal two weighty additions. By the first the fundamental principle of the inviolability of private property in the domain of legal claims is recognised. According to the legislation of individual states, war has the result of extinguishing or temporarily suspending, or at least of suppressing the liability of the state or its nationals to be sued by nationals of the enemy. These prescriptions have now been declared inadmissible by Article 23 (h).'

The original form of the addition to Article 23 which the German delegates proposed was as follows: ' de déclarer éteintes, suspendues ou non recevables les réclamations privées de ressortissants de la Partie adverse' (see procès-verbal of the 2nd meeting of the 1st sub-Committee of the 2nd Committee, 10th July, 1907).

There is nothing to show that any explanation was vouchsafed to the effect that the proposed addition to the article was intended to mean more than its wording necessarily implied, though there is a statement by one of the German delegates in the procés-verbal of the 1st meeting of the 1st sub-Committee of the 2nd Committee, on July 3rd, which in all probability must have referred to this particular amendment, though the procés-verbal does not render it at all clear; nor is the statement itself free from ambiguity. An amendment was suggested and accepted at the second meeting to add the words ' en justice ' after ' non recevables,' and in this form the sub-article was considered by an examining committee, was accepted and incorporated in Article 23, and brought before and accepted by the Conference in its 4th Plenary Sitting on the 17th August, 1907.

The subsequent alteration in the wording must have been made by the Drafting Committee, but cannot have been considered to affect the substance of the provision, as in the 10th Plenary Sitting on October 17th, 1907, the reporter of the Drafting Committee, in dealing with the verbal amendments made in this Convention, merely said,' En ce qui concerne le règlement lui-même, je n'appellerai pas votre attention sur les différentes modifications de style sans importance que nous y avons introduites.'

Nor is there anything to indicate any such far-reaching interpretation as the German White Book suggests in the report which accompanied the draft text of the Convention when it was brought before the Plenary Sitting of the Conference (Annex A. to 4th Plenary Sitting). It merely states that the addition is regarded as embodying in very happy terms a consequence of the principles accepted in 1899.

The result appears to Sir E. Grey to be that neither the wording nor the context nor the circumstances attending the introduction of the provision which now figures as Article 23 (h) support the interpretation which the writers you quote place upon it and which the German White Book endorses.

Sir E. Grey notices that, in the extract you quote, Monsieur Politis, after placing his own interpretation upon the article, remarks that it is quite foreign to the hypothesis of the occupation of territory and ought to be removed from the Regulations and turned into a Convention by itself. If this interpretation were correct, this remark of Monsieur Politis is certainly true: but the fact that the provision appears where it does should have suggested to Monsieur Politis that it does not bear the interpretation he puts upon it.

Nor does it appear to Sir E. Grey that the provision conflicts with the principle of the English common law that an enemy subject is not entitled to bring an action in the courts to sustain a contract, commerce with enemy subjects being illegal.

That principle operates automatically on the outbreak of war, it requires no declaration by the Government, still less by a commander in the field, to bring it into operation. It is a principle which applies equally whether the war is being waged on land or sea, and which is applied in all the courts and not merely in those within the field of the operations of the military commanders.

The whole question of the effect of war upon the commerce of private persons may require reconsideration in the future; the old rules may be scarcely consistent with the requirements or the conditions of modern commerce; but a modification of those rules is not one to which His Majesty's Government could be a party except after careful enquiry and consideration, and, when made at all, it must be done by a convention that applies to war both on land and sea.

They certainly have not become parties to any such modification by agreeing to a convention which relates only to the instructions they are to give the commanders of their armed forces, and which is limited to war on land.

I am, &c.,

(Signed) F. A. CAMPBELL.

Third Lecture

ADMINISTRATION OF JUSTICE AND MEDIATION WITHIN THE LEAGUE OF NATIONS

SYNOPSIS

I. Administration of Justice within the League is a question of International Courts, but it is incorrect to assert that International Legislation necessitates the existence of International Courts.

II. The Permanent Court of Arbitration created by the First Hague Peace Conference.

III. The difficulties connected with International Administration of Justice by International Courts.

IV. The necessity for a Court of Appeal above the International Court of First Instance.

V. The difficulties connected with the setting up of International Courts of Justice.

VI. Details of a scheme which recommends itself because it distinguishes between the Court as a whole and the several Benches which would be called upon to decide the cases.

VII. The advantages of the recommended scheme.

VIII. A necessary provision for so-called complex cases of dispute.

IX. A necessary provision with regard to the notorious clause *rebus sic stantibus*.

X. The two starting points for a satisfactory proposal concerning International Mediation by International Councils of Conciliation. Article 8 of the Hague Convention concerning Pacific Settlement of International disputes. The Permanent International Commissions of the Bryan Peace Treaties.

XI. Details of a scheme which recommends itself for the establishment of International Councils of Conciliation.

XII. The question of disarmament.

XIII. The assertion that States renounce their sovereignty by entering into the League.

XIV. Conclusion: Can it be expected that, in case of a great conflict of interests, all the members of the League will faithfully carry out their engagements?

THE LECTURE

I. My last lecture dealt with the organisation of a League of Nations and International Legislation by the League. To-day I want to draw your attention to International Administration of Justice and International Mediation within the League.

I begin with International Administration of Justice which, of course, is a question of International Courts of Justice. Hitherto, although International Legislation has been to some extent in existence, no International Courts have been established before which States in dispute have been compelled to appear. Now there is no doubt that International Legislation loses in value if there are no arrangements for International Administration of Justice by independent and permanent International Courts. Yet it is incorrect to assert, although it is frequently done, that one may not speak of legislation and a law created by legislation without the existence of Courts to administer such law.

Why is this assertion incorrect? Because the function of Courts is to decide *controversial* questions of law or of fact in case the respective parties cannot agree concerning them. However, in most cases the law is not in jeopardy, and its commands are carried out by those concerned without any necessity for a Court to declare the law. Modern International Law has been in existence for several hundred years, and its commands have in most cases been

complied with in the absence of International Courts. On the other hand, there is no doubt that, if controversies arise about a question of law or a question of fact, the authority of the law can be successfully vindicated only by the verdict of a Court. And it is for this reason that no highly developed Community can exist for long without Courts of Justice.

II. The Community of civilised States did not, until the end of the nineteenth century, possess any permanent institution which made the administration of international justice possible. When States were in conflict and, instead of having recourse to arms, resolved to have the dispute peaceably settled by an award, in every case they agreed upon so-called arbitration, and they nominated one or more arbitrators, whom they asked to give a verdict. For this reason, it was an epoch-making step forward when the First Peace Conference of 1899 agreed upon the institution of a Permanent Court of Arbitration, and a code of rules for the procedure before this Court. Although the term 'Permanent Court of Arbitration,' as applied to the institution established by the First Hague Peace Conference, is only a euphemism, since actually the Court concerned is not a permanent one and the members of the Court have in every case to be nominated by the parties, there is in existence, firstly, a permanent panel of persons from which the arbitrators may be selected; secondly, a permanent office at the Hague; and, thirdly, a code of procedure before the Court Thereby an institution has been established which is always at hand in case the parties in conflict want

to make use of it; whereas in former times parties in conflict had to negotiate a long time in order to set up the machinery for arbitration. And the short time of twenty years has fully justified the expectations aroused by the institution of the Permanent Court of Arbitration, for a good number of cases have been brought before it and settled to the satisfaction of the parties concerned.

And the Second Hague Peace Conference of 1907 contemplated further steps by agreeing upon a treaty concerning the establishment of an International Court of Appeal in Prize Cases, and upon a draft treaty concerning a really Permanent International Court of Justice side by side with the existing Court of Arbitration. Although neither of these contemplated International Courts has been established, there is no doubt that, if after the present war a League of Nations becomes a reality, one or more International Courts of Justice will surely be established, although the existing Permanent Court of Arbitration may remain in being.

III. But just as regards International Legislation, I must warn you not to imagine that International Administration of Justice by International Courts is an easy matter. It is in fact full of difficulties of many kinds.

The peculiar character of International Law; the rivalry between the different schools of international jurists, namely the Naturalists, Positivists, and Grotians; the question of language; the peculiarities of the systems of law of the different

States, of their constitutions, and many other difficulties, entail the danger that International Courts may become the arena of national jealousies, of empty talk, and of political intrigues, instead of being pillars of international justice.

Everything depends upon what principles will guide the States in their selection of the individuals whom they appoint as members of International Courts. Not diplomatists, not politicians, but only men ought to be appointed who have had a training in law in general, and in International Law in particular; men who are linguists, knowing, at any rate, the French language besides their own; men who possess independence of character and are free from national prejudices of every kind. There is no doubt that, under present conditions and circumstances of international life, the institution of International Courts represents an unheard of experiment. There is, however, likewise no doubt that *now* is the time for the experiment to be made, and I believe that the experiment will be successful, provided the several States are careful in the appointment of the judges.

IV. And it must be emphasised that an International Court of Appeal above the one or several International Courts is a necessity. Just as Municipal Courts of Justice, so International Courts of Justice are not infallible. If the States are to be compelled to have their judicial disputes settled by International Administration of Justice, there must be a possibility of bringing an appeal from lower International Courts to a Higher Court. It is

only in this way that in time a body of international Case Law can grow up, which will be equivalent in its influence upon the practice of the States to the municipal case law of the different States.

V. I have hitherto considered in a general way only the difficulties of International Administration of Justice; I have not touched upon the particular difficulties connected with the setting up and manning of International Courts. If the several States could easily agree upon, say, five qualified men as judges of a Court of First Instance, and upon, say, seven qualified men as judges of a Court of Appeal, there would be no difficulty whatever in setting up these two Courts. And perhaps some generations hence the time may come when such an agreement will be possible. In our time it cannot be expected, and here therefore lies the great difficulty in the way of setting up and manning International Courts of Justice; because there is no doubt that each State will claim the right to appoint at least one man of its own choice to sit as judge in the International Court or Courts. And since there are about fifty or more civilised independent States in existence, the International Court would comprise fifty or more members.

Now why would the several States claim a right to appoint at least one man of their own choice as judge? They would do this because they desire to have a representative of their own general legal views in the Court. It is a well-known fact that not only the legal systems which prevail in the several States differ, but also that there are differences

concerning the fundamental conceptions of justice, law, procedure, and evidence. Each State fears that an International Court will create a practice fundamentally divergent from its general legal views, unless there is at least one representative of its own general legal views sitting in the Court.

I think that in spite of everything the difficulty is not insurmountable provided a scheme for an International Court which follows closely the model of Municipal Courts is not insisted upon. Just as the organisation of a League of Nations cannot follow the model of the organisation of a State, so the attempt to set up an International Court must not aim at following closely the model of Municipal Courts. What is required is an institution which secures the settlement of judicial international disputes by giving judgments on the basis of law. I think this demand can be satisfied by a scheme which would meet both the claim of each State to nominate one judge and the necessity not to overcrowd the Bench which decides each dispute.

VI. The scheme which I should like to recommend is one which distinguishes between the Court as a whole and the several Benches which would be called upon to decide the several cases. It is as follows :

The Court as a whole to consist of as many judges as there are members of the League, each member to appoint one judge and one deputy judge who would take the place of the judge in case of illness or death or other cause of absence. The President, the Vice-President, and, say, twelve or fourteen

members to constitute the Permanent Bench of the Court and therefore to be resident the whole year round at the Hague. Half of the members of this Permanent Bench of the Court to be appointed by the Great Powers—each Great Power to appoint one—and the other half of the members to be appointed by the minor Powers. Perhaps the Scandinavian Powers might agree upon the nomination of one member; Holland and Spain and Portugal upon another; Belgium, Switzerland, and Luxemburg upon a third; the Balkan States upon a fourth; Argentina, Brazil, and Chile upon a fifth; and so on. Anyhow, some arrangement would have to be made according to which the minor Powers unite upon the appointment of half the number of the Permanent Bench.

If a judicial dispute arises between two States, the case to go in the first instance before a Bench comprising the two judges appointed by the two States in dispute and a President who, as each case arises, is to be selected by the Permanent Bench of the Court from the members of this Bench. This Court of First Instance having given its judgment, each party to have a right of appeal. The appeal to go before the Permanent Bench at the Hague, which is to give judgment with a quorum of six judges with the addition of those judges who served as the Bench of First Instance. The right of appeal to exist only on questions of law and not on questions of fact.

Decisions of the Appeal Court to be binding precedents for itself and for any Courts of First Instance.

But should the Appeal Court desire to go back on a former decision of law, this to be possible only at a meeting of the Court comprising at least twelve members of the Permanent Bench.

VII. The proposal which I have just sketched, and which will need to be worked out in detail if it is to be realised, offers the following advantages:

Every case would in the first instance be decided by a small Bench which would enjoy the confidence of both parties because they would have their own judge in the Court. This point is of particular importance with regard to the mode of taking evidence and making clear the facts; but is likewise of importance on account of the divergence of fundamental legal views and the like.

Since the Court of Appeal would only decide points of law, the facts as elucidated by the Bench of First Instance would remain settled. But the existence of the Court of Appeal would enable the parties to reargue questions of law with all details. The fact that six of the Bench which serves as a Court of Appeal are members of the Permanent Bench would guarantee a thorough reconsideration of the points of law concerned, and likewise the maintenance and sequence of tradition in International Administration of Justice.

Again, the fact that the Court of Appeal is to comprise, besides six members of the Permanent Bench, those three judges who sat as the Bench of First Instance would guarantee that the judges appointed by the States in dispute could again bring into play any particular views of law they may hold.

VIII. This is the outline of my scheme for the establishment and manning of the International Court of Justice. But before I leave the subject, I must say a few words concerning two important points which almost all other schemes for the establishment of an International Court overlook. Firstly, the necessity to make provision for what I should like to call complex cases of dispute; namely, cases which are justiciable but in which, besides the question of law, there is at the same time involved a vital political principle or claim. Take the case of a South American State entering into an agreement with a non-American State to lease to it a coaling station: this case is justiciable, but besides the question of law there is a political claim involved in it, namely, the Monroe doctrine of the United States. Unless provision be made for the settlement of such complex cases, the League of Nations will not be a success, for it might well happen that a case touches vital political interests in such a way as not to permit a State to have it settled by a mere juristic decision.

Now my proposal to meet such complex cases is that when a party objects to a settlement of a case on mere juristic principles, although the other party maintains that it is a justiciable case, the Bench which is to serve as Bench of First Instance shall investigate the matter with regard to the question whether the case is more political than legal in nature. If the Court decides the question in the negative, then the same Court shall give judgment on the dispute; but, if the Court decides the question

in the affirmative, then the case shall be referred by the Court to the International Council of Conciliation. Whatever the decision of the Bench of First Instance may be, each party shall have the right of appeal to the Permanent Bench which serves as the Court of Appeal.

IX. The other point which I desire to mention before I leave the subject of International Administration of Justice concerns the notorious principle *conventio omnis intelligitur rebus sic stantibus*. You know that almost all publicists and also almost all Governments assert the existence of a customary rule according to which a vital change of circumstances after ratification of a treaty may be of such a kind as to justify a party in demanding to be released either from the whole treaty or from certain obligations stipulated in it. But the meaning of the term 'vital change of circumstances' is elastic, and there is therefore great danger that the principle *conventio omnis intelligitur rebus sic stantibus* will be abused for the purpose of hiding the violation of treaties behind the shield of law. This danger will remain so long as there is no International Court in existence which, on the motion of one of the contracting parties, could set aside the treaty obligation whose fulfilment has become so oppressive that in justice the obliged party might ask to be released. Now, as the League of Nations is to set up an International Court of Justice, my proposal is that the Court should be declared competent to give judgment on the claim of a party to a treaty to be released from its obligations on account of

vital change of circumstances. Of course the case would go before that Bench of the Court which is to serve as the Court of First Instance, and an appeal would lie to the Permanent Bench which serves as the Court of Appeal.

X. Having given you the outlines of a scheme concerning International Administration of Justice, I now turn to International Mediation by International Councils of Conciliation.

For a satisfactory proposal concerning International Councils of Conciliation two starting points offer themselves. One starting point is the special form of mediation recommended by Article 8 of the Hague Convention concerning the pacific settlement of international disputes. The following is the text of this Article 8 :

'The Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form :—

'In case of a serious difference endangering peace, the contending States choose respectively a Power, to which they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

'For the period of this mandate, the term of which, in default of agreement to the contrary, cannot exceed thirty days, the States at variance cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers. These Powers shall use their best efforts to settle the dispute.

'In case of a definite rupture of pacific relations, these Powers remain jointly charged with the task of taking advantage of any opportunity to restore peace.'

The second starting point is supplied by the Permanent International Commissions of the so-called

Bryan Peace Treaties concluded in 1913–14 by the United States of America with a number of other States. These peace treaties are not in every point identical, but of interest to us here are the clauses according to which Permanent International Commissions are set up to serve as Councils of Conciliation. The following is the text of the three articles concerned of the treaty between the United States and Great Britain of September 15, 1914:

Art. I. 'The High Contracting Parties agree that all disputes between them, of every nature whatsoever, other than disputes the settlement of which is provided for and in fact achieved under existing agreements between the High Contracting Parties, shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a permanent International Commission, to be constituted in the manner prescribed in the next succeeding article; and they agree not to declare war or begin hostilities during such investigation and before the report is submitted.'

Art. II. 'The International Commission shall be composed of five members, to be appointed as follows: One member shall be chosen from each country, by the Government thereof; one member shall be chosen by each Government from some third country; the fifth member shall be chosen by common agreement between the two Governments, it being understood that he shall not be a citizen of either country. The expenses of the Commission shall be paid by the two Governments in equal proportions.'

'The International Commission shall be appointed within six months after the exchange of the ratifications of this treaty; and vacancies shall be filled according to the manner of the original appointment.'

Art. III. 'In case the High Contracting Parties shall have failed to adjust a dispute by diplomatic methods, they shall at once refer it to the International Commission for investigation and report. The International Commission may, however, spontaneously by unanimous agreement offer its services to that effect, and in such case it shall notify both Governments and request their co-operation in the investigation.'

Keeping in view the special form of mediation recommended by Article 8 of the Hague Convention concerning the Pacific Settlement of International Disputes and the stipulations of the Bryan Peace Treaties concerning Permanent International Commissions, we can reach a satisfactory solution of the problem of International Mediation if we take into consideration the two reasons why a League of Nations must stipulate the compulsion of its members to bring non-justiciable disputes before a Council of Conciliation previous to resorting to hostilities. These reasons are, firstly, that war in future shall not be declared without a previous attempt to have the dispute peaceably settled, and, secondly, that war in future shall not break out like a bolt from the blue.

XI. My proposal concerning International Councils of Conciliation is the following :

Every member of the League shall appoint for a term of years—say five or ten—two conciliators and two deputy conciliators from among their own subjects, and one conciliator and one deputy conciliator from among the subjects of some other State. Now when a non-justiciable dispute arises between two States which has not been settled by diplomatic means, the three conciliators of each party in dispute shall meet to investigate the matter, to report thereon, and to propose, if possible, a settlement.

According to this proposal there would be in existence a number of Councils of Conciliation equal to half the number of the members of the League.

Whenever a dispute arises, the Permanent Council of Conciliation—with which I shall deal presently —shall appoint a Chairman from amongst its own members. The Council thus constituted shall investigate the case, report on it, send a copy to each party in dispute and to the Permanent Council of Conciliation.

The *Permanent* Council of Conciliation should be a *small* Council to be established by each of the Great Powers appointing one conciliator and one deputy conciliator for a period of—say—five or ten years. The reason why only the Great Powers should be represented in the Permanent Council of Conciliation at the Hague is that naturally, in case coercion is to be resorted to against a State which begins war without having previously submitted the dispute to a Council of Conciliation, the Great Powers will be chiefly concerned. This Permanent Council of Conciliation would have to watch the political life of the members of the League and communicate with all the Governments of the members in case the peace of the world were endangered by the attitude of one of the members ; for instance by one or more of the members arming excessively. The Council would likewise be competent to draw the attention of States involved in a dispute to the fact that they ought to bring it before either the International Court of Justice or their special Council of Conciliation.

This proposal of mine concerning mediation within the League of Nations is, of course, sketchy and would need working out in detail if one were thinking

of preparing a full plan for its realisation. However that may be, my proposal concerning a number of Councils of Conciliation has the advantage that non-justiciable disputes would in each case be investigated and reported on by conciliators who have once for all been appointed by the States in dispute and who therefore possess their confidence. On the other hand, the proposed Permanent Council of Conciliation would guarantee to the Great Powers that important influence which is due to them on account of the fact that they would be chiefly concerned in case economic, military, or naval measures had to be resorted to against a recalcitrant member of the League.

XII. Having discussed International Mediation by International Councils of Conciliation, I must now turn to two questions which I have hitherto purposely omitted, although in the eyes of many people they stand in the forefront of interest, namely, firstly, *disarmament* as a consequence of the peaceable settlement of disputes by an International Court of Justice and International Councils of Conciliation, and, secondly, the question of the *surrender of sovereignty* which it is asserted is involved by the entrance of any State into the proposed League of Nations.

Now as regards disarmament, I have deliberately abstained from mentioning it hitherto, although it is certainly a question of the greatest importance. The reason for my abstention is a very simple one. I have always maintained that disarmament can neither diminish the number of wars nor abolish

war altogether, but that, if the number of wars diminishes or if war be abolished altogether, disarmament will follow. There is no doubt that when once the new League of Nations is in being, war will occur much more rarely than hitherto. For this reason disarmament will *ipso facto* follow the establishment of a League of Nations, and the details of such disarmament are matters which will soon be solved when once the new League has become a reality. Yet I must emphasise the fact that disarmament is not identical with the total abolition of armies and navies. The possibility must always be kept in view that one or more members of the League will be recalcitrant, and that then the other members must unite their forces against them. And there must likewise be kept in view the possibility of a war between two members of the League on account of a political dispute in which mediation by the International Councils of Conciliation was unsuccessful. Be that as it may, it is certain that in time disarmament can take place to a very great extent, and it is quite probable that large standing armies based on conscription might everywhere be abolished and be replaced by militia.

XIII. Let me now turn to the question of sovereignty. Is the assertion really true that States renounce their sovereignty by entering into the League? The answer depends entirely upon the conception of sovereignty with which one starts. If sovereignty were absolutely unfettered liberty of action, a loss of sovereignty would certainly be involved by membership of the League, because

every member submits to the obligation never to resort to arms on account of a judicial dispute, and in case of a political dispute to resort to arms only after having given an opportunity of mediation to an International Council of Conciliation. But in fact sovereignty does not mean absolutely boundless liberty of action; and moreover sovereignty has at no time been a conception upon the contents of which there has been general agreement.

The term 'sovereignty' was introduced into political science by Bodin in his celebrated work 'De la République,' which appeared in 1577. Before that time, the word *souverain* was used in France for any political or other authority which was not subordinate to any higher authority; for instance, the highest Courts were called *cours souveraines*. Now Bodin gave quite a new meaning to the old term. Being under the influence and in favour of the policy of centralisation initiated by Louis XI of France (1461–1483), the founder of French absolutism, Bodin defines sovereignty as the 'absolute and perpetual power within a State.' However, even Bodin was far from considering sovereignty to give absolutely unfettered freedom of action, for he conceded that sovereignty was restricted by the commandments of God and by the rules of the Law of Nature. Be that as it may, this conception of sovereignty once introduced was universally accepted; but at the same time the meaning of the term became immediately a bone of contention between the schools of publicists. And it is to be taken into consideration that the science of politics

has learnt to distinguish between sovereignty of the State and sovereignty of the agents who exercise the sovereign powers of the State. According to the modern view sovereignty is a natural attribute of every independent State as a State; and neither the monarch, nor Parliament, nor the people can possess any sovereignty of their own. The sovereignty of a monarch, or of a Parliament, or of the whole people is not an original attribute of their own, but derives from the sovereignty of the State which is governed by them. It is outside the scope of this lecture to give you a history of the conception of sovereignty, it suffices to state the undeniable fact that from the time when the term was first introduced into political science until the present day there has never been unanimity with regard to its meaning, except that it is a synonym for independence of all earthly authority.

Now, do you believe that the independence of a State is really infringed because it agrees never to make war on account of a judicial dispute, and in case of a political dispute not to resort to arms before having given opportunity of mediation to International Councils of Conciliation? Independence is not boundless liberty of a State to do what it likes, without any restriction whatever. The mere fact that there is an International Law in existence restricts the unbounded liberty of action of every civilised State, because every State is prohibited from interfering with the affairs of every other State. The fact is that the independence of every State finds its limitation in the independence of every

other State. And it is generally admitted that a State can through conventions—such as a treaty of alliance or of neutrality or others—enter into many obligations which more or less restrict its liberty of action. Independence is a question of degree, and, therefore, it is also a question of degree whether or no the independence of a State is vitally encroached upon by a certain restriction. In my opinion the independence of a State is as little infringed by an agreement to submit all its judicial disputes to the judgment of a Court and not to resort to arms for a settlement, as the liberty of a citizen is infringed because in a modern State he can no longer resort to arms on account of a dispute with a fellow citizen but must submit it to the judgment of the Court.

And even if it were otherwise, if the entrance of a State into the new League of Nations did involve an infringement of its sovereignty and independence, humanity need not grieve over it. The Prussian conception of the State as an end in itself and of the authority of the State as something above everything else and divine—a conception which found support in the philosophy of Hegel and his followers—is adverse to the ideal of democracy and constitutional government Just as Henri IV of France said 'La France vaut bien une messe,' we may well say 'La paix du monde vaut bien la perte de l'indépendance de l'état.'

XIV. I have come to the end of this course of lectures, but before we part I should like, in conclusion, to touch upon a question which has

frequently been put with regard to the proposal of a new League of Nations :—Can it really be expected that, in case of a great conflict of interests, all the members of the League will faithfully carry out their engagements ? Will the new League stand the strain of such conflicts as shake the very existence of States and Nations ? Will the League really stand the test of History ?

History teaches that many a State has entered into engagements with the intention of faithfully carrying them out, but, when a grave conflict arose, matters assumed a different aspect, with the consequence that the engagements remained unfulfilled. Will it be different in the future ? Can the Powers which enter into the League of Nations trust to the security which it promises ? Can they be prepared to disarm, although there is no guarantee that, when grave conflicts of vital interests arise, all the members of the League will faithfully stand by their engagements ?

These are questions which it is difficult to answer because no one can look into the future. We can only say that, if really constitutional and democratic government all the world over makes international politics honest and reliable and excludes secret treaties, all the chances are that the members of the League will see that their true interests and their lasting welfare are intimately connected with the necessity of fulfilling the obligations to which they have submitted by their entrance into the League. The upheaval created by the present World War, the many millions of lives sacrificed, and the

enormous economic losses suffered during these years of war, not only by the belligerents but also by all neutrals, will be remembered for many generations to come. It would therefore seem to be certain that, while the memory of these losses in lives and wealth lasts, all the members of the League will faithfully carry out the obligations connected with the membership of the League into which they enter for the purpose of avoiding such a disaster as, like a bolt from the blue, fell upon mankind by the outbreak of the present war. On the other hand, I will not deny that no one can guarantee the future; that conflicts may arise which will shake the foundations of the League of Nations; that the League may fall to pieces; and that a disaster like the present may again visit mankind. Our generation can only do its best for the future, and it must be left to succeeding generations to perpetuate the work initiated by us.

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