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THE FUTURE OF THE COVENANT

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THE LEAGUE OF NATIONS
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for Study Circles

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The Future of the Covenant.

I.—THE LEAGUE AS AFFECTED BY WAR CONDITIONS.

IN any discussion of the Covenant of the League, the first point to be taken must be one of congratulation that the League exists at all. That forty-three States should have agreed to submit all their disputes to peaceable settlement, either by way of mediation or arbitration, and to take joint coercive action against a State that breaks this agreement, is an achievement which, at the outbreak of the war, would have seemed to most men incredible. It is, indeed, thought by some that the statesmen who signed the Covenant promised more than the public opinion of their peoples will endorse, and that the League may break down for that reason. Whether that be so or no, it must be regretfully admitted that public opinion is very indifferent and ignorant about the obligations and guarantees created by the League.

On the other hand, those who advocated, from the beginning of the war, the formation of a League, find much to criticise in the Covenant, and still more in the conduct towards it of the Governments of the great Powers. These criticisms are justified. But it must be remembered that the League was the creation of victorious States just emerged from a bloody and bitter war. And to expect this fact not to be reflected in the terms of the Covenant, and in the behaviour of Governments, was to expect a magnanimity which victors have never been able to show.

Much that is unsatisfactory in the present situation is thus to be accounted for by the legacy of the war, and (one may reasonably hope) may be amended as war conditions and passions disappear. We may notice especially the following points :—

THE SUPREME COUNCIL AND THE LEAGUE.

I.—At present the Supreme Council, that is, the representatives of England, France, and Italy (for Japan is taking little part), are usurping functions which, according to the Covenant,

ought to be exercised by the League. For instance, according to the spirit and letter of the Covenant (Articles 11 and 17), the Polish attack on Russia (May, 1920) ought to have been referred to the League; but it was not so referred, and it is shrewdly suspected that the attack had the support of some members of the Supreme Council. Again, by the Turkish treaty, the Straits leading to the Black Sea are to be put under an international commission. But it is not to be a commission of the League, but one composed of representatives of certain States only; and the force at its disposal is to be supplied by only three of those States, and those precisely the three most interested in the exploitation of the Near East (Great Britain, France, and Italy).

When, on the other hand, the Supreme Council does refer a difficult matter to the Council of the League, as in the case of Armenia, it gives the League no force to enable it to take up the duty. So long as the League is thus hampered, it is difficult to say whether or not it is going to be able to perform the duties laid upon it by the Covenant; and the delay and doubt involved is discrediting it with its friends, and giving occasion of triumph to its enemies.

Another drawback which it may be hoped is temporary, but which is very serious, is the fact that the United States, by refusing to ratify the treaty, has shut itself out from membership of the League. That this condition should cease, and the United States assume its international responsibilities, is perhaps the most important of all the conditions necessary to be fulfilled if the League is to be a success. For, without the steadying power of America, Europe can hardly avoid flying to pieces again.

THE LEAGUE AND ENEMY STATES.

2.—The legacy of the war appears not only in the usurpation of the functions of the League by the Supreme Council, but in its actual membership. For the defeated States have been excluded. So long as this exclusion is maintained, the League is only an alliance, although an alliance on quite new lines. This is evident from the fact that the Council of the League, which is the active and executive body, is controlled by the same Powers that constitute the Supreme Council. On the Assembly, on the other hand, each of these Powers counts only as one in a body where forty-three States are represented. This is important. But the Assembly has not yet been sum-

moned to meet, and it remains to be seen how important a place it will be able to secure for itself. The admission of Germany, Russia, Bulgaria, and Turkey is the most urgent step required to make the League a reality.* The conditions of their admission will be found in Article 1, where, it should be observed, the phrase "Give effective guarantees of its sincere intention to observe its international obligations" is quite indefinite. No guarantee other than adherence to the Covenant has been required of any existing member.

Admission to the League, it will also be observed, does not carry with it admission to the Council. The conditions of admission to that body will be found in Article 4. It seems clear that if the League is to function properly, both Germany and Russia should be admitted to the Council, since they will remain Great Powers.

THE LEAGUE AND PEACE TREATIES.

3.—The adverse effects of war conditions on the League and its work are also to be traced in many of the terms of the treaties of peace. These cannot be discussed in this place. But attention may be called to the important point that, whereas the treaty with Germany contemplates a general convention under the League of Nations for the regulation of international waterways (Art. 338), yet, for the present, such a *régime* is applied only to the rivers of enemy States, which are subjected to control by a commission dominated by the victorious States. A similar differentiation against the defeated States is shown in various regulations about trade and tariffs. For these one-sided arrangements must clearly be substituted general rules applying, on some intelligible principle, equally to all States, if the League of Nations is to operate in a way consistent with its avowed purposes as laid down in the preamble to the Covenant.

II.—REVISION OF THE CONSTITUTION OF THE LEAGUE.

Apart from the obstacles in the way of the League due to transitory war conditions, there are points in its constitution which meet with adverse criticism, and which will be dealt with in this section.

* Mexico would then be the only State excluded. But presumably Mexico will be admitted as soon as civil war ceases there.

(a) UNANIMITY.

With one or two exceptions (see Articles 1, 4, 5, 6, 15, and 26), all decisions, both of the Council and of the Assembly of the League, must be approved by all the nations represented at the meeting. It is urged that this will paralyse the action of the League.

It must be remarked, first, that one of the cases in which unanimity is not required is important. If a dispute is referred to the Council, the consent of the parties to the dispute is not required to give validity to the Council's recommendations. Unanimity of the other members is sufficient. And in the case of a dispute referred to the Assembly, the agreement of a majority of the members, inclusive of the members represented on the Council, but exclusive of the parties to the dispute, is sufficient to give validity to the recommendation. In case such a recommendation is arrived at, all members are under obligation not to attack any member who accepts the recommendation (Art. 15). It is, however, true that the requirement of unanimity will make it difficult for the League to take action in highly controversial matters. This is especially the case in the Assembly, where nearly fifty States will have to agree. If, for instance, the Assembly is to attempt to make international law (as presumably it will), its enterprise may be completely defeated by the vote of one State. That this is a very real possibility is shown by the history of the Hague Conferences of 1899 and 1907, where the same condition of unanimity was required.

Unsatisfactory though this be, it may be questioned whether the Covenant could have gone further without grave risk of wrecking the League. The requirement of unanimity is, in fact, a deduction from the tradition of the sovereignty of States. And that, in turn, rests on the unwillingness not only of governments, but of peoples, to renounce the right to take independent action in all matters which may affect their vital interests, their independence, or what is called their honour. Let us take, for example, the question of disarmament. Would British public opinion consent, beforehand, to submit the strength of its naval forces to the decision of a majority of other States? Would they even consent to accept regulations for the government of tropical dependencies passed by such a majority? The requirement of unanimity seems to correspond to the existing tradition; a bad one, in the opinion of the present writer, but one which will only

weaken by experience and practice in international co-operation.

It may be suggested that a transition from the present arrangement to one in which a majority decision shall be final might be afforded by giving validity to majority decisions, in some or in all matters, subject to the right of any State to refuse to accept the decision within a given interval of time.

(b) PROCEDURE FOR SETTLING DISPUTES.

There seems to be no obligation laid on members of the League to accept the solution of any given dispute arrived at under the procedure authorized by the Covenant. Thus:—

(1) If a dispute is referred to arbitration (Article 13), the members of the League are pledged to "carry out in full good faith any award that may be rendered." And a sanction is suggested. For "in the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto."

But, on the other hand, only such disputes will be submitted to arbitration as the members of the League recognize to be suitable for submission. This is not very clear, but it seems to imply that any party to a dispute may decline to submit it to arbitration, and insist on its reference instead to the Council or to the Assembly. And a State not wanting to be bound beforehand to accept an award would naturally adopt this course.

Article 13, however, contains a useful definition of cases "generally suitable for submission to arbitration."* And, of course, it may become the practice to submit such cases to arbitration.

If a case is so submitted, the parties may select any tribunal they may agree upon.

(2) Cases not referred to arbitration go to the Council, or to the Assembly (Article 15). In that case, neither party seems to be bound to accept the recommendation arrived at. But under certain conditions laid down in the article, the members of the League (including the parties to the dispute) are bound "not to go to war with any party to the dispute which complies with the recommendations of the report." Should, therefore, any State attack a party that has accepted the recommen-

* This definition is taken from the "Proposals for the Prevention of Future Wars," by Viscount Bryce and others, issued in 1917. It was drafted by the late Richard Cross.

dation, in order to force upon it some action other than that suggested by the recommendation, the attacking State becomes liable to the penalties of Article 16. On the other hand, if one party refuses to carry out the recommendation, the members of the League are not bound to put pressure on it to do so.

(3) The award of an arbitrator is not the same thing as the judgment of a Court. An arbitrator "is a person chosen to act as judge on a particular occasion; the fact that his authority is created by the parties and confined to the occasion appears to constitute the specific character of the office." He is indeed "a kind of judge" and he is "bound to observe the rules of judicial conduct." But "his judgment seat is not the seat of a permanent Court, nor is he in the exercise of his office a member of such a Court; his jurisdiction is created for a special purpose, and comes to an end when that purpose is fulfilled. His award has no authority beyond the particular occasion, and the parties who have agreed to submit the dispute to him." The consequence is that "the isolated awards of arbitrators or arbitral bodies, however conscientious and able, will not produce a coherent doctrine, nor settle any standing doubt."*

In contrast to an Arbitral Tribunal, a Permanent Court could and would develop international law, just as the English courts have developed the Common Law, judgments becoming precedents. Now this development of International Law is essential, if the ultimate ideal of international organization—the substitution of judicial process for war—is to be attained. International Law may be developed both by legislation (such as the assembly might undertake) or by a Court. And it is satisfactory to note that Article 14 of the Covenant contemplates the creation of a Court.

Such a Court must be distinguished from the "Permanent Court of Arbitration" created by the Hague Conference of 1899. That is not, in fact, in spite of its name, a Permanent Court, but a panel of persons from among whom States that choose to arbitrate a question may choose their arbitrators. At the Second Hague Conference, 1907, an attempt was made to constitute a true Permanent Court, but a difficulty, at the time insuperable, was presented by the claim put forward that every State should have its own judge in the court; which would have involved a court of something like fifty judges. The notion of having "one's own judge" in the

* The passages in inverted commas are taken from Sir Frederick Pollock's book, "The League of Nations," p. 20 *seq.* (Stevens and Son, 1920.)

court which is to try one's cases seems odd from the point of view of ordinary jurisprudence. It has, however, been defended on the ground that "not only the legal systems which prevail in the several States differ, but also 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 legal views sitting in the Court."*

While these views prevail, it will not be easy to get a Court constituted. But what is difficult is not therefore impossible. A great number of proposals have been put forward to get over the difficulty, and by Article 14 the Council is bound to prepare a scheme.† A scheme put forward with all the authority of the Council is not unlikely to be accepted by the members of the League.

It should be noticed, however, that even if the Court be constituted, the article still leaves it to the discretion of the States concerned whether or no they will submit their case to it. We have here the same reluctance on the part of sovereign States to bind themselves to accept the jurisdiction of even the most judicial body on which we have already commented. The fact must be recognized, however much it may be regretted. The history of international organization is likely to follow that of the organization of States. We shall have a court before we have a recognized obligation to appear before it, to accept its decisions, or to enforce them. But the creation of the Court may, none the less, be an immense step in advance.

III.—REVISION OF THE LEAGUE'S CONSTITUTION (Continued).

(c) DEMOCRATIZATION OF THE LEAGUE.

It has been objected to the Covenant that it creates no international body independent of the Governments of the States. This point requires some discussion.

First, what about the Assembly of the League? On this body every member of the League has one voice, and may have not

* Oppenheim, "The League of Nations," p. 20.

† A commission appointed by the Council is now sitting, to prepare a scheme.

more than three representatives. The method of appointment of these representatives is not prescribed by the Covenant, but left to the decision of each State. The official commentary is therefore justified in saying: "The members need not all be spokesmen of their Governments." The British Parliament, for instance, might enact that the representatives of this country should be elected by the people, or by the House of Commons, by proportional representation.

On the other hand, the representatives of each State can only give one joint vote, so that differences of opinion cannot be expressed in the voting of any delegation from a single State. And it seems pretty certain that the practice will be that the members of the assembly will be appointed by Governments, subject, perhaps, to approval by representative chambers, and will vote under instructions from Governments.

That this arrangement is consonant with existing political ideas and traditions we have already noted in discussing the question of unanimity. At the present stage of political development, it seems to be inevitable that any international organ with power of action (as distinguished from advice) should have behind it the support of the Governments of the States concerned. For otherwise it could not rely on its decisions being executed. In other words, the peoples of States are not yet prepared to prefer the decision of an international body to that of their own Government selected by themselves. And Governments are not prepared to accept as a matter of course the decisions of an international body as determining their own policy.

On the other hand, delegates voicing the views of their Governments cannot voice the whole opinion of a nation, and may voice only that of a minority. For Governments are seldom or never selected on questions of foreign policy. These, indeed, may come up suddenly at any moment in a Government's life. Moreover, different elements in a State are sure to have different views about international policy; there are likely, for a long time to come, to be pacifists and militarists, nationalists and internationalists. And a given Government cannot represent both these tendencies at once. Now, if the delegates to an international assembly were chosen by electorates or Parliaments, on some system of proportional representation, and were free to vote according to their convictions, each member of each national delegation giving an independent

vote, there would, no doubt, be cross voting, the assembly dividing not by States, but by parties—Socialists, for example, of different States voting together. That this would be likely to happen is shown by the voting at the Labour Conference held at Washington at the end of 1919, where cross-voting was allowed and did occur.

It should be observed, however, that the resolutions of the Labour Conference are only recommendations, and do not come into effect unless and until they are adopted by the legislatures of the States represented at the conference. In other words, the conference is advisory, not executive or legislative.

The precedent of the Labour Conference suggests that the most practicable way of introducing into the League a body representative of the public opinion of peoples, rather than of Governments, would be to add an organ, with powers to discuss and recommend, but not to act. This body should be appointed by proportional representation, by representative chambers or by electorates, and its members should be free to vote as they please, irrespective of nationality. Such a body might come to exercise a real influence on both nations and Governments, while at the same time it would not claim a power to override either. It would also accustom nations to think internationally, and to realize that there may be more real affinity between those holding similar points of view in different nations, than between those holding opposite points of view in the same nation. Action by national unities may force together men of opposite convictions, and force apart men of similar convictions.

In this connection it is worth while to consider a suggestion that has been made that the organ we are seeking should be formed out of the existing Inter-parliamentary Union. This body, constituted in 1889, is composed of Members of the Parliaments of the various States, any Member of a Parliament being eligible. It meets in annual or biennial conferences, of which eighteen had been held previous to 1914. Its object was originally the propagation of the principle of international arbitration. Later, it added the study of other questions of international law, and in 1912 took as its sphere "The study in general of problems relating to the development of pacific relations between the nations."

The suggestion is that this organization be adapted so as to become a regular part of the machinery of the League.

For this purpose, the constitution of the Union would have to be revised. At present the membership bears no proportion either to the relative importance of the different States or to the relative weight in each Parliament of different parties.

It might be prescribed that the members of the Conference of the Union should be elected in each Parliament by proportional representation, and that the representation of each Parliament be proportioned to the importance of its State in population and civilization. For a merely discussing body, however, this latter point does not seem to be of primary importance, and the number of members from each State might without disadvantage be equal. The new body should have formal powers conferred on it to receive reports on the work of the League from its officers, and to convey their comments and recommendations to the Council or the Assembly. If such a body were able and responsibly conducted, its debates and resolutions would have great weight, even though they had no binding force; and its conclusions would be a better index than those of the Assembly to the real currents of international opinion, just because the voting would be not by States, but by parties taking different views and holding different principles about international affairs.

(d) THE LEAGUE AND TREATIES.

Among the most important articles of the Covenant are 18, 19, and 20, dealing with treaties. Article 18 abolishes secret treaties, so far as a solemn pledge can do it. If States, nevertheless, do make secret agreements, at least either party will be able to plead in case of need that such agreement is not binding, since it was not registered with the secretariat of the League. Perhaps this fact may be an additional motive not to make such agreements. But so curious is, or at least has been hitherto, the morality of States, that it is not inconceivable that they might feel more bound in "honour" to adhere to a secret agreement than to adhere to their public agreement not to make secret agreements.

Article 20 abrogates all existing agreements inconsistent with the Covenant, and obliges the members of the League to make no such agreements in future. The question here arises, what is meant by "inconsistent with the terms of" the Covenant. The official commentary says that "military conventions that are genuinely defensive" are not inconsistent.

And in accordance with this view treaties of alliance have been entered into between France and Great Britain and France and the United States.* The former treaty pledges Great Britain to come immediately to the assistance of France "in the event of any unprovoked movement of aggression against her being made by Germany." These terms seem to be deplorably vague. For what constitutes "unprovoked aggression?" Suppose, for instance, a dispute arises between France and Germany about the terms of the peace treaty, and the dispute is referred to the Council, and the Council fails to agree on a recommendation by a unanimous vote of its members other than France and Germany. At that point war becomes legitimate between France and Germany, and one must suppose both parties massing troops on the frontier. Would such massing of troops by Germany be an act of "unprovoked aggression" on France, and would the *casus foederis* arise? The point is left entirely to the discretion of the parties. But it is precisely such agreements that have led to arming and counter-arming in the past. The exact definition of "unprovoked aggression" is, in fact, a first requirement for international peace. The Covenant provides such a definition, namely, any act in breach of the Covenant. But the definition fails in the case of any acts of war, or preparation for war, not contrary to the Covenant. The treaty between France and England is very likely to be followed by similar treaties between other Powers. Thus we may have a Europe of alliances and counter-alliances as before the war, and these again are likely to vitiate the action of States at the Council and the Assembly of the League by the fact that allies will tend to act together. Especially such treaties will affect the whole question of disarmament, for every ally will wish to insist on its allies remaining adequately armed. It is more than unfortunate, however intelligible it may be, that France was not satisfied to trust for her defence to the action of the League. Such treaties of alliance put the old wine into the new bottle of the League, with results that cannot be foreseen, but that must awaken grave disquietude.

Article 19 provides for the possibility of an international reconsideration of "treaties which have become inapplicable." This clause should be read in connection with Article 11, which

* The Franco-American treaty has not been ratified. And the Franco-British treaty does not come into force until the other is ratified.

makes it possible for any member of the League to bring the provisions of a treaty before the Assembly or the Council. That there should be some formal means for such reconsideration is essential, for wars have arisen, and may easily arise again, in order to throw off the shackles of intolerable treaties imposed originally by force. There are many who think that such reconsideration is already urgently demanded for the treaties of peace just concluded.

It must, however, be noticed that in such a matter as the revision of a treaty the requirement of unanimity comes in, so that any party to a treaty can veto any revision of it. Thus the revision of a treaty, however unjust that treaty is, and however plainly making, in its observance, for war and ruin, is in fact rendered very difficult.

IV.—THE SANCTIONS OF THE LEAGUE.

Many have objected to the Covenant that it does not go far enough in prohibiting war. It does, in fact, permit war, if the attempt at peaceable settlement fails. As to this, it can only be remarked that in the view (probably correct) of the framers of the Covenant, States are not at present ready to abandon the ultimate arbitrament of war. But this fact has, of course, serious consequences. It makes all-round disarmament more difficult. For if war is always possible, failing agreement under the machinery of the Covenant, States are likely to insist on being prepared for war. The existence of alliances such as those dealt with in the last section obviously increases this probability.

Meantime, Article 8 obliges the Council of the League to "formulate plans" for the reduction of armaments. Such plans, however, will not come into effect unless accepted by the Governments of the States. Once accepted, the limit laid down may not be exceeded. There is little to say about this article except that it is one of the most important in the Covenant, and also one of the most difficult to carry out.

A drastic way out of the difficulty of disarmament would be the summary abolition of national armaments, and the substitution of an international force to keep the peace by sea and by land. That this solution would, in fact, be the most effectual for preventing war is evident. What prevents its

adoption is its novelty, the tradition of national independence and sovereignty, and the lack of a tradition of international solidarity. Here, as so often, the most effective means to the end is the most radical, but the most radical is ruled out by the unpreparedness of men's minds.

Not only, however, does the Covenant not provide an international force, it does not *bind* the members to any use of force. Article 16 obliges them, in case any member resorts to war in defiance of the Covenants referred to, to apply an economic boycott, but not to apply armed force. The most that can be said is that the use of force is contemplated in paragraph 2 of the article. It should be noted here that some advocates of the League have always held that, in case of breach of the Covenant by any member, all the other members should *ipso facto* be in a state of war with that member. In particular this was the position adopted by the American League to Enforce Peace. The framers of the Covenant have not thought fit to go so far. But it must be observed that this lacuna in the provisions for enforcing the Covenant may increase the difficulty of arriving at a large measure of all-round disarmament, since States will think they may be thrown back on self-defence at the critical moment.

In this connection, however, an ambiguity is caused by the provisions of Article 10. On the face of it that article would oblige the Council of the League to advise as to the possibility of taking suitable action in defence of any member attacked or threatened with attack under any circumstances at all by any other State. For *any* war (including such as is not forbidden by the other articles of the Covenant) must involve a threat to the territorial integrity and political independence of the parties engaged. It seems difficult, however, to read this article as intended to forbid all war, in view of the other articles. But on the other hand, if it does not intend that, it is not easy to see exactly what it does intend. It was this article, it will be remembered, that was a principal cause of the American opposition to endorsing the treaty. The opponents held that the United States would be pledged under it to make war in Europe in defence of territorial arrangements that might be fundamentally unjust and untenable. These fears are, perhaps, exaggerated, for the article does not bind the members to go to war. And there are other means, as we have seen, provided in the Covenant to revise objectionable treaties. Still, failing the possibility of revision, the

article does seem to constitute some kind of moral obligation to intervene by force in the case supposed. At any rate, President Wilson seems so to interpret it, and he apparently regards the article as the most important in the whole Covenant.

Finally, it should be noticed that the French insistence on alliances with Great Britain and the United States was apparently due to dissatisfaction with the provisions of the Covenant to deal with breaches of its articles. The French delegation submitted to the Peace Conference two amendments to the Covenant intended to secure that an International force composed of national contingents should be kept "in such a state of efficiency that it could suppress any attempt at aggression with sureness and promptitude." These amendments failed to secure adoption. But it is thought that they will come up again at some early meeting of the League.*

* See Pollock, "League of Nations," p. 125.

Questionnaire.

I.

- (1) In what ways have conditions resulting from war left their mark on the Covenant?
- (2) How does the existence of the Supreme Council interfere with the development of the League?
- (3) What effect has the absence of enemy and other States from the League upon its future? What difficulties are there in the way of the future admission of such States?
- (4) How do the Peace Treaties affect the League's future?

II.

- (1) What problems concerned with the future working of the League are raised by the principle of unanimity adopted in the Covenant?
- (2) What are the weak points in the procedure for settling disputes laid down in the Covenant?
- (3) Why has the creation of a permanent international court an important bearing upon the League's future? What are the difficulties which the League will have to face in creating such a court?

III.

- (1) What is the principle adopted in the Covenant for representation of nations in the League's Council and Assembly?
- (2) What are the difficulties in the way of representing peoples as distinguished from Governments on international bodies?
- (3) What methods have been suggested for democratizing the League's organs and for providing representation other than that of Governments?
- (4) What are the League's provisions with regard to treaties?
- (5) How is the League's future affected by the existence of treaties of alliance?

IV.

- (1) What difficulties will the League have to face in the problem of disarmament ?
- (2) How might the League be strengthened by increasing the sanction to be applied in case of a breach of the fundamental pledges of the Covenant ?
- (3) What proposals have been made, *e.g.* by the French, for increasing the League's sanctions and guarantee and the creation of an international force ?

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