

# THE GENEVA PROTOCOL

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THE League of Nations is a valuable institution, but in adopting the *Protocol for the Pacific Settlement of International Disputes* (even *ad referendum*), it went much too far, or possibly only somewhat too fast. This will be submitted for the consideration of our parliament. We ought to understand it. For that purpose, we must recall some of the provisions of the Covenant—the League's constitution.

*Article X.* The famous Article X was as follows:

The Members of the League undertake to respect and preserve against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression, or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.

Obviously, there is here a definite and wide-embracing obligation; for not only is that word (obligation) used, but there also appears the word "undertake." That the Council is "to advise" (only) "upon the means," etc., does not affect the existence of the obligation to act—in the way advised, or in some other way. At every session of the League, Canada has endeavoured to eliminate or modify that obligation, but has failed. Either she ought never to have agreed to it, or, in agreeing, she should have added a reservation similar to that adopted by the United States' Senate (13th November, 1919):

The United States assumes no obligation to preserve the territorial integrity or political independence of any other country, or interfere in controversies between nations, whether Members of the League or not, under the provisions of Article X.

Annexations of enemy territory after the war having been based, in many respects, upon no better principle than "woe to the defeated," the victors were well aware that the conquered would fight for restitutions as soon as favourable opportunities arrived. They provided, therefore, for mutual assistance in case of attempts to readjust the territorial boundaries.

They knew that Germany would submit but temporarily to Poland taking territory which separated eastern Prussia from

western, to amputation of all her colonies, and to humiliating subjections of various kinds; that Russia would not indefinitely submit to the interposition of three little States (Lithuania, Latvia, and Esthonia—constituted out of Russian territory) between her and the waters of the Baltic; that Russia would decline to acquiesce in the assignment of Bessarabia (Russian since 1878) to Roumania; that Austria would refuse to recognize the transfer of her people to Italy on the south and to Czecho-Slovakia on the north; that the proud Magyars of Hungary would protest against their co-patriots being incorporated in Roumania and Czecho-Slovakia; that Bulgaria would fight again for Macedonia and an outlet on the *Ægean*; and that even Serbia would deem herself outraged by the inclusion of her people of the Banat of Temesvar within Roumanian boundaries.

The victors well knew all that. They took of the spoil what they pleased, and agreed to help one another to retain it. Of the thirty-two original Members of the League, fourteen were among the takers of profit; eleven were small American republics who were willing to exchange with the European Powers meaningless promises as to maintenance of territorial integrity; and the other seven were (1) India, (2) China, (3) Siam, (4) Liberia, (5) Portugal, (6) the United States, and (7) Canada. India's action was controlled by the British India Office. The next four took, probably, a very light view of their responsibility. The United States rightly refused to agree. Canada pledged her support, partly because of misrepresentation as to the effect of Article X, and partly under the belief that modification of it could be secured.

*Articles XII, XIII, and XV.* Articles XII and XIII of the Covenant provided for arbitration, but only for submission to the court agreed on by the parties to the dispute, or stipulated in any convention existing between them,

a limitation which rendered arbitration non-obligatory.

By Article XV, Members agreed that disputes not submitted to arbitration should be submitted to the Council of the League:

If a report by the Council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

While it is possible that on occasion the prescribed unanimity will be secured as against some little nation, none of the stronger Powers will ever be so condemned. Such action would mean spectacular

explosion of the League. The Shantung incident at the peace conference of 1919, the Corfu incident of a few months ago, and the Japanese action in connection with the recent Protocol make that clear.

*Article XVI.* The first clause of Article XVI of the Covenant is as follows:

Should any Member of the League resort to war in disregard of its covenants under Article 12, 13, or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

This clause, it will be observed, is not only definite as to its obligatory character, but specific as to the means to be employed. The United States' Senate objected to it. Under it, should France—for example—disregard one of her covenants, Canada is bound to prevent (as far as possible) "all financial, commercial, or personal intercourse between the nationals" of France and the United States—although not a member. Canada ought not to have assumed duty of that sort. Clause 2 of the same Article provided as follows:

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

*The Protocol.* The Protocol contains provisions not only more widely prohibitive of war, but still more categorically obligatory as to co-operation in suppressing war. Article II is as follows:

The signatory States agree in no case to resort to war either with one another or against a State which, if the occasion arises, accepts all the obligations hereinafter set out, except in case of resistance to acts of aggression, or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present Protocol.

The proposed methods of settlement of all disputes are elaborated. Disputants shall do so-and-so; the Council of the League shall do so-and-so; if the Council cannot agree, then so-and-so—arbitration, or Assembly, or Permanent Court of International Justice. Meanwhile the parties are to keep perfectly quiet—no increase in arma-

ments, no "military, naval, air, industrial, or economic mobilization." If one party should become active, the other may complain; the Council may investigate, may "summon" a delinquent to stop, and may (if necessary) decide upon the measures to be taken. One wonders whether the draftsmen of these provisions really imagined that any great Power would fail in finding lawyers who would give to all these arrangements such interpretation as suited its purpose.

*An Aggressor.* Article 10 of the Protocolis supposed to provide a method by which the difficulty of ascertaining whether a nation is "an aggressor" or not is eliminated:

Every State which resorts to war in violation of the undertakings contained in the Covenant or in the present Protocol is an aggressor.

It is an aggressor also (unless the Council shall unanimously declare otherwise),

if it has refused to submit the dispute to the procedure of pacific settlement provided by Articles 13 and 15 of the Covenant as amplified by the present Protocol; or to comply with a judicial sentence or arbitral award, or with a unanimous recommendation of the Council; or has disregarded a unanimous report of the Council, a judicial sentence, or an arbitral award recognizing that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State; *nevertheless, in the last case, the State shall only be presumed to be an aggressor if it has not previously submitted the question to the Council or the Assembly, in accordance with Article XI of the Covenant.*

The Council shall call upon the signatory States to apply forthwith against the aggressor the sanctions provided by Article II of the present Protocol, and any signatory State thus called upon shall thereupon be entitled to exercise the rights of a belligerent.

The words in italics were added at the instance of the Japanese for the purpose hereinafter mentioned.

*Compulsory arbitration.* Articles XII and XIII of the Covenant having provided for voluntary arbitration only, the League in 1920 adopted a statute providing (by paragraph 2 of Article 36) for the voluntary adoption of compulsory arbitration in four widely comprehensive classes of subjects, namely: (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of international obligation; and (4) the nature or extent of the reparations to be made for the breach of an international obligation. The

Protocol (Article 3) removes the facultative features of the statute. It provides as follows:

The signatory States undertake to recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Permanent Court of International Justice in the cases covered by paragraph 2 of Article 36 of the Statute of the Court, but without prejudice to the right of any State, when acceding to the special protocol provided for in the said Article and opened for signature on December 1920, to make reservations compatible with the said clause.

The reason for the rider as to "reservations" was that the United Kingdom intimated that it would not agree to compulsory arbitration unless with the reservation that no question with reference to any action of the British fleet during war should be debatable. Thereby hangs a tale. During the wars of 1914-18 the British Government, when rules of international law proved to be embarrassing, paid no more attention to them than did any other nation. Determined to drive Germany to surrender by cutting off all importations, the British fleet treated neutral vessels as though international law gave them no protection. As against this attitude the United States made vigorous protest (remembering, no doubt, the circumstances which preceded the war of 1812). The Scandinavian Powers, particularly prejudiced by the action of the British fleet, also protested, but without effect. The United Kingdom, which had always refused to agree to the constitution of an international prize court, insisted that neutral ships should have such rights as British courts would allow them, and no others, and the decision of the Judicial Committee of the Privy Council in the *Stigstad* case (December, 1918) was of very astonishing character. The *Stigstad* was a Norwegian ship loaded with briquettes sailing from a port in Norway to Rotterdam, a port in Holland, both countries being neutral. The briquettes, however, were intended to be transferred from Rotterdam to Germany, and, in pursuance of the embargo policy, the British fleet seized the ship. There was no doubt that (apart from the circumstance to be mentioned) the seizure was a flagrant breach of international law; but the Judicial Committee declared it to be valid, purely upon the ground that Germany was committing breaches of international law, and that, by way of retaliation for what Germany did as against some neutrals, the United Kingdom was justified in her proceedings as against other neutrals; just as though if one man takes my umbrella, that justifies me in taking the umbrella of somebody else. The Judicial Committee declared that

its function is, in protection of the rights of neutrals, to weigh on a proper occasion the measures of retaliation which have been adopted, and to enquire whether they are in their nature or extent other than commensurate with the prior wrong done, and whether they inflict on neutrals, when they are looked on as a whole, inconvenience greater than is reasonable under all the circumstances.

In other words, the rights of a neutral against British seizures were to be governed by consideration of the illegal actions of Germany. This being the British attitude, the reason for the reservation above referred to is very clear. The British Government would agree to compulsory arbitration, provided that the methods of the fleet during war were not to be limited by considerations of international obligation as interpreted by anybody but themselves.<sup>1</sup>

Canada may have to consider whether she would agree to the British reservation. Our present political association with the United Kingdom would insure us to some extent against damage by illegal action of the British fleet. But, for two reasons, Canada ought to hesitate in giving her assent to the British proposal: (1) because Canada would be much embarrassed if some other nations made similar or equivalent reservation, and (2) because it is certain that the United States would never agree to enter a League of Nations one of whose Protocols provided for compulsory arbitration upon the basis that the actions of the British fleet, vigorously protested against between 1914 and 1917, should be, if not legalized, at least protected against investigation or objection.

*Domestic questions.* The provisions of the Covenant applied to international difficulties only, and expressly (by paragraph 8 of Article XV) excluded consideration of domestic disputes. For the same purpose, Article 5 of the Protocol provided as follows:

If in the course of an arbitration, such as is contemplated by Article 4 above, one of the parties claims that the dispute or part thereof arises out of a matter which by international law is solely within the domestic jurisdiction of that party, the arbitrators shall on this point take the advice of the Permanent Court of International Justice through the medium of the Council. The opinion of the Court shall be binding upon the arbitrators, who, if the opinion is affirmative, shall confine themselves to so declaring in their award.

*If the question is held by the Court or by the Council to be a matter solely within the domestic jurisdiction of the State, this decision shall not prevent consideration of the situation by the Council or by the Assembly under Article I of the Covenant.*

The words in italics were inserted at the instance of the Japanese, for the purpose hereinafter mentioned.

1. Space need not be devoted to a suggested modification of the reservation. The British parliament would certainly not agree to it.



It has been suggested, however, that the distinction between international and domestic questions is not so clear as was thought. It is argued (Italy argued it with reference to British coal) that if one country contain a supply of raw material needed by another country, the possessing country has no right to inhibit exportation under reasonable conditions. Basing their arguments on contention of that sort, the Japanese have insisted at meetings of the League that the right of the nationals of one country to reside in another is not a matter of domestic importance, but, on the contrary, one of such high international moment that its non-recognition might possibly constitute a menace to the peace of the world. They desire, therefore, to bring questions of that character within the jurisdiction of the League, and at the recent meeting, in spite of strenuous opposition, they succeeded in forcing (I do not think the word too strong) a compromise with which, as a commencement at all events, they may well be satisfied.

The Article of the Protocol (above quoted) which defines the word "aggressor," provided that a nation shall be "an aggressor" if it disregards

a judicial sentence or an arbitral award recognizing that the dispute between it and the other belligerent State arises out of a matter which by international law is solely within the domestic jurisdiction of the latter State.

The Japanese objected to this. They urged that should they demand arbitration upon the subject of residence in the United States, for example, the decision might be that the matter was one of domestic concern, and that, in that case, if they disregarded the decision, they would be an aggressor-nation. They have succeeded in avoiding that result by securing the adoption of two clauses. The first was the addition to Article 5 as above quoted in italics:

If the question is held by the Court, or by the Council, to be a matter solely within the domestic jurisdiction of the State, this decision shall not prevent consideration of the situation by the Council, or by the Assembly, under Article XI of the Covenant.

The second of the clauses is the rider to Article 10 as above quoted in italics, providing that although a nation becomes "an aggressor" by refusing to accept judicial or arbitral decisions with reference to the subject of domestic jurisdiction—

Nevertheless... the State shall only be presumed to be an aggressor if it has not previously submitted the question to the

Council, or the Assembly, in accordance with Article XI of the Covenant.

Article XI of the Covenant is as follows:

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared to be a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council.

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

The effect of these various provisions when taken together is that, although the Permanent Court should declare that the dispute

arises out of a matter which by international law is solely within the domestic jurisdiction

of one of the parties; and although, in that case, the arbitrators who have the dispute in hand "shall confine themselves to so declaring in their award", the defeated party may still require "consideration of the situation by the Council or by the Assembly under Article XI of the Covenant," and thereupon "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."

Domestic questions are excluded by one set of clauses, and introduced by the almost imperceptible co-relation of three widely-separated provisions; with the result that should the Japanese disregard "a judicial decision, or an arbitral award," and inaugurate war in connection with what they choose to view as an international and not a domestic question, Japan will not be "an aggressor." Why should not other recalcitrants be similarly free in other cases? Simply because Japan insisted, and they did not.

*Spoiliations safeguarded.* Safeguarding the spoiliations of the peace conference, the Protocol contains the unfair provision that, although one of the fourteen recipient-nations may for some future reasons be declared "an aggressor", and may, for example, suffer defeat at the League-authorized hands of one of the 1914-18 defeated nations—

Nevertheless, in view of Article X of the Covenant, neither the territorial integrity nor the political independence of the



aggressor shall in any case be affected as the result of the application of the sanctions mentioned in the present Protocol.

The defeated nations of 1914-18 were despoiled on the ground that they were the aggressors. If that was right, this clause is wrong.

*Sanctions.* The Protocol (Article II) removes any doubt that may have existed as to the categorical character of the obligations of Articles X and XVI of the Covenant. Offering advice by the League under Article X becomes a power "to call upon the signatory States to apply sanctions"; and when that is done, the "obligations" of paragraphs 1 and 2 of Article XVI

shall be interpreted as obliging each of the signatory States to co-operate loyally and effectively in support of the Covenant of the League of Nations, and in resistance to any act of aggression, in the degree which its geographical position and its particular situation as regards armaments allow.

If Canada's geographical position is on the North American continent, our ineffective armaments may be something of an asset. But if we are part of a world-investing State? The Protocol then proceeds as follows:

In accordance with Paragraph 3 of Article 16 of the Covenant, the signatory States give a joint and several undertaking to come to the assistance of the State attacked or threatened, and to give each other mutual support by means of facilities and reciprocal exchanges as regards the provision of raw materials and supplies of every kind, openings of credit, transport and transit, and for this purpose to take all measures in their power to preserve the safety of communications by land and by sea of the attacked or threatened State.

It is not probable that either the United Kingdom or the United States would pledge its fleet for operations which only the owners of commanding fleets could undertake. And what if it should happen that one of these fleets was endeavouring to prevent trading which the other was interested in protecting?

*Non-members.* Believing that the United States would become a Member of the League, and hitting at recent enemies, the draftsmen of the original Covenant inserted a clause (XVII) providing for intervention by the League in disputes between Members and non-Members, and added:

If a State [a non-Member] so invited shall refuse to accept the obligations of Membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provision of Article 16 shall be applicable as against the State taking such action.

The United States not being a Member, advantage ought to have been taken of the revision of the Covenant by the Protocol to modify that clause. Instead, it is continued, and the more drastic provisions of the Protocol are applied to it.

*Comment.* The League is hedged with insurmountable difficulties, the chief of which is the character of the peace treaties. If war is ever to be ended, it will be by the removal of the causes of war, and not by paper agreements charged with ever-so-clever prescriptions and prohibitions. Look at the last great war and learn. Serbia wanted Bosnia and Herzegovina, which formed part of Austria-Hungary. Austria-Hungary wanted an opening on the *Ægean*. Russia wanted control of the Straits. Germany wanted chief influence at Constantinople, and satisfactory railway transportation through the Balkans. France wanted Alsace-Lorraine. Italy wanted the Trieste, Trentino, and other districts belonging to Austria-Hungary. Bulgaria wanted territory from Serbia, Greece, Roumania, and Turkey. Roumania wanted territory from Russia and Austria-Hungary. Turkey wanted territory from Bulgaria, Greece, and Serbia. The Poles wanted territory from Russia, Germany, and Austria-Hungary. And peace could have been assured only by satisfactory adjustment of the boundaries of all these. The Peace Conference supplied a splendid opportunity—the only sufficient sort of opportunity—for rearrangement of the map of Europe upon a peace basis. But passions were hot, anxieties acute, and desires insistent; with the result that not only are there to-day as many reasons, of territorial character, for apprehension of war as existed prior to the war, but the fact that, potentially, the two mightiest Powers in Europe (Germany and Russia) are those which cherish the bitterest resentment against their despoilers makes absolutely certain that, long before the lapse of a period of time comparable to that in which France meditated revenge, the nations will once more engage in mutual massacre. The peace treaties may have left for the League of Nations no better fundamental principle than that embodied in its Article X—the stereotyping of the absurd rearrangements of the European map; but there is no more chance for the perpetuation of these rearrangements than there was for regulating Europe upon the unpractical principle of The Holy Alliance of 1815.

What ought to be done? Voluntary revision of the territorial arrangements of the peace treaty is unattainable, and the choice appears to be between a League determined, by exercise of force, to perpetuate these arrangements, and a League which would limit its activities to arbitration, mediation, consultation, counsel,

and the development of peace-providing methods. There is, along these last lines, ample scope for beneficent activities of the League of Nations. Along them it has already done good work. But the Protocol, I regret to say, is a marked development of the spoliation-safeguarding idea, and for its support I am unwilling that Canada should be pledged to engage in war. Canada should not have entered a League of which Articles X and XVI formed parts. If to it the Protocol is added, Canada ought to withdraw.