Part 2: The Establishment of a New International Order of Peace

Chapter 2 The League of Nations as a Universal Organization

Thomas D Grant[*]

1. Introduction

The attainment by the United Nations of nearly universal participation of states, joined with the 'turn to history' in the study of international law, imparts interest to the topic of participation in the League of Nations. A relatively well-known, if still incompletely understood, dimension of the international environment of the time was the emergence of new dispute settlement mechanisms and the vivification of existing ones. Dispute settlement mechanisms are the central focus of the works contained in this book. It is not at first obvious, perhaps, what effect universality of membership in the League, or the striving toward it, might have had on dispute settlement mechanisms. Universality and the principle of sovereign equality that underlay it were themselves, however, a dimension of the same environment in which those mechanisms functioned. This chapter considers how universality and sovereign equality may have affected dispute settlement in other forums in the interwar era.

The League, though a political body, was congenial to sovereign equality, which, in turn, lent support to legal procedures for dispute settlement, because sovereign equality is indispensable to any legal procedure that purports to be binding as between states. States in the decades before the League by no means had rejected legal procedures as a means to settle inter-state disputes; nor did states suddenly arrive at a complete acceptance of such procedures in the League era. Far from it.[1] However, as other chapters in this volume attest, the interwar era witnessed an efflorescence of inter-state dispute settlement.

As the dispute settlement machinery of the interwar era was not entirely new, so too was society at large characterized by a mixture of innovation and continuity. After a century, we still think of World War One as the end

---

* Fellow, Lauterpacht Centre for International Law, University of Cambridge. The views expressed in this chapter are those of the author and do not reflect those of any other individual or institution.

1 See Erpelding (Introduction).

of a social order, and 1919 as the start of something very different. Professor Nathanial Berman has noted that, after the war, it seemed as though 'everything [had] changed.'[2] One is reminded of the Foreword to Thomas Mann's *The Magic Mountain*, that favourite of international lawyers, in which the third person narrator attributes the 'extraordinary pastness' of his story to 'its having taken place *before* a certain turning point, on the far side of a rift that has cut deeply through our lives and consciousness... back then, long ago, in the old days of the world before the Great War, with whose beginning so many things began whose beginnings, it seems, have not yet ceased.'[3] The changes no doubt were momentous, and the people who experienced them were shaken by the transition. Even so, in and after 1919, vestiges of an earlier epoch remained. Much of the old social order was gone, but, in truth, not everything had changed. This was no less the case in regard to international law in particular than in society at large. Because formal equality of parties is an indispensable principle in judicial and arbitral procedure, it is salient for present purposes to recall that certain vestiges of sovereign inequality remained very much visible in 1919.

2. *Sovereign Equality Emerging—But not Entrenched*

It was still accepted in 1919 that not all states were equal, even in the formal, legal sense. Inequality was reflected in the Treaty of Versailles itself.

Part V of the Treaty—the Military, Naval and Air Clauses[4]—famously placed Germany under special constraints. There were also the financial clauses[5] and the articles relating to the internationalization of certain rivers passing through Germany.[6] In defence of the drafters, it might be said that those constraints were the substantive rules of the treaty. They implement-

2 See Berman (ch 1).

3 Thomas Mann, *The Magic Mountain* (John E Woods tr, Alfred A Knopf 1995) xi–xii. The passage in full in the German language original, *Der Zauberberg* (S Fischer Verlag 1924), is as follows:'*Um aber einen klaren Sachverhalt nicht künstlich zu verdunkeln: die hochgradige Verflossenheit unserer Geschichte rührte daher, daß sie vor einer gewissen, Leben und Bewußtsein tief zerklüftenden Wende und Grenze spielt... Sie spielt, oder, um jedes Präsens geflissentlich zu vermeiden, sie spielte und hat gespielt vormals, ehedem, in den alten Tagen, der Welt vor dem großen Kriege, mit dessen Beginn so vieles begann, was zu beginnen wohl kaum schon aufgehört hat*'.

4 Arts 159–213.

5 Part IX—arts 248–263.

6 See Part XII, Section II, Chapters III and IV (arts 331–362) (relating to the Elbe, the Oder, the Niemen, and the Danube; and the Rhine and the Moselle). Cf *Territorial*

ed political decisions taken in the aftermath of a war in which the victors insisted on maximum terms against the Central Powers. In themselves, the punitive provisions of the Treaty did not entail a loss of sovereign equality. They were burdensome, but they did not indicate that the state to which they applied was anything less than a legal person having the same formal rights and obligations under general international law as other states. At least the formal indicia of state consent were present; these were terms to which a state had acceded in the normal way, even if the circumstances were anomalous.

Less often noted are the provisions of the Treaty of Versailles that really did reflect a formal, juridical imbalance in the relations among states. The most striking examples related to third states—that is, to states not parties to the treaty. For example, Germany in Article 142 re-affirmed that it recognized the French Protectorate in Morocco. In Article 147, it did the same in respect of the British Protectorate in Egypt. Morocco and Egypt, under Protectorate, did not possess the full scope of rights that we expect a state today to hold.[7] These protectorate provisions reflected a generally accepted reality of the day, as was seen in the response to the Rif rebellion in the French and Spanish Protectorates of Morocco.[8]

Also sometimes overlooked are the guarantee provisions of Article 433 regarding Eastern Europe. German troops were to remain in the Baltic States until the Principal Allied and Associated Powers said otherwise. One

---

Jurisdiction of the International Commission of the River Oder, PCIJ Rep ser A no 23 (Judgment, 10 September 1929).

7 It is true that protectorates, too, were understood to result from treaty engagements between the protecting and the protected states, and, to that extent, might be considered as simply another example of substantive treaty rules imposing an agreed burden on a state: see *Nationality Decrees Issued in Tunis and Morocco,* PCIJ Rep ser B no 4 (Advisory Opinion, 7 February 1923) 27–28. However, in balance, at least some of the protectorates were not 'sovereign' in the fullest sense. Relevant in this regard were the extreme extent to which their competences were curtailed and doubts as to whether they were free to renounce the protectorate treaty. The Advisory Opinion on the Austro-German customs régime furnishes a comparison, where the Permanent Court addressed Article 88 of the Treaty of Saint-Germain, under which Austria's independence was affirmed to be 'inalienable otherwise than with the consent of the Council of the League of nations...' PCIJ Rep ser AB no 41 (Advisory Opinion, 5 September 1931). Also salient in this connection is the example of Egypt. That state formally ended the capitulatory rights of various states in its territory, and this was an important development in opening the way to its admission as a member of the League. See Manley O Hudson, Editorial Comment (1937) 31(4) AJIL 681–83.

8 See Berman (ch 1).

might ask whether this is consistent with sovereign equality. Lithuania, Latvia, and Estonia were not parties to the Treaty of Versailles. Yet under Article 433 very large numbers of foreign troops remained in those territories, in effect with the imprimatur of the victorious powers.

Even though provisions such as these were still included in treaties—or perhaps because they were—sovereign equality was a topic of high interest at the time. The third edition of Oppenheim's *International Law*, the first edition of that work published after the war, had the following to say about equality of states:

> The equality before International Law of all member States of the Family of Nations is an invariable equality derived from their International Personality. Whatever inequality may exist between States as regards their size, population, power, degree of civilization, wealth, and other qualities, they are nevertheless equals as International Persons.[9]

Oppenheim's editor went on to say that sovereign equality had three consequences, which he expressed as follows:

(1) that, whenever a question arises which has to be settled by the Family of Nations, every State has a right to a vote but to one vote only
(2) that—legally though not politically—the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful
(3) that—according to the rule *par in parem non habet imperium*—no State can claim jurisdiction over another full Sovereign State.

The Oppenheim treatise here expressed the first two points in terms of voting procedure; the third as a matter of jurisdiction. To express sovereign equality as a matter of jurisdiction—as it was expressed in the third point—is unremarkable. But to express sovereign equality as a matter of voting procedure merits note. The third edition of Oppenheim was published in 1920. The League's First Assembly was on 15 November 1920; the first session of the Council had been in January. So Oppenheim was speaking of sovereign equality as a matter of voting procedure; then linked the point to the principle that a sovereign does not exercise jurisdiction over another sovereign (*par in parem non habet imperium*); and this was practically at the same time as the inauguration of the League. It is to be suggested that the

9 Ronald Roxburgh (ed), *Oppenheim's International law: A Treatise* (3rd edn, Longmans, Green and Co 1920) Section 115.

arrival on the scene of a body of states in which decisions were to be reached by it as a body, and in which those decisions were to be reached by votes, and in which the votes were to be cast on the basis of sovereign equality, had captured the imagination of international lawyers.

To be sure, there were situations before the League came into existence where states might cast votes. Diplomatic conferences well before 1914 had sometimes been conducted under voting procedures. However, it was not self-evident that the way to speak about sovereign equality was to speak about voting procedures. Indeed, diplomatic conferences of the earlier era were characterized by variable rights and precedence, depending on the status or power of particular states participating. Compared to the particular rules adopted for diplomatic conferences, under which different states had different rights, the Covenant of the League indeed inspired a new way of seeing things. With the Covenant, the idea started to take hold that international relations might now be coming under the rule of law. Moreover, the League appeared to promise that international relations would be institutionalized, as well as legalized, to a degree heretofore unknown. And so it was becoming natural to speak about sovereign equality as a matter of *procedural* equality. The equality of states was no longer a matter of abstract principle. It instead was beginning to have practical consequences in decision-making mechanisms.

Thus the United States Secretary of State, Charles Evans Hughes, speaking in 1923 about the Monroe Doctrine, which asserted the supremacy of United States power in the New World, placed unmistakeable emphasis, instead, on the sovereign equality of states in that region and upon the value of cooperation among them.[10] Writers at the time took keen interest in sovereign equality. More particularly, it was noted how the League of Nations was giving effect to sovereign equality through its rules and procedures. Schücking and Wehberg addressed this development in *Die Satzung des Völkerbundes* (2nd edn);[11] Georges Scelle in various works concerning the League,[12] and Edwin Dickinson in his dissertation on *The Equality of*

10 See James Brown Scott, Editorial Comment (with the Secretary of State's statement) (1924) 18 AJIL 117–19.

11 Walter Schücking and Hans Wehberg, *Die Satzung des Völkerbundes* (Franz Vahlen 1924).

12 See, eg, Georges Scelle, 'La troisième Assemblée de la Société des Nations', *L'Europe Nouvelle* (Paris, 7 October 1922) 1257; 'Ce que nous attendons de l'Assemblée de Genève', *La Paix par le droit* (August–September 1921) 274, for discussion of which see Jean-Michel Guieu, *Les juristes français, la Sociéte des Nations et l'Europe* (colloquium paper, 2005) 6–8.

States in International Law published around the same time in the United States.[13] And the connection between the League, sovereign equality, and dispute settlement was observable not only in the writings of publicists or inferrable from the pronouncements of foreign ministers. The constitutive texts of the contemporary international order reflected it.

To consider the conceptual connection between the League, sovereign equality, and dispute settlement, it helps to recall how the Treaty of Versailles, the Covenant of the League, and the dispute settlement machinery of the interwar era were connected as texts. It has been recalled that the Treaty of Versailles was not a stand-alone document; it was one in a series of treaties.[14] Part I of the Treaty of Versailles was a common part repeated and incorporated into each of them. The Covenant was, figuratively speaking, a long preamble to the peace itself—or at least to the written instruments whose purpose was to secure the peace.

As to the dispute settlement machinery, this was two-fold: there would be the League Council in which disputes might be addressed at diplomatic level; and there would be the legal procedures of arbitration, now supplemented by a standing judicial organ, the Permanent Court of International Justice.[15] The Council, in this arrangement, was available under Article 12 of the Covenant as a forum for resolving any dispute between members of the League. The Covenant also conferred on the Council the function of a backstop: where members had a dispute and did not submit it to arbitration or to the Permanent Court, they were to submit it to the Council. In accordance with Article 15, the Council then would conduct a dispute settlement procedure itself (or refer the matter to the Assembly if so requested by either party to the dispute). The benefits of universal membership in the League for this dispute settlement apparatus were obvious: the apparatus was open to members, and so the closer the League approached universal membership, the fewer the bilateral disputes not potentially subject to the Council's dispute settlement function. Universality would close the gaps.

Then there was the standing judicial organ, the Permanent Court. Its Statute provided that '[o]nly States or Members of the League of Nations

13 Edwin DW Dickinson, *The Equality of States in International Law* (HUP 1920). Dickinson saw as particularly important the rules and apparatuses established under the Covenant to remove self-help from international relations; with recourse to force no longer a normal part of international relations, juridical relations among states had a chance, in Dickinson's view, to come to the fore. ibid 347–48.

14 See Erpelding (Introduction).

15 See further Tams (ch 10).

can be parties in cases before the Court.'[16] The Statute indicated that the 'conditions under which the Court shall be open to other States' were to be 'laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.' In light of these provisions, it might appear that universality of membership in the League was not centrally important to the functioning of the Court. After all, the Statute expressly identified non-member states as potential parties in the Court's cases. The subsistence of a number, or even a large number, of non-members for that reason would not seem necessarily to have impeded the Court's dispute settlement function. A degree of separation seemed to exist between the Court and the League.

The manner in which the Court came into being also suggested that these institutions might not be absolutely integral to one another. The Covenant itself did not bring the Permanent Court into being. Instead, Article 14 required the League Council to 'formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court…' This provision stands in contrast to the ICJ, which Chapter XIV of the UN Charter with reference to the annexed Statute of the Court constitutes as a principal organ of the UN. The link between the PCIJ and the League of Nations was not quite so tight.

One should take care, however, not to overstate the degree of separation. The Statute of the Permanent Court envisaged a role for the Council. It was, for example, for the Council to say what conditions a state not a member of the League would have to meet in order to participate as a party in proceedings of the Court. Article 13 of the Covenant provided for referral of legal disputes to the Court. Article 14 provided for the competence of the Court in contentious matters between states, to the extent that states submitted such matters to it. And the Covenant provided for advisory jurisdiction. Advisory jurisdiction was to be based on referral by the League Council or by the League Assembly. Advisory jurisdiction in this way was a further illustration of the nexus between the League and the Court.

3. Admission, Voting, and Sovereign Equality in the League

There was a less direct, but perhaps just as important, connection between the League and the dispute settlement system then taking shape. This was

16 Statute of the Permanent Court of International Justice (adopted 16 December 1920, entered into force 20 August 1921) 6 LNTS 389, art 34.

in the character of the League as a permanent international body predicated on the equality of its members. When it came to the Council itself, insofar as it might perform dispute settlement functions, the equality of the members was of direct importance, because a body in which certain members had formal, legal privileges of general scope placing them above others in matters of decision-making could not have performed dispute settlement functions in a manner compatible with modern principles of law or justice. There was also the supporting role that the political organs might perform in respect of decisions reached by the judicial organ. When it came to the judicial machinery as such, that is to say, the Permanent Court, and all the more so the various arbitral procedures, these, it is true, functioned on their own terms, separately from the political organs of the League; one could have had political organs in which sovereign equality was curbed or ignored altogether, and still have had dispute settlement organs in which it was respected in full. It may be submitted, however, that sovereign equality in the Council and Assembly were nevertheless important to judicial and arbitral procedures in the interwar era. Before considering how sovereign equality in the League's political organs supported the judicial and arbitral procedures, some observations are in order in respect of the rules and procedures of the League—in particular, the rules and procedures regulating participation in the League.

The states parties to the Peace Conference needed to answer a threshold question about participation, if they were to build a permanent international body of states. Namely, they needed to say what states would be members of that body. The states parties answered the question in two parts.

First, in an Annex to the Covenant, they set out a list of states which Article 1, paragraph 1, of the Covenant designated '[t]he original Members' of the League. The category 'original Members' itself had two subsidiary parts. The first subsidiary part consisted of 'Signatories [of the Treaty] which are named' in the Annex; the second consisted of 'such of those other states named in the Annex as shall accede without reservation' to the Covenant. The list of signatories included 32 states. (Not all states on the list in fact ratified the Treaty, most famously the United States). The second group in the Annex consisted of 13 states 'invited to accede to the Covenant.'

Then there was the possibility of the League admitting states in addition to the original members. That is to say, it was open to the League to admit states in addition to those included by name in the Annex. Admission of such states required agreement of two-thirds of the Assembly. Admission also required that a state seeking admission 'shall give effective guarantees

of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.' These requirements were contained in Article 1 of the Covenant. In principle, any state was able to meet such requirements. This held for the defeated states as well as others. There was no special reference to defeated or enemy states, and so nothing prevented the states on the losing side of the Great War from requesting and gaining admission to the League. Even the mandates provision, Article 22, which addressed certain territories and colonies of Germany and the Ottoman Empire, referred to the change of status of those territories and colonies as 'a consequence of the late war,' saying simply that the territories to come under mandate 'have ceased to be under the sovereignty of the states which formerly governed them…' The language here was neutral. It did not place any special disability on the defeated states, and it did not address them as a special class for purposes of participation in the League.

As to the procedures of the League under which its members operated, these guaranteed the formal equality of members. Under Article 3, paragraph 4, of the Covenant, 'At meetings of the Assembly each member of the League shall have one vote.' The Council was somewhat different. The Principal Allied and Associated Powers were guaranteed membership in the Council. Further members were selected by the Assembly. So a degree of unequal treatment was entailed by the manner in which the League constituted the Council. It is natural to compare this provision for preferential treatment in the League Council to the UN Security Council, with its permanent five members. Nevertheless, each state in the League Council had one vote; and, at least as a formal matter, each vote was equal. The Covenant in this way placed the member states on an equal procedural footing even where, in the Council, a certain precedence was given to the main powers. The one-state, one-vote formula in the Assembly was striking for its institutionalization, and proceduralization, of sovereign equality. While the Council embodied a preference for its guaranteed members, this was not a general purpose denial of equal rights.

Another provision of the Covenant that holds interest for present purposes is Article 1, paragraph 2. That provision described what entities were eligible for admission to the League. The UN Charter, in its article 4, paragraph 1, concerning admission of new members, does not distinguish between different types of 'peace-loving states'. The Covenant of the League, by contrast, indicated that the entities that 'may become a Member of the League' included '[a]ny fully self-governing State, Dominion or Colony'. So there were three possible subjects under Article 1, paragraph 2 of the Covenant. Article 1, paragraph 2, presents a question of interpretation. It

might be that the modifying phrase 'fully self-governing' is the center of gravity in Article 1, paragraph 2. The requirement that the entity be 'fully self-governing,' perhaps, was what really controlled the matter. On that view, the drafters of the Covenant intended to adopt a requirement of independence, tantamount to statehood. On that view, whether the entity was designated 'state,' 'dominion,' or 'colony' was less important than the substance of what it was.

The practice of the League, however, suggested that independence was not an absolute requirement. As at 1919, the dominions that belonged to the British Empire were in the process of attaining full independence, but even as to the dominions furthest along the road to independence—Canada, Australia, New Zealand, South Africa—it could be asked at the time whether the journey was complete. As to India, it clearly was not. India was not an independent state in 1919. It was however, by virtue of its inscription in the Annex, a member of the League. The League practiced openness as regarded membership.

At least to a degree. The only Dominion to be admitted under paragraph 2 of Article 1 was the Irish Free State. Its representatives having taken their places in Geneva, the Irish Free State was mindful to distinguish its position from that of a dependency of the British Empire. Any suggestion of dependency roused sharp protest from the Irish delegates. Indicative of the priority that the Irish attached to their equal representation in the League, there was this observation from the Permanent Representative of the Free State to his superiors in Dublin:

> it would perhaps also be well to consider the prejudice that may be caused to the Saorstát [the Free State] by the meetings of the delegates of the 'Empire' whilst at Geneva. It is because of these meetings that the British delegate has frequently pretended to speak to his Colleagues in the name of the Dominions as well.[17]

The point was that Ireland did not intend to tolerate another state speaking in its name. This new Assembly was to be a forum of equal rights, regardless of size or history. A member that enjoys sovereign equality with other members might voluntarily assign its rights to another, but for another member to purport to exercise its rights, even procedural rights such

17 Memorandum, para V, with letter of Michael MacWhite [Irish Permanent Representative to the League] to Joseph P Walshe (Dublin), (M L 04/0130), dated 14 April 1928: no 136 NAI DFA LN 1/7.

as the right to speak in the Assembly of the League, would be incompatible with that equality.

Apart from the Free State, no other party was admitted as a member of the League under the dominions or colonies provision. The potential openness of the membership provision of the Covenant thus remained a possibility, but not a generally realized fact. Two states that were plainly states—Afghanistan and Ethiopia—discovered that gaining admission was an uphill battle.[18] The League admitted them, but it seems only begrudgingly. The subsequent maltreatment of Ethiopia in the League at the time of the Italian invasion was one of the low points in the League's declining years.[19]

Other national communities at the margins of international relations asked for admission but were refused. There were the independent states at the edges of the former Russian empire for example. Ukraine's pleas to the League were emotionally moving,[20] but ultimately did not move the Assembly to admit Ukraine.[21] Georgia and Armenia were not admitted either.[22]

---

18 Request for Admission to the League of Nations from the Empire of Ethiopia: C.562.1923.IX (31 August 1923). See further Antoinette Iadarola, 'Ethiopia's Admission into the League of Nations: An Assessment of Motives' (1975) 8(4) International Journal of African Historical Studies 601–622. As to Afghanistan, see Manley O Hudson, Editorial Comment (1935) 29 AJIL 110–11. Upon Afghanistan's eventual admission to the League, the French delegate, M Aubert, said that its admission 'was a further stage towards the universality which all desired.' Assembly, Sixteenth Meeting (26 September 1934) 94. Other delegates invoked universality as well in the same connection (eg, Tevfik Rüstü Bey for Turkey: ibid 93).

19 See, for example, the doubts expressed as to Ethiopia's credentials following the invasion:'The question seemed to the Committee an extremely delicate one. No member suggested that it should be settled in the negative, and that the credentials in question should accordingly be declared to be manifestly not in order. None the less, all the members of the Committee felt some doubt whether they really were in order.' (Politis [Greece], as Rapporteur of the Committee on Credentials). LoN, Assembly, 17th ordinary session, 4th plenary meeting, 23 Sept 1936: *LONS*, VR (Ass) 1–2, cols 2, 1. No legal basis existed for denying credentials to the representatives of Ethiopia after Italy had purported to extinguish that member state's independence by force.

20 See Letter of A Margolin, Ukrainian Diplomatic Mission in the United Kingdom, to Sir Eric Drummond, Secretary-General of the League of Nations (14 April 1920) 20/48/5 VII.

Another episode was similarly instructive about the attitude in the League toward states and political communities at the peripheries of international relations. The King of Yemen, in 1936, wrote to his counterpart, Edward VIII, asking about admission to the League. He asked,

> [W]e hasten to request Your Majesty, thus placing us under a debt to Your Majesty and to Your Beloved Government, kindly to intercede personally on our behalf by placing our request to join the membership of the League of Nations from this time onwards in company with those who are already sincere members of it. By this means, Your Majesty will have both rectified the omission made by the Foreign Minister [sic] … and also accomplished a praiseworthy act by being the means of commencing a golden age for the Yemen, as a result of Your Majesty's gracious intervention.[23]

The matter in the end was referred to the British governor at Aden, a rather minor colonial official.[24] There is no record that Yemen's request received consideration at Geneva.

4. Other Aspects of Participation

This is not to depreciate the developments toward greater equality which took place under the Covenant. As already noted in this chapter, there was the formal equality of states in the Assembly and Council as reflected in voting procedure.

There were other examples as well. Article 18 of the Covenant provided for the registration of treaties. This was the precursor to Article 102 of the UN Charter. At first glance, treaty registration might not appear to have anything to do with sovereign equality. However, it was not only League

---

21 See Admission of new members: Ukraine; Report Presented by 5th Committee to the Assembly, 20/48/180 VII (6 December 1920). The 5th Committee's objection was that Ukraine lacked a stable government exercising authority over the whole of Ukraine's territory.

22 See Admission of New Members: Georgia; Reported Presented by the 5th Committee to the Assembly, 20/48/208 VII (10 December 1920); Armenia, 20/48/209 VII (10 December 1920).

23 His Majesty the King of Yemen, Imam Yahya bin Muhammad Hamid Ud Din, to His Majesty King Edward VIII, King of Great Britain and the British Dominions beyond the Seas, Emperor of India (25 March 1936) FO 141/455/9, 6.

24 Foreign Office text of letter, from the King to the King of the Yemen (dated 27 July 1936) FO 141/455/9, 8–9.

member states that availed themselves of the treaty registration apparatus. States not parties to the Covenant of the League from time to time communicated treaties to the Secretariat. Moreover, Wilson's call for 'open covenants of peace, openly arrived at' was one of the foundation stones of the post-war peace as envisaged.[25] The principle of openness (to be implemented through publication) is a famous one; less remarked is the other branch of this Wilsonian precept: the peaceful character of the treaty. Proposals were made in the Fifth Session of the League Council by Council President Léon Bourgeois and at the Second Assembly by the representative of Greece that a treaty which the Council determined to be 'contrary to international public order' was to be declared null and void and not to be registered; Arnold McNair was among the jurists in sympathy with such proposals.[26] If they had been implemented, then Article 18 would have evolved into a system of treaty certification as against fundamental international law rules—a sort of permanent advisory procedure to test the lawfulness of the treaty engagements of states.[27] The idea of a substantive certification for treaties was ahead of its time (and it remains so today!). It nevertheless highlighted another way in which participation in the functions of the League tended to support international dispute settlement. Even though Article 18 never entailed a system of formal, centralized scrutiny of treaties, it prescribed an open and transparent procedure under which treaties henceforward would be published and thus available to any interested party. Under that procedure, a state, regardless of its size or political power, could comment upon and, as it wished, object to, treaties that concerned it, including treaties to which it was not a party. This was, in effect, a decentralized procedure of review. In its decentralization, Article 18's effects fell short of the ambitions of those who wished the League to perform custodial functions in a centralized way. The new transparency nevertheless was valuable to certain states, especially those having less political influence and adversely affected by treaty-making carried out by others in

25 This being the first of Wilson's Fourteen Points. See (1919) 13 AJIL 161.

26 Arnold D McNair, 'Equality in International Law,' (1927) 26(2) Mich LR 131, 150 with citations at footnotes 55 and 56 to the Council and Assembly proceedings.

27 Such a procedure would have accorded with McNair's view that a reservation to a multilateral treaty should not be effective unless all parties assent to it, a view that he expressed in 1938 in *The Law of Treaties* (Clarendon Press 1938) 106 and which was reflected in the joint dissent in the *Reservations* advisory opinion in 1951: 'We believe that the integrity of the terms of the Convention is of greater importance than mere universality in its acceptance.' *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Dissenting Opinion of Judges Guerrero, McNair, Read, and Hsu Mo (28 May 1951): ICJ Rep 1951 at 47.

their absence.[28] The earlier practice of secret treaty-making had often been used to derogate the rights of third states; in this way secret treaty-making had undermined the practical value of sovereign equality. Article 18 tended to level the playing field.

And there were still other steps toward equality, in a wider social sense, going beyond the treatment that international organization accorded to states. Article 7 of the Covenant provided that '[a]ll positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.' Seen through present-day eyes, this provision does not suggest any great progressive ambition. It was not however written by 21st century drafters. It was a product of its time, and as such may it be read. The social milieu in which the Covenant came into force was not the same as that before the Great War, but by no means had Europe been catapulted to a completely new social order in 1918. To paraphrase Mann, so many things had begun whose beginnings, it seems, even today have not yet ceased ... To give a taste of the milieu in the immediate post-war period, one might consult the first volume of the *Cambridge Law Journal*. This was published in February 1920. The *Journal* that month reported on two debates at the Pembroke College Law Society.[29] The Michaelmas Term debate was on the motion 'That in the opinion of this House the power of women has increased and ought to be diminished.' The motion prevailed. Then in Lent Term the motion in the Law Society was 'That this House welcomes the advent of women on the jury.' That motion 'was finally defeated by a substantial majority.'[30] So this was a time in which basic propositions of the equality of individuals in civic life had not been settled.[31] The provision in Article 7 of the Covenant opening League positions equally to men and women is a more significant step than it might at first appear. It was of a piece with a general theme of openness and participation that, modest as its particular mechanisms were, marked a step toward a different attitude than had prevailed before.

---

28 Noteworthy in this connection were Ethiopia's protests against an Italian–British treaty allocating rights in Ethiopia between those two parties. See 'Italy and Abyssinia,' 12 (2) Bulletin of International News (Chatham House, 27 July 1935) 35–38.

29 Pembroke College is one of the constituent Colleges of the University of Cambridge.

30 (1921) 1 (1) Cambridge L J 106.

31 Addressing restrictions on industrial employment, see *Interpretation of the Convention of 1919 concerning Employment of Women during the Night,* PCIJ Rep ser AB no 50 (Advisory Opinion, 15 November 1932).

5. Conclusion

This movement toward equality was significant to the dispute settlement machinery emerging after 1919. Dispute settlement was assisted, albeit in subtle ways, by the movement toward equality, in particular, by the sovereign equality of participants in the League and the relative, if still incomplete, openness of the League to new participants.

A political organ may be governed by rules that give some states more power, and more rights, than others. This is visible for example in the system of quotas for member states in the International Monetary Fund.[32] Such an arrangement is perfectly able to co-exist with a mechanism for the settlement of legal disputes that operates on the principle of equality. The procedures of ICSID are in no way frustrated by the weighted voting procedures of a related institution. Equality of the parties is a principle embedded in those procedures.[33] Political organs and judicial or arbitral organs are different things. Each operates on its own terms.

And so the existence of a League of Nations under rules that treated the states comprising it as equals, and which also recognized individual equality in certain respects, does not seem to 21st century observers as relevant in any particular way to the creation of a machinery for interstate adjudication and arbitration. The League might have had a highly restrictive approach to participation, and it might even have had rules giving some members more rights than others in its Assembly. In fact, the Covenant did give some states more rights than others, namely by giving some of them permanent seats in the Council. Such an arrangement did not impede the functioning of an international court or arbitral procedure. From the standpoint of formal legal rules, the voting procedures in a political organ have nothing to do with the decision-making procedures of a court or arbitral tribunal. Because that observation is valid generally, it must have

---

32 For the allocation as at November 2018, see <https://www.imf.org/external/np/sec/memdir/members.aspx> accessed 28 November 2018.

33 The principle has been acknowledged repeatedly in ICSID jurisprudence. See, eg, *Enron Creditors et al* v *Argentine Republic*, ICSID Case no ARB/01/3, Decision on Application for Annulment (30 July 2010) (Griffith, President; Robinson & Tresselt, *ad hoc* Committee Members), para 197; *Amco Asia Corp et al* v *Republic of Indonesia*, ICSID Case no ARB/81/1, Decision on Application for Annulment (16 May 1986) (Seidl-Hohenveldern, President; Feliciano & Giardina, *ad hoc* Committee Members), para 88. See also in the 1984 version of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) Rule 2, Note D; Rule 3, Note B; Rule 33, Note A (reprinted in (1986) 4 International Tax & Business Law 362.

been valid as well for the League of Nations and for the dispute settlement machinery that was emerging at that time. The League and the emergent dispute settlement machinery merit consideration as formal legal institutions functioning under particular constitutive instruments interpretable by the ordinary methods of legal interpretation. There is no formal imperative to consider the social and political milieu in which that machinery operated.

But the machinery did not operate in a vacuum. These institutions came into being in a particular setting. To implement sovereign equality of states in an inter-state organ was not a self-evident solution to the questions faced by states at the time. The 19th century, when most of the statesmen present at Versailles had come of age, was not an era in which sovereign equality was a presumption in all interactions among states. In this historical setting, the creation of a body open in principle to all states and the establishment of sovereign equality among the states in that body was to set an example. In the circumstances that existed immediately after the First World War, sovereign equality was still a matter of contestation. It was a momentous step to affirm sovereign equality in a general political organ of the international community.

The League was not a perfect organization of state equality. Its record was particularly lacking in respect of states at the periphery. States that were not part of the Peace Conference were certainly present. The further that one went, however, from the core of European states, and states closely modeled on European states, the less equal was their treatment in the League. The League's behaviour toward Ethiopia was a debacle. China, too, struggled at the time against a 19th century legacy.[34] The League had difficulty accommodating certain states even in Europe, especially the smallest ones.[35]

Nevertheless, an international political body that opened itself as widely as did the League was unprecedented. The openness reflected a commitment to sovereign equality which, though incomplete, it may be submitted lent support to the judicial and arbitral procedures that were emerging at the time. It is possible to have procedurally unequal states in a political

34 The damage to the prestige of the League following Japan's invasion of Manchuria is a centrepiece in the historical narrative. Less frequently noted is the skirmish between China and Belgium at the Permanent Court. The Court's Order of 8 January 1927 protected Belgian capitulatory rights under the Treaty of 2 November 1865 between China and Belgium: PCIJ Rep ser A no 8.

35 Consider the rejection of Liechtenstein's application: 20/48/178 VII (6 December 1920).

body; it is not in a court. The procedures of a court, if the court is to be worthy of the name, must treat the parties who come before it as equals. The League was a political body, and its creators had all the discretion and all the choices that inhere in political decisions. They decided that their organization should strive to be universal in scope, and its states should participate, mostly, on a footing of juridical equality. Their decisions in this regard were not essential to the functioning of dispute settlement under legal procedures independent from the League itself. They did however help make the environment for judicial and arbitral procedures more congenial than it would otherwise have been. The rules and procedures of the League in respect of participation in it in this way helped set the stage for the dispute settlement machinery that followed.