III. The Dominions and some Perennial Major Issues.

§ 1. *Policies ? — or Policy ?*

When, in December 1924, Mr. Austen Chamberlain asked the Council to postpone its discussion of the Geneva Protocol he made it a part of his plea that on such a question the British representative must speak the mind not merely of one but of five or six different governments[1]. Again, when in 1930 you find the British Government issuing a White Paper to explain its grounds for proposing accession to the General Act, it contains such passages as these:

> " The time is past when His Majesty's Government in this country could make any new departure of this kind in foreign affairs without full consultation with His Majesty's Governments in the other parts of the Empire. On a question of such international importance as accession to the General Act, it was not only desirable but essential to obtain the views and, if possible, the concurrence of all the other Members of Commonwealth. "[2]

And later:

> " Having regard to the opinion . . . expressed at the (Imperial) Conference, His Majesty's Government in the United Kingdom will invite the House of Commons at an early date to approve their accession in the knowledge that His Majesty's Governments in the Dominions . . . are in agreement with their action . . . "[3]

The Protocol and the General Act, that is, fall into the category of matters in relation to which some serious effort seems to be made by the British Commonwealth to preserve a united front in its League of Nations policies. It is one of the matters where we see the League to prevent war rather than merely the League to promote international cooperation. The success of the British Commonwealth in its cult of unity in these things is not uniform.

[1] C.32, p. 128.
[2] Cmd. 3803, p. 6.
[3] *Ib.*, p. 7.

To-day I propose to examine the characteristic positions the several Dominions have adopted on some of those big fundamental, quasi-constitutional questions which you know so well if you have followed at all closely the work at Geneva. You know the successive stages in the movement—the Draft Treaty of Mutual Assistance, the 1924 Protocol, the General Act, the proposals to amend the Covenant, and, always with us, the Optional Clause. Let us first see what the Dominions said to these several proposals and then in general the views they hold on arbitration, security and disarmament.

§ 2. *The Draft Treaty of Mutual Assistance.*

Two Dominions, Canada and Australia, sent in observations on the Draft Treaty of Mutual Assistance. Neither viewed it favourably.

Canada complained that the Draft Treaty would have transferred from the individual States to the Council the determination of the aggressor, that it made the guarantee obligation wider and more precise than that of Art. 10, that it neither ensured disarmament nor minimised the risk of war, and incidentally that whatever might be the general possibilities of making war on the principle of limited liability, the continental limitation was of little use of Canada, a portion as she was of the world-wide British Empire[1]. Canada added that she was in favour of every extension by agreement of facilities for formal, regular, early, informed public discussion of the possible causes of war, but did not regard the Draft Treaty as a promising example, if an example at all, of this kind of measure.

Australia pointed out amusingly that, as the sole occupant of a whole continent, she found little either to like or to dislike in a document which limited the duty of assistance to fellow occupants of the same continent[2]. She objected to the 4-day

[1] 5A.3C, p. 145.
[2] *Ib.*, p. 142.

period for determining the aggressor, and to the intensification of the guarantee obligation; and she particularly reminded the League that her own armaments had not yet risen to the lowest point consistent with her national safety.

§ 3. *The Geneva Protocol of* 1924.

As you know, the Draft Treaty was abandoned, its place being, as it were, taken by the Protocol of 1924. No one seems to know what would have been the considered opinion of the British Labour Cabinet on that Protocol. And when the Conservatives, their successors in power, condemned it, they seem to have had the general concurrence of all the Dominions. Canada, it is true, communicated to the League a separate statement of her view, expressing her support of the League as such and her willingness to sign the Optional Clause with reservations, to consider any new pacific methods of settling non-justiciable disputes, including "joint investigation"—but reserving questions arising out of matters of domestic jurisdiction—and to take part in any general conference on the reduction of armaments which did not involve prior acceptance of the Protocol: for her Government did not consider adherence to the Protocol to be in the interests of Canada, or of the British Empire, or of the League itself [1]. Nor would she undertake any further obligations to enforce decisions in the case of other states.

So too, to quote from the speech from the throne of the Governor-General in opening the Australian Commonwealth Parliament, the Australian Government,

> "whilst anxious to extend so far as practicable the principle of the pacific settlement of disputes, was of opinion that the acceptance of the Protocol would have accentuated existing obligations without achieving the objects aimed at." [2]

The New Zealand Government concurred, it seems, in the British rejection of the Protocol, without deeming it necessary to

[1] J.P.E. VI.2, p. 317.
[2] J.P.E. VI.3, p. 583.

provoke in that connection any immediate discussion in Parliament.

As for South Africa, the Union Government, said General Hertzog in Parliament,

> could not see its way clear either to adopt that Protocol or to commend it to Parliament [1].

He thought the reasons were really very obvious to them all.

> "No nation, and no government, feeling its responsibility over against the nations, much less South Africa, far removed from the immediate danger zone—if I may call it so—of Europe, could think of undertaking obligations, the number of which and the kind of which nobody could foretell, and nobody ever would be able to foretell . . . We took up the position that we were not prepared to extend our obligations under the Convention [Covenant] of the League of Nations. As far as those obligations are there, we have undertaken them and I hope we shall carry them out."

§ 4. *The General Act.*

In 1927 the Council, at the Assembly's request, set up the Committee on Arbitration and Security,[2] out of the products of whose work the Assembly, in 1928, constructed the General Act [3]. At a recent Imperial Conference the British Government and every Dominion, except South Africa, agreed to adhere, with some important reservations, to the General Act. South Africa "though not opposed to the principle" of the document desired further time to study "certain questions involved" [4].

§ 5. *The Optional Clause.*

Meanwhile I should mention the Optional Clause of the Statute of the Permanent Court. The single Commonwealth policy on this point had not been altogether easy to maintain. Canada,

[1] *Ib.*, p. 593.
[2] 8A.Pl.,p. 178.
[3] 9A.Pl., p. 182.
[4] Cmd. 3717, p. 38.

for instance, in rejecting the Protocol, had intimated that she was not thereby dissenting from the principle of the Optional Clause.

In 1926, however, at the Imperial Conference:

> a " general understanding " was reached " that none of the Governments represented at the Imperial Conference would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court, without bringing up the matter for further discussion " [1].

According when, early in 1929, Mr. McKenzie King, the Canadian Premier, was asked why Canada was still withholding her acceptance, he replied that the Government was already consulting the other Commonwealth countries on the matter but could not in the circumstances do more than that [2]. It was known also that the Irish Free State was favourable to the acceptance of the Court's compulsory jurisdiction. As early as 1925 we find the Irish delegate in the First Committee categorically dissociating himself from the explanation given by Sir Cecil Hurst of the British hesitancy in that matter.

> Portions, he said, of that speech had been construed as representing the considered attitude not of one Government but of six to the principle of compulsory arbitration and to the question of adherence or non-adherence to the Optional Clause of Article 36 of the Statute of the Permanent Court of International Justice [3]. He wished to make it clear that, so far as the Government of the Irish Free State was concerned, that was not the position. The Government of the Irish Free State had not yet decided upon its attitude towards this important matter; it was sympathetically inclined towards the principle of arbitration, but, before reaching a decision as to the practical application of the Optional Clause it would wish to go into the question more thoroughly.

When, in 1929, the second Labour Government took office, it was said to be bound by electoral pledges to sign the Optional Clause. Correspondence with the Dominions began at once, followed, on the eve and during the early part of the Assembly,

[1] Cmd. 2768, p. 28.
[2] J.P.E. X.2, p. 313.
[3] 6A.1C., p. 24.

by prolonged conversations, the object being to arrive, if possible, at a common formula for acceptance of the Clause by all the governments of the British Empire. Mr. Ramsay Macdonald said in his Assembly speech,

> " I am in a position to announce to you now that my Government has decided to sign the Optional Clause . . . Further, my Government has consulted His Majesty's Governments of the other members of the British Commonwealth of Nations who are also Members of this League, and I believe that each of them will instruct its representatives at this Assembly to sign the Optional Clause during the present session. " [1]

Conversations with a view to the use by all members of the Commonwealth of some common formula of acceptance were pursued over a number of days. The success of the conversations was not complete. One fine day, while the other delegations were still talking, the Irish Delegation went and signed the Clause, with no reservation at all [2]. Then a day or two later, at a special 'parade' in the Glass Room of the Secretariat, the delegates of His Majesty's Governments in Great Britain, New Zealand, South Africa and India also signed the Clause, with an identical set of reservations known, I expect, to most of you.

The British Foreign Secretary, after reading aloud the reservations, added an important formal statement of the British view on certain of their aspects.

> " Disputes with other members of the British Commonwealth of Nations ", he said, " are excluded because the Members of the Commonwealth, although international units individually in the fullest sense of the term, are united by their common allegiance to the Crown [3]. Disputes between them should therefore be dealt with by some other mode of settlement and for this provision is made in the exclusion clause. "

Whether this declaration came as a surprise to other delegates, I cannot tell, but I noticed that the South African delegate, Mr. Eric Louw, pencilled some hasty jottings on the back of an

[1] 10A.Pl., p. 34.
[2] 10A. Journal, p. 194.
[3] *Ib.*, p. 291.

envelope, and, when his turn came, revealed that the view of the Union Government differed somewhat from that of the Government in London.

The reservation of so-called *inter se* disputes, so far from resting upon considerations of principle, was given by him the aspect of a piece of arbitrary discrimination.

> " With regard to the reservation as to disputes between Members of the British Commonwealth of Nations, I wish to state that, although in the view of my Government such disputes are justiciable by the International Court of Justice, my Government prefers to settle them by other means— hence the reservation. " [1]

It is commonly understood that it was precisely her dislike for this *inter se* reservation which had led the Irish Free State to take her independent line.

Ironically enough, Canada, having been the first Dominion to show a readiness to accept the Optional Clause, was actually the last to sign, for Mr. Dandurand, on the day of ' big parade ', was still awaiting his Government's instructions as to the things he was to say. When, eventually he did sign, what he said was:

> " the Dominion of Canada has excluded from the purview of the Court legal disputes with other Members of the British Commonwealth for the sole reason that it is its expressed policy to settle these matters by some other methods, and it has deemed opportune to include its will as a reservation although a doubt may exist as to such reservation being consistent with Article 36 of the Statute of the Court. " [2]

I wonder whether there are in history many parallels to the use of these concluding words by a government in regard to action of its own.

Just before Canada, Australia too had signed, with the same " British " set of reservations, but without adding any special explanations.

[1] *Ib.*, p. 293.
[2] *Ib.*, p. 314.

§ 6. *The Proposed Amendments to the Covenant.*

What further ? . . . The proposal, originally moved by the British delegates in 1929 and elaborated by the Committee of Eleven in 1930, for the amendment of the Covenant in order to bring it into harmony with the Pact of Paris. During the recent Assembly, in 1930, the Irish, Australian, South African and New Zealand delegations in varying terms intimated their general approval of the proposed amendments [1]. By that time the original sponsors, the British, had qualified their own support of those amendments with the stipulation that they should become operative only in conjunction with an effective measure of general disarmament [2]—a curiously illogical position for a State which had professed to regard the amendments as not merely an improvement, but an urgent and indispensable improvement, upon the existing Covenant. Though some of the Dominions joined in making the same proviso, there are slight variations, if only of emphasis, in their policies as explained in Committee.

Sir Thomas Wilford of New Zealand could give little help:

> " . . . Whilst New Zealand is only too ready to do what it can to assist the purposes and objects of this League in attaining that which we all desire, the accomplishment of world peace, my hands are tied in that I have had no opportunity to consult with those from whom I receive my instructions [3]. . . . I cannot bind my country to agree, nor can I state that they will disagree, with amendments which are to a certain extent in the air, though they may be brought into practical form during the discussion later on. "

This is Sir Robert Garran, of Australia:

> " The Australian Government is of opinion that the amendment of the Covenant is desirable for the purpose of reconciling it with the Pact of Paris as regards the prohibition of resort to war, and the employment of only peaceful means for the settlement of disputes. [4] At the same time my Government thinks it very important that

[1] IIA.Pl., pp. 95, 76, 55 and IC., p. 62.
[2] IIA.Pl., p. 41.
[3] IIA.IC., p. 62.
[4] *Ib.*, p. 44.

the amendment should be limited to the minimum necessary for carrying out that principle, together with such consequential alterations as are necessary for filling the gaps left in the Covenant and bringing it into harmony with itself. The Australian Government regards the Covenant as a fundamental document which should be immune from alteration except on great occasions and for great purposes. It thinks that the establishment of the Pact of Paris is one of those great occasions, and that the outlawry of war is one of those great purposes, and that it not only demands but requires the amendment of the Covenant so far as is necessary to meet the new situation. The amendments proposed by the Committee of Jurists appear to conform with those principles and the Australian delegation, therefore proposes to support them, reserving its right to consider any amendments that may be brought forward and that are in harmony with the principles which I have mentioned. "

Then again, listen to Mr. te Water, of South Africa:

" It is the intention of the South African Government to sign and ratify the agreed amendments to the Covenant, but this signature and ratification, it must be understood, will be subject to the suspensive condition that ratification will only be of effect upon the promulgation of a disarmament plan under Article 8 of the Covenant [1]. It is in a spirit of benevolent scepticism that my Government has attached this condition—that it is prepared to honour its signature at such time only as when the nations of the world shall have made their great gesture by the signature of a disarmament plan, which will be the earnest to the peoples of the world that the New Age has begun, and the signal that words have been translated into actions. It would be idle for me to say that my Government has come to this decision without much hesitation. It views with disfavour the principle of the extension of sanctions in the Covenant nor has it escaped the notice of my Government that to harmonise the Pact with the Covenant carries with it the logical implication of the removal of all sanctions from the Covenant. It views, also, with little approbation the conversion of the functions of the Council of the League from those of a mediatory and conciliatory body to those of an arbitral and judicial authority. Nevertheless, in the interests of unanimity in a matter upon which clearly the great majority of nations appear to place such great importance, and as an expression of its desire to collaborate with the nations in its efforts to prevent war, my Government is ready to agree to these amendments. "

[1] *Ib.*, p. 57.

Except in the report of the Imperial Conference, there seems to have been hitherto no indication of Canada's attitude in regard to those amendments [1].

§ 7. *Unity (?) of Policy on the Optional Clause.*

Having shortly recalled the treatment received by this succession of proposals at the hands of the several Dominions, I would like to make a rather fuller analysis of their points of view on the leading themes running through all these debates, viz., arbitration, security and disarmament, in that order.

Sir Austen Chamberlain, in justification of Great Britain's non-acceptance of the Protocol, was fond of reminding the world that England had in practice been a party to more actual arbitrations than probably any other country [2]. It was in part a specious argument. Sir Austen knew, and his hearers most certainly knew, that the arbitration of which so much talk occurs in Geneva is compulsory, not *ad hoc* arbitration, and, if he were hazy as to the difference, he would only need to turn up the speech in which in 1924 M. Politis answered some observations of Lord Parmoor [3].

Arbitration as discussed in Geneva should be considered under two heads, viz., arbitration of matters recognised in Article 13 of the 1919 Covenant as "generally suitable for submission to arbitration", and arbitration on other matters. In practice, discussion of the first type means discussion of the Optional Clause.

It was the habit of British Conservative delegates to assert, in order to justify their negative attitude to Article 36, that the composite structure of the Empire made it peculiarly difficult for Great Britain to sign. Thus Sir Austen Chamberlain:

" I speak for a moment of arbitration. Again I would beg you to bear in mind the special conditions of the British Empire [4]. Ours is not a unitary system of government such as prevails in your

[1] Cmd. 3717, p. 39.
[2] 8A.Pl., p.97.
[3] 5A.Pl., pp. 57, 70.
[4] 8A.Pl., p. 97.

countries. We are a great community of free and equal nations, each autonomous, united in the oldest league of peace in the world. It is not easy for an Empire so constituted always to accept the obligations that can be readily undertaken by a State homogeneous, compact, and speaking by the voice of but a single Government. It is not easy, and it would not be right, to accept obligations unless we not only have the intention, but know that we have the power, to fulfill them. "

And in the First Committee Sir Cecil Hurst gave a similar explanation:

> " Other States might well be in a position to accept so extreme an obligation as to pledge themselves in all cases to refer their legal disputes to the Court at the Hague even though they might affect the vital interests of their country, but the British Empire at the present moment was a very composite and peculiar political unit [1]. It did not consist of one Government alone—it consisted of a partnership of six nations standing on a footing of equality. In a matter which affected the vital interests not only of Great Britain but of any one of these six partners there had to be solidarity of action. In a matter which affected either the vital interests, the independence or honour of any one of the six nations there must of necessity be unity of action. "

Whether, by this, he meant that certain Dominions were opposed to the Optional Clause and that the British Conservative Government were not prepared to put pressure upon them, or whether he meant something else, I cannot tell you. Prior to the 1929 Assembly I think it is certain that neither in the name of Australia, nor of New Zealand, nor of South Africa, had anything favourable to the Clause been officially said. Canada and the Irish Free State, on the other hand, had spoken up more than once. In 1928, indeed, when the then British Government had favoured the League with some more of its grounds for hesitating in regard to the Optional Clause, it was Mr. Dandurand who in effect suggested that the Assembly ought not to rest content with the explanations given. Speaking in the First Committee he recalled . . .

> " that certain Governments had mentioned, as one of the difficulties in the way of their acceptance of the optional clause . . . the existing uncertainties in international law. [1] He wondered whether it would not constitute a step towards the removal of this difficulty if Governments were invited to give their plenipotentiaries at the Codification Conference such instructions as would enable them to explain there to what precise points the particular uncertainties in question related."

Mr. Dandurand's suggestion was adopted. [2]

There was perhaps, I think, a certain temptation for Canada and the Irish Free State to make a little political capital at Geneva by dwelling on their relative progressiveness. It is relevant in this connection to notice some words spoken by Mr. Dandurand himself in the Canadian Senate:

> Canada's situation was a peculiar one when it came to deciding whether or not it would accept the compulsory submission of all differences to the Court of International Justice. [3] He surmised that nine-tenths, if not all, of the questions of difference that might arise between Canada and the outside world would be questions concerning the neighbouring Republic, and their southern neighbour had not yet adhered to the Court of Justice. So there was no pressing need for Canada to join when it knew that it could not suggest to the United States even a reference to the International Court.

§ 8. *" Arbitration " not always a Precise Term.*

With the creation of the Permanent Court of International Justice a terminological distinction has established itself, whereby arbitration at the feet of that particular tribunal is known specifically as " judicial settlement ". As used in Geneva, the term " arbitration ", as distinct from judicial settlement, has suffered, or maybe benefited, from the lack of any one precisely specified meaning. In order for it to have any substantial importance, of course, it must involve the compulsory settlement, by some *other* procedure, of *some*, if not all, disputes not independently subject to compulsory settlement under the terms of the Optional Clause. For instance there exist a number of bi-lateral treaties of so-called

[1] 6A.Pl., p. 22.

[1] 9A. 1C., p. 15.
[2] *Ib.*, p. 93.
[3] J.P.E. VIII.3, p. 573.

"all-in arbitration". In principle, the arbitration contemplated by the Geneva Protocol was to have been of this kind, though there were to have been excepted from its scope such important classes of differences that it might not have been found in practice to amount to very much. On the other hand, if Professor Brierly, in the British Yearbook of International Law for 1930, is right, the arbitration provided for in the General Act will differ materially from that contemplated in principle by the Protocol.

As understood by the various member States of the League, one is sometimes tempted to suspect that the term "arbitration" carries different connotations. To some it seems to suggest a method alternative to war for obtaining what in justice they are entitled to and otherwise unable to get. To some it seems to suggest a method alternative to war for preserving, as against any who would like to deprive them thereof, the good things in the enjoyment of which, under the legal arrangements prevailing at a given moment, they are happy to find themselves. To these two classes of members the word arbitration has an agreeable sound. Correspondingly to some other members arbitration seems to suggest a procedure whereby—in the name of justice, *qua* maintenance of law—they would be liable to suffer frustration in their endeavours to obtain by peaceful means what *true* justice, that is, abstract, natural, justice would give to them. Again to others it seems to mean merely one particular means, not necessarily the most suitable, offered in preference to other alternative pacific procedures, for the settlement of disputes.

§ 9. *Canada and Pacific Procedures.*

Now despite the fact that most of them have lately agreed to accept the General Act, it cannot be said that the Dominions have in general shown much enthusiasm for arbitration, as distinct from judicial settlement.

Take the case of Canada. Canada, as contrasted with many of her fellow-members of the League, enjoys, in relation to the

pacific settlement of international disputes, the advantage of having had some practical experience in this domain. She feels justified in drawing for herself certain lessons from her special experience. It is true she does not claim to know what is best in this respect for other members of the League, but she does claim, so it appears, to be entitled to prefer the teaching of her own experience to the suggestions framed *a priori* in Geneva and offered for her acceptance as the orthodox and the right, the *League* procedures *par excellence*.

As has often been explained by Canadian delegates, Canada has since 1911 been associated with the United States in the maintenance of a United States-Canadian International Joint Commission. The philosophy underlying this encouraging experiment is one of faith in the power of informed public opinion to bring about just, agreed solutions. (This is hardly the idea upon which the Geneva arbitration movement is founded.) It assumes, of course, that when, from time to time, difficulties arise, the countries concerned will wish for a fair arrangement based on a recognition of all the facts of the case, neither desiring in the last resort to press for more than what a calmly guided public opinion can see to be reasonable. In a word, it rests on good faith and mutual confidence. In what way, Canada may ask herself, would her position in relation to the United States be improved if, under a joint military guarantee of all the other Powers, Canada and the United States bound themselves to refer *all* their differences for binding decision to a committee, however enlightened, of arbitrators. Amongst others we find this view voiced by Mr. McKenzie King and Dr. Riddell. Mr. McKenzie King, addressing the Assembly in 1928, and recalling the long history of good relations between Canada and the United States, proceeded:

> "It is not to be assumed that in that period of more than a century no differences have arisen between the two countries[1]. . . . Ceasing to rely upon force, we have looked to reason as the method of solving our differences, and reason has supplied us from time to time with

[1] 9A.Pl., p. 60.

conference, conciliation or arbitration in a form all sufficient to settle our various differences as they have arisen. To conference and conciliation as a means of adjusting international differences we have given permanent expression in what is known as the International Joint Commission, established in 1911 in accordance with a treaty negotiated in 1909, a tribunal . . . to which is referred for settlement by enquiry and report all differences, particularly as to boundary waters, and by special agreement all differences of any kind whatever between the two countries which prove to be difficult o fadjustment by direct negotiation. . . . It would ill become me with my limited knowledge of world affairs to attempt to tell the nations represented here what, for them, may or may not be good policy. I can only speak of the experience of my own country and of its attitude born of its experience . . . Our experience . . . has led us to put our faith very strongly in compulsory investigation as the most satisfactory of all methods of adjustment. Compulsory investigation might be defined as reliance upon an informed public opinion . . . "

And here is Dr. Riddell, speaking in the Committee on Arbitration and Security in 1928:

" It could not be expected that my Government, after seventeen years of experience, and fifteen years of the most satisfactory experience, of a certain model of treaty, would abandon it for something that had been worked out theoretically at Geneva [1]. That is not to be supposed" . . . "Whichever course is followed, the value of conciliation and investigation, as distinct from traditional arbitration, cannot, in the opinion of my Government, be overestimated. . ." [2]

And again later:

" I have listened with great interest to what the honourable representative of Belgium has said with regard to the combination of arbitration and conciliation in a single treaty [3] . . . I think this Committee would lose a great opportunity if it did not give to conciliation and investigation their proper place in the settlement of international disputes. In the opinion of my Government, they are by far the most important, and this view is based on years and years of experience with arbitration and also with conciliation and investigation; so that I would not wish to see a draft come back from the Drafting Committee dealing simultaneously with arbitration and conciliation and discover that the two combined are unacceptable. In that way we might overlook conciliation. "

[1] P.C.D.C. VI, p. 54.
[2] *Ib.*, p. 30.
[3] *Ib.*, p. 60.

It is, however, only fair to notice that, in the speeches of M. Dandurand, we seem to find a fairly thoroughgoing acceptance of the idea of compulsory arbitration. As, however, he enters into no close distinctions between arbitration and conciliation, it is possible that the former term as used by him ought not to be understood in too precise a sense.

distinct of arbitr + conciliate (Con positive = latter)

§ 10. *Arbitration and the White Australia Policy.*

In Australia again, judging from things said, there are two or three grounds for anxiety in the arbitration movement. All have a direct or indirect connection with what is called the White Australia Policy.

It is commonly and I think correctly believed in Australia that the White Australia Policy is not likely to be well understood or to be regarded with sympathy in the world at large. If by some mischance this passionately cherished ideal came to be passed upon by a foreign tribunal, there might easily result a ruling adverse to the Australian view.

Aus defensive about White only policy

Now under the Covenant Australians perceive that they are doubly secure from what they dread. First of all there is the provision whereby, if one of the parties has satisfied the Council that the dispute arises out of a matter which by international law is within that party's domestic jurisdiction, the Council must make no recommendation as to the settlement of the dispute, and secondly, there is the fact that the Council's procedure under Article 15 does not amount to an arbitration. Mr. Hughes took care to point this out [1]. Under the Protocol, however, compulsory arbitration was to have supplemented the Council's procedure. Unless, therefore, the Australian view as to the scope of domestic jurisdiction were accepted, a disquieting possibility would arise.

Aus view: LoN not involved ① dom juris not abolish under a 15 but ② Adopt Geneva Protocol

The New Zealand Government, who looked upon this question much in the Australian manner, put the point quite nakedly in the following telegram to London:

[1] J.P.E. II.1, p. 124.

" Whatever the jurists of Geneva may think, the law advisers to the Crown in New Zealand believe that there is great danger that the Court of International Justice at the Hague, consisting mainly of foreigners, might hold that the New Zealand law is contrary to the comity of nations, and that the New Zealand system is not a question of merely domestic jurisdiction [1]. And our law advisers believe that, if a question arose for determination under the Protocol, the Permanent Court might decide: firstly, that the right of foreigners to reside in New Zealand was not a matter exclusively within the jurisdiction of New Zealand; and secondly, that, as a matter of international law, we must admit them or reduce the restrictions on their admission. "

The sensitiveness of Australian opinion on the point was conspicuously demonstrated when the Japanese Delegation in 1924 proposed their famous amendment to the draft Protocol. The principle to be embodied was that the State which, having previously undertaken to arbitrate, refused to do so, and resorted to war, should be *ipso facto* presumed an aggressor. Cases of "domestic jurisdiction" were to be excluded from the undertaking to arbitrate. The Japanese logically enough asked to have it recognised that this made a difference, so that a resort to war would not here have to be *presumed* aggressive. For, so far from refusing to arbitrate, the State in question might have been asking in vain for arbitration.

The chairman, who happened to be the Australian member, Sir Littleton Groom, at first tried to argue M. Adatci out of his position, which, however, was far too deeply thought out for that [2]. What he would have liked would have been arbitration even on "domestic" questions :

> " There would be otherwise that absurd consequence, that the League of Nations will remain quite indifferent to the fact that the most flagrant acts of injustice are being committed under the purely technical and juridical cover of the alleged domestic jurisdiction of a State which is a Member of the League [3]. And yet, the Committee has desired to maintain a disconcerting and absolute inactivity on the part of the League in disputes which may arise between the Members in connection with any of the problems which are vaguely covered by paragraph 8 of this article. Very regretfully we yield to your wishes, for the time has perhaps not yet come to insist upon this point. But what is so illogical and unjust is that any party should incur the risk of being declared the aggressor because it takes action when flagrant injustice has given rise to disputes between the Members of the League and the latter has categorically refused, in virtue of purely technical and juridical considerations, to deal with the matter. "

[1] J.P.E. VII.1, p. 148.
[2] 5A.1C, p. 56.
[3] *Ib.*, p. 81.

The main historical importance of that 1924 incident lay in the way it focussed attention on the possibilities of Article 11.

It seems to have taken some time for public opinion in Australia to admit that, under the Protocol, that country might have been no worse off in respect of the White Australia Policy than under the Covenant. It must have surprised many Australians when their Attorney-General, Mr. Latham, propounded the view that, far from being worse off, Australia would have been positively the better off under the Protocol [1]. His argument was that, assuming a dispute for which, owing to the principle of Article 15, para. 8, no settlement could be reached, Australia, if wantonly attacked, even after three months' delay, would, under the Protocol, have had the help of the League. He doubted if this would be the case under the Covenant. However, Australians do not seem to think, as a rule, of the guarantee provisions of the Covenant as making much difference to Australia's security.

A curious point in this connection arose when the British Empire accepted the Optional Clause. Would it be possible, under the ordinary operation of the Clause, for the Court to proceed to a decision in a case of domestic jurisdiction ? The question seems to be divisible into three. Firstly, could there arise out of a domestic matter a dispute concerning either any question of international law, or the interpretation of a treaty, etc. ? Secondly, assuming that there could and did arise such a dispute, would the Court, or would it not, hold the dispute to fall within the scope of the Optional Clause? And if yes, then would the Court, or would it not, feel bound to refuse to give a decision upon the case ?

[1] B.Y.I.L. 1926, p. 185.

I leave you to worry over this problem. The fact of course is that, with the exception of that of the Irish, the British Commonwealth acceptances of the Optional Clause were specifically stated not to cover such disputes, and it is said to have been the Australian and New Zealand governments that insisted upon this express reservation [1].

§ 11. *Australia and the General Theory of Arbitration.*

But there were on the part of Australia further wider objections to arbitration proposals. As Canada speaks with experience of methods other than arbitration, so Australia considers compulsory arbitration, in virtue of special experience, a matter on which she is peculiarly competent to speak.

I shall give you quotations from Mr. Latham, Senator Pearce and Sir Granville Ryrie:

> " All lawyers ", said Mr. Latham, " are familiar with the distinction between substantive law and the law of procedure . . . [2] I suggest that arbitration belongs not to substantive law but to procedural or adjective law.
>
> " Arbitration is merely a method of ascertaining facts, of declaring and of enforcing rights, which rights are derived from some other source than the arbitral procedure itself—that is to say, arbitration, speaking generally, operates as a means of procedure within a system of law, that system of law defining the rights and duties to which it is the function of the arbitrator to give effect. There are some special instances in which individuals agree that they will submit their differences to arbitration without any insistence upon legal right, so that the matter is simply left to the discretion of the particular arbitrator. In this case, everything depends upon his knowledge, impartiality and fairness. The effect of this procedure is that the matter is removed from the realm of law to that of the opinion of an individual or individuals. There are obvious objections to such a process, or rather there are obvious limitations to the utility of such a procedure in the case of important differences, especially when they involve questions of policy or of national aspiration . . .

[1] 10A. Journal, p. 291.
[2] 7A.Pl., p. 57.

> " There are certain dangers attached to the institution of a system of arbitration in which the arbitrator, instead of applying a law derived from another source than himself, or interpreting and applying an agreement made by the parties, is left to act according to his own view of the case. The effect of such a procedure is that the arbitrator . . . really makes a law, and we have found in Australia that, when a body is set up for the purpose of determining industrial disputes without any rules being laid down as to the law according to which they are to be determined, the result is that, in order to invoke the jurisdiction of the tribunal, a dispute is created. We do not want to get into a similar position in international affairs, and the mere establishment of a tribunal for the settlement of international disputes incurs the risk of the creation of disputes in order that an appeal may be made to the jurisdiction of the international tribunal. In such a case the claimant has nothing to lose and may gain something. This, again, is another reason for the development of a complete system of international law and for the making of further agreements between the representatives of the nations. "

Here is a piece from Sir George Pearce's speech to the Assembly in 1927:

> " I believe . . . that human nature is much the same in all nations, and that by a study of the application of certain principles in human affairs within one's nation one is able to appreciate something of the effect of the application of those same principles on relations between the nations. . . .[1] We in Australia are probably unique in that we have applied the principle of compulsory arbitration to industrial affairs. We have done this by legislation . . . We have established courts of arbitration and empowered them to promulgate awards and have clothed them with power to secure the compulsory enforcement of those awards. In the discussion of these measures we adopted the very arguments and reasons that I have heard urged on behalf of the adoption of the Protocol.
>
> " I draw attention to the term " compulsory arbitration ". Does it not contemplate ill-will and dispute ? . . . Are we proposing to substitute one form of force for another ? I am not prepared to say that our industrial arbitration systems have failed, but none can claim that they have been an unqualified success. What have been some of the results of this system ? Because compulsory arbitration presumes a dispute, the system has encouraged the organisation of employers and employed into separate armies which tend to regard each other with hostility and suspicion.

[1] 8A.Pl., p. 94.

It has led to the propagation of what we call paper disputes—that is, artificial disputes, generated by one or other of the parties, inspired with the hope of gaining something by an award and consoled by the fact that, even if the reference fails, the party creating the dispute is in no worse position. Because of these results, opinion in Australia is turning from the compulsory principle in the direction of conciliation and conference.

"One of the conditions precedent to compulsory arbitration is that there shall be a dispute upon which to arbitrate. The main aim of the League, as I take it, should not be to settle disputes but to try to prevent disputes arising, and, if they do arise, to encourage measures which will prevent differences from growing into disputes which will cause the intervention of the League or of the Court of Arbitration at the Hague.

"Moreover, it seems to me that the League should encourage the settlement of differences arising between the nations by friendly negotiation and without recourse to the League.

"It seemed to us that the Protocol had adopted and extended this dangerous phase of our industrial arbitration laws to which I have referred. . . . This is not the spirit that will help the cause of international peace . . ."

Finally, Sir Granville Ryrie, as Minister for Defence in the Australian Parliament:

> He did not not believe that the League of Nations would prevent future wars and, in support of his opinion he might repeat the argument he had used on other occasions [1]. For years they had been passing legislation in the Commonwealth and in State Parliaments for the settlement of industrial disputes. They had laid it down that parties to a dispute must come before certain tribunals. At first it was fondly believed that, as they had set up arbitration courts, there would be no further strikes, but so far from that being the case, since the introduction of this class of legislation, strikes in Australia had increased by 100 per cent. A similar result, he thought, might be anticipated with regard to international disputes for the settlement of which the League of Nations had been brought into being . . .

If we are fully to understand the associations which the term arbitration has for the Australian mind, it is useful, I think, also to remember that when, in addition to the State arbitration tribunals, there was set up a Federal Tribunal, there was found

[1] J.P.E.II.1, p. 130.

to be a tendency for the jurisdiction of this latter tribunal to expand beyond the limits intended for it by its founders so as to include cases that might properly have been handled by State tribunals [1]. Such an object-lesson is perhaps calculated to inspire in Australian minds doubt as to the efficacy of formal paper limits to the competence of international tribunals.

§ 12. *The Problem of Security.*

As the arbitration movement is led by those who are not satisfied with the system of pacific settlement afforded by the Covenant, so we have the movement for improving upon the provisions of the Covenant in the matter of security.

By security people usually understand a system of guarantees, mutual guarantees as a rule, but at any rate guarantees—against aggression. In regard to any new proposal for additional guarantee arrangements, mutual or otherwise, States naturally tend to group themselves into those who see more likelihood of needing or obtaining help under such a system and, on the other hand, those for whom it represents a probability of being called upon to furnish assistance. It is not to be wondered at that the former group should be the keener advocates. Perhaps one should recognise an intermediate class, of those who feel no particular interest in the subject either way.

Now for one reason or another none of the Dominions seems to belong to group one. Canada, as witness her anxieties in regard to Article 10, is inclined to see the question from the angle of group two. The other Dominions, it seems to me, fall into group three.

Australia and New Zealand do, it is true, feel exposed; but, since most proposals for increasing security resolve themselves in the first place into arrangements for bringing in the help of the British Navy, and as these two Dominions feel they can rely upon that in any event, they are not among the leaders in Geneva of the security movement. In the past they have more than once

[1] R.T.51, p. 641.

shown their readiness to hasten to the aid of Great Britain in time of war; and they feel entitled, I think, to conceive of the several Dominions and the Mother Country as bound together by what Mr. Bruce has called "an unwritten treaty of mutual guarantee." [1]

In South Africa you will find only a minimum of discussion on this subject. This, I think, is partly because, as in Canada, the possibility of being attacked from without seems so remote as not to need providing against, and also partly, no doubt, because it is not fashionable to admit too openly the obvious dependence of the Union upon Great Britain's friendship. As General Hertzog said, "it is to be hoped that South Africa will carry out" the obligations she has actually assumed; but there is little discussion of the point.

Canada, having had from the first a representative, Dr. Riddell, on the Committee on Arbitration and Security, has made some valuable and distinctive contributions to its work. Like so many other Canadian speakers, Dr. Riddell has, of course, reminded his colleagues of the bases of that security, or at least that sense of security (for the ideas are almost interchangeable), which Canada enjoys. He has spoken of demilitarised zones. Consistently with this he has protested, not very successfully, against the prevalent identification of security, as such, with mutual assistance:

> "Many of the questions raised in this Committee have occupied the best minds of my country for generations. Canada is a nation young in years, but she is old in the practice of the principles which this Committee has been set up to promote. It is now more than a century since the Rush-Bagot agreement . . . was concluded for the purpose of giving greater security to two countries situated on either side of the world's greatest system of inland waterways." [2]

And at a later meeting:

> "I think it would be most unfortunate if we did not sufficiently approve the value of demilitarized zones [3]. You may pardon a further reference to my own country. This was the first step in

1 J.P.E. VII.4, p. 826.
2 P.C.D.C.VI, p. 30.
3 *Ib.*, p. 82.

> the erection of our structure of security more than one hundred and ten years ago. We look upon it as almost the keystone of the satisfactory relations we have had with our neighbours during these years. Previous to that time, our relations had not always been satisfactory, so that we have reason to feel very keenly on this subject. We believe that the absence of armed forces along a frontier is in itself one of the finest lessons that can be set before a people to inspire confidence in their neighbours on the other side of the frontier."

And again:

> "The question I wish to raise may not seem of very great importance; it deals with the title of this Treaty (Draft Treaty D) This is called a "Treaty of Security" [1]. We have passed a resolution with regard to Treaties of Conciliation, Arbitration and Judicial Settlement. In the opinion of the Canadian Government, these are as much treaties of security as is a treaty of mutual assistance, and I therefore suggest that the Treaty we have just been considering should be called a "Treaty of Mutual Assistance" or a "Treaty of Non-Aggression". As I see it, these four types of treaty all go to make up security, and it is unfair and gives a wrong picture of our deliberations here to say that we put arbitration, conciliation and judicial settlement on one side and apply to the treaty that embodies sanctions the word "security".

The chairman could only declare that the observations of the representative of Canada were "perfectly correct", and it was agreed to adopt his suggestion [2]. But at the next session of the Preparatory Commission we find Dr. Riddell complaining that the suggestion has after all not been complied with in the printed documents [3]. It is worth while to read the little speech in which M. Politis, while putting the omission down to some "error in copying", went on to argue that, after all, the result was not altogether bad since "while all the treaties in various degrees possess the character of security treaties, in the current language of the League the term "security treaties" has hitherto been used more particularly for treaties providing for mutual assistance and non-aggression [4]. These, if I may say so, are security treaties

1 *Ib.*, p. 114.
2 *Ib.*, p. 115.
3 *Ib.*, p. 233.
4 *Ib.*, p. 234.

"*par excellence*"; — which, of course, was just the attitude against which Dr. Riddell had been protesting.

§ 13. *Canada and Article 16.*

The grounds on which the British Commonwealth have resisted any general extension of the sanctions provisions in the Covenant apply with peculiar force in the case of Canada. Mr. Dandurand told the Assembly in 1927 of the difficulties Canada felt:

> "Among the reasons which prevented us from adhering to the Protocol was the necessity of taking into account the consequences which would ensue from the non-participation of the United States in the application of economic and military sanctions." . . .[1] Canada is separated from the United States by a chain of lakes and by the River St. Lawrence. Both countries use this waterway, which leads to the sea, and their commercial relations are of the closest."

And in 1925 he said:

> "We will be loyal to that Covenant (signed at Versailles). We are not forgetful, however, of the conditions under which we signed it[2]. Canada was then far from thinking that she would have the whole burden of representing North America when appeals would come to our continent for assistance in maintaining peace in Europe.
>
> "The falling away of the United States has increased, in our eyes, the risks assumed, the history of Europe in the past five years has not been such as to lessen that apprehension."

As a matter of fact as regards Mr. Dandurand personally we find that in 1919 he had declared that before voting for the Treaty "he wanted to make sure that all the principal nations—and he pointed specially to the one which took the lead in creating the League—the United States—would join in it."

By accepting the now proposed amendments to the Covenant, as from the Imperial Conference reports it appears that Canada has agreed to do, Canada will of course be reversing her policy

[1] 8A.Pl., p. 113.
[2] 5APl., p. 221.

of awaiting the entry of the United States before subscribing to such an extension of the field of operation of Article 16 of the Covenant as would have been involved in the Protocol of 1924.

§ 14. *Disarmament Doctrines.*

One reason no doubt why the Dominions take relatively so little interest in the security discussions is that in Anglo-Saxon countries the League has never from the first been conceived of as primarily concerned with the organisation of guarantees. It is otherwise with Disarmament. Throughout the Empire I think you will find it assumed that, if the League does not bring about a general reduction of armaments, it will have failed in its essential function. In the eyes of most English-speaking people the European countries in 1919 were in a condition of tremendous over-armament. In the plain terms of Art. 8, they heard the European countries with united voice declaring, "we recognise that we are seriously over-armed. We recognise that peace depends on our reducing considerably our armaments. There is however a point beyond which we shall not be expected to reduce." The Dominions, they too, gladly accepted Article 8. But to them it did not seem to have much positive application to their own situations. The Dominions mostly conceive themselves as only now on the way to emergency from a condition of shameless dependence on the strength of Great Britain. Never yet has any Dominion so far faced up to its responsibilities as to maintain armaments sufficient for its own national safety. They are, they feel, already disarmed, under-armed, indeed. They do not necessarily boast of the fact. But they wish it to be acknowledged by the world.

Thus Mr. Dandurand has drawn attention to Canada's condition:

> "It requires no effort on our part to respond to your appeal for disarmament[1]. The minimum fixed by the League, however low, will never be as low as ours; for we are in the fortunate position—

[1] 8A.Pl., p. 112.

one which the nations of Europe might well envy us—of being quite free from fear and mistrust.

"We have a neighbour as pacific as ourselves, a neighbour who, like ourselves, thinks in terms of peace. This probably accounts for our sense of entire security."

Canada moreover is the portion of the Empire which is able to take an attitude most similar to that of Denmark: 'I am not strong enough to withstand attack by any Great Power. There is nobody my size who will wish to attack me. Therefore I have no use for armaments'!

In Australia and New Zealand they are very conscious of the modesty of their own preparations. Ought they not to assume a fuller share of responsibility for their own defence? The philosophy of the sturdiest Australians on this point is perhaps to be found in the following passage contained in Professor Hancock's excellent little book on Australia, recently published:

> "No nation . . . should gamble with other people's money[1]. It is necessary that we should be clear about our burdens, our liabilities . . . A reduction of our armed forces may be either a step forward or a step backwards; everything depends upon the condition of the world and upon what we put in the place of our sunken ships and dismissed soldiers. If we were to put nothing in their place we should be dropping our burdens and expecting some patron or protector to pick them up. We should, in effect, be saying: 'Let the British Empire defend us until such time as Europe and Asia and America organise the world for peace. We, however, will not contribute to that organisation except by our shining example . . . Meanwhile, let the British Navy defend us . . .' There is, however, no real danger of our relapsing into this colonialism."

I do not know whether the Irish Free State Government conceives of Ireland as suffering from "colonialism", but it is curious to compare with the words of Professor Hancock the language of Mr. McGilligan in 1929 on the subject of Ireland's armaments. M. Briand had contended in the Assembly that, for France, any further disarmament was at that stage an impossibility[2]. His

[1] W.K.H., p. 250.
[2] 10A.Pl., p. 51.

statement was not left unanswered. Mr. McGilligan, when his turn came, adverted to it and said:

> "In some countries nevertheless there has been a reduction[1]. I bring forward the action of my own country, which in this matter has acted in closest accord with the spirit of the League.
>
> "Five years ago we had, comparatively speaking, made an enormous decrease in the armaments of the Irish Free State and had reached a position of something approaching normality. Since then, however, we have further reduced our annual expenditure on arms from about £2,800,000 to less than £1,500,000. When I mention that our expenditure on education now amounts to over £4,500,000 a year and that to a single branch of social service (namely, provisions for old-age pensions) our State contribution is in the region of £3,000,000 a year, it should help to place in true perspective our present provision of £1,500,000 for all purposes of natural defence.
>
> "I think you will admit that, from the technical point of view, excellent arguments could have been advanced against these reductions; but the feeling that influenced our decision was that money urgently required to develop agriculture and other industries should not be squandered on arms. That is an aspect of the question which merits the consideration of the nations . . ."

It is, alas, all too easy, from a distance, to criticise the policies of European governments. South Africa at least is sufficiently far away. Even General Smuts, who continues an optimist in regard generally to the League's future, has found fault with the plans of the Preparatory Committee:

> If reserves were excluded from the purview of armed forces, a nation like France, which had a conscript Army, and an annual turn over of soldiers to the reserve, would build an enormous Army which could not be dealt with[2]. The reserves were just as useful in War time as the actual Army; in fact, at the beginning of the Great War the reserves of Germany and France were integrally used in the active army. The armies that marched to the frontiers in 1914 consisted not only of active forces but also of reserves.

One speech by Mr. Smit in 1928 deserves a passing mention. He drew attention to a particular aspect of the problem, to which relatively little notice had been given, but which peculiarly affected South Africa. In the interests of the native Africans

[1] *Ib.*, p. 110.
[2] J.P.E. X.2, p. 382.

themselves, whose welfare the Union Government had so closely at heart, he urged that the Disarmament Conference should restrict the training of those natives to serve in the armies of European Powers:

> " We have had wars in South Africa between civilised peoples, but, thank God, the savage hordes of Africa have never been dragged into those wars . . . [1]
>
> " The savage races have settled down as peaceful citizens, with no wish for the knowledge which some think so necessary for the civilised man, and they are the happier for it . . .
>
> " Is it too much to hope that, under the guidance of the League, we shall, in the near future, meet in order to agree among ourselves that those which are not yet able to stand by themselves, and whose well-being and development form a sacred trust of civilisation, shall not be used to strengthen military forces which are already deemed by many to be excessive for the purposes of peace and goodwill in the world ? . . . Our grave concern is for the well-being of these uncivilised races, and it is in that spirit that I am expressing these views . . . "

The present South African Government takes a not very hopeful view of the prospects of disarmament.

> " In its anxiety ", said General Hertzog from the Assembly platform last September, " South Africa is beginning to think of asking Europe: How much more armament ? [2] And when the question is put, I am afraid Europe will necessarily stand embarrassed, not knowing what answer to make. "

And you remember the " spirit of benevolent scepticism " in which Mr. de Water explained that South Africa was contingently accepting the amendments to the Covenant [3].

Inasmuch as there appears a real prospect of there being a Disarmament Conference in the near future, it will perhaps be well that I should conclude with some words spoken by Mr. Latham several years ago in the Assembly. Referring to the " remarkable complication " which the Preparatory Commission was giving to the problem of disarmament, he said:

[1] 9A.Pl., p. 93.
[2] 11A.Pl., p. 55.
[3] 11A.1C., p. 57.

> " These questions with their balancing and opposing considerations remind me of the dialectical discussion upon the subject of whether to marry or not to marry, to be found in a famous French classic.[1] The risks of an unfortunate marriage are so great if they are really thought out, that the truly reflective man or woman would have missed all opportunities for marriage if he or she insisted upon fully accomplishing the process of reflection, and yet we do marry and we do take risks. Surely, in the case of disarmament, something can be done, even if the whole problem in all its aspects cannot be completely solved. "

IV. Miscellaneous Views on Miscellaneous Matters.

§ 1. *The Period of Organisation.*

Practitioners in international politics are familiar with a species of inhibition whereby delegates are deterred from doing or saying what would be unwelcome to their friends. M. Loudon has referred to this propensity as " inertie courtoise ". The Dominions, young in diplomacy, have not yet been smitten with this disease. They commonly say just what they think and, what is more, they dislike assenting to what they do not think. It was partly at the instance of the delegates of Canada and South Africa that, at its first session, the Assembly adopted the view that the votes of delegates should represent the attitudes of governments and involve a moral commitment.[2]

Today I propose to examine the position taken by the Dominions on a series of subjects not comprised in that class on which the Commonwealth makes particular efforts to pursue a single policy.

Perhaps had it not been for Professor Rappard's challenging suggestion to the effect that the Dominions confined themselves in the main to the rôle of observers, I would not have troubled you with much detail as to the part they took in the League's period of organisation. It happens, however, that—whether we assume them to have been instructed, or merely authorized, or

[1] 7A.Pl., p. 58.
[2] 1A.Pl., pp. 282, 284, 286.