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# Sanctions Under the Covenant

Time was when a lecturer on League sanctions must almost have apologised for his choice of a subject so seemingly remote from the real. To-day, after certain doings of last year and of this, the position has changed. If anything now needs defence, it is rather the thought that so hackneyed and elementary a theme should receive an academic hour to itself. And certainly, on the broader issues of ethics and policy, as opposed to the intricacies of law and procedure, the main arguments must now be fairly well known.

No one, it is true, but a pedant would think to interest himself in mere technical quibbles and theoretical niceties for their own sakes. In the present context, however, they are a vital component in that total reality which most of us would prefer to understand. The diplomats and officials and statesmen who engage, before our eyes, in the business of 'applying' collective pressure are affected by their knowledge of a background of practice, lack of practice, and of discussion which to laymen is largely unknown. And so, while the latest developments will not be altogether ignored, it is with the background that this lecture will be mainly concerned.

It all began of course in 1919, with the inclusion in the Peace Treaties of the Covenant, a principal part of which is the 'sanctions' article,* its first two paragraphs running as follows:

"1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it

*Article 16.

shall *ipso facto* be deemed to have committed an act of war against all other members of the League, which hereby undertake immediately to subject it to the severance of all trade and financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not.

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

The general idea will no doubt have been to reproduce on the international terrain one of the more obvious features of domestic society. In the words of Signor Schanzer, delegate of Italy at the Assembly in 1921, "The most powerful weapon possessed by the League of Nations is the public opinion of the world, which will force the members of the League to respect the Covenant. In the domestic affairs of States, however, it is sometimes necessary to use force in order to compel individuals to respect the law. . . . and in the same way it may in certain cases be necessary to resort to the economic weapon in order to compel members of the League to fulfil their obligations."* Already in 1914 President Wilson had thought of a League in which even military pressure would be used against the covenant-breaking belligerent. The same idea is found in that report of the Phillimore Committee from which the existing Article 16 takes its main inspiration.

Traditionally the redress of international grievances had been left to the self-help of the State or

*League of Nations Publications V Legal, 1927, V. 14, p. 31.



States aggrieved. International social control would mean in effect a generalisation of the aggrievedness.

Notice the alternative systems theoretically conceivable. One possibility is simple reliance on the pressure of public opinion, unorganised, uncanalised, unarmed. The Kellogg Pact is the eminent example of this. Or there might, theoretically at least, be instituted an international Police Force: of this there is no hint in the Covenant and it need not concern us here.

Also not put into the Covenant, though advocated energetically by France in 1919, was an international general staff, to elicit and co-ordinate the military efforts of the several member States. The Covenant, it is true, does foresee recommendations by the Council for the furnishing of military, naval or air contingents,† and, in that behalf, the Council would doubtless be advised by a technical commission. Yet this is less than what France had in mind.

A further alternative would be a universal duty to take "effective" though unspecified action. That is rather the principle of the 'hue and cry' on which, as Sir Alfred Zimmern has recalled, Lord Parker of Waddington made a remarkable House of Lords speech in the spring of 1914.‡

The remaining possibility, exemplified in Article 16, is action of a specified character to be simultaneously taken by the generality of States. So we get what, at least to an uninitiated reader, looks like provision for a blockade and boycott to be

†Article 16, paragraph 2.
‡Zimmern, *The League of Nations and the Rule of Law*, p. 454.

established immediately against a breaker of the peace. In the Phillimore report the phrases "unanimous and automatic" and "without waiting for the others" actually occurred:* and that same spirit seems also present in the language of paragraph 1. The model the authors had in mind was the naval operations performed by the associated British and American fleets in the closing stages of the war. Full-dress hostilities might or might not follow, but the blockade was to come on instantaneously, each Power proceeding, within its possibilities—without waiting for the others.

However, as we know, the United States Senate rejected the treaty, and in respect of Article 16 Great Britain was left, so to say, 'holding the baby.' What was to be done?

When a State, waking up in the morning, finds itself committed to an uncongenial text, the courses open to it number about five. It may—though in some cases no doubt it shouldn't—formally denounce or repudiate the objectionable pledge. Of this procedure there is a recent case. At the other extreme it may follow the principle 'Let law prevail though Heaven fall.' Thirdly, resort may be had to what is known, perhaps euphemistically, as 'interpretation.' If white does not mean black it can perhaps be construed to signify a sufficiently dirty grey. A fourth course theoretically open is duly to amend the text, substituting black for white. There is yet a further alternative to be mentioned in a moment.

The exegetics that began in the Council and Assembly in 1920 have continued, off and on, ever since. Among the classic pieces you will find the

*Hunter Miller, *The Drafting of the Covenant*, Vol. I, p. 5.



Cecil report of the 1st Assembly, December, 1920;† the report of the *ad hoc* so-called International Blockade Committee (I.B.C.) in August, 1921; the proceedings at the 2nd Assembly and especially the reports of Signor Schanzer, September, 1921;‡ documents by the Secretariat,§ and M. de Brouckère in 1927;‖ and one by M. Rutgers in 1928.¶

In the summer of 1935, following the re-introduction by Germany of conscription, a Committee of Thirteen made a study in Geneva of possible "economic and financial measures" to be recommended if, in future, a state should "endanger peace" by repudiating its international obligations.** Little progress, however, was made.

I should now like to notice divers difficulties discovered in the examination of Article 16 and the manner in which they were met, if not surmounted. I cannot better begin than by quoting M. de Brouckére,†† who in 1926 represented Belgium on the Council.

"The starting point" in 1920 "had been Article 16 as drafted by the authors of the Covenant and an endeavour had been made to determine the most satisfactory rules for its application. Certain rules had then been conceived, the effect of which should have been most satisfactory, but which were not entirely consistent with parts of the text. An endeavour was then made to obviate this difficulty by a system of interpretation which was in certain cases somewhat bold. It had then been decided that the best solution of the difficulty was to modify Article 16 itself by means

†1st Assembly, plenary meetings, p. 407.
‡2nd Assembly, Committees, Vol. I, p. 355.
§2nd Assembly, plenary meetings, pp. 424 and 736.
‖Official Journal, 8th year, No. 7, p. 834.
¶League of Nations Publications IX. Disarmament, 1928.ix.6, p. 142.
**Official Journal, 16th year, No. 5, pp. 551-2 and 564.
††League of Nations Publications V. Legal, 1927. V. 14, p. 62.

> of amendments.....The result was that, after having sought to find rules to fit the text, an attempt was finally made to find a text to fit the rules."

Then, concerning the I.B.C., which did its work against time in August 1921, "It is not surprising that they were unable, despite their zeal and efficiency, to produce more than a provisional study, which, as M. Viviani said, raised a large number of questions but left the solutions unfound." And later, speaking of the 1921 Assembly.

> "At each stage of the proceedings. . . . . we find one or sometimes more versions of the text. One is struck. . . .by the wide differences between them, and one finds that, during the course of these important preliminary proceedings, the same thesis was resumed and abandoned several times. The extreme difficulty of the subject explains this hesitation. . . . .It also explains the anxiety of the authors of these resolutions to submit them only as suggestions admitting of amendment and essentially provisional in character."

The upshot, in 1921, was that the Assembly adopted, subject of course to ratification, four reputedly indispensable amendments to the text of Article 16; and at the same time nineteen resolutions concerning the manner of its application in the prospective amended form.* Meanwhile, the nineteen resolutions were to stand provisionally as "rules for guidance" should the need arise, before ratifications were complete, to apply Article 16. Whether this procedure will or will not have been wise, assuming that ratifications were soon to be on the way, the sequel is that fourteen years later the text of the Article continues today to read exactly as it did.

*2nd Assembly, plenary meetings, p. 814.



Some, even recently, have thought that the resolutions, "devised precisely to fit the case of the amendments not coming into force," should be considered as remaining orthodox for so long as the 'transitional' period may last.† Of this M. de Brouckére, already in 1926, was by no means persuaded. How was it possible to admit that when the States had been asked their view on the desirability of amendments to the Covenant and had rejected them, those amendments could nevertheless be regarded as having any kind of force? . . . How could the proposals become obligatory at a time when they were perhaps contrary to the compulsory provisions of the Covenant?‡

Eventually, in 1935, with Article 16 neither abrogated nor amended, it was my fifth alternative that prevailed. While not disposed to take too literally the existing text and yet not agreed in regarding the 1921 resolutions as its valid "interpretation," the delegates were content as "practical" men, to concentrate on finding common ground in the realm of action—reserving their doctrinal positions unimpaired.§

Let me recall now a little more in detail the exploration, and—one must admit—the watering-down, of Article 16.

On three, and almost on four, points a "bold" interpretation was considered to suffice. First, a notorious word—"immediately." The members "undertake immediately to subject" the Covenant-breaker "to the severance, etc." In English one might have supposed that this word—unlike its

†Official Journal, Special Supplement No. 115, p. 30.
‡League of Nations Publications V. Legal 1927. V. 14, p. 65
§Official Journal, Special Supplement No. 115, p. 31.

South German first cousin—meant just one single thing. Advantages however were seen in the idea of allowing time for Geneva to give a lead and to co-ordinate the action of members in general, as well as in permitting delay in the execution by particular States of their duties under the Article. Here is the I.B.C.* :

> "The Committee have not failed to observe that Article 16 uses the word 'immediately,' but they entertain no doubt that the Article is sufficiently complied with in this respect. The obligation is to sever all relations immediately but such an obligation includes of course an undertaking to sever them at a later date if so directed. . . . Unanimity . . . is the very essence of the action contemplated and the fixing of the date by the Council, at the earliest possible moment at which unanimous action could be secured, would lead to action which would, in the strict sense of the word, be immediate."

could be directed by unanimous vote of Council

immediately means

That is—sanctions, if not "immediate" on, say, October 3rd when the aggressor resorts to war, or even on October 7th when the fact is officially perceived, will be "immediate" on November 18th, the date suggested from Geneva for simultaneous measures. Lord Robert Cecil (as he then was), delegate for South Africa (as he likewise then was), had expressed in December 1920 the opinion that "It would be expedient to delete the word 'immediately' in Article 16, which could not be reconciled with the postponement in bringing the economic sanctions . . . . into effect";† but the psychological impression that would produce might, it was seen, be unfortunate, and the proposal was withdrawn.

→ some called for immediately to be deleted but would've had a psych. impact

At the 1921 Assembly the I.B.C. reasoning was, perhaps, improved upon. The word "immediately"

*League of Nations Publications V. Legal. 1927. V. 14. p. 19
†2nd Assembly, Committees, Vol. 1, p 305.



might, in the opinion of the majority of the Third Committee, "be reconciled according to circumstances and commonsense with the necessary and inevitable period required for the adoption and putting into practice of a common plan."* The expression "immediately" must, again in the opinion of "the majority," be interpreted "as meaning that the act constituting a breach of the Covenant entails an immediate obligation for all members of the League. . . . This, however, does not mean that, as far as action is concerned, certain states may not, by common agreement and in the general interest, be absolved from the immediate carrying out of this obligation."

interpreting immediately

Well, perhaps, that the victims of aggression is still free to defend himself immediately in the old-fashioned sense of the word.

nations allowed to defend themselves immediately

And what is it that has, thus '*alsbald*,' to be done? Did somebody whisper the word 'blockade'?

1) Blockade

For a clue to the ideas of 1919 we can usefully refer to the memorandum, "A Practical Suggestion," by General Smuts.‡ At that time it was envisaged that, on breaking the Covenant, the aggressor should automatically find himself at war with all the other members of the League. The sanctions, however mild, were thus to have been *belligerent* measures. And the obligation of members to use coercion, in the Smuts view, must be "absolute," though its execution might be at the discretion of the Council. When, in deference to American 'constitutional' scruples, the principle of 'the *ipso facto* war' was abandoned,‡ so that, in

Smuts Plan

& belligerent measures in a war

US Senate disallowed possib

*Ibid. pp. 387,8.
‡Hunter Miller, *The Drafting of the Covenant*, Vol. II, p. 23
‡Hunter Miller, *The Drafting of the Covenant*, Vol. I, p. 49

the first place at any rate, the sanctions might be the work of states technically 'neutral' in the war, the distinction between the specifically obligatory and the discretionary measures remained—with the important difference that the discretion in the latter case was not made a monopoly of the Council. Response to the Council's 'recommendations' under paragraph 2 would be optional. Nevertheless, certain things under paragraph 1 were still to be matters of binding duty. What were those things? As late as in December 1920, in the Cecil report, we still find the following: "When the Covenant-breaking state has a seaboard it will be necessary to institute an effective blockade thereof and the Council should forthwith consider which members of the League can most conveniently be asked to discharge this duty."* "It will"—not, that is, "it may" be necessary. . . And, if the Council is merely to "ask," what it is to ask is described as the discharge of a "duty." After all, on a literal reading of paragraph 1 it is hard to escape the impression of a duty to impose the blockade.

The I.B.C., however, thinks it should recommend only "such measures as in the present phase of the League of Nations would most closely accord with the facts of the situation."† In short, there has entered a recognition that, with the United States outside and potentially hostile, the full application of Article 16 may have to be waived. Still, it is not yet suggested that the blockade falls technically beyond the obligatory portion of the Article. Even Signor Schanzer, while he talks of a blockade as something that may

*1st Assembly, plenary meetings, p. 109
†League of Nations Publications V. Legal. 1927. V. 14, p. 16.



perhaps be decided on (not, that is, something that *will* be *necessary*), speaks of the Council as having to recommend what members of the League should be "called upon" to effect the blockade.

Now, although I shall not give you any official references on this point, you may take it from me that in learned discussion of these things a tendency has developed to regard the 'maritime' blockade as belonging to the merely discretionary portion of Article 16. The progress has been somewhat thus: 'Paragraph 1—obligatory: economic measures. Paragraph 2—optional: military, naval and air measures. Now, the use of ships is a naval measure; therefore maritime or naval, or effective blockade is discretionary: that is, it is not obligatory: that is, it does not fall within paragraph 1. That is to say, the 'economic measures' though loosely talked of as involving an 'economic blockade,' do not include the use of ships: that would be a 'naval' or maritime blockade. But, *are* there really two, or three, or four kinds of blockade? That rather seems to be the suggestion. In point of fact—apart from the distinction, here inconsequential, between 'pacific' and warlike blockade—history hitherto has taught us only of one kind of blockade, which is effective as regards its intensity, maritime as regards its setting, naval as regards its instrument, and economic as regards its results. Until someone has explained what is a merely 'economic' blockade and how paragraph 1 of Article 16 can be applied without the use of naval forces, I shall go on believing that an effective naval, maritime blockade falls among those economic measures which Sir John Fischer Williams refers to as being matters of "clear defi

nite peremptory" obligation.* As Sir John continues: "It is impossible to put the article aside as being too vague in its drafting." Not even on the question of blockade do I personally find it too vague.

As, however, these bolder 'interpretations' have not yet been officially endorsed, how comes it that in 1935 the word blockade was hardly even breathed? The answer partly is that the Committee of Thirteen in the summer had worked out a set of "financial and economic measures" which, being ready to hand, were by common consent taken as a basis of discussion and action in October: and those proposals as it happened said nothing about a blockade.

For this there was a reason. The Committee of Thirteen had not been formed to discuss the application of Article 16. Even the somewhat overeager French memorandum had said "Whatever may be the danger to peace there can, in principle, be no question of contemplating immediate recourse to a series of measures as wide in scope as those, . . . . . under Article 16."† And the relevant sub-Committee had considered that the case . . . was that of "measures of a pacific character" and that accordingly "such measures as a blockade properly so-called" must remain outside its field of study. The recommended measures would "not have the same purpose and character" as those envisaged in Article 16. Their object would be "to check preparation for war." They

*Fischer Williams, *Some Aspects of the Covenant of the League of Nations* p. 155.

†Memorandum of May 22nd, submitted by the French Delegation to the Committee of Thirteen, p. 3.



would be "a selection of measures less comprehensive" than those provided under Article XVI.*

Yet, when, in the following October, action under Article 16 fell to be planned, the programme of the Committee of Thirteen was, seemingly without question, adopted as an appropriate basis. Small wonder that the 1921 resolutions caused so little trouble.

So much for the blockade—with whatever adjective differentiated.

Next—another awkward phrase: "the prevention of all financial, commercial and personal intercourse between the nationals," of say, Italy, and those of any other State. Two difficulties seem here to call, in the first place, for a further effort of interpretation. Three categories of intercourse one might have thought: but, no. Thus the I.B.C.: This word "personal" must be construed "in accordance with what is, in the Committee's opinion, the sound principle of construction, as governed by the general scope of the article. The general scope . . . . is to stop all commercial and financial relations, and only those personal relations need, in the committee's view, be dealt with which have a bearing upon commercial or financial relations. It would be absurd, for example, to forbid a father whose daughter might have married an inhabitant of the defaulting state to hold communication with her on purely personal affairs."†

The second difficulty was more serious. "Nationals": did this mean that English butchers must

*Report of the sub-committee on economic and financial questions pp. 2 and 3.

†League of Nations Publications V. Legal. 1927. V. 14. p. 21.