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The League of Nations: a retreat from international law?*

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Abstract

During the First World War, civil society groups across the North Atlantic put forward an array of plans for recasting international society. The most prominent ones sought to build on the Hague Conferences of 1899 and 1907 by developing international legal codes and, in a drastic innovation, obligating and militarily enforcing the judicial settlement of disputes. Their ideal was a world governed by law, which they opposed to politics. This idea was championed by the largest groups in the United States and France in favour of international organizations, and they had likeminded counterparts in Britain. The Anglo-American architects of the League of Nations, however, defined their vision against legalism. Their declaratory design sought to ensure that artificial machinery never stifled the growth of common consciousness. Paradoxically, the bold new experiment in international organization was forged from an anti-formalistic ethos – one that slowed the momentum of international law and portended the rise of global governance.

Keywords global civil society, international law, international organization, internationalism, League of Nations

Alfred Zimmern had reason to be scathing. As one of the chief architects of the League of Nations, he recognized the threat to his vision that lay across the Atlantic during the First World War. The threat arose precisely from the fact that his antagonists, like him, favoured the creation of an international organization to promote peace and cooperation, not least between his Britain and their America. Zimmern felt, however, that this similarity masked the deepest of differences. The League to Enforce Peace (LEP), America's largest civil society group advocating a permanent league of nations, had rallied behind a legalistic scheme in which states would agree to settle legal disputes in an international court and non-legal disputes in a conciliation council, and to fight any member that went to war before submitting its dispute for settlement. Zimmern recoiled at this prospect. A legalistic league was, he wrote, 'a fraction of a system of World-government set up in a void. It is a Judicature

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without a Legislature, with only so much of an Executive as is needed to endorse the decisions of the Bench, and with no social system or social consciousness to rest upon.' In the absence of foundations in common consciousness, the international court, the centrepiece of the legalistic design, would be a formalistic fiction. It 'would not even be *part* of a constitutional system', Zimmern concluded. 'It would be an array of wigs and gowns vociferating in emptiness.'[1]

Earlier events warranted the defensive tone. Throughout the First World War, the legalistic model that drew Zimmern's ire was at least as popular as what became the League of Nations. Historians of internationalism, however, have not appreciated international law's eclipse in the founding of the League. The prevailing historiographical paradigm depicts the development of international society as a progressive advance from power politics toward global community.[2] Teleology, discredited in national narratives, has fared better – perhaps been redeployed – in international ones. The result occludes alternatives *within* internationalism, in this case taking at face value the League's presentation of itself as a momentous first step from anarchy to order and from politics to law.[3]

Internationalist teleology cannot make sense of the creation of the League system, representing as it did the triumph less of internationalism over nationalism than of one kind of internationalism over others. However, new historical work is recovering the rich variety of international ideas that galvanized politicians, intellectuals, and activists all across the world.[4] That the First World War fired pan-Islamic imaginations in the Ottoman empire, for instance, shrinks the Paris Peace Conference down to size. More important than the dramatic discussions at the conference may be the conditions that sent the big powers to Paris in the first place and the assumptions that structured their thinking.

This article reappraises the ideas of private associations within the three victorious powers that did the most to shape the settlement. Years before 1919, the American LEP, the Association Française pour la Société des Nations (AFSDN), and, in part, the British League of Nations Union (LNU) agitated for a formalistic, legalistic conception of international organization. Linking these organizations, heretofore examined in isolation by historians adhering to national frameworks, reveals a creative alternative to the League that was transnational in popularity and not just the product of national particularity. And fixing squarely on the fate of international society shows the contingency of the victory of Zimmern's declaratory vision.

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1 Alfred Zimmern, *The League of Nations and the rule of law, 1918–1935*, 2nd edn, London: Macmillan, 1939, pp. 124–5, 161–5.

2 G. John Ikenberry, *After victory: institutions, strategic restraint, and the rebuilding of order after major wars*, Princeton, NJ: Princeton University Press, 2001; Akira Iriye, *Global community: the role of international organizations in the making of the contemporary world*, Berkeley, CA: University of California Press, 2002; Paul Kennedy, *The parliament of man: the past, present, and future of the United Nations*, New York: Random House, 2006.

3 David Kennedy, 'The move to institutions', *Cardozo Law Review*, 8, 5, 1987, pp. 841–988.

4 Cemil Aydin, *The politics of anti-Westernism in Asia*, New York: Columbia University Press, 2007, ch. 5; Carl Bouchard, *Le citoyen et l'ordre mondial: le rêve d'une paix durable au lendemain de la Grande Guerre*, Paris: Pedone, 2008; Erez Manela, *The Wilsonian moment: self-determination and the international origins of anticolonial nationalism*, Oxford: Oxford University Press, 2007; Timothy Mitchell, *Carbon democracy: political power in the age of oil*, London: Verso, 2011, chs. 3–4; Peter Yearwood, *Guarantee of peace: the League of Nations in British policy, 1914–1925*, Oxford: Oxford University Press, 2009, chs. 1–4.

By 1914, after all, internationalist activists in Europe and the western hemisphere had promoted an incipient but confident brand of legalism for half a century. The twin causes of arbitration and codification attracted a broad coalition of supporters, ranging from the peace movement to the diplomatic and military corps. This legalistic internationalism culminated, it turned out, in the Hague Conferences of 1899 and 1907, which produced formal conventions detailing the laws of war and established the Permanent Court of Arbitration. To supporters at the time, however, this was only the beginning.

When the First World War began, the reflex of legalistic internationalists was to renew calls for a third Hague Conference. Now, though, they had to contend with the manifest failure of the Hague system to prevent general war. After Germany had brazenly violated Belgian neutrality, a crisis of confidence afflicted international law. The belief that 'public opinion' sufficed as law's sanction was especially shaken. Some responded by turning away from law and toward politics, the move of the League's architects and some jurists. Others, in contrast, redoubled their commitment to law. The trouble with the Hague system, they decided, was that it had not gone far enough. It had left wide gaps through which states could evade the judicial or arbitral settlement of disputes. Politicians had too much free play, and their publics proved startlingly bellicose. Only when lawyers and judges supplanted politicians as the protagonists of world affairs would principle trump 'expediency' and peace replace war.

Hence the need for international organization: to make the law, as it were, as impossible to evade as possible. The organization would consist, first, of a fully judicial court, not the mere roster of arbitrators that the Hague Conferences provided. Then it would require, and enforce, the settlement of interstate disputes. Member states would pledge to submit legal disputes to the international court, and non-legal disputes to a conciliation council; they would obligate themselves to submit disputes for settlement, abide by rulings, or both; and, many legalists now ventured, they would commit to enforce this obligation upon any recalcitrant members, by armed force if necessary. Thus, without resorting to world government, many legalists aspired to make international law be compelled by an ersatz superior rather than merely declared among equals. A legalistic organization, they hoped, would eliminate war between states as the state had ended war between citizens.

They did not think, however, that they could realize their utopia – the reign of law over politics, rules over 'expediency' – immediately or even soon. Their proposed legalistic league would allow disputes not legal in character to be conciliated by experts ruling on the basis of expediency. Many followed the precedent of pre-war arbitration treaties in exempting issues of 'vital interests' and 'honour' from judicial scrutiny. More devastatingly yet, their rejection of world government raised the perhaps insuperable question of how to create physically enforced obligations among free and equal states. But legalists at least recognized these dilemmas, despite partially evading them by imagining future progress that justified stopping short of their ideal in the present. They recommended accelerating the development of legal codes so that an increasing number of disputes would fall under the rule of law. They debated intensely what institutional arrangements would most reliably put force behind a court. Their proposals would not convince realists today, but at the time legalists' designs for international organization looked as credible and inspiring as any. Even in retrospect, one might ask whether their assumptions were less plausible than those behind the League of Nations that came to be.

That League was conceived, paradoxically, as an anti-formalistic organization. After legalists spent the war years pouring over the precise arrangements that their league should take, British and American leaders met at the Peace Conference in January 1919 and demoted legalism. Blending neo-Hegelian idealism with anti-statist liberalism, and the interests of British world leadership with the pretensions of American moralism, British representatives and US President Woodrow Wilson privileged politicians' judgement above judicial settlement, and 'public opinion' above armed enforcement, albeit without excluding any of these. Seamless legal codes and judicial procedures would, they thought, trample society underfoot. Lawyers had to get out of the way of politicians attuned to popular sentiment, the true agent of historical progress. The League's central institution became parliaments of politicians, embodied in the Executive Council and Assembly. The well-known rejection of the Hague legacy at Paris therefore had less known material consequences: it spurned not only prior ideas but also contemporaneous proposals to extend Hague efforts radically and to take international society in a more formal and juridical direction.

Non-Wilsonian internationalism: the twilight of legalism in US foreign relations

It was in the United States that large-scale mobilization in favour of post-war international organization began. Neutral toward the European war until April 1917, Americans did not face the pressures that existed within belligerent nations to subordinate talk of planning peace to the disciplined waging of war. They also had an exceptionally rich tradition of legalistic internationalism on which to draw. Throughout the war, and especially before 1917, this tradition dominated discussions of world order.[5]

Wilsonianism was much less prevalent. Wilson himself remained coy in public and vague in private about the type of international organization he envisioned. As late as January 1919, the British LNU complained: 'We are still ignorant of the exact nature and scope of President Wilson's proposals'.[6] And although some non-legalistic groups, such as the Women's Peace Party and the American Union Against Militarism, rivalled legalism in the ambition of their ideas for transforming international society, they were not comparable in their organizational scale or political resonance.[7] One must look beyond Wilsonianism, despite its near monopoly in the historiography, in order to see the largest current of internationalist thought in America.

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5 Detailed accounts of legalistic league advocacy in the United States include Benjamin Coates, 'Transatlantic advocates: American international law and US foreign relations, 1898–1919', PhD thesis, Columbia University, 2010, ch. 7; David Patterson, 'The United States and the origins of the world court', *Political Science Quarterly*, 91, 2, 1976, pp. 279–95; Stephen Wertheim, 'The league that wasn't: American designs for a legalist-sanctionist league of nations and the intellectual origins of international organization, 1914–1920', *Diplomatic History*, 35, 5, 2011, pp. 797–836.

6 Donald Birn, *The League of Nations Union, 1918–1945*, Oxford: Clarendon Press, 1981, p. 15.

7 Sandra Herman calls this 'community', as opposed to 'polity', internationalism; Thomas Knock writes of 'progressive', as opposed to 'conservative', internationalism. See Sandra Herman, *Eleven against war: studies in American internationalist thought, 1898–1921*, Stanford, CA: Hoover Institution Press, 1969; Thomas Knock, *To end all wars: Woodrow Wilson and the quest for a new world order*, Princeton, NJ: Princeton University Press, 1992; David Patterson, *The search for a negotiated peace: women's activism and citizen diplomacy in World War I*, New York: Routledge, 2008.

International law held tremendous appeal for Americans between the Civil War and the First World War, when their country was an important but secondary power in the state system. Every secretary of state from 1892 to 1920, except Wilson's William Jennings Bryan, had prominence in the American Society of International Law.[8] Law and lawyers would never again be so pervasive in the making and discourse of US foreign relations. In private internationalism, too, civil society groups sprung up in droves in the 1890s and 1900s to promote the idea of peace through law. Even the peace movement joined in, despite the sanction that law could give to violence. 'Pacifism' thus revived itself by becoming not very pacifist at all, sidelining Quaker non-resistance in order to hoist international arbitration to the top of its agenda.[9]

The ultimate goal of pre-war legalists was to erect a true international court. Judicial rather than arbitral, the hoped-for court would decide cases exclusively on the basis of law. At the Hague Conferences, therefore, US delegates sought to establish a permanent judicial tribunal, but the enthusiasm for legalism of France and Russia, also second-tier powers, did not prevent Germany's steadfast opposition.[10] Even so, states agreed to endorse the 'principle' of obligatory arbitration and signed well over a hundred general arbitration treaties bilaterally from 1899 to 1914.[11] Not everyone was satisfied. The most ambitious pre-war legalists proposed that states should obligate themselves to settle legal disputes in a judicial court, leaving 'public opinion' to provide any sanction. They recognized that endorsing the arbitration 'principle' far from guaranteed the practice.[12] Yet zealous activism seemed unnecessary amid the ostensible progress of civilization toward law, order, and peace. It also seemed unlawyerly – perhaps the reason why it was two non-lawyers, the journalist Hamilton Holt and the former president Theodore Roosevelt, who issued, in 1910, some of the few pre-war calls in America for an international executive to put armed force behind law.[13] Almost uniformly, 'public opinion' was deemed to suffice as the sanction of international law. Its progressive evolution promised to redress remaining imperfections in time, and at the right time.[14]

When general war came instead, it shook faith in voluntarism and gradualism. The massive violation of seemingly unambiguous rules of law rendered the new challenge 'not so

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8 This excludes the month-long secretaryship of Robert Bacon in 1909. Coates, 'Transatlantic advocates', p. 167.

9 Michael Lutzker, 'The "practical" peace advocates: an interpretation of the American peace movement, 1898–1917', PhD thesis, Rutgers University, 1969; Cecilie Reid, 'Peace and law: peace activism and international arbitration, 1895–1907', *Peace & Change*, 29, 3–4, 2004, pp. 521–48.

10 Arthur Eyffinger, 'A highly critical moment: role and record of the 1907 Hague Peace Conference', *Netherlands International Law Review*, 54, 2007, pp. 218–19; Peter Holquist, *The Russian empire as a 'civilized state'*, Washington, DC: National Council for Eurasian and East European Research, 2004.

11 Helen Cory, *Compulsory arbitration of international disputes*, New York: Columbia University Press, 1932, pp. 43–86; Warren Kuehl, *Seeking world order: the United States and international organization to 1920*, Nashville, TN: Vanderbilt University Press, 1969, pp. 30–142; Thomas Joseph Lawrence, *The principles of international law*, 6th edn, Boston, MA: D.C. Heath, 1915, pp. 579–86.

12 For example, Benjamin Trueblood, 'The gains of arbitration during the past year', address at the Mohonk Arbitration Conference, 20 May 1908, in *Advocate of Peace*, 70, July 1908, pp. 167–8.

13 Theodore Roosevelt, 'International peace', address before the Nobel Committee, 5 May 1910, in Lawrence Abbott, ed., *African and European Addresses*, New York and London: G.P. Putnam's Sons, 1910, pp. 81–3; Roland Stromberg, *Collective security and American foreign policy*, New York: Frederick Praeger, 1963, pp. 3–4.

14 See the florid Nicholas Murray Butler, *The international mind*, New York: Charles Scribner's Sons, 1912.

much to make treaties which define rights as to prevent the treaties from being violated', as the archetypal legalist, Republican senator Elihu Root, put it.[15] But confidence in 'public opinion' was not broken. Many lawyers, probably most, stayed true to pre-war prescriptions. Even those touting the importance of armed sanctions inevitably fell back on 'public opinion' to explain why states would deliver on their obligation to furnish force, and why the resort to force would not transpire so often as to subvert the goal of peace.[16] Now, however, advocates of an international court alone were transformed into minimalists. Sanctionists moved into the vanguard. As the peace activist Theodore Marburg observed in 1915, 'Many men formerly satisfied with these voluntary institutions now believe that the element of obligation must be added. It is only a question of how far they are willing to go.'[17]

This was indeed the pressing question in the US debate over post-war international organization, a debate led by legalists for the following three years. One kind of answer given by legalists who supported physical sanctions was more radical than the other. This scheme sought the automatic use of force to compel the judicial settlement of legal disputes. The defiance of clear rules, as judged by 'impartial' international experts, would in theory trigger collective war. Moderate schemes, by contrast, permitted greater discretion over sanctions, less out of hostility to the ideal of automaticity than because they struggled to devise rules and procedures that seemed sure to identify aggressors correctly and prevent tyrannical uses of supra-sovereign authority. These differences sparked vigorous disagreements, but they were embedded within broader commonalities. For both radicals and moderates, the institutional centrepiece was to be an international court, not a political council. States would agree to settle their legal disputes in court and make war on any state that defied this obligation; and the military enforcers would be pooled from member states, not consolidated into a standing army.

The LEP embodied the more radical position. Formed in June 1915, it quickly became the largest pro-league organization in the world. Aside from its president, William Howard Taft, the previous US president, its leadership consisted of elites at one level of remove from government: lawyers, academics, businessmen, journalists, and peace activists. They united around a resolutely legalist and sanctionist platform. Under the LEP's plan for international organization, member states would obligate the judicial settlement of international disputes by pledging to submit all 'justiciable' disputes arising between them to an international court and all non-justiciable disputes to a non-judicial council of experts. They would also agree to fight states that initiated war before making such submissions – the LEP's prime novelty – although states were left free to disobey rulings. Finally, in a continuation of pre-war legalist orthodoxy, the LEP advocated regular international conferences to formulate legal codes.[18]

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15 Elihu Root Papers, Library of Congress, Manuscript Division, Washington, DC (henceforth Root Papers), Box 136, Root to George Gibbons, 8 December 1916.

16 For example, William H. Taft, speech to the LEP Convention in Philadelphia, 17 June 1915, in Theodore Marburg and Horace Flack, eds., *Taft papers on League of Nations*, New York: Macmillan, 1920, pp. 50–1.

17 Theodore Marburg, 'The obligation to keep the peace', *The Independent*, 14 June 1915, 82, 3471, p. 461; see also Hidemi Suganami, *The domestic analogy and world order proposals*, Cambridge: Cambridge University Press, 1989, pp. 79–82.

18 LEP Platform, 17 June 1915, in Frank Gerrity and David Burton, eds., *The collected works of William Howard Taft*, vol. 7, Athens, OH: Ohio University Press, 2003, pp. 3–4.

The LEP's rapid ascent to popularity seemed remarkable even to its leaders. By the end of 1916, it had branches in every US state except three and was in contact with governments in Europe and Latin America.[19] By 1919 it counted 300,000 members, who in May delivered 12,000 speeches per day.[20] The Republican and Democratic parties alike endorsed the LEP's general aims in the presidential campaign of 1916. The Republican candidate, Charles Evans Hughes, went so far as to embrace the LEP platform in his nomination speech. His less enthusiastic Democratic counterpart, Wilson, was savvy enough to speak highly of the LEP in public. Vocal opposition to the LEP had been limited largely to anti-militarists and traditional legalists opposed to forcible sanctions, although the LEP league idea never became an urgent question in US politics as Wilson's Treaty of Versailles later did.[21]

But just what kind of league was it to be? The particulars mattered immensely, and the LEP's plan, despite being the most popular, was also the least realistic. In its quest to make law gapless and enforcement automatic, the LEP required every international dispute to be submitted to the league, and every state automatically to attack any other that initiated war before receiving a verdict. At the same time, states would have no obligation to enforce the rulings. This arrangement appeared both too weak and too strong for many politicians and legalists. It was too weak because allowing rulings to be flouted seemed to turn the LEP into a machine less for enforcing international law than for imposing cooling-off periods, as Taft nearly acknowledged.[22] It was too strong because national sovereignty was eroded. By fingering the first state to open fire as the aggressor, the LEP eliminated the legal right of pre-emptive self-defence. How could any rule always classify aggressors justly? Moreover, the LEP endowed the international court with the jurisdiction to decide whether a dispute was justiciable in character and thus resolvable in court. Any dispute whatsoever could thereby become juridified, threatening the US prerogative to interpret for itself such 'vital interests' as the Monroe Doctrine.

All these criticisms were levelled at the time by Roosevelt, the moralistic geopolitician, and Root, the cautious legalist.[23] Themselves proponents of a legalistic league, however, they drew up alternative schemes that were more feasible. They achieved this by introducing a greater degree of political discretion, in effect retreating from the ideal of seamless juridification.

Roosevelt's solution elevated sanctionism at a cost to legalism. He narrowed the scope of judicial-settlement obligations in order to retain only those likely to be obeyed or compelled. In his proposed covenant, unlike Taft's or Root's, member states would not only reserve matters of 'vital interest' and 'national honour' from the court's purview but also retain jurisdiction, deciding, 'as each case arises', whether their dispute had to be settled in court

19 Ruhl Bartlett, *The League to Enforce Peace*, Chapel Hill, NC: University of North Carolina Press, 1944, pp. 61–2; A. Lawrence Lowell Papers, Harvard University Archives, Cambridge, MA (henceforth Lowell Papers), Box 108, Theodore Marburg to foreign ministers of Argentina, Belgium, Brazil, Chile, Denmark, France, Greece, Italy, Norway, Portugal, Romania, Russia, Spain, Sweden, and Switzerland.

20 Bartlett, *League to Enforce Peace*, pp. 127–30.

21 Bartlett, *League to Enforce Peace*, pp. 52–5; William Jennings Bryan and William H. Taft, *World peace*, New York: George Doran, 1917. On anti-LEP lawyers, see Coates, 'Transatlantic advocates', pp. 396–403.

22 William H. Taft, address to the LEP Convention in Philadelphia, 17 June 1915, in Marburg and Flack, *Taft papers*, p. 50.

23 See Wertheim, 'The league that wasn't', pp. 810–12.

(though jurisdiction might one day be surrendered, Roosevelt maintained).[24] Moreover, membership would begin by being restricted to the victorious Allies, and the colonial powers would reserve regional spheres of influence from league oversight.[25]

If Roosevelt's was a diluted legalism, it was legalistic nonetheless, centred on a court and the enforcement of its decrees. The model of a parliament of politicians issuing resolutions, regardless of whether they intended to enforce them, disgusted him. He insisted that force was 'the first and vital point in any settlement'.[26] Mere declaration, talk without action, was dishonest and ineffectual – in a Rooseveltian word, unmanly.[27] Through his vocal advocacy at the start and end of the war, Roosevelt demonstrated how politicians harbouring an Austinian scepticism of international law could come around to a legalistic league. And by casting his league as a progressive step toward eventual world federation or government, he showed how deferring radical ambitions to the future might paper over disagreements in the present.[28]

Root also diluted LEP-style automaticity, but he did this by privileging legalism at the expense of sanctionism. Throughout the war, Root, the most respected Republican voice on international affairs, laboured in vain to find some formula to put force reliably behind law while preserving the independence of states. He shot down existing proposals but sounded confident that the right one could be devised.[29] 'I heartily agree with the purpose and general principle of the League to Enforce Peace', he announced; a 'general agreement to enforce submission to the jurisdiction of the court' must be concluded. Yet he stopped short of endorsing the LEP platform, citing 'details of method'.[30] What was needed, he thought, was the proper lawyerly fine-tuning. But Root's own inability to deliver this fine-tuning betrayed a profound problem. He found himself caught between a desire for the ideal of international juridification and an apology for national sovereignty and US geographic exceptionalism. If, for example, the United States had to be the sole interpreter of the Monroe Doctrine, then it could not authorize the automatic enforcement of judicial settlement as determined by a supranational body. Without the latter, however, would not obligations to provide enforcement, even in theory, reside with individual states? Root's solution, such as it was, was overwhelmingly to apologize in the present, by keeping national independence intact, while imagining that the future would bring progress toward his utopia.

Not until March 1919 did a conflicted Root, now confronting the draft of the League of Nations Covenant, voice his plan for a legalistic league. He did so in the form of two

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24 Theodore Roosevelt, 'The League to Enforce Peace', 2 December 1918, in *Roosevelt in the Kansas City Star*, Boston and New York: Houghton Mifflin, 1921, pp. 278–9.

25 Theodore Roosevelt, 'The League of Nations', 17 November 1918, in *Roosevelt in the Kansas City Star*, p. 263.

26 Roosevelt to Susan Dexter Dalton Cooley, 2 December 1914, in Elting Morison, ed., *The letters of Theodore Roosevelt*, vol. 8, Cambridge, MA: Harvard University Press, 1954, p. 853.

27 See Frederick Marks, *Velvet on iron: the diplomacy of Theodore Roosevelt*, Lincoln, NE, and London: University of Nebraska Press, 1979, pp. 95–117.

28 Roosevelt to Susan Dexter Dalton Cooley, 2 December 1914.

29 Martin David Dubin, 'Elihu Root and the advocacy of a league of nations, 1914–1917', *Western Political Quarterly* 19, 3, September 1966, pp. 439–55; Wertheim, 'The league that wasn't', pp. 810–15, 822–5.

30 Lowell Papers, Box 112, Root to Lowell, 10 February 1916.

amendments to the Covenant. One obligated the use of an international court; the other, the convocation of regular conferences to codify law. The former exceeded the LEP plan by requiring states not only to submit all legal disputes to the court but also to heed the court's judgments. On balance, however, Root's alternative moderated the LEP plan by implicitly letting the League Council decide whether and how to supply enforcement. Yet even this injection of discretion exceeded the rigidity of the Covenant. Article 13 mandated arbitration only for disputes that both parties 'recognize to be suitable for submission to arbitration'. Hence it seemed to Root an empty requirement, 'merely an agreement to arbitrate when the parties choose to arbitrate' and 'therefore no agreement at all'. He concluded that the Covenant 'puts the whole subject of arbitration back where it was twenty-five years ago. Instead of perfecting and putting teeth into the system of arbitration provided for by the Hague Conventions, it throws those conventions upon the scrap heap.'[31]

Root's appeal incited no movement to strengthen what many senators already opposed for going too far. Still, the displacement of legalistic internationalism was a more contingent outcome than the anaemic Senate debate at that late date might suggest. Hughes garnered 48% of electoral votes in 1916, and Roosevelt died in 1919 amid calls for him to run for president the next year. As it happened, Wilson was in charge of US foreign policy and brought his own assumptions to the post-war settlement, which so divided the Senate as to eliminate the idea of obligatory judicial settlement even from the minds of the legalistic Republicans who made US foreign policy in the 1920s.

French league thought: the primacy of enforced commitments

In 1919, Antoine Pillet marvelled at the fortunes of French internationalism. The professor's point was larger than the immediate irony that the most devastating of wars had made a league for peace the question of the day. Characteristic of the present age, he wrote, was how it had 'transported into the political arena pacifist ideas hitherto remaining in the realm of pure speculation'.[32] First the Hague Conferences and now talk of the Société des Nations: the march of law and order seemed ever forward. Pillet himself was not so sanguine. To him, Germany's wartime 'barbarism' exposed treaties as a façade. International law could not be imposed from on high but had to emerge organically from 'civilized' cultures, grounded in Christian morality. When the defects of the Treaty of Versailles only reinforced his doubts, the renowned professor of public international law moved on to the subject of private law and never in his life turned back.[33]

In departing from public international law, Pillet was atypical of French internationalists. Most resolved to redress international law's weakness by putting force behind it. But Pillet's dismay at the founding of the League of Nations differed only in its extreme nature. During the war, French opinion on international organization had been emphatically legalistic, while also synthesizing ideas of national self-determination and democratic constitutionalism.

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31 Root Papers, Box 137, Root to Will Hays, 29 March 1919.

32 Antoine Pillet, *De l'idée d'une société des nations*, Paris: Marcel Rivière & Cie, 1919, p. 18.

33 Martti Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law, 1870–1960*, Cambridge: Cambridge University Press, 2001, pp. 291–3.

Civil society groups had converged around the goal of putting force behind the judicial settlement of disputes, minding much less than in America or Britain if a supranational army were to be required. In this context, the Treaty of Versailles proved bitterly disappointing. French internationalists had already collaborated with the American LEP and the British LNU. They knew that a legalistic league was a real possibility, though they overestimated governments' willingness to sacrifice sovereignty.[34] They need to be taken seriously, not simply as idealistic peace activists in France (as most historians have positioned them) but also as practical political actors in a transnational movement whose time seemed, up to the eve of the Peace Conference, to have come.[35]

French wartime ideas emerged from a pre-war internationalist movement as legalistic as in the United States, but more tolerant of the use of force. After the advent of the Third Republic in 1870, the peace movement united around a juridical orientation, transcending mid-century divisions between the arbitrationism of Frédéric Passy and the radical republicanism of Charles Lemonnier.[36] Arbitration and codification became the main objectives of the growing movement. These were ranked firmly above disarmament, formally disavowed as a goal by the largest internationalist group, the Association de la Paix par le Droit (APD), in 1890.[37] Indeed, although the word *pacifisme* would be coined to characterize them, French peace movements proved to be remarkably belligerent in the decades preceding the First World War. Committed to France's reacquisition of Alsace and Lorraine, they went so far as to reject the legitimacy of conscientious objection: if war came, citizens had to fight for *la patrie*.[38] Small wonder that the French government strongly supported obligatory arbitration at the Hague Conferences, although the Quai d'Orsay's commitment to legalism was circumscribed by its avoidance of any arrangement that might cement German claims to Alsace-Lorraine.[39]

French 'pacifists' cheered on their nation's struggle in the First World War. The immediacy of France's war, coupled with censorship by the Interior Ministry, inhibited discussion of post-war arrangements far more than in the Anglo-American world, and civil society groups exclusively devoted to planning the peace emerged only in the last two years

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34 See, for example, Léon Bourgeois Papers, Ministry of Foreign Affairs Archives, Paris (henceforth Bourgeois Papers), PA-AP 29, P16053, Minutes from the founding of the Ligue pour une Société des Nations, 3 January 1917; Marburg to Bourgeois, 13 September 1917; Bourgeois to Hamilton Holt and Henderson Wadhams, 1 May 1918.

35 Recent exceptions to purely national frameworks are Christian Birebent, *Militants de la paix et de la SDN*, Paris: Harmattan, 2007; Bouchard, *Le citoyen*.

36 Michael Clinton, '"Revanche ou relèvement": the French peace movement confronts Alsace and Lorraine, 1871–1918', *Canadian Journal of History*, 40, 3, 2005, pp. 435–40; Sandi Cooper, *Patriotic pacifism: waging war against war in Europe, 1815–1914*, New York: Oxford University Press, 1991, chs. 2–4; Sandi Cooper, 'Pacifism in France, 1889–1914', *French Historical Studies*, 17, 2, 1991, pp. 360–4.

37 Michael Clinton, '"Peace through justice": l'Association de la Paix par le Droit and the evolution of patriotic pacifism', unpublished paper for Forty-sixth Annual Meeting for the Society of French Historical Studies, Arizona State University, Scottsdale/Tempe, AZ, 30 March–1 April 2000, p. 2.

38 Cooper, 'Pacifism', pp. 369–70. See, for example, 'Refus de porter les armes', *IIème Congrès National des Sociétés Françaises de la Paix: Nîmes: 7, 8, 9 et 10 Avril 1904*, Nîmes: Bureaux de l'Association de la Paix par le Droit, 1904, pp. 40–51.

39 Clinton, '"Revanche ou relèvement"', pp. 442–5. On the limits of legalism in French foreign policy, see M. B. Hayne, *The French foreign office and the origins of the First World War, 1898–1914*, Oxford: Clarendon Press, 1993.

of the war.[40] Those who did begin discussing how to reform international society, particularly within the APD, the Socialist Party, and the Ligue des Droits de l'Homme (LDH), foreshadowed the plan that the French government eventually sponsored. The war showed to French internationalists not that the work of Hague Conferences was useless but that it needed to be drastically expanded by compelling arbitration through the force of arms. Compared with their Anglo-American counterparts, French internationalists more openly conceded the need for states to surrender sovereignty. They spent less time discussing the obstacles to implementing a system of enforcement, more often incorporated the nationality principle into their legalistic visions, and more readily took for granted that a post-war organization should exclude the Central Powers until they had disarmed and democratized.[41] French ideas, while both legalist and sanctionist, were somewhat more the latter than the former.

As the LDH became a locus for public debate in 1917 and 1918, two positions crystallized.[42] One was a true federalism, articulated by the Republican-Socialist deputy Jean Hennessy and his important Société Proudhon.[43] The other, represented by the APD president, Théodore Ruyssen, among others, rejected federation as 'impossible', at least for a long time, but nevertheless favoured an international organization to compel the arbitration of all disputes, without exception, and to police all threats to peace.[44] Whereas Anglo-American legalistic internationalists contended with large factions opposed to the use of force altogether, such anti-militarism looked chimerical from the European continent. As an LDH report stated: 'Why promulgate obligatory arbitration, if the obligation remains in words [alone] for want of a real force that punishes those who refuse?'[45] In the teeth of the German threat, collective security seemed necessary, and so perhaps it seemed feasible.

In late 1918, French internationalists finally united in a single group focused on the matter of post-war organization, the Association Française pour la Société des Nations. The AFSDN inherited much of the LDH's leadership. Adopting a platform of the essentials, it established a broad coalition of supporters, including members of parliament, peace activists, academics, writers, and religious leaders.[46] 'The work undertaken at The Hague', the Association proclaimed, 'should be carried to completion.'[47] True, the war had laid bare the weakness of law, but this would be rectified by the 'establishment of an international

40 Jean-Michel Guieu, '"Pour la paix par la Société Des Nations', *Guerres Mondiales et Conflits Contemporains*, 222, 2, 2006, pp. 90–7.

41 Carl Bouchard, 'Des citoyens français à la recherche de la paix durable (1914–1919)', *Guerres Mondiales et Conflits Contemporains*, 222, 2, 2006, pp. 67–87.

42 See Guieu, '"Pour la paix', pp. 95–6; William Irvine, *Between justice and politics: the Ligue des Droits de l'Homme, 1898–1945*, Palo Alto, CA: Stanford University Press, 2007, pp. 131–7.

43 Carl Bouchard, 'From French federalism to world federalism: Jean Hennessy's Société Proudhon', *Proceedings of the Western Society for French History*, 34, 2006, pp. 233–46; Jean-Michel Guieu, 'De Proudhon à Pétain: le parcours européen de Jean Hennessy', in Gérard Bossuat, ed., *Inventer l'Europe*, Brussels: PIE Lang, 2003, pp. 111–23.

44 Théodore Ruyssen, 'Le problème de la paix durable', *La Paix par le Droit*, 10–25 June 1915, 25, 11–12, pp. 382–4.

45 Gabriel Séailles, *Les conditions d'une paix durable*, Paris: Ligue des Droits de l'Homme, 1916, p. 18.

46 Guieu, '"Pour la paix', pp. 98–100.

47 Association Française pour la Société des Nations, 'Notre programme', Paris: Georges Cadet, 1918, p. 2.

authority imposing on nations, for all conflicts present or future, of whatever kind, a plan, procedures, and guarantees of law'.[48] Specifically, member states were to submit to the league court all legal disputes, including those impinging on 'vital interest' and 'honour', and comply with verdicts. Defiance would trigger sanctions, forcible if necessary, delivered by sovereign armies working in concert. In this way, the use of force would be 'reserved exclusively to the international society itself', turning war into an act of either breaking the law or enforcing it.[49]

The platform of the AFSDN therefore mirrored that of the LEP, and not by accident. Hamilton Holt, the LEP's vice-president, visited France earlier in 1918 and pressured internationalists there to consolidate into what became the AFSDN. David Davies also came, from Britain, where he was extraordinary in his advocacy of an international police force.[50] The AFSDN, however, operated in a receptive environment. Whereas the LEP represented one extreme in the US debate, the AFSDN's primary competitor in French civil society, the Ligue pour une Société des Nations, sought no less than a world federation, featuring a legislature to pass binding laws, a tribunal to render binding decisions, and a supranational police force to overpower any other military.[51] More importantly, the AFSDN had the ear of the state. Endorsed by the Chamber of Deputies, it counted one hundred deputies and senators as members. Its president, Léon Bourgeois, having chaired the government's committee for planning international organization since its inception in 1917, went on to represent France at the Peace Conference.[52]

Bourgeois had been the most prominent politician close to the peace movement since he served as a French delegate to the First Hague Conference. He was also the chief formulator and exponent of 'solidarism', the Third Republic's social philosophy. The counterpart of US progressivism and British new liberalism, solidarism emphasized the social responsibility of individuals. It thus sought a median point between liberalism and socialism that licensed extensive governmental action. Internationally, solidarism entailed compulsory arbitration backed by economic and military sanctions, formalized through international organization, and anticipating an ever-closer integration of states.[53] For Bourgeois, international law was as objectively true as the celestial laws, 'unbiased and dispassionate'. 'By its absolute impartiality and its authoritative evidence', he averred, 'the law will appease passions, disarm ill will, discourage illusory ambitions, and create that climate of confidence and calm

48 Association Française pour la Société des Nations, 'Appel du comit d'initiative', Paris: Georges Cadet, 1918, p. 7.

49 'Plans for the League of Rights of Man', in Theodore Marburg, *Development of the League of Nations idea*, vol. 2, New York: Macmillan, 1932, pp. 771–3; 'Appeal to form a French Association for the Society of Nations', September 1918, in *ibid*., p. 824.

50 Jean-Michel Guieu, *Le rameau et le glaive: les militants français pour la Société des Nations*, Paris: Presses de Sciences Po, 2008, pp. 44–5.

51 Guieu, *Le rameau*, pp. 37–40, 48, 59; Henri Lepert, 'Lepert and Otlet Plans', in Marburg, *Development*, vol. 2, pp. 767–8.

52 Scott Blair, 'Les origines en France de la SDN: la commission interministérielle d'études pour la Société des Nations, 1917–1919', *Relations Internationales*, 75, 1993, pp. 277–92.

53 J. E. S. Hayward, 'The official social philosophy of the French Third Republic', *International Review of Social History*, 6, 1, 1961, pp. 19–48; Orville Menard, 'Léon Bourgeois, Antoine de Saint-Exupery, and "solidarité"', *International Social Science Review*, 68, 1, 1993, pp. 3–11; Alexandre Niess and Maurice Vaïsse, eds., *Léon Bourgeois: du solidarisme à la Société des Nations*, Langres: Dominique Guéniot, 2006.

in which the delicate flower of peace can live and grow.'[54] The Hague Conferences, despite their limited results, proved to Bourgeois that international law was destined to replace 'the politics of cabinets'.[55]

There was one exception. What the Monroe Doctrine meant to the United States, Alsace-Lorraine meant to France: no foreigner could be allowed to decide its fate. The ardent arbitrationist Paul Henri d'Estournelles de Constant was blunt: 'No policy is possible for Europe except the policy of peace, which can have only Federation as its purpose and basis. Federation is possible only after resolving the question of Alsace-Lorraine. That is what European opinion will have to understand and then make its governments understand.'[56] Bourgeois insisted that obligatory arbitration should make no formal exceptions for matters of 'vital interest' or 'honour', but when pressed in private by LEP representatives he implied that all was not so simple. In one sentence, he criticized a proposal to exempt major issues such as Alsace-Lorraine or the Monroe Doctrine: 'if the associated nations do not have the impression that the decisions of the international Council have obligatory force sanctioned by armies, they will have a tendency not to obey and the conflict will become more venomous and could lead to war'. In the very next sentence, he admitted that the council 'will always have the possibility of making an exception and not using force in too delicate a case'.[57] Where violating its own rule would leave the deterrent power of the league, Bourgeois did not say. Utopia thus deferred, apology ruled the present. And if every nation's internationalists insisted on their own apology, how would utopia's deferral ever end?

Bourgeois nevertheless sincerely desired a league with teeth, even if those teeth were to point away from France. The dream of enforced arbitral or judicial settlement and the need for allies against Germany came together in the official French draft for the League of Nations. The draft stressed that league obligations should be as definitive as possible. 'Guarantee' was its favoured word: member states would 'give each other all necessary guarantees of a practical and legal nature'. To that end, membership would begin with the victorious great powers. The French draft also restricted future admission to states with representative institutions, prizing democratic over universal membership. But its decisive move was to invest an international general staff with the authority over military forces of member states. This general staff would decide how to enforce the decisions of the international tribunal, to which every legal dispute between members must be submitted. 'At its demand', the French draft read, 'every nation shall be bound, in agreement with the other nations, to exert its economic, naval, and military power against any recalcitrant nation.'[58]

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54 Léon Bourgeois, 'The reasons for the League of Nations', December 1922, http://www.nobelprize.org/nobel_prizes/peace/laureates/1920/bourgeois-lecture.html (consulted 14 March 2012); see also Léon Bourgeois, *Soldarité*, Paris: Colin, 1896.

55 Léon Bourgeois, *Pour la société des nations*, Paris: Bibliothèque-Charpentier, 1910, pp. 13, 177.

56 Paul Henri d'Estournelles de Constant, 'La politique de la paix', lecture at the École des hautes études en sciences sociales, Paris, 29 November and 6 December 1902, in *La paix et l'enseignement pacifiste*, Paris: Félix Alcan, 1904, p. 8.

57 Bourgeois Papers, PA-AP 29, P16053, Bourgeois to Hamilton Holt and Henderson Wadhams, 1 May 1918.

58 'Official French plan for a League of Nations', in Ray Stannard Baker, *Woodrow Wilson and world settlement*, vol. 3, New York: Doubleday, 1922, p. 154.

The French plan was dead on arrival at the Peace Conference. Wilson simply ignored diplomatic correspondence from France.[59] Robert Cecil, the British delegate, dismissed French plans as revivals of the Holy Alliance.[60] In return, the French prime minister, Georges Clemenceau, put up no fight. He had little regard for Bourgeois and his legalistic internationalism; at best international organization might be leveraged for the real benefit of French security.[61] Still, Clemenceau appointed Bourgeois and the dean of the Paris Law School, Ferdinand Larnaude, to the French delegation to the League of Nations Commission, and the delegation made its voice heard.

Bourgeois wasted no time in complaining: 'I consider it a serious matter to ignore completely, as if nothing had ever been done up to the present time for the organization of international law, what has been done and elaborated at The Hague in 1899 and 1907'.[62] Stymied on substantive points, France put forward an amendment to the preamble, stating that members desired to 'maintain a scrupulous regard for international engagements, continuing and enlarging upon the work begun by The Hague Conference'.[63] On British opposition, however, the measure failed. Bourgeois remained undeterred. Until the end, he kept pushing for a permanent international general staff to prescribe military measures to enforce League obligations. Only the insistence of France and Britain forced Wilson to accept the meagre Article 14, which called for the Permanent Court of International Justice to be established sometime in the future. The American president bent no further.[64]

In the hands of Hughes or Roosevelt, French proposals might have amounted to more. Plans for an international general staff might have formed the basis for a Franco-American partnership, as two second-rank powers asserting their commitment to law, and might have pressured the British to accept more cautious plans. This dormant affinity between France and America was not lost on the British Foreign Office. Zimmern observed that Bourgeois' plan 'may be described as a stiffer edition of Mr Taft's …. How surprised [Taft] must have been to see his distant vision brought down to earth in this fashion under the sponsorship of one of the most powerful governments in the world.'[65] The single most powerful government, however, was Zimmern's Britain, and it posed a decisive obstacle to a legalistic league of nations.

Anti-formalistic internationalism: the Anglo-Wilsonian League of Nations

The idea of an international organization so attracted British officials that the League of Nations has been called 'a product of British wartime diplomacy'. During the First World War,

59 Kalevi Holsti, *Peace and war: armed conflicts and international order, 1648–1989*, Cambridge: Cambridge University Press, 1991, p. 194.

60 George Egerton, *Great Britain and the creation of the League of Nations*, Chapel Hill, NC: University of North Carolina Press, 1978, p. 75.

61 David Newhall, *Clemenceau: a life at war*, Lampeter: Edward Mellen Press, 1991, pp. 376, 430; David Watson, *Georges Clemenceau*, London: Haus, 2008, p. 77.

62 David Hunter Miller, *The drafting of the Covenant*, vol. 1, New York: G.P. Putnam's Sons, 1928, p. 261.

63 Florence Wilson, *The origins of the League Covenant*, London: Leonard and Virginia Woolf, 1928, p. 18.

64 Kuehl, *Seeking world order*, p. 278; Marburg, *Development*, vol. 2, p. 824; Miller, *Drafting*, vol. 1, pp. 379–80, 404.

65 Zimmern, *League of Nations*, p. 188.

the British government drew up more detailed and numerous plans for international organization than either its American or its French counterpart. It held richer internal debates. It even welcomed some form of sanctions, for the war revealed the need for a 'guarantee of peace', in the language of the time.[66] But the idea of obligatory judicial settlement, not to mention its automatic armed enforcement, was another matter. Whitehall believed that any sanctions should be applied at the discretion of politicians. They, not judges, would be the protagonists of a new international organization, modelled not on the Hague Conferences but on the Concert of Europe and the British Commonwealth, and fused with the idealism of originally anti-Concert liberal internationalism.

The bare acceptance of political discretion was not what separated British officials from Franco-American legalists, who had failed to eliminate discretion from their own designs. Legalists, however, understood their failure as a reluctant or exceptional accommodation of political realities. The presence of discretion was kept implicit in plans of men such as Root and Bourgeois, perhaps because they hoped for evolution toward greater rule-based automaticity. Here was where British ideas differed: not only in terms of institutional structures but also in the way in which those structures were moralized. British officials, joined by Wilson, lauded the political rather than legalistic nature of the Covenant as a positively good thing. They thought that only politicians, animated by 'public opinion' (yet standing above the actual public's whims), could discern the international spirit and shepherd its growth. It was this spirit, a shared sense of devotion and fellow-feeling, that created social order and gave effect to laws worth having.

The 'idealist liberals' who moralized the League blended a neo-Hegelian belief in spirit, a liberal fear of state power, and an organicist understanding of political organizations and evolution. Zimmern in the Foreign Office and Gilbert Murray in the LNU (to whom might be added Jan Smuts and, to a lesser degree, Robert Cecil, the principal drafters of the Covenant) believed that the League would transform international society because it would consist principally of talk.[67] They thought that formal contracts neglected the true root of conflict, not so much clashing state interests as interests themselves, especially when sharply delimited from the interests of others. 'It is more important to preserve elasticity and a sense of freedom of action than to secure binding engagements, signed, sealed, and delivered', Zimmern wrote in November 1918. 'After all, law courts and arbitration machinery are neither designed nor expected to breed sympathy and understanding between rival litigants. They can but follow and consolidate the swifter advance of the international spirit in more fruitful and less contentious spheres of activity.' Legalism both presupposed and reinforced intersubjective differences among states. It hindered the inner, ethical transformation that really counted. In sum: 'the living experience of Versailles, rather than the academic dreams of the Hague, must be the starting-point for all our international schemes'.[68]

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66 Yearwood, *Guarantee of peace*, pp. 7–137.

67 Jeanne Morefield, *Covenants without swords: idealist liberalism and the spirit of empire*, Princeton, NJ: Princeton University Press, 2005, pp. 97, 182. See also Mark Mazower, *No enchanted palace: the end of empire and the ideological origins of the United Nations*, Princeton, NJ: Princeton University Press, 2009, chs. 1–2; Paul Rich, 'Alfred Zimmern's cautious idealism', in David Long and Peter Wilson, eds., *Thinkers of the twenty years' crisis*, Oxford: Oxford University Press, pp. 77–99.

68 Alfred Zimmern, 'Some principles and problems of the settlement', *Round Table*, 9, 33, December 1918, pp. 100–1, 112.

When British officials entered the drawing rooms of Paris, they found a partner in the American president. Wilson's sweeping wartime rhetoric had aroused suspicion in the Foreign Office, but now Wilson proved amenable to British thinking. As far back as 1885, he had worried that the American system of government struck his countrymen as an 'artificial structure resting on contract only' rather than the 'deep reality of national character'.[69] He brought the same anti-formalistic assumptions to the construction of a global polity. Although Wilson blocked Cecil's attempt to downgrade Article 10's guarantee of political independence and territorial integrity from an 'obligation' to a 'principle', this should not obscure the deep intellectual communion between Wilson and the British representatives.[70] Wilson's idea of 'obligation' was declaratory in nature – moral, not legal, as he termed it – and therefore not far from Cecil's 'principle'. Wilson assured the Senate that Article 10 imposed no legal obligations on the United States; it was 'a moral, not a legal obligation', 'binding in conscience only, not in law'.[71] That did not make the obligation trivial in Wilson's mind. On the contrary, moral obligations seemed all the more solemn and efficacious. He told the Peace Conference, 'Every public declaration constitutes a moral obligation, and the decision of the court of public opinion will be much more effective than that of any tribunal in the world, since it is more powerful and is able to register its effect in the face of technicalities.'[72]

That the Covenant turned out to be riddled with 'gaps' was not mourned by the League's architects as an unfortunate concession to the realities of British world leadership and rising American power. Rather, morality seemed to call for what such interests already dictated. Gaps in formal rules were moralized as pores through which international society would breathe. Accordingly, Article 10's 'obligation' to act against violations of political independence or territorial integrity was vitiated in formal terms by its second sentence: 'the Council shall advise upon the means by which this obligation shall be fulfilled'. At the same time, Wilson attributed such overriding importance to Article 10 that he insisted upon retaining it against critics in the Senate, with the result that the United States did not join the League at all!

The League's other system for guaranteeing peace combined Articles 12, 13, 15, and 16, which concerned the international settlement of disputes and proved more relevant than Article 10 to the League's operation. These articles appeared to make the submission of disputes to the League obligatory. As Root pointed out, however, they permitted legal disputes to be heard by the political Council instead, because Article 13 obligated the arbitral or judicial settlement of only those disputes that the parties 'recognize to be suitable for submission to arbitration or judicial settlement'. Moreover, although member states were obligated to implement the ruling of the arbitral or judicial court, they were not obligated to implement the ruling of the Council and had only to wait nine months or so before going

69 Woodrow Wilson, 'The modern democratic state', December 1885, in Arthur S. Link, ed., *The papers of Woodrow Wilson*, vol. 5, Princeton, NJ: Princeton University Press, 1968, pp. 68–9. See also John Thompson, 'Woodrow Wilson and a world governed by evolving law', *Journal of Policy History*, 20, 1, 2008, pp. 113–25.

70 Egerton, *Great Britain*, p. 131; George Curry, 'Woodrow Wilson, Jan Smuts, and the Versailles settlement', *American Historical Review*, 66, 4, 1961, pp. 968–86.

71 *Congressional Record*, 66th Cong., 1st Sess., 20 August 1919, p. 4014.

72 Minutes of seventh meeting of League of Nations Commission, 10 February 1919, in Miller, *Drafting of the Covenant*, vol. 2, p. 280.

to war. And the provision for enforcing all this, Article 16, despite mandating the immediate, automatic application of economic sanctions against violations of the aforementioned obligations, spoke differently of military sanctions. It required the Council only to 'recommend to the several Governments concerned what effective military, naval or air force' member states should contribute.[73] In short, as the British chronicler of the Peace Conference, Harold Temperley, wrote of the Covenant: 'There is no insistence on the submission of legal issues to legal or even quasi-legal decision; and there is no non-political Council of Mediation or Conciliation'. The framers 'wished to make as few rules and restrictions as possible'.[74]

The British government therefore had little desire for obligatory judicial settlement, much less if backed by automatic armed sanctions. Nevertheless, the overriding priority was to create some sort of league in order to coax the United States into the European balance of power on Britain's side and to affix the stamp of civilization to the British empire.[75] The insistence of Allied governments, and not least the war-weary British public, persuaded Prime Minister David Lloyd George that an international organization had to be created. By the middle of 1918, the mobilization of civil society had won acclaim for the idea of a permanent international body from almost every arena of public life, including political parties, unions, churches, and the press.[76]

The question of what kind of league it should be seemed secondary, and inspired diverse proposals. The largest and most influential private organization was the LNU, which, along with its forerunner, the League of Nations Society (LNS), undertook propaganda campaigns that subordinated differences among its ranks in order to increase membership and drive home the message that the world's choice was organization, in some form, or destruction.[77] Toward the end of 1918, the LNU released its semi-official plan for a league, though it still continued to court new members by avoiding what its periodical called 'academic controversy'.[78]

The LNU plan, revolving around the peaceful settlement of disputes along the lines of the LNS plan of 1915, indicated that legalistic league models were prominent in British civil society, more so than in the Foreign Office, though less narrowly legalistic than in America or France. 'Suitable' disputes were to be decided by a judicial court, the rest by a political council, and states would respect and enforce the court's or the council's decisions. The council would also develop international legal codes. This plan left crucial details vague: who would have jurisdiction to determine a dispute's suitability for judicial treatment, and how would enforcement obligations be arranged? The debt to legalistic internationalism was

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73 Martin Ceadel, 'The origins and Covenant of the League of Nations: a corrective to two standard simplifications', unpublished paper for 'Towards a New History of the League of Nations' conference, Geneva, Graduate Institute of International and Development Studies, 25 August 2011, pp. 8–10.

74 Harold Temperley, ed., *A history of the peace conference of Paris*, London: Henry Frowde, 1924, vol. 6, pp. 459–60.

75 See Egerton, *Great Britain*, pp. 108–9; Jan Smuts, *The League of Nations: a practical suggestion*, New York: The Nation Press, 1919; Yearwood, *Guarantee of peace*, pp. 94, 138.

76 Egerton, *Great Britain*, pp. 93–4; Henry Winkler, *The League of Nations movement in Great Britain, 1914–1919*, Metuchen, NJ: Scarecrow, 1967, pp. 70, 255.

77 Winkler, *League of Nations movement*, pp. 65–9, 81.

78 Birn, *League of Nations Union*, p. 23; Winkler, *League of Nations movement*, pp. 68–9, 73, 77; see also Egerton, *Great Britain*, p. 51.

nonetheless clear. The LNU saw itself as the LEP's counterpart, formally proclaiming its association 'with the American League to Enforce Peace and other kindred societies in the United Kingdom and abroad'.[79] The juridical strand in LNU thinking originated in a study group convened early in the war by the jurist and former ambassador James Bryce. Close to Republican internationalists in America, Bryce had negotiated an ill-fated Anglo-American arbitration treaty in 1911 that was intended to be a model for other states.[80] He recognized the LEP's plan as being 'substantially the same' as his own – from which the LEP got the idea of having non-legal disputes adjudicated by a council of conciliation, composed of experts appointed for a fixed term of years.[81]

On the whole, however, debates in Britain were not cast in terms of a sharp bifurcation between law and politics. Few people ranked the extension of international law as an aim on a par with the prevention of war, and the Concert of Europe was more common than the Hague Conferences as a point of departure for a new international organization. Those who condemned politicians for their expedient machinations tended to be not legalists but radicals, who sought a solution from below not above, through public opinion instead of lawyers and experts. The small Union of Democratic Control (UDC), for example, urged the parliamentary control of foreign policy and mediation in the ongoing war.[82] One of its members, Ramsay MacDonald, worried that the 'union of States' proposed by the LEP, though preferable to pre-war conditions, 'might even become a menace to liberty like a new Holy Alliance' because it would anoint an 'international committee of the governing classes'.[83] Yet even MacDonald's Labour Party unanimously declared itself in favour of a league to 'restrain by any means that may be necessary any Government or Nation which acts in violation of the Laws and Judgements of the International Court'. Labour eventually endorsed a catch-all scheme, incorporating both UDC and legalistic provisions.[84]

Civil society's efforts had their effect. Lloyd George, personally cool toward any international organization save one emerging from inter-Allied organs of wartime cooperation, perceived the public demand for some type of league and pledged to create one in the election of 1918. Voters would punish him 'sooner rather than later', he judged, if he returned from Paris empty-handed.[85] And there was little reason to do so. Once rescued from legalism, the League became a body designed to protect political discretion. It wrapped its formal weakness in high ideals: an institution made for British world leadership. A few decades on, the United States would find this model suited to a similar task.

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79 Birn, *League of Nations Union,* p. 8; Winkler, *League of Nations movement*, p. 77.

80 H. A. L. Fisher, *James Bryce*, vol. 2, New York: Macmillan, 1927, pp. 67–72.

81 Martin David Dubin, 'Toward the concept of collective security: the Bryce group's "proposals for the avoidance of war", 1914–1917', *International Organization*, 24, 2, 1970, pp. 300, 309–10; Burton Hendrick, *The life and letters of Walter H. Page*, vol. 2, Garden City, NY: Doubleday, Page & Company, p. 165.

82 Sally Harris, *Out of control: British foreign policy and the Union of Democratic Control, 1914–1918*, Hull: University of Hull Press, 1996; Michael Howard, *War and the liberal conscience*, New Brunswick, NJ: Rutgers University Press, 1978, pp. 75–84; Marvin Swartz, *The Union of Democratic Control in British politics during the First World War*, Oxford: Clarendon Press, 1971.

83 Ramsay MacDonald, *National defence*, London: George Allen & Unwin, 1917, pp. 57, 60.

84 Egerton, *Great Britain*, pp. 54–7.

85 *Ibid.*, pp. 92–3.

Conclusion

If the First World War exposed the brittleness of international law, it also seemed to present an opportunity to achieve what few jurists had previously thought possible. Voluntary arbitration had failed to prevent catastrophe, but for every person who repudiated juridical approaches, another thought the remedy was to strengthen a system of law by compelling the judicial settlement of disputes. International lawyers busied themselves during the war by compiling treaties and precedents for when the victors called on them to plan a legalistic peace.[86] However, in Britain, and more curiously in America, the call never came. By the summer of 1919, Elihu Root knew the cause was lost. 'Nothing has been done to provide for the reestablishment and strengthening of a system of arbitration or judicial decision', he lamented, with some exaggeration. 'Nothing has been done toward providing for the revision or development of international law.' The League was not without merit as a political device, Root thought, but more important was that his legalistic utopia was no closer to being realized: 'We are left with a program which rests the hope of the whole world for future peace in a government of men, and not of laws, following the dictates of expediency, and not of right.'[87]

The founding of the League thus marked the start of the displacement of international law within liberal internationalism. It hardly compared with the crises of the 1930s in shattering confidence in international law as the basis of international order and the embodiment of civilization, but perhaps international law fell away so easily in part because judicial settlement had already been pushed to the outskirts of international organization. The voluntary International Court of Justice within the United Nations continued what the men at Paris began.

That is not to deny the many expanded functions that the League provided for international law. As a profession and a practice, international law thrived in the 1920s. The League established institutional sites that were both new subjects of law and new fora where lawyers participated. Its mandates system deepened the role of international law outside Europe, introducing the creation of sovereignty as a job for law.[88] Many legalists harnessed the League apparatus to formalistic ends, reviving codification projects, using the permanent court, and attempting, through the failed Geneva Protocol of 1924, to close the Covenant's gaps by instituting the compulsory international settlement of every dispute.[89] But the dream of replacing politics with law, of establishing the rule of law as opposed to that of men, was losing plausibility. As interwar pragmatists assaulted legal positivism, and as world events provided supporting evidence, law increasingly appeared to serve men, not stand above them.[90] When the arbitration movement died in the 1930s, the entire century-long quest for the pacific settlement of international disputes suddenly sounded quaint.

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86 Coates, 'Transatlantic advocates', p. 414.

87 Root Papers, Box 161, Root to Henry Cabot Lodge, 19 June 1919.

88 Antony Anghie, *Imperialism, sovereignty, and the making of international law*, Cambridge: Cambridge University Press, 2004, ch. 3.

89 See Lorna Lloyd, *Peace through law: Britain and the international court in the 1920s*, Woodbridge and Rochester, NY: Royal Historical Society and Boydell Press, 1997; Yearwood, *Guarantee of peace*, pp. 282–325.

90 Anghie, *Imperialism*, pp. 127–31.

The League's architects bore some responsibility for beginning this subordination of international law. Wartime legalists themselves, however, revealed the difficulty inherent in transforming past voluntary arbitration into obligatory judicial settlement. As long as international law was inchoate enough to make arbitration treaties seem dramatic, the most important disputes, concerning 'vital interests' and 'honour', could be exempted in the hopes that modesty now would beget more juridification later. In other words, in the Hague Conference era, legalists fell well short of their ideal, while believing that they were making meaningful if gradual progress toward it. International law's centrality in pre-war internationalist movements was conditioned on its marginality in real politics.

The war forced a reckoning with the limits of law. What made the goal of achieving peace through law look plausible was the assumption that 'public opinion' would one day reduce the intensity of political disputes so as to render them amenable to judicial settlement. The war turned this distant dream into an urgent task, finally forcing legalists into a direct confrontation with the political. Should states really agree to settle every dispute peacefully without exception? Would the United States actually uphold such an agreement concerning the Monroe Doctrine, or France vis-à-vis Alsace-Lorraine? If not now, then after how many general wars would national egoism be tamed?

Second, by convincing many legalists that law needed force behind it, the war opened a Pandora's box of practical and theoretical conundrums. How could sanctions be reliably furnished while preserving the sovereignty of the state, from whose will international law supposedly emanated? Few Americans or Britons wanted to entrust decisions to use force to a supranational entity, which might become a tyranny. Yet if the decision remained with states, did that not prove that significant political discretion in the enforcement of law was ineradicable, since any supranational police force, even if established in the future, might act tyrannically? To keep faith in a utopia of law replacing politics, one had to believe that the progressive evolution of 'public opinion' would somehow produce the transcendence of this dilemma. But forcible sanctions seemed necessary precisely because 'public opinion' no longer seemed sufficient. Meanwhile forcible sanctions would not be furnished at all unless 'public opinion' so permitted.

So although the League's founders pushed aside a legalistic vision that seemed plausible at the time, the pre-war generation's international legal positivism was also starting to implode. The further that proposals moved beyond voluntary arbitral or judicial settlement, the less tenable the replacement of politics with law was likely to look, even as a hope for the future. Perhaps Root, despite perceiving a need to put force behind law, declined to endorse a specific plan obligating the use of force because he was paralysed by the unpalatable choices that he would have to confront. To build a rule of law, not men, seemed to require constant decisions as to what the law entailed.

The League of Nations, for its part, rested on assumptions of its own. By the time Wilson presented the final draft of the League Covenant and hailed its 'definite guarantee of peace', few were so sure.[91] The League's open embrace of gaps and discretion was hard to square with its talk of guaranteeing peace, especially in countries with more reason than America or Britain to feel insecure. Bourgeois had already declared at the Peace Conference: 'The whole

91 Woodrow Wilson, Address to the Peace Conference, 14 February 1919, in Link, *Papers of Woodrow Wilson*, vol. 55, p. 175.

idea of obligation has now disappeared. It will, therefore, be necessary to continue and to conclude separate alliances, inasmuch as the League admits its inability to offer a formal guarantee of protection to its own members.'[92] This lack of formal guarantees was the condition of British participation. Indeed the League's Secretary-General, Eric Drummond, courted British Conservatives by noting how little the League asked of Britain. He pointed out:

> The obligations under the Covenant, when they come to be examined, are extremely light. There is, of course, much loose talk about these obligations, but after careful examination they are, I believe, really reduced to one thing, viz. that if a Power breaks the solemn engagements she has entered into under the Covenant, Great Britain will have to break off financial and economic relations with that Power. But even here … it is the British Government who will judge whether the Power has or has not broken these engagements.[93]

Contrary to conventional wisdom, the League of Nations was never quite a formal collective-security organization. 'Collective security', a term not widely used until the 1930s, rests on deterrence and therefore 'permits no ifs or buts', no gaps that authorize inaction against an aggressor.[94] The League's founders not only allowed gaps but idealized them. To them the 'guarantee of peace' was serious *because* informal. Formal obligations could stifle the spirit of cooperation. It was better to rely on moral obligations, law-but-not-law, so as to cultivate the growth of common sentiment essential to effecting anything.

The problem was that the rest of the world did not share the new ethos. The US Senate was offended by Wilson's denigration of 'legal obligations' and confused by the meaning of Article 10.[95] Refusing to join the League, it saddled Britain with the unexpected burden of supplying force, if force was to be supplied at all.[96] A specific Anglo-American guarantee of French security, offered because France mistrusted the League, fell apart once the US Senate rejected the peace treaty, with which it was bundled. Britain in turn refused to guarantee French security before France disarmed, which it would not.[97] A Canadian effort to remove Article 10 ended in confusion in 1923: the article remained but was understood to mean little.[98] As for Article 16, which authorized automatic economic sanctions, the League Council often declined to invoke it. Instead it employed Article 11, which treated disputants

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92 Felix Morley, *The society of nations*, Washington, DC: Brookings Institution, 1932, p. 195.

93 Drummond to Arthur Balfour, 29 June 1921, quoted in W. J. Hudson, *Australia and the League of Nations*, Sydney: Sydney University Press, 1980, p. 44.

94 Inis Claude, 'Collective security as an approach to peace', in Donald Goldstein, Phil Williams, and Jay Shafritz, eds., *Classic readings and contemporary debates in international relations*, Belmont, CA: Thomson Wadsworth, 2006, pp. 289–302; George Egerton, 'Collective security as political myth', *International History Review*, 5, 4, 1983, pp. 502–3; Roland Stromberg, 'The idea of collective security', *Journal of the History of Ideas*, 17, 2, 1956, pp. 250–63.

95 Lloyd Ambrosius, *Woodrow Wilson and the American diplomatic tradition: the treaty fight in perspective*, Cambridge: Cambridge University Press, 1988, pp. 165–7, 180.

96 Yearwood, *Guarantee of peace*, pp. 3–4, 138–48.

97 Carolyn Kitching, *Britain and the problem of international disarmament, 1919–1934*, London and New York: Routledge, 1999, pp. 58–60; Yearwood, *Guarantee of peace*, pp. 211–50.

98 Yearwood, *Guarantee of peace*, pp. 161–2.

as moral equals, giving everyone a free hand.[99] Thus the League, far from replacing power politics, ended up facilitating its functioning.[100] Yet the idea that the League was an absolute guarantee of peace, capable of transforming politics, proved pervasive. It opened up a gulf between popular expectations and political realities that was distinctive to interwar diplomacy.[101]

Thanks to the deliberate ambiguity and anti-formalistic organicism of the Covenant, the League's main long-range impact actually lay outside the realm of interstate security altogether. It was rather as a forum for global governance that international organizations probably had their greatest effect on the twentieth century. 'Technical' work had been almost an afterthought for the League's founders, but in areas such as health, economics, and communications this work fitted nicely into the League's ideological emphasis on organic social growth.[102] The primary beneficiary of the League's anti-formalistic founding therefore turned out to be global civil society. The League itself provided crucial sites where non-governmental actors interacted with state representatives and developed unprecedented networks and knowledge.[103] By the end, the League of Nations had largely become its 'technical' bodies, which consumed the majority of its budget and were directly transplanted into the United Nations.[104]

Ironically, global civil society might not have fared so well had its largest pro-league groups been heeded in 1919. An international organization centred on the judicial settlement of disputes and consisting of obligations formally ratified and enforced among sovereign states left little room for private associations to act as routine participants in the governing of world politics. As Zimmern noted, legalistic conceptions envisioned 'a sort of fire brigade' for suppressing war, not 'an *everyday institution*, part of the working machinery of the world'.[105] For global civil society to grow after the First World War, its own brand of legalism had to be surpassed. Global civil society requires an anti-formalistic juridical order, one that generates norms through talk, without fussing over the standing of their source or the means of their enforcement. Thus the legal formalists since decolonization have been states of the global south opposed to 'neo-colonial' global civil society with its affinity for declaratory law and its pragmatic stance toward sovereignty. In this sense, the vision of the

99 *Ibid.*, p. 208.

100 Zara Steiner, *The lights that failed: European international history, 1919–1933*, Oxford: Oxford University Press, 2005, p. 349.

101 See Susan Pedersen, 'Back to the League of Nations', *American Historical Review*, 112, 4, 2007, pp. 1096–9.

102 See Martin David Dubin, 'Transgovernmental processes in the League of Nations', *International Organization*, 37, 3, 1983, pp. 469–93; *The League of Nations in retrospect: proceedings of the symposium*, Geneva: United Nations Library, 1983, pp. 19–92, 295–403.

103 See, among others, Patricia Clavin and Jens-Wilhelm Wessels, 'Transnationalism and the League of Nations: understanding the work of its economic and financial organization', *Contemporary European History*, 14, 4, 2005, pp. 465–92; Barbara Metzger, 'Towards an international human rights regime during the inter-war years: the League of Nations' combat of traffic in women and children', in Kevin Grant, Philippa Levine, and Frank Trentmann, eds., *Beyond sovereignty: Britain, empire, and transnationalism, c. 1880–1950*, Basingstoke: Palgrave Macmillan, 2007, pp. 54–79; Claudena Skran, *Refugees in inter-war Europe*, Oxford: Clarendon Press, 1995; Paul Weindling, ed., *International health organizations and movements, 1918–1939*, Cambridge: Cambridge University Press, 1995.

104 Pedersen, 'Back to the League of Nations', pp. 1108–12.

105 Zimmern, *League of Nations*, p. 162.

League's founders has triumphed, but in a severely attenuated form. The purpose of their anti-formalism was to foster the growth of a global society bound by common consciousness and values. By the end of the twentieth century, there was the materiality of global governance, but little sense of a shared ethics beneath it. Vociferating in emptiness still without legalism to boot: for everyone in 1919, a defeat.

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