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A. Introduction

Under this title I propose to discuss the present position of the old doctrine of the Equality of States, to consider whether it has been helpful in the development of international society, and what prospect there is of that society finding in international law an instrument wherewith to bring about less inequality between States than at present exists.

For a statement of what may perhaps still be called the conventional meaning of the doctrine I shall go to the work of the late Professor Oppenheim who wrote as follows:[1]

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

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[1] *International Law*, vol. I (3rd ed.) (1920) § 115.

From this principle he deduced three important consequences: (1) "that, whenever a question arises which has to be settled by the Family of Nations, every State has a right to a vote but to one vote only"; (2), "that—legally though not politically—the vote of the weakest and smallest State has quite as much weight as the vote of the largest and most powerful"; (3) "that—according to rule *par in parem non habet imperium*—no State can claim jurisdiction over another full Sovereign State". So that no State can without its consent be sued in the courts of another.

Later he points out that legal equality must not be confused with political equality.[2]

B. The Past

On the historical side there is very little, if anything, that can be usefully added to two valuable and recent studies by American writers, The Equality of States in International Law by Professor Edwin DeWitt Dickinson of the Michigan Law School, in 1920, and The Equality of States by Dr. Julius Goebel, Jr., of Columbia University in 1923. Both upon the historical genesis of the doctrine and upon its value in the development of international law, these two writers are far from being in agreement, as we shall see later. The purpose of this lecture relates more to the present and to the future than to the past and I shall not attempt to add anything to the exhaustive investigations of these two writers. Professor Dickinson, who is hostile to the doctrine, is naturally concerned to deprive it of the authority which would attach to it if it could be shown to be part of the Grotian system of international law. His conclusion is that (p. 334): "Grotius neither discussed the conception nor based his system upon it..... It had its beginning as a naturalist doctrine in the writings of that school of publicists who acknowledged the leadership of Pufendorf and the inspiration of Thomas Hobbes. The early positivists developed no such conception. It was not until the middle of the eighteenth century, in the period of Burlamaqui, Vattel, Wolff, and Moser, that publicists of all schools included the equality of states among their leading principles. Once established by the process of reasoning" (previously

[2] *Ibid*, § 116.

summarized by the author), "the principle was reinforced by theories of sovereignty. The absolute equality of sovereign states became one of the primary postulates of *le droit des gens theorique.*"

Professor P. J. Noel Baker of the University of London, as the result of an independent investigation, entirely confirms these conclusions and asserts that it is[3] "a complete mistake to claim the authority of Grotius for the doctrine of equality, though, by a false "Grotian tradition", this has been done by Lawrence and many others as well." Baker, like Dickinson, attributes the doctrine to "Pufendorf and other leaders of the reaction to extreme naturalism." Pufendorf's argument is seductively simple: "All persons in a state of nature are equal; the persons of international law are in a state of nature; therefore they are equal."[4] Without denying the value of the inspirations which international law has derived from the law of nature, it is permissible to point out that in Pufendorf's state of nature man is little more than a featherless biped entirely devoid of political organization "since all subjection and all command are equally banished,"[5] so that the state of nature in which the persons of international law find themselves according to his second premises is a state of affairs very different from mankind's state of nature and an argument based on the similarity of these two "states of nature" is dangerous.

On the other hand, Goebel claims for Leibnitz, writing in 1677, "the first statement in the idioms of modern jurisprudence of the conception of equality in international law",[6] and states that he inferred it in a truly realistic fashion from the actual diplomatic practice of states prevailing over a period of two or three centuries before he wrote.[7] Whoever can make the best claim to be the "true and first inventor" of the doctrine, there seems little doubt that its almost universal reception into the orthodox literature is due to the eight

[3]"The Doctrine of Legal Equality of States" in *British Year Book of International Law,* 1923-26, at p. 6.

[4]*Ibid.*

[5]Dickinson, *op. cit.* p. 78.

[6]Goebel, *op. cit.* p. 88.

[7]*Ibid.,* pp. 56-58. See also a review of Goebel's work in *Am. J. of Int. Law* xviii (1927) pp. 386-388, by Quincy Wright, who considers that the opposition between Dickinson and Goebel is less radical than at first appears.

months spent by Pufendorf in a Danish prison in 1658,[8] with his mind full of Grotius and Hobbes, but without access to any books and without adequate exercise or fresh air.

One of the strongest movements in dynamic political science today is the attack upon sovereignty, to which one of my colleagues[9] in this series of lectures has "consecrated" no small part of his abundant energies. The undermining of the doctrine of the Equality of States seems to be a flank action on the same front. That sovereignty postulates equality is, in one sense, almost self-evident, and it is significant that the qualities which Oppenheim and other maintainers of the doctrine of equality derive from it are among the very qualities which Westlake[10] and Pollock would attribute to the fact of independence. Oppenheim's statement that "no State can claim jurisdiction over another full sovereign State" can be based with equal relevance upon a principle of equality or a principle of sovereignty.

Most of the well known publicists of the nineteenth century followed Pufendorf and one another, somewhat slavishly, in asserting the doctrine of the Equality of States, and few of them paused to think out what it meant, and where it came from. To have doubted it would have been to lay hands upon the ark of the covenant. But Lorimer,[11] Regius Professor of Public Law and the Law of Nature and Nations in the University of Edinburgh, an original thinker whose work does not receive today the attention which it deserves, (largely, I think, because he was a reformer and was apt to speak *de lege lata* and *de lege ferenda* in the same breath,) did a great deal in his INSTITUTES OF LAW, published in 1872, and his INSTITUTES OF THE LAW OF NATIONS in 1883, to start the questioning and re-consideration of the doctrine. He was in part a naturalist for the reason that Grotius was and that all must be who seek to impart an ethical element into the development of international law, but he was a naturalist who could face the facts, and there are signs that in the period

[8]Dickinson, *op. cit.*, p. 76.

[9]Professor H. J. Laski.

[10]*International Law*, vol i, (Peace) (1910) p. 321: "the equality of sovereign states is merely their independence under another name."

[11]See Dickinson, *op. cit.*, p. 136.

of constructive and practical idealism which began in 1919 he is coming into his own again. On the matter in hand he said:[12]

"All States are equally entitled to be recognized as States, on the simple ground that they are States; but all States are not entitled to be recognized as equal States, simply because they are not equal States. Russia and Roumania are equally entitled to be recognized as States, but they are not entitled to be recognized as equal States. Any attempt to depart from this principle, whatever be the sphere of jurisprudence with which we are occupied, leads not to the vindication but to the violation of equality before the law."

To pursue the literary side of the controversy, we find Kaufmann[13] in 1911, referring to the passage from Westlake cited above, and saying:

"The right to equality, in the sense of an inherent equality of power and rights, is nonsense, and in the sense of formal equality of capacity for rights is nothing else but a tautological expression for the conception of International Personality."

The doctrine is also severely criticised by Nelson[14] in 1917, and since the World War one German writer after another has joined in the hue and cry, the influence of Dickinson being patent and acknowledged.

Fleischmann in his edition of Liszt qualifies his author's dogmatic statement of the doctrine with the sentence: "But what is meant is not absolute equality but only relative equality in the weight or position as States[15] (*Staatsgeltung*). And Verdross in STRUPP'S WOERTERBUCH[16] emphatically repudiates the doctrine as a fundamental principle of international law.

C. THE PRESENT

In order to consider the present meaning, operation, and utility of the doctrine, let us turn to Dickinson's analysis of it. For him[17] it

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[12]*Institutes of the Law of Nations,* vol. ii, p. 260(n).

[13]*Das Wesen des Voelkerrechts und die Clausula Rebus Sic Stantibus.* (1911) p. 195.

[14]*Rechtswissenschaft ohne Recht* (1917), particularly pp. 96-106.

[15]*Voelkerrecht,* 12th ed. (1925) p. 117.

[16]Vol. i, p. 424.

[17]Cf. pp. 334-335.

expresses "two important legal principles": (1) "the equal protection of the law or equality before the law," and (2) "equality of capacity for rights". To these we may add what is, I think, a third and distinct principle, (3) "equality for law-making purposes", and then (4) we shall briefly notice the application of the doctrine in the Covenant of the League of Nations.

I. *Forensic equality.* In the first sense, the doctrine embodies a reality which hardly requires illustrations.[18] An international tribunal, or a municipal tribunal when giving effect to the international obligations of the State to which it belongs, pays the same attention to the rights of France as it does to the rights of Costa Rica. And Chief Justice Marshall in 1825, in *The Antelope*[18a], said:

"No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."

If you and I were both injured in the streets of London as the result of the negligent driving of motor cars, you by the ambassador of France, and I by the diplomatic agent of Costa Rica, neither of us could recover damages unless the defendant's Government elected to waive the right of diplomatic immunity which international law confers upon it in the person of its diplomatic representative. If Miss Mighell had promised to bestow her hand and fortune upon an Emperor of all the Russias instead of a Sultan of Johore, she would have been in the same unfortunate position when she sought to recover damages in England from her faithless suitor; though far from equal in the possession of rights, they would both have had an equal claim to such rights as they possessed, one of which would have been that of immunity from process in an English court.

II. *Equality in the Acquisition and Exercise of Rights.* On the other hand, "equality of capacity for rights" may be an ideal but it is not a reality. International law recognizes differences in the status

[18]See the Award in a recent Arbitration between the United States and Norway, *American Journal of International Law.* xvii (1923) at p. 392.

[18a]10 Wheat 66. Scott, *Cases on International Law* at p. 10.

of its subjects just as in English law we find the status of an infant, a lunatic, or a married woman differing from that of a sane adult male or unmarried woman. If you by negligently driving your car inflict injury upon any one of these persons you will find that they have an equal right to be protected from bodily injury resulting from your wrongful act. But if you attempt to make the same contract separately with each of these persons, you will find that, according to the nature of the contract and the varieties of their status, the same contract will have widely differing legal effects. The infant, the lunatic, and the married woman are equal to the normal legal person in regard to the protection and enforcement of such rights as they may possess; but they are inferior to him in the range of rights which they can legally acquire or exercise.

Turning to international society, it seems fair to say that a State under a protectorate and a neutralized State have each a definite status in virtue of which, so long as it lasts, their capacity for the acquisition and exercise of rights is less than that of the normal, fully independent State. Among protected States may be mentioned Danzig under the protection of the League of Nations, Zanzibar under that of Great Britain and Morocco under that of France. It is dangerous to generalize upon the condition of protected States, and it suffices to point out the characteristic that the right of managing the international affairs of the State under protection is to a greater or a less degree vested in the protecting State, so that the status of the protected State is inferior to that of the normal State and its capacity for acquiring and exercising rights is therefore subnormal. Similarly we find Switzerland, a permanently neutralized State, unable to conclude treaties of guarantee or alliance or other treaties which involve her in offensive hostilities, and therefore only able to join the League of Nations upon special terms whereby she "shall not be forced to participate in a military action or to permit the passage of foreign troops or the preparation of military enterprises upon her territory."[19] And many writers hold that a neutralized State cannot legally acquire new territory without the consent of the guarantors of

[19]Mowat in *British Year Book of International Law*, 1923-24, pp. 90-94.

her neutralization.[20] Nevertheless, a neutralized State must not be regarded as a half sovereign State.

May it be put this way? The Equality of States in the protection of their rights is a rule of law. But the equality of States in capacity for acquiring and exercising legal rights is the statement of a political ideal. Whether or not it is desirable to realize that ideal, we are not at present discussing. It may be said justly that the incidents of international status are not enough to account for the gross political inequality of States which patently exists. Even when you have enumerated all the States under protection or under a League of Nations Mandate (and it must be admitted that Iraq at any rate is a State), your list is not a long one, and you have barely touched the fringe of political inequality. That is perfectly true. Status will not carry us far. A subnormal status not infrequently originates in a treaty, but we shall find that the greater part of this inequality at present existing arises from treaties and yet cannot be said to produce a change in status, to make the inferior State a half-sovereign state.

A survey of the world will confront us with the spectacle of a number of States which as the result of the provisions of treaties are politically and sometimes economically dependent upon and unequal to certain other States to which they stand in a special relation. The system of capitulations whereby certain States, China, for instance, or Turkey before the Treaty of Lausanne, have agreed by treaty or by custom to surrender the right to try certain classes of foreigners for crimes committed within their territory, affords an illustration. There you have a sample of the "unequal treaties" about which we are now hearing so much. Again, whereas according to the practice of many, if not of most States, the immunity of a State and of its property from process in the courts of a foreign State is not forfeited by embarking upon trading ventures, we find that as a result of the Peace Treaties of 1919 Germany,[21] Austria,[22] Hungary[23] and Bulgaria[24] when engaged in trade forfeit "the privileges and im-

[20]See Oppenheim, *op. cit.* vol i. § 96.
[21]Art. 281.
[22]Art. 233.
[23]Art. 216.
[24]Art 161.

munities of sovereignty"; and the same Peace Treaties will afford many other illustrations of inequality.

Another kind of inequality resulting from treaties occurs where States have by treaties made with more powerful neighbors limited their treaty-making power, as in the case of Cuba[25] and Haiti[26] or in some other way impaired their freedom of action, as in the case of Panama.[27]

In short, it will not explain the political inequalities of international society to say that there is one law for the weak and another for the strong; there is not, though it may be easier for strong States to break the law with impunity than for weak ones to do so, nor can existing inequalities be attributed except in a comparatively trivial degree to differences in legal status. We must look elsewhere. The overwhelming bulk of them are due to the existence of treaty obligations entered into between pairs of superior and inferior States. It would be an unworthy quibble for a student of international law to leave it at that and to reply that if a State chooses to make itself politically unequal by entering into a treaty, that has nothing to do with international law, that a treaty is a treaty, and that the sole concern of international law is to afford equal protection of treaty and other rights. *Modus et conventio vincunt legem.*

The truth is that in two important and relevant respects international law lags behind the private law of most civilized States and international treaties differ from private contracts. The first is that international law does not recognize the fact that one party to a treaty was induced by duress or coercion or undue influence to make it, as a ground for treating it as invalid. The second is that only in the most rudimentary degree does international law recognize that a treaty which conflicts with morality or with policy is void and need not be performed. Of these each in its turn.

(a) *Duress or Coercion, and Undue Influence.* Hall[28] states that international law regards "all compacts as valid notwithstanding the use of force or intimidation, which do not destroy the independence

[25]Hyde, *International Law*, vol. i. § 19.
[26]*Ibid.* § 22.
[27]*Ibid.* § 20.
[28]*International Law*, § 108.

of the State which has been obliged to enter into them. When this point however, is passed constraint vitiates the agreement, because it cannot be supposed that a State would voluntarily commit suicide by way of reparation or as a measure of protection to another."[29] His justification of the rule is that otherwise "few treaties made at the end of a war or to avert one would be binding, and the conflicts of States would end only with the subjugation of one of the combatants or the utter exhaustion of both."[30] But duress applied to a negotiator and inducing him to sign a treaty is said to vitiate the treaty, though, as Hyde points out,[31] the only scope for the operation of this rule would appear to be when the negotiator had power to bind his State without the necessity of ratification.

No one can regard the position of duress in international law as satisfactory or as consistent with a civilized society. But so long as international law is unable to distinguish between just and unjust exercise of force, it follows *a fortiori* that is must recognize the fruits of veiled or unveiled threats of force when embodied in a treaty.[32]

(b) *Morality and Public Policy.* "If international law obtains among enlightened States," says Hyde,[33] "it is not unreasonable to assert that that law may denounce as internationally illegal, agreements which are concluded for the purpose of securing the performance of acts acknowledged to be lawless and contemptuous of fundamental

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[29]Fiore, *International Law Codified,* (Borchard's Translation, § 760) imposes a similar limitation upon the validity of a treaty.

[30]See Grotius, *De Jure belli ae Pacis,* lib. ii, c. xvii, § 19: "As, by the consent of nations, a rule has been introduced that all wars, conducted on both sides by authority of the sovereign power, are just wars; so this also has been established, that the fear of such a war is held a justly imposed fear, so that what is obtained by such means cannot be demanded back" (Whewell's translation). See also lib. ii, c. xi, § 7, where he is not so definite. See also Vattel, Book iv, c. 4, § 37, who states quite dogmatically that "on ne peut se degager d'un Traité de Paix en alleguant qu'il a été extorque par la crainte, ou arraché de force." On the subject of duress in international law, see Lauterpacht. *Private Law Sources of and Analogies in International Law* (1927) pp. 161-167.

[31]*Op. cit.,* ii, § 693.

[32]It is believed that the effect of duress or undue influence upon the validity of a treaty has not yet been considered by an international court or tribunal of arbitration except perhaps in the *Croft* Arbitration between Great Britain and Portugal in 1856, and then only indirectly; see Lapradelle—Politis, *Recueil des arbitrages internationaux,* ii. pp. 36-37.

[33]*Op. cit.* ii. § 490.

principles of justice;" for instance, a secret alliance for an unprovoked attack upon an unoffending State and its subsequent partition amongst the aggressors, or a treaty recognizing and guaranteeing the appropriation of a portion of the open sea.[34] And Hyde further suggests that there is a growing recognition of the "principle of self-determination," the crystallization of which into a rule of law would make the validity of a treaty for the cession of territory depend upon the consent of its inhabitants.[35]

In some systems of private law contracts may be held void not merely on the ground that they tend to further the commission of a crime or are illegal in some other way, but alternatively on the ground that they conflict with what the English common law calls "public policy," either political or economic, for instance, a contract imposing an undue restraint upon a man's liberty to dispose of his capital or his labour as he wills, or a contract which 'savours of slavery' by tending "to impose servile obligations upon one party to it."[36] How far does international law go in this direction? Beyond a few vague and unsatisfactory assertions by one writer after another, taken over as part of the traditional stock-in-trade, we get no guidance. Vattel[37] tells us that "a treaty concluded for an unjust or dishonest purpose is absolutely null and void, nobody having a right to engage to do

[34]Vattel, *Law of Nations,* Book ii, c. xii, § 161; Hall, *op. cit.* § 108; Oppenheim, *Op. cit.* i. § 505. For Members of the League, Article 10 of the Covenant demands consideration in this respect.

[35]*Op. cit.* i. § 108.

[36]Horwood v. Millar (1917) 1 K. B. 305 (where a man of small means bound himself body and soul to a money-lender into whose clutches he had fallen: contract void). Contrast Denny (Trustee) v. Denny & Warr (1919) 1 K. B. 583 (where a father imposed by contract severe restrictions upon his son as to mode of life, place of residence, companions, relations with money-lenders, etc., and, the object being to save the son from moral and financial ruin, the contract was held not to be contrary to public policy and was enforced). It is a reasonable analogy to compare the financial object of the contract in the last-named case (omitting the moral object which is inapplicable) with the financial object of a treaty between a powerful State and a weak State whereby the former in return for certain serious impairments of the independence of the latter agrees to give its assistance and protection with a view to the achievement of the latter's financial and political rehabilitation; for instance, the treaties between the United States and the Dominican Republic (see Hyde *op. cit.* i. § 21) and Haiti (see Hyde *op. cit.* i. § 22) respectively.

[37]*Op cit.* Book ii, c. xii, § 161.

things contrary to the law of nature." He also has a great deal to say in criticism of unequal treaties and "unequal alliances," but more on the ground of the imprudence of entering into such treaties than of their immoral and impolitic tendencies.

Fauchille[38] regards as "nulle pour illicité de son objet toute convention tendant á la violation .....des règles de la morale universelle, des droits fondamentaux de l'humanite." And Oppenheim asserts it to be[39] "a customarily recognized rule of the Law of Nations that immoral obligations cannot be the object of an international treaty." Many similar assertions could be cited. They are as a rule unsupported by illustrations, and so far as I am aware, have never received the specific imprimatur of an international court or tribunal of arbitration. They are, as Vattel indicates, recruited from the law of nature—none the worse for that—and embody an ideal to be striven for rather than a positive rule of law. The cause of their inadequacy is probably the same as that which underlies the rule as to duress already examined; namely, that, so long as international law recognizes the fruits of the exercise of force, it is difficult for it *a fortiori* effectively to restrain or condemn the achievement, by means of treaty obligations, of ends which conflict with international morality and public policy.

III. *Equality for law-making purposes.* There is yet a third sense which may be attributed to the doctrine of the Equality of States and in the light of which that doctrine must be considered. The law of nations is based on the common consent of States, and that consent may be evidenced either (a) tacitly, by custom, or (b) expressly, by treaty. How far does the Equality of States prevail in these respects? Oppenheim[40] indeed regards equality as an inference from this necessity of common consent:

"Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law."

Upon the question whether that consent must be literally universal before any given rule may be said to be a rule of international

[38] *Droit International Public,* t. i. (Paix) § 819.
[39] *Op. cit.* i § 505.
[40] *Op. cit.,* vol. i, § 16.

law, there is some difference of opinion. Oppenheim says[41] that "common consent can .... only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatever, and disappear totally from the view of one who looks for the will of the community as an entity in contradistinction to the wills of its single members."

But that is not a satisfactory test. Lord Alverstone in the case of the *West Rand Central Gold Mining Company v. Rex*[42] said, with reference to the statement that "international law forms part of the law of England," that "the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it."

The necessity of the individual consent of States is clearer in the case of that portion of international law of which the source is law-making treaties. Oppenheim classifies the law deriving from such treaties as *particular* when they are "concluded by a few States only," *general* "when the majority of States, including leading Powers, are parties to them," and only as *universal* "when all the members of the Family of Nations are parties to them," at the same time pointing out that "general international law has a tendency to become universal." That a powerful group of States cannot make law for the whole world is expressly admitted in the Declaration of Paris, 1856, which states that "the present Declaration is not and shall not be binding except between those powers who have acceded or shall accede to it."

During the World War the prize courts of the belligerents were faced with the fact that a number of the Hague Conventions relating to maritime warfare, while ratified by the principal belligerents, had not been ratified by some of the less important, for instance, Montenegro, having no navy, and Serbia, having no sea coast.[43] In strict

[41] *Op. cit.*, vol. i, § 11.

[42] (1905) 2 K. B. at p. 407.

[43] The Moewe (1915) P. at p. 13; 1B. and C. P. C. 60, 70; *The Fenix Zeitschrift fuer Voelkerrecht*, vol. ix (1915-1916) p. 103; cited by Garner, *International Law and the World War* (1920) pp. 25-27. See also The Blonde (1922)

law, therefore, as the result of the "general participation" clause, a Convention in this condition was not binding on a British or a German court. Nevertheless, both British and German prize courts declined to take advantage of this technicality and considered themselves bound by the contents of such a Convention, if not by the Convention itself. It will be noticed, however, that in these cases there was no question of holding a State bound by a treaty to which it was not a party. It may often happen that a law-making treaty is in substance declaratory of existing customary law and only in name law-making; in such a case a State which is not a party to it may be bound by the customary law but it cannot be bound by the treaty.

The requirement of common consent has its good side and its bad side. The bad side is that it operates as a clog upon the process of law-making. The good side is obvious. It is oppressive that a State should be bound by rules of law to which it has not consented. That seems almost a platitude. But few persons would regard it as oppressive that you and I who are subject to the laws of Great Britain should be bound to obey laws to which we have not specifically given our consent. This contrast shows how widely different are the ideas which prevail regarding international society and the society which makes up one State. Most of us accept without question the fact that a municipal legislature acting by a majority of its members, can bind all persons subject to its laws whether they like them or not,[44] but an invitation to apply the same principle to the Family of Nations gives us something of a shock. Let us see whether there is anything to be said for the principle in the international sphere.

How is international law going to adapt itself to the needs of the society of States if every step is to be dogged by this requirement of

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1 A. C. at pp. 323, 324, 3B. and C. P. C. 1031, 1038; and on the "general participation clause" (*Allbeteiligunsklausel*) Zitelmann in *Archiv des oeffentlichen Rechts,* vol. xxxv (1915) pp. 1-27 and in *Strupp, Woerterbuch,* i. pp. 31-32.

[44]It is interesting to notice that it was considered necessary to provide in clause 14 of *Magna Carta,* which describes the composition of the Feudal Assembly and probably by analogy influenced the National Assembly, that the consent of those present on the appointed day shall bind those who, though summoned, have not attended. Even then (1215) it was apparently not considered right that of those present the consent of the majority should bind the minority.

common consent? Custom is a slow business, and no one whose desire is to accelerate the establishment of the rule of law over a continually expanding sphere of international relationships can be accused of impatience when he looks to a series of law-making treaties rather than to the tardy operation of custom as the main instrument for the achievement of this desirable end. Law-making treaties do for international society what legislation does for the society of an individual State; they represent the conscious and deliberate creation and adaptation of the law in contrast to custom. Says Professor Brierly:[45] "International law lost the most fruitful seed of development that it has ever had when, far too early for the health of the system, though doubtless inevitably, its foundation in natural law was undermined. With the triumph of the positive school the problem of development became universally more difficult, for the system possesses hardly any of the apparatus of change that exists within a municipal system. Not only has it no legislature, and until recently no courts; but even the spontaneous growth of a new customary rule is incomparably more difficult than it is within the community of a State."

There is the problem. How can we supply this "apparatus of change"? Oppenheim in an article entitled "The Future of International Law,"[46] published in 1911, in discussing international legislation and after commenting upon the Hague Peace Conferences as a legislative organ, pointed out that,[47]

"A difficulty of a special kind besets international legislation, owing to the fact that international rules cannot be created by a majority vote, and that, when once in existence, they cannot be repealed save by a unanimous resolution. But (he continues) when once we free ourselves from the preconception that the equality of States makes it improper for legislative conferences to adopt any resolutions which are not unanimously supported, there is nothing to prevent a substantial result being arrived at even without unanimity. *At this point the difference between general and universal inter-*

[45]"The Shortcomings of International Law" in *British Year Book of International Law*, 1926, at p. 9.

[46]Translated into English by Bate and published by the Carnegie Foundation of International Law in 1921.

[47]At pp. 30-31.

national law furnishes a way out (italics mine). Rules of universal international law must certainly rest on unanimity. It is postulated in the equality of States that no State can be bound by any law to which it has not given its consent. But there is naught to prevent a legislative conference from framing rules of general international law for those States which assent to it and leaving the dissentient States out of consideration.[48] ..... In no long time thereafter the dissentient States will give in their adherence to these conventions, either in their existing or in some amended form."

This was not mere idle speculation. It is in fact the process by which important rules of general (and sometimes even particular) international law have become in substance universal. The Declaration of Paris 1856, prescribing four important rules of maritime warfare, was made by seven States. Today the United States of America is the only important power which has not yet actually acceded to the Declaration. Nevertheless in the American Civil War and in the Spanish-American War the United States adopted the provisions of the Declaration.

Half a loaf is better than no bread. Hitherto this process of international legislation has been too occasional, too haphazard, too spasmodic. There are signs that it is about to become conscious, regular, and deliberate. The League of Nations has appointed a Committee of Experts for the Progressive Codification of International Law, which is now at work. A prominent citizen of the United States sits upon it. It is sincerely to be hoped that, as and when the council of the League receives reports from this Committee upon the different topics of law which they consider ripe for codification, the Council will not feel bound to insist on a prospect of unanimity before taking the necessary steps for the drafting of the various conventions. Let them be drafted and opened for signature. Some States may refuse to sign a convention, others may sign it reserving liberty to denounce it after a period of years, others with other reservations of much or minor importance. At any rate a beginning will have been made, and it will become increasingly difficult for any State which values membership of the Family of Nations to

[48]Notice the procedure of the International Labour Oragnization and particularly Article 405 of the Treaty of Versailles, 1919.

maintain its dissent once it finds itself in a rapidly dwindling minority.[49]

IV. *Equality in the League of Nations.* Little need be said of the Equality of States in the League, for much has already been written upon it.[50] Politically, the League is realist in that its Constitution, while providing for absolute equality in the Assembly, recognizes that a Council which did not embody the historical fact of the preponderating influence of the Great Powers in world affairs would not exercise much influence upon those affairs.[51] Accordingly we find five Great Powers permanently represented upon it, France, Germany, Great Britain, Italy and Japan, and provision exists for creating further permanent seats as and when they may be required. (The United States was likewise named in the Covenant as a permanent member.) It is this permanent representation of the Great Powers that links the League for good or for ill, with the Concert of Europe. The States occupying the nine non-permanent seats are normally not re-eligible, when their terms of office expire during the following three years. But at the meeting of the Assembly in 1926 a power was conferred upon the Assembly to declare in advance any State, elected to a non-permanent seat, to be re-eligible; thereupon, such State on or before the expiry of its term of office may, but not must, be re-elected. Poland was elected to a non-permanent seat in 1926 for three years, and thereupon at her request the Assembly declared her to be re-eligible. Thus we have at the present moment three grades of States on the Council: five permanent, eight non-permanent and not immediately re-eligible, and one

[49]Note Hall, writing in 1880 on p. 12 of the first edition of his *International Law* of the Declaration of Paris: "if the signatories to it continue to act upon those provisions, the United States will come under an obligation to conform its practices to them in a time which will depend on the number and importance of the opportunities which other states may possess of manifesting their persistent opinions."

[50]See Schücking and Wehberg, *Die Satzung des Völkerbundes* (2nd. ed.) 4 pp. 142-144; Scelle in *Munch's Les origines et l'oeuvre de la Societé des Nations,* vol. i (1923) p. 66; Dickinson, *Op cit.* pp. 337-338 and Armstrong in *American Journal of International Law,* xiv, pp. 540-564.

[51]As regards the application of the principle of equality in the selection of the judges of the Permanent Court, see Fernandes, *Le Principle de l'egalite juridique des etats dans l'activité international de l'apres-guerre.* (1921) (Geneva).

non-permanent but re-eligible immediately upon the expiry of its term of office. The nine non-permanent States sit for different periods of years, three, two and one, but that is a matter of machinery rather than of status. The preponderance thus given in the League to five Great Powers is not confined to their influence in the every day business of the council itself; for in several respects the Covenant places members of the Council in a position superior to the rank and file of the Assembly. Thus under Article 16 it is the Council which can expel a member from the League for violation of the Covenant, and under Article 26 amendments of the Covenant do not become effective until ratified by all the members represented on the Council and a majority of the Assembly.

But apart from the inequality embodied in the constitution and powers of the Council, which I think most friends of the League will consider to have been justified by the facts of international society as it stood in 1919, whatever amendments the future may have in store, the League is based on the Equality of States; that is, on their independence, on the theory that one is as good as another and that no one can be bound by any decision of the League except in matters wherein it has agreed to be bound by a majority vote. Hence, unanimity is the general rule at meetings both of the Council and of the Assembly, and a majority vote is the exception. The exceptions are very considerable and commentaries upon the League may be referred to for them. The most[52] important is the power of the council or of the Assembly to make, without the concurrence of the parties to the dispute, a report upon a dispute referred to it under Article 15. The other exceptions relate mainly to matters of procedure. An illustration of the normal necessity of unanimity may be recalled in the case of the resolution interpretative of Article 10, which was introduced by Canada in the Assembly in 1923 and which, unanimity being essential failed to secure adoption by reason of the opposition of Persia alone.[53]

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[52]Pollock, *League of Nations,* 2nd. ed. (1922) pp. 109-110; Schücking und Wehberg, op. cit. pp. 335-338; Fischer Williams in *American Journal of International Law,* xix (1925) pp. 475-488; McNair in *British Year Book of International Law,* 1926, pp. 1-13.

[53]Records of the Fourth Assembly (1923). Resolutions and Recommendations Adopted, p. 34.

D. The Future

Can any suggestion be made for mitigating the legal inequalities which we find existing in the present international society? Most writers upon international law, following the example of the father of the science, have conceived it to be their duty not merely to state the law as they see it but to make suggestions for its improvement. The pity is that so many of them in doing so have not made it clear when they are writing *de lege lata* and when *de lege ferenda.* In their zeal for amendment they are prone to attempt to give the desired amendment the prestige of established law—to the disrepute of the whole science. Let it be clear, therefore, that I now speak *de lege ferenda.* In order to remove the defects in the system of international law which I have described, international law must evolve some machinery whereby the expressed intention of the parties shall not be the sole test of the validity of treaties; for we know by experience that in many cases one party has expressed its intention under coercion and that in many other cases the intentions of all the parties freely expressed may involve acts which are immoral or contrary to the general interest of the society of States. In private law the maxim, *modus et conventio vincunt legem,* is balanced by another; *privatorum conventio juri publico non derogat.* Sooner or later some international authority must be constituted or recognized as having power in the public interest to withhold the public *imprimatur* which should be essential to the validity of a treaty. One's thoughts naturally turn to the League of Nations which represents a very large part of the Family of Nations in its organized form. Without ignoring the important States which are outside that organization, let us examine it in order to see whether we can detect any machinery conceivably capable in the future, however, remote, of being adapted for our present purposes.

Article 18 of the Covenant provides that,

"Every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat, and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered."[54]

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[54]Upon this article, see Manley Hudson, "The Registration and Publica-

There is nothing to prevent the registration with, or at any rate communication to, the Secretariat of treaties by States which are not members of the League, followed by their publication by the Secretariat, and a perusal of the Treaty Series of the League of Nations reveals instances of treaties communicated to the Secretariat by the United States of America, by Germany (before admission to the League), and by Ecuador.

At present, it cannot be too plainly stated, the functions of the Secretariat under this article are purely ministerial. It was suggested by Mr. Leon Bourgeois at a meeting of the Council that States which presented for registration a treaty containing clauses incompatible with the letter or the spirit of the Covenant should be asked to modify them; and the representative of Greece at the Second Assembly[55] proposed the addition to Article 18 of a clause, whereby,

"Any treaty, the provisions of which in the unanimous opinion of the Council are contrary to international public order, shall not be registered and shall, therefore, be deemed to be non-existent."[56]

But neither of these suggestions met with success. On the other hand, there are indications that the registration of a treaty need not necessarily be a "clean" registration. In 1926 we find a strong protest being made by the Government of Abyssinia to the States members of the League of Nations against the contents of an agreement made between Great Britain and Italy regarding the economic development of Abyssinia, which not being a party to the agreement was not bound by it. The Government of Abyssinia having received reassuring replies from Great Britain and Italy addressed a further communication to the Secretary-General, with the request that it should be registered and published together with the Anglo-Italian agreement. Thereupon the Secretary-General announced that this communication would be published in the Official Journal and that a suitable reference to it would be made in the Treaty series against the text of the notes exchanged between the British and the Italian

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tion of Treaties" in *American Journal of International Law,* xix (1925) pp. 273-292.

[55]Minutes of Fifth Session of Council, p. 13; cited by Manley Hudson. *Op. cit.* p. 278.

[56]Records of Second Assembly, Meetings of Committees, 1, 77; cited by Manley Hudson, *Op. cit.* p. 279.

Governments.[57] That was a case of a protest by a third State. It is not unlikely that it may be followed later on by other instances of protest by third States not parties to a treaty presented for registration or even by one of the parties themselves which has not been a free agent in the matter. Such a *caveat* if noted in the Treaty Series would mar the "cleanness" of the registration and would in fact have the moral weight of a reservation of rights, even though at present no legal weight can be attached to it. These are but straws, however, and it would be idle to suggest that the League is yet strong enough to assume the task of acting as a censor of the treaties which its members may choose to make.

E. Conclusion

Let me now try to sum up. The idea of equality, when it affected an entry into the field of international law, gave birth at the hands of the naturalists to the doctrine of the Equality of States. That doctrine has three meanings. In the first, it is used to denote *Equality before the law,* equality in the assertion and vindication by law of such rights as a state may have, what I have ventured to call Forensic Equality. In this sense the Equality of States is a normal fact of international jurisprudence; it is a just and necessary principle, and requires no particular comment.

In the second sense, it denotes Equality in the acquisition and exercise of rights, *equality of capacity for rights.* Here the doctrine may or may not represent an ideal but it does not embody a reality. The existing inequality of capacity for rights is due only in a very small degree to inequalities of status; thus Switzerland by reason of her permanent neutralization, or Danzig by reason of being under the protection of the League, cannot be said to have full and normal capacity for rights. But far more than status the true cause of the existing inequality of capacity for rights is the fact that a great many States have, with the approval and sanction of international law, entered into treaties which permanently impair their capacity for acquiring and exercising rights; for instance, Panama by reason of her treaty arrangement with the United States of America. I say with

[57] L. N. Off. Jo. xi, (1926), p. 1526; L. N. Treaty Series, vol. 50, p. 282; British Official Paper, C. M. A. 2792.

the approval and sanction of international law, because there exist at present in that system of law no rules which invalidate a treaty on the ground of duress or coercion or undue influence, and only the most embryonic rules relating to morality and public policy. Not until international law succeeds in developing such rules will there exist anything like equality of capacity for rights among States.

In the third sense, the doctrine of the Equality of States denotes *Equality for law-making purposes.* Here it has operated as a clog on the process of international legislation. Without holding that a State is bound by a convention to which it has not consented, it is desirable that complete unanimity should not be regarded as essential for the framing of law-making conventions and for opening them for signature. Conventions which embody *general* international law tend by the lapse of years to receive the adhesion of originally dissentient States and thus to become *universal* international law. It is in the highest degree desirable to see the rule of international law extended by agreement, and a pedantic insistence upon unanimity must not be allowed to obstruct the process of drafting Conventions and opening them for signature.

If a too literal adherence to the doctrine in the last sense may have retarded the creation and development of international law, it may at any rate be claimed that in the second sense much remains of good for the application of the doctrine to achieve; for here it may foster the development of some legal principle, or the creation of some administrative machinery, which will mitigate that large part of the existing inequality between States resulting from treaties—treaties made under duress or coercion and treaties open to grave questions on the ground of international public policy and morality but nevertheless valid in the present imperfect condition of the law of nations.