THE INTERNATIONAL COURT OF THE LEAGUE OF NATIONS.¹

I HOPE that I shall not either dissatisfy you or disappoint you in what I have got to say to-night, in offering you some observations on the Permanent Court of International Justice, but I confess that it is a pleasure to me to feel that I can cast away all such taints and disadvantages as may attach to a member of the Government, and speak to you as a Trinity man.

In offering to you some remarks about the Court of International Justice, which is the first permanent organization set up by the League of Nations, I want to try to tell you not only what it is, but I also want to say something by way of discussing the question of whether or not it has got any roots which are likely to enable it to grow, and, further, to consider for a short time within what limits it is possible that we can hope for its success.

The origin of this Court is to be found in Article 14 of the Covenant of the League, which we know forms part of the Peace Treaties. It is important that we should examine, or, rather, remember, its terms, because something will turn on the limitations of this article. The article reads as follows:—"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

In pursuance of the terms at the commencement of the article, "the Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice," the Council appointed an Advisory Committee of Jurists consisting of eminent international lawyers and authorities on International Law of various Allied and neutral nationalities for the purpose of preparing a draft scheme for the constitution of the Court. This committee

¹ An address delivered to the Trinity College Law Society on February 18, 1921, by Sir Ernest Pollock, K.C., M.P., Solicitor-General.

met at The Hague in the early part of 1920, and in the course of a few weeks arrived at a unanimous conclusion, which they embodied in the draft scheme which forms the basis of the constitution of the Court now in force. The scheme which they submitted was altered in some important features, but one must pay a tribute to the international lawyers who, in so short a time, found it possible to arrive at a unanimous solution of the problems presented to them. The scheme was then submitted to the Council of the League, and considered by them at their meeting in the summer of 1920 and again at Brussels in October of last year, when some amendments were made and the scheme was finally adopted by the Council. The final draft was submitted to the Assembly of the League at its first meeting, which took place in November, 1920, at Geneva.

Now the Assembly, you must remember, is a true International Parliament in which all the members of the League, great and small, are equally represented, and have equal voting power. If you turn to Article 3 of the Covenant, to which perhaps I may call your attention, it says "The Assembly shall consist of Representatives of the Members of the League. The Assembly shall meet at stated intervals and from time to time as occasion may require. . . . The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world. At meetings of the Assembly each Member of the League shall have one vote and may have not more than three Representatives." By that, therefore, you have a number of representatives to assist each other, and the ultimate result in voting power is that each State which is a member of the League has one vote and no more. The Assembly at Geneva referred this scheme to a committee of its members for examination and report, and this committee, after exhaustive discussion, proposed certain amendments which they embodied in their draft Statute and submitted to the Assembly on December 13, 1920. The Assembly unanimously declared its approval of this draft Statute and passed a resolution in the following terms:—"1. The Assembly unanimously declares its approval of the draft Statute of the Permanent Court of International Justice, as amended by the Assembly, which was prepared by the Council under Article 14 of the Covenant and submitted to the Assembly for its approval. 2. In view of the special wording of Article 14, the Statute of the Court shall be submitted to the Members of the League of Nations for adoption . . . in the form of a Protocol duly ratified and declaring their recognition of this Statute. 3. As soon as this Protocol has been ratified by the

majority of the Members of the League, the Statute of the Court shall come into force and the Court shall be called upon to sit in conformity with the said Statute in all disputes between Members or States which have ratified as well as between the other States to which the Court is open under Article 35 paragraph 2 of the said Statute."

In other words, the terms of the resolution provide that the system of the Court is made available to all members of the League and to others who desire to submit their cases to it. It will be observed that the Statute of the Permanent Court of International Justice, which represents the considered and unanimous opinion of the Assembly, remains to be adopted formally by each separate State. But this is probably now a mere formality, because twenty-seven States have already signed the Protocol, and I take note with pride that the Chancellor of our University has signed it on behalf of the British Empire. I have a facsimile here of the signatures, including that of Arthur James Balfour.

We have thus, in short, got the history of how the Court has been set up under the powers of Article 14; but one asks oneself the question whether a Court of this sort is entirely a new idea or whether its existence is to some extent accounted for by tacit evolution or by the imitative propensity which we so often find in human nature. To me it has been of great interest to find that in history we see previous examples of an effort by nations to try to get rid of their difficulties by the submission of them to arbitration, and it is important to remember—and I shall deal with that a little later on—that at The Hague we have achieved some measure of success in international arbitration. Perhaps it may also be of interest to you to find examples far more ancient than anything we know of in the Hague Tribunals which embody the idea of an International Court of Arbitration—in a rudimentary form, it is true, but which nevertheless embody the idea. In fact, we may say that the present Court is not an isolated phenomenon, but springs from the terrible lessons of war and is the development and extension of earlier experiments in the settlement of international disputes. We may, perhaps, glance at a few of these historical instances as illustrative of what I may call the evolution of the idea and as showing that the present Court may be said to have its roots in an effort of human nature to rid itself of the horrors of war.

Arbitration between States is found amongst, and was practised by, the ancient Greeks. Although I remember this lecture-room years ago, and many professors who lectured to me, I

cannot remember any of them telling me that; and attention was not drawn then—I think I am right in saying—to the point I am dealing with now. In a very interesting paper, to which I can give the reference in the *Solicitors' Journal*,¹ the writer has found some eighty recorded cases of arbitration in classical times dealing with disputes which might have led to war. The forms of arbitration were either “voluntary”—under agreement to submit the dispute to a selected tribunal—or “obligatory”—under a treaty. The arbitrator was in different instances either an individual, a State or city, or an institution, such as the Delphic oracle, the Amphietyonic Council, or the Hellenic Council, formed by Philip of Macedon. In every case, however, the tribunal was created *ad hoc* by the consent of the parties. Sometimes in these cases a mere decision was pronounced; in others, reasoned judgments were delivered. It is worthy of note that in those days there was no sanction of force attached to the decision, and yet there is only one recorded instance of a refusal to carry it out, namely, when Athens refused to comply with the sentence of the Corinthian arbitrators in its dispute with Thebes, and Corinth in this case resorted to arms in order to enforce its decision. Generally, the true sanction seems to have been what it will always primarily be, the fear of public opinion or simply public opinion without the fear.

Passing to a later period, the Middle Ages, you will find frequent instances of recourse to arbitration for the purpose of settling differences between States or Sovereign Princes; *e.g.*, in 1298 Edward I of England and Philip le Bel of France appointed as arbitrators between them Boniface VIII “as man, not as Pope.”

We probably should not go to such a tribunal for any political purpose to-day, but it is interesting to see that the experiment was made, though not, I fear, in that instance with very conspicuous success. There is also an example of a treaty providing for permanent arbitration in 1304 between the King of France and the Count of Hainault, but towards the end of the fourteenth century records of arbitration became less frequent, owing partly to the establishment of permanent embassies, and no doubt in great measure to the development of the modern idea of the national State, whose interests are considered as above and outside law. In fact, we get to the point where the development of the idea of the State excluded law, because, at the time I am speaking of, there had been no development in, or, indeed, any

¹ *Solicitors' Journal*, November 1, 8, 1919.

idea of, International Law; and perhaps it is not until the time of Grotius that we get the beginnings of International Law, afterwards fostered through a long period of time and with somewhat intermittent success. There are, of course, various cases of international arbitration during the succeeding centuries, but I do not propose to detain you by further illustrations, and have merely brought my observations down to this period for the purpose of illustrating what I think is a very interesting fact: that the effort had been made in previous centuries to try to achieve some form of settling disputes which would not involve the agency of war, and that at a time when undoubtedly the idea of war and its horrors as a commonplace of everyday life was much more in every man's mind than it is necessarily to-day.

I now come to the Hague Conferences of 1899 and 1907. The establishment at The Hague of the arbitration system is a very important development; and you will observe that in the Statute of the present Court, under Article 1, "The Permanent Court of International Justice . . . shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907." Hence there is definite recognition in the Statute of the Hague system of arbitration; this is an effort to build upon that system, and I think those who were responsible for framing the Statute have wisely recognized the good work that was done at The Hague, and have sought rather to develop that work than to push it aside or treat it as unimportant and useless. You will remember that the First Convention of 1899 provided two bodies for the settlement of international differences. The first was an International Commission of Enquiry, and the second a "permanent" Court of Arbitration. The Commission of Enquiry was empowered by the terms of its jurisdiction to ascertain facts in dispute and report on them. I think, speaking as an English lawyer, that the idea underlying it was very much the outcome of the training of the continental lawyers, because a "*commission pour établir les faits*" is one of the first demands made by continental lawyers. I have found it very strongly rooted in the minds of continental lawyers (and they are a very distinguished body of men) that they are impelled to establish a commission of enquiry into a large number of facts for the purpose of sorting and "establishing" them as a preliminary to bringing a case into Court, where we should proceed at once with the trial and deal with the facts there. The Commission under the Hague Convention was to be constituted *ad hoc* between the parties and was to fix its own procedure. The machinery thus

created was used with great success on one occasion—the settlement of the Dogger Bank incident in October, 1904. You will remember that Admiral Rojesvsky, the Russian commander, when passing down the Channel, came upon a number of English fishing-boats, which he thought were Japanese war vessels, and opened fire, with the result that a number of our fishermen were injured. A great outcry arose at the time, and we were very indignant. Lord Lansdowne, who was Foreign Secretary, submitted the matter to a Commission under the Hague Convention, and ultimately the matter was referred to a Commission composed of an English admiral, a Russian admiral, two naval officers chosen by France and the U.S.A., and a fifth officer chosen by Austria. From their conclusion that the attack was unjustifiable the Russian admiral was the only dissentient, and the matter was peacefully settled by the Russian Government paying a sum of money as damages. It is interesting to see that the Commission of Enquiry has on occasions functioned usefully, and it certainly at that time averted the consequences of what was a distinctly ugly dispute: for this country was, for a short time, deeply stirred by the outrage.

A “permanent” Court of Arbitration was also provided by the Convention of 1899. The procedure by which the Judges are chosen in the International Court of Justice is based on the experience gained in setting up the Court of Arbitration under the Convention. By the Convention arbitration was declared suitable in cases of a judicial character, but it was confined, of course, to disputes voluntarily submitted by both parties. The Judges became official Judges, and the machinery created in 1899 was used as a basis for the more elaborate provisions of the Hague Peace Conference in 1907. As finally settled by the Convention of 1907, the Court of Arbitration is declared competent in all cases of arbitration unless the parties fix upon another tribunal; and it is important to notice that the Court is, *ex hypothesi*, purely arbitral, international arbitration being defined in the Convention as “the settlement of disputes between States by Judges of their own choice and on the basis of respect for law,” the most suitable subjects for procedure being declared to be the interpretation of treaties, etc. The manner in which this Court was constituted in the absence of special agreement is as follows: each Power adhering to the Convention selects not more than four persons, competent in international law and of high moral character, who are inscribed on a list as members of the Court, and who hold office for six years. When a dispute arises and the Powers involved agree to have recourse to the

Court, they choose the arbitrators from amongst the persons named in the list. In case of inability to agree on the choice of the arbitrators, and, ultimately, of the umpire, elaborate provision is made to safeguard the right of the parties to select their own Judges.

That is in outline the system of the Arbitration Court set up at The Hague, the authority of which is preserved by Article 1 of the Statute of the International Court of Justice. It is interesting to note that the difficulty of choosing Judges was to the fore under that system. To those who were framing the Statute of the International Court of Justice it gave an illustration of the difficulties they would have to meet, and you will see how the new system alters and amplifies the old. But, as I have just suggested, throughout the old arbitration system there has been a jealous care to safeguard the principle of agreement between the parties as to the persons who are to decide each individual dispute: and I think a striking contrast or contradiction is provided between the arbitration system and the International Court.

The Court of Arbitration at The Hague has done a great and important work, and perhaps subconsciously we have become accustomed to the idea of settling disputes by means of arbitration, which undoubtedly introduces or leads on to the plea that we may find some better method of settling disputes than by the terrible arbitrament of war. It is to the credit of the Hague system that between 1902 and 1914 the Court successfully dealt with fifteen cases, to which seventeen different States were parties, involving violation of territory, delimitation of frontiers, etc. in Europe, in Asia, in Africa, and in North and South America. One of the cases that we shall remember as submitted to it was the dispute which we had with the U.S.A. about the great North Atlantic coast fisheries. That came to a satisfactory conclusion.

Having briefly indicated what was the state of international arbitration when it was determined to try to set up under the League of Nations a Permanent Court of International Justice, I now turn to the Court itself. As I mentioned, the provisions for creating and defining its scope are contained in Article 14. As to the composition of the Court, there are to be fifteen Judges—eleven full Judges and four deputy Judges—who must be persons of high moral character and either qualified for the highest judicial offices in their own country or of recognized competence in International Law. Moreover, a special direction is given that in electing Judges care should be taken that the whole body

should represent the main forms of civilization and the principal legal systems of the world. You may wonder what the meaning of that phrase is, "the main forms of civilization"—it is partly in contradistinction to "the principal legal systems of the world." The desire was to include the East. I was very apprehensive of the direction to include the East within the ambit of the Court. Those of us who have got our minds fixed as lawyers on the legal systems known in European countries would be unable to accept the legal system of—let us say, China—as quite on the same level as our own, and this phrase is happily, or unhappily, introduced as embracing the East. Exactly how that will be interpreted, I leave for those who come after me to define, but that was the intention, and that is why you find what may be called an inclusive phrase. It is purposely left as vague as many matters in diplomacy are.

The election of the Judges is carried out as follows: each State which is a member of the League of Nations nominates not more than four candidates, as in the case of the Hague Tribunal, only two of whom can be of its own nationality, and from this list the Assembly and the Council of the League proceed independently of each other to elect first the Judges and then the deputy Judges. The candidates who obtain an absolute majority both in the Assembly and Council are elected. If the first election does not result in all the seats being filled, a second, and if necessary a third attempt is made. If after the third meetings of the Assembly and Council there still remain vacancies, three members are appointed by each body for the purpose of holding a joint conference and of agreeing, if possible, on one name for each vacancy, and they submit these names to the Assembly and Council for their respective acceptance.

The Council and the Assembly are the two Houses of the League of Nations; and this provision seems to be a method devised, as in many rigid constitutions, for bringing the two Houses together when they cannot agree. But the interesting point is that the importance of getting really good men as Judges, men who will be elected under circumstances which will command the respect of those who come before the Court, has been elaborated with the greatest possible care. An effort has also been made to eliminate the possibility of the selection of a Judge for a particular case in such a way as to give either of the parties who appear before the Court an unfair advantage. It is ensured that the Judges shall be chosen upon a basis which will command both the attention and the respect of those concerned.

The members of the Court are to be elected for nine years and

may be re-elected. The character of the Judge's office is to be contrasted with the temporary nature of a Hague Tribunal. The Court is constituted once for all; and though in one sense, and up to a certain point, the Judges are chosen by the States who come before them, they are not selected *ad hoc* for any particular case or question after it has arisen, but form a real Court always in being. Therefore we get a very marked distinction between a system of arbitration and the Permanent Court of Justice. A Judge of the Court is irremovable unless in the unanimous opinion of his brother Judges he has ceased to fulfil the conditions required for his office. The Court itself elects its President (whose position is of outstanding importance) for a term of three years; he must reside at The Hague, which is the seat of the Court. It is bound to hold one session in every year, beginning on June 15 and continuing as long as is necessary to attend to the business before it. In addition to this the President can summon the Court whenever necessary. Normally the full Court of eleven Judges is required to sit, this number being made up, when Judges cannot be present, by calling upon deputy Judges. For a quorum, however, nine Judges are sufficient.

Now you will see that this is a very stable Court, chosen with great care, a permanent body with a permanent president and a session every year. No doubt these provisions have been made in order to distinguish the Court from the more casual forms of arbitration with which the world has hitherto been familiar.

Labour cases and cases relating to transit and communications are to be considered by special Courts of five Judges sitting with technical assessors. The former class of cases has a special importance, and I shall allude to it again. As to the latter class, perhaps it is worth noting that reference to this Court appears to be contemplated by Article 376 of the Treaty of Versailles, which deals with the settlement of questions relating to rivers, ports, canals and communications. When so many smaller nations or communities have been set up, it is quite obvious that the question of transit and communication may be more difficult than was the case when we had larger States who were able to make their own arrangements for a long stretch of river or railway or canal; and, regard being had to the complicated provisions of the Treaty on this subject, it seems probable that references to the Transit Court will be frequent.

Now we come to one of the most important matters—namely, Jurisdiction: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." The great question of

whether or not jurisdiction should be compulsory has been discussed and written upon by many persons of authority, and many a strenuous effort was made during the discussion of the draft scheme to introduce the right of unilateral arraignment before the Court. To my mind, however, the only satisfactory method is to obtain unanimous agreement to submit disputes to the Court; and Article 14 of the Covenant, to which I called your attention at the beginning of my remarks, excludes any compulsory jurisdiction. It says "This Court shall be competent to hear and determine any dispute of an international character *which the parties thereto submit to it.*" The result is that the Court is to have jurisdiction by agreement, and I am glad that it is so; for if the scheme is to be a success you must not overpress it; you must wait until the general international opinion gives it greater authority and greater power. If you were to ask nations during this period of great unrest, great uneasiness, great anxiety and great apprehension to set up a Court, however noble and orderly, and gave one country the right to hale another country before it, I submit you would break up the whole system. If you were to ask for this you would lose the sanction of public opinion.

The class of cases which *can* be brought before the Court are unlimited and unrestricted, and if you turn to Article 13 of the Covenant of the League you will observe that members of the League agree that "whenever disputes arise which cannot be settled by diplomacy, they will submit the whole subject-matter to arbitration." Whether it is intended to define the jurisdiction of the Court in Article 13, I do not know; but as a practical question, I think that, once having got the Court, they will make use of it for that very purpose. As confidence in the Court is increasingly established, it may be anticipated that it will naturally come to be *the* tribunal selected in every instance, and there is thus a good prospect of a very considerable number of cases being brought before it. But apart from this there are a number of provisions in the various treaties which we have made which imply a compulsory reference of certain matters. Let me give you an illustration. Perhaps I may remind you of the Labour questions under certain clauses of the Treaty of Versailles. It is there laid down that questions arising out of the refusal by a State to accept recommendations of the Labour Organization of the League of Nations shall be submitted to the Court for final decision. When the scope of the recommendations referred to are borne in mind, you will appreciate the importance of this branch of the Court's powers. Again, in the

Treaties made with the Balkan States will be found instances of "compulsory" jurisdiction, *e.g.*, under Articles 9, 10 and 11 of the Treaty between the Allies and Roumania, she has agreed to give freedom in religious, racial and linguistic matters to all minorities; and under Article 12 of the same treaty it is definitely provided that any question of law or fact arising out of those articles shall be referred to the Court on the demand of any Power which is a member of the Council of the League. It therefore appears that the Court is not set up merely to deal with cases brought before it by an agreement to refer the particular case; there are a number of cases which by virtue of a continuing obligation *must* be brought before it.

The next most important question is: what is the law to be administered by the Court? In England, with our very elastic Common Law, the growth of centuries, which gives us a freedom almost unknown in continental countries where codes prevail, we are accustomed not to require a very definite or precise catalogue of the system which is to be made use of before the Courts. It is otherwise abroad; they are so accustomed to look for their law to codes that they require something like a code to follow, and a very great difficulty must have been felt by those who framed the Statute in defining what law the Court should administer. It has now been decided that the Court should apply: (1) International Conventions, establishing rules recognized by the contesting States. (2) International custom as evidence of a general practice accepted as law. (3) The general principles of law recognized by civilized nations. (4) Judicial decisions and the teaching of international lawyers as subsidiary means for the determination of the rules of law. That is perhaps a very indefinite and wide catalogue. It includes very many of the sources from which we draw the law administered in the one International Court of Law that we know at the present day, namely, the Prize Court; and on the whole the probability is that the discretion of the drafters has been well exercised in the catalogue given. If, however, the parties so agree, the Court may decide a case *ex aequo et bono*. Now, generally, I do not hesitate to say that these words give me some trouble from the point of view of definition. I think the words have been thrown in by contrast; where you find that all the recorded conventions and cases fail, then you may turn to what is after all the enlightened man's reference—common sense. Others will differently interpret this wide and embracing phrase, but we will leave it at that. Generally the catalogue that I have described marks a very decided step towards a true international Court as

distinguished from a mere arbitration tribunal. It is intended to deal with and satisfy the demands of to-day.

As to the remainder of the Statute which deals with procedure, I do not want to detain you. The Judges of the nationality of the contesting States keep their positions in the Court, and special provision is made for the appointment of a Judge of such nationality if there does not happen to be one already a member. The languages to be used, unless otherwise agreed, are French and English. The parties may be represented. The oral and written proceedings are very much on the model of an ordinary Court. Provision is made for a single reasoned judgment, but the dissenting minority are allowed to deliver their opinions. The judgment has no *binding* force except between the parties and in the particular case in question, but this does not affect its force as a precedent within the limitation of the article which I have referred to as defining the law to be applied by the Court.

Finally there is a sanction, a definite sanction of force. If you refer to Article 13 of the Covenant you will read, "In the event of any failure to carry out an award, the Council shall propose what steps should be taken to give effect thereto." In the last resort, such steps would imply armed invasion, but no doubt economic blockade is intended as being the most pacific and most potent of the weapons available. When you realize what was the effect of it in the last war; when you read the tribute paid to it by the German writers on the war, you see what an immense effect that will have, and you can appreciate how powerful that weapon can be made without recourse to arms.

I will not make further reference to Article 13, which is inherently difficult to interpret; but perhaps I may conclude by summarizing the new features of the Court. Note first its permanence and the determinate character of the Judges and judgments; secondly its suitability to deal with cases of all kinds, though only such as are submitted to it by agreement (whether by previous treaty or as the dispute arises); next, its power of advisory jurisdiction, under Article 14 of the Covenant, which may acquire a far-reaching importance; fourthly, its administration of international law and its potentiality for developing a definite system of law by means of its decisions. Finally, you ought to observe that it is not without some sanction; and although the absence of compulsory jurisdiction is the criticism that is made upon it, for the reasons which I have given you I welcome that fact. I believe that if this Court is to serve the purpose which we hope it will serve, it must be by steady advance towards acceptance of, rather than by insist-

ence upon, a jurisdiction to which the world is not accustomed, and which has never yet been exercised on a large scale in international spheres.

May we not as lawyers regard the establishment of an International Court of Justice as a great advance in the science which we pursue? It certainly inspires hopes. Whether it will eliminate war is a question which only the future can answer, but in these times, so full of international difficulties of greater or less importance, we may all heave a sigh of relief if *some* system of justice is established which shall gradually—I do not say immediately—command the attention and the respect of nations and which may offer an alternative solution to the horrors of arbitrament by battle. We can indeed draw some hope from one or two facts which we may observe at the present time. I think we may say that law is the greatest bond that we have with the United States of America. It is always interesting to me that when we meet lawyers from across the Atlantic we are immediately found in close concert together; and it is no mean thing to say that we have the same titles in the law on both sides of the Atlantic. We may regard the bond between us and the great English-speaking race on the other side as the root and foundation of peace at all times, and if we can lay the same foundation between ourselves and other nations we shall have done a great deal for the peace of the world. Law is, after all, the training which leads men away from mere conflict. As Lord Macaulay wrote to the glory of England, “she has much to boast of, in her triumphs on sea and land; but she has a still higher claim . . . her mightiest empire is that of her morals, her language and her laws.”

When I think what a widespread force English justice and English laws have been throughout the world, I welcome the thought that an International Court has been founded which may lay between a number of other nations the basis and foundation of friendship. We may take comfort and hope that in founding a system on law we have founded it on a real foundation. Its beginnings may be small; we must not force the pace too quickly. But we may hope that a beginning has been made which will ultimately lead to wars ceasing throughout the world.

ERNEST POLLOCK.