

## VENTRILOQUISM IN GENEVA: THE LEAGUE OF NATIONS AS INTERNATIONAL ORGANISATION

Megan Donaldson<sup>1</sup>**I. Law and the international organisation**

For international lawyers, the League of Nations is an institution of great symbolic and doctrinal importance. With its quasi-universal membership ('universal' of course heavily qualified), open-ended mandate, and inauguration of an 'international civil service', the League broke from the more limited institutional forms of nineteenth-century interstate cooperation, and helped shift 'international organisation' from a general aspiration of ordered interaction to a more specific legal category of inter-governmental entities.<sup>2</sup> However, the League was an irritant in the international legal order as well as an agent of law's expansion. It posed new legal questions concerning its own status and personality; the nature of relations with states and others; and the regulation of officials working within it. The emergence of the League thus offers a revealing vantage point on the workings of early twentieth-century international legal thought, and the modes of analysis we can bring to bear upon it.

Interwar thinking about the League is often treated by doctrinal texts today in narrow terms, as a subset of questions about the legal personality of international organisations later settled by a 1949 advisory opinion of the International Court of Justice,<sup>3</sup> or as laying the foundations for the emergence of a distinct 'law of international organisations'.<sup>4</sup> Yet debates about the League were more wide-ranging, and perplexing, than these frames suggest. The League was a novel, even disturbing creature in a world of states and empires. Legal commentators found it difficult to grasp the League's relations with member states. Was the League an actor in its own right (albeit animated and constrained by the decisions of member states); or a mere shorthand for the combination of member states themselves? And how did the Secretariat—the closest the League had to human agents—relate to the League itself, and its members? These questions invoked puzzles already familiar to political and legal thought, about artificial personality and collective

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<sup>1</sup> This chapter draws on Megan Donaldson, 'From Secret Diplomacy to Diplomatic Secrecy: Secrecy and Publicity in the International Legal Order c. 1919–1950' (JSD, NYU School of Law, 2016). With thanks to Surabhi Ranganathan for comments and conversation on these themes, and Moran Yahav, who sparked my thinking about our very limited juridical grasp on the inner lives of institutions. Unless otherwise signaled, translations from French are my own. I am grateful to Samuel Zeitlin for help with German.

<sup>2</sup> On the various meanings of 'international organisation' pre-1945, see Pitman B. Potter, 'Origin of the Term International Organization', *American Journal of International Law* 39 (1945), 803–806.

<sup>3</sup> *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174.

<sup>4</sup> Though even these acknowledge that the League was not readily assimilated into such synthetic accounts of institutions as did exist, or their underlying 'functionalist' assumptions. See Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations', *European Journal of International Law* 25 (2014), 645, at 649–50; Jan Klabbers, 'The Transformation of International Organizations Law', *European Journal of International Law* 26 (2015), 9–82, at 32.

agency, but against the backdrop of renewed ferment over the conceptualisation of the state,<sup>5</sup> and the nature of (international) law.<sup>6</sup>

This chapter probes interwar thinking about the League, its nature and authority, as an instance of legal innovation. It focuses in particular on the way in which the League, like other institutions, presented more than a static object of inquiry. By their workings, institution and office shift the conditions and terms in which deliberation about their nature occurs. This was particularly evident in the League's Secretariat: the human nucleus of the institution. As Susan Pedersen has argued, the Secretariat became a site of political thought in its own right: an 'arena within which ... the scope, practice and legitimacy of internationalism were fought out'.<sup>7</sup> This process shifted understandings of the 'international' as a subject and source of authority, just as the League, in offering new sites and procedures for political discourse, gave both governments and new actors ('civil society', mandatory peoples, minority populations, aspiring member states, ostensibly impartial and cosmopolitan 'experts') a means of articulating claims, albeit not on terms exactly of their own choosing; and so reshaped prevailing legal and political categories.

The chapter seeks to bring out this quality of the institution—at once abstract and concrete, artificial and material, its operation shaping the conditions of its own analysis—by tracing a theme which recurs in very disparate ways as contemporaries sought to make sense of the League: a concern with *speech*. Speech is implicated in agency, personality and the constitution of a political sphere, and the identification of he who authorises speech has been central to the theorisation of sovereignty and the state.<sup>8</sup> It is thus unsurprising that discussions of the nature and authority of the League circled uneasily around whether and how the League might speak for some kind of 'international' position, and who might in turn speak for the League—or make the League speak (hence the reference to 'ventriloquism' in my title). More basic questions about speech—who could say what, to whom—also proved a pressing concern for those within the Secretariat, as they felt their way into new offices. Senior Secretariat staff shrank from speaking for the League themselves. Instead they cultivated the League as a scene of speech of a certain kind (public, harmonious exchange between member state delegates, in keeping with the valorisation of liberal democracy and open diplomacy in the wake of WWI), and tried to curb the more confronting challenges to a diplomatic order of interstate speech. This orchestration depended on a sort of underground exchange of information and opinion between Secretariat staff, government officials

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<sup>5</sup> On the way in which thinking through the international institution prompted new questions about the state, and vice versa, Leonard V. Smith, *Sovereignty at the Paris Peace Conference of 1919* (Oxford: Oxford University Press, 2018) 7, 30–33; and, tracing this pattern over a longer time-span, Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford: Oxford University Press, 2017). On the diversity and creativity of interwar thinking on subjecthood as it pertained to mandates, minorities, and individuals, see Natasha Wheatley, 'Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State', *Law and History Review* 35 (2017), 753–87.

<sup>6</sup> Smeltzer and Kelly, this volume; Von Bogdandy and Hussain, this volume.

<sup>7</sup> Susan Pedersen, 'The League of Nations as a Site of Political Imagination' (Nicolai Rubinstein Lecture, Queen Mary University of London, 15 March 2017), available at <https://academiccommons.columbia.edu/doi/10.7916/D80K3SK5>.

<sup>8</sup> Quentin Skinner, 'Hobbes on Persons, Authors and Representatives' in Patricia Springborg (ed), *The Cambridge Companion to Hobbes's Leviathan* (Cambridge: Cambridge University Press, 2007), 157–80.

and NGOs; and it necessitated, in turn, quite strict control of what Secretariat staff said to the world at large.

The chapter moves from the ‘outside’ to the ‘inside’ of the League, with a focus on the Secretariat. It begins by sketching efforts of commentators (legal and otherwise) to get to grips with the League in the 1920s (Part II). It turns then to the gradual elaboration, within the Secretariat, of a *modus operandi* of institutional life, managing the public speech of delegates, balancing public circumspection on its own part with tacit flows of information (Part III). This system, always precarious, broke down in the 1930s, as exemplified in an exchange between an outspoken internationalist on the Secretariat staff and his more conservative colleagues. Here, an official’s speech threatened the hierarchy in the Secretariat and its conception of the League; but, for that official, it was the silence of the hierarchy—the failure to speak—which traduced a proper understanding of the institution (Part IV). This coupling of quite distinct sites, actors and sources is of course not a comprehensive, even representative, account of interwar thinking about the League, but the movement between formal and lived facets of the institution offers a way of re-examining the bounds of international legal thought, and of the disciplinary perspectives we bring to the international organisation today (Part V).

## II. Encounters with the League as a ‘new state of things’

The Covenant of the League of Nations was curiously oblique in its innovation. It did not explicitly provide for the *creation* of a League, but rather ‘establishe[d] the League by presuming it’, referring to the existence of a new entity whose ‘action ... shall be effected through’ various organs.<sup>9</sup> The Covenant identified an array of areas in which the League was expected to work: prevention of war, the advancement of disarmament, the oversight of a *sui generis* ‘mandatory’ administration of former German colonies and Ottoman territories; together with improvement of labour conditions; repression of the traffic in women and children and the drug trade; the development of freedom of communication and transit, and the equitable treatment of commerce. Other treaties in the peace settlement added obligations concerning the administration of certain ‘internationalised’ territories, as well as oversight of the treatment of ‘national minorities’ in the newly created states of Eastern Europe. The Covenant envisaged the League not just as a new agent, but as a locus for the organisation of international life in its ensemble. It was to take control of all existing international bureaux and commissions, and review periodically members’ treaty arrangements.

The Covenant text laid out only the rudiments of the institutional structure: an Assembly (of representatives of all Members), and a Council (representatives of the allies and four further states, the selection of which would be contentious throughout the interwar period), each meeting at least once a year. The Assembly and Council were to operate on the basis of unanimity, except in certain specified cases. The Covenant also created a permanent Secretariat, comprising a

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<sup>9</sup> David Kennedy, ‘The Move to Institutions’, *Cardozo Law Review* 35 (2017), 841–988, at 950; Covenant of the League of Nations, in ‘Treaty of Peace with Germany’, in *United States Treaties and International Agreements* 2 [1918–1930] (1969), 43–240, Part I; available at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>.

Secretary-General and ‘such ... staff as may be required’, appointed by the Secretary-General with the approval of the Council.

The League had an ambivalent relationship to contemporary understandings of the role of law in an interstate order. The creation of the League registered in some accounts as a shift from a (chaotic, conflictual) politics into a more law-governed world. But the League, with its emphasis on discussion and consultation, was at some remove from the nineteenth-century ‘peace through law’ programme of compulsory judicial, or at least arbitral, dispute settlement,<sup>10</sup> and the Covenant itself might be read as foreshadowing a movement from formalist legal text *to* politics, albeit of a newly institutionalised kind: what one of its drafters called a ‘new form of international political life’.<sup>11</sup> However, the coupling of far-reaching responsibilities and minimalist institutional prescriptions gave little real sense of how the League would work. It was not that there had been no thought about how the League would operate, nor that Covenant provisions were drafted without deliberation (although in some instances this was the case). Rather, drafters and commentators had glimpses of something, but its full contours were expected to take shape only later, as the institution began to function.

Once in existence, the League fell to be parsed in familiar vocabularies. Jurists’ discussion of ‘the League’ gravitated towards interlinked debates over what *kind* of a body the League was, and—relatedly—whether it could be conceived of as a legal person in its own right, distinct from the (somewhat arbitrary) list of its member states and empires.<sup>12</sup> Aspects of the Covenant gestured at independent legal status for the League at international law, conceived derivatively as akin to that of a state,<sup>13</sup> but the text was not decisive. German-language scholars took up these questions with particular energy. Questions about the nature of the League were seen through the lens of longstanding debates, shaped by the shifting forms of the German polity, about the legal nature of ‘confederations of states’ [*Staatenverbindungen*].<sup>14</sup> The most systematic commentary on the Covenant, by the pacifist jurists Walter Schücking and Hans Wehberg, argued that the League

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<sup>10</sup> Stephen Wertheim, ‘The League of Nations: A Retreat from International Law?’, *Journal of Global History* 7 (2012), 210–32.

<sup>11</sup> M.F. Larnaude, *La Société des Nations. Conférences faites à MM. les Officiers du Centre des hautes études militaires de l’École supérieure de la Guerre et de l’École supérieure de Marine* (Paris: Imprimerie nationale 1920), 8. On the dueling understandings of the League in relation to a politics / law divide, see Kennedy, ‘The Move to Institutions’, 868–9.

<sup>12</sup> Britain having succeeded in having both the British Empire and each of Canada, Australia, New Zealand and India as founding members, with India being particularly exceptional since it arguably would not have satisfied the ‘independence’ threshold for new members seeking admission after the League’s creation. On the ways in which the creation of the League inflected existing thinking about statehood, sovereignty and personality for peripheral polities, see Megan Donaldson, ‘The League of Nations, Ethiopia and the Making of States’, *Humanity* 11 (2020), 6–31.

<sup>13</sup> Covenant, art 2; art 7 (4) ([r]epresentatives of the Members of the League and officials of the League when engaged on the business of the League’ should enjoy ‘diplomatic privileges and immunities’, as ambassadors did).

<sup>14</sup> See, e.g., Kraus, *Vom Wesen des Völkerbundes* (Berlin: Deutsche Verlagsgesellschaft für Politik und Geschichte, 1920), 12–13.

satisfied Georg Jellinek's influential definition of 'confederation': a permanent, agreement-based alliance of independent states for the purposes of protecting their territory as against external enemies, and keeping the peace between them.<sup>15</sup> However, this scholarship on confederations was connected to larger disputes over the character of international law itself. Jellinek, having grounded his account of the binding force of international law on the notion of the 'self-binding' will of states, was unable to concede to a confederation legal personality in its own right.<sup>16</sup> To articulate the League as having a legal existence independent of its members—at least vis-à-vis those members—Schücking and Wehberg invoked instead the private-law analogy of the 'community of joint ownership' [*Gemeinschaft zur gesamten Hand*]: a community which would, within the sphere of its competences, have a legal unity opposable to members.<sup>17</sup>

The jurisprudential ferment of the interwar opened up contrasting approaches, but perhaps not ones which offered any greater possibility of grasping the League's legal, political, social and bureaucratic existence in a holistic way. Kelsen and the Vienna School, liberated by their larger precepts, saw neither states nor the League as pre-legal persons, but rather as personations of legal orders, both of which might be integrated into an overarching universal law.<sup>18</sup> Schmitt, on the other hand, with his insistence on the primacy of concrete (statist) order, argued that a genuine 'league' [*Bund*] required a certain political homogeneity. For Schmitt, the League of Nations lacked this homogeneity, being rather an arbitrary league of victors. Thus, there might be in Geneva a 'political-practical purposive entity' [*politisches Zweckgebilde*] but not a League capable of asserting legal personality in its own right or constituting any legal order whatsoever.<sup>19</sup>

Both Anglophone and French works noted the German-language discussions, but tended not to follow them in detailed integration of the League into existing categories. The 'international legal personality' of entities other than states had been largely ignored, or brusquely denied, in Anglo-American international law prior to 1919,<sup>20</sup> and the treatment of group personality in early

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<sup>15</sup> Walther Schücking and Hans Wehberg, *Die Satzung des Völkerbundes: Kommentiert* (2<sup>nd</sup> ed.) (Berlin: Franz Vahlen, 1924) 103. Schücking had already, and somewhat eccentrically, seen in the Hague system of a standing court of arbitration the germ of a world confederation [*Weltstaatenbund*]: *The International Union of the Hague Conferences*, trans. Charles G. Fenwick (Oxford: Clarendon Press, 1918), 86.

<sup>16</sup> On Jellinek's views, Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: Cambridge University Press, 2010), 55–7.

<sup>17</sup> Schücking and Wehberg, *Die Satzung des Völkerbundes*, 103–19. Bernstorff suggests that this merely recasts the difficulty of reconciling the sovereign will of states with the existence of some countervailing entity: Bernstorff, *Public International Law Theory of Hans Kelsen*, 142.

<sup>18</sup> See, e.g., *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Mohr, 1920).

<sup>19</sup> 'Die Kernfrage des Völkerbundes' (1924); see Bernstorff, *Public International Law Theory of Hans Kelsen*, 136–45.

<sup>20</sup> P.E. Corbett, 'What Is the League of Nations?', *British Yearbook of International Law* 5 (1924), 119–48, at 120; David J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Sparte', *Virginia Journal of International Law* 36 (1996), 275–377, at 333–49.

twentieth-century pluralist thought seems not to have seeped into international legal discourse.<sup>21</sup> Oppenheim was typical of Anglo-American approaches to the League in proceeding by way of negatives (the League was *not* a super-state, nor a confederation, nor a mere alliance), and concluding, by a process of exhaustion, that it was of a *sui generis* kind.<sup>22</sup> Whereas Schücking and Wehberg, concerned to place the League within a pre-existing category of ‘confederation’, had seen in the Covenant various rights (of legation, of war and peace) analogous to those enjoyed by states, more literal readings of the Covenant in British scholarship emphasised that most of the stipulations in the Covenant applied to *members*, rather than to ‘the League’.<sup>23</sup> The strongly sociological and functionalist tendencies of French scholarship also precluded a strong focus on personality,<sup>24</sup> emphasising instead disparate sites of intensifying social interdependence.<sup>25</sup> The French jurist Larnaude, who had served as one of France’s representatives on the commission drafting the Covenant, likened the League to a trade union or free association: an ‘instrument of co-operation ... a standing agency facilitating common action by states animated by the co-operative spirit.’<sup>26</sup>

Even where it was conceded, recognition of international legal personality as such did not answer definitively questions about the agency of the League. As Kelsen had earlier observed of public law theory of the state, legal thinking had a tendency to hypostatise the ‘legal person’: scholars moved from personhood to agency, like ‘mythological thinking, which, anthropomorphically, suspects a dryad behind every tree ... Apollo behind the sun’.<sup>27</sup> Legal person or not, the ability of ‘the League’ to act in any full sense was constrained by the decision procedures of its various organs and in turn by the determinations of governments of member states. On paper, then, the League fell somewhere between an ‘it’, a unitary agent, and, a ‘they’, a

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<sup>21</sup> On the translation of Gierke into English, and the brief efflorescence of English pluralism, David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press 1997).

<sup>22</sup> See, e.g., L. Oppenheim, ‘Le caractère essentiel de la Société des Nations’, *Revue générale de droit international public* 26 (1919), 234–44, at 238; Alfred Eckhard Zimmern, *The League of Nations and the Rule of Law* (London: Macmillan, 1936), 283–8. Corbett, on the other hand, argued there was no harm in ranging the League within a category of ‘confederation’, as long as regard was paid to the specific terms of the Covenant: Corbett, ‘What is the League of Nations?’, 147–8. For a relatively rare Anglo-American discussion of the League informed in detail by Jellinek’s work, John William Burgess, *The Sanctity of Law, Wherein Does It Consist* (Boston: Ginn & Co, 1927), 275ff. For other treatments of the personality question, see, e.g., Manfredi Siotto-Pintor, ‘Les sujets de droit international autres que les états’, *Recueil des Cours de l’Académie de Droit international* 41 (1932), 245–362; John Fischer Williams, ‘The Status of the League of Nations in International Law’, in *Chapters on Current International Law and the League of Nations* (London: Longmans, 1929) 477, 480–82.

<sup>23</sup> See, e.g., Corbett, ‘What is the League of Nations?’, 143–4.

<sup>24</sup> Prominent treatises, like Fauchille’s, merely noted the different positions taken by other authors: Paul Fauchille, *Traité de droit international public* (8th ed.) (Paris: Rousseau, 1922) vol. 1, 215–16.

<sup>25</sup> Perhaps pursued most systematically by Georges Scelle; see, e.g., his early ‘Essai de systematique de droit international’, *Revue générale de droit international public* 30 (1923), 116–42.

<sup>26</sup> Zimmern, *League of Nations and the Rule of Law*, 289 (italics omitted).

<sup>27</sup> Kelsen, *Das Problem der Souveränität*, 18.

collective of organs or members—and, if the latter, it was not clear how the collective became a unity.<sup>28</sup> Whether they began from a categorisation of legal persons, or the text of the Covenant, legal accounts could only restate these puzzles in more technical language, or gesture to the possibility of future evolution of the institution through iterative interpretations of the Covenant.

Anglo-American lawyers were quick to liken the League to a biological or evolutionary phenomenon (a pattern with parallels in constitutional law).<sup>29</sup> Political scientists and international relations theorists, together with supporters of the League in governmental office and public life, often took a markedly anti-formalist stance, rejecting efforts to parse the Covenant for answers and emphasising the League's role as a locus for practical cooperation and the gradual cultivation of internationalist sensibility.<sup>30</sup> The emphasis on dynamism was part of a political promise: that the League would transform itself over time, incorporating the defeated powers and correcting what even many strong League supporters conceded were iniquities in the peace settlement. But it was not clear what would *generate* the change, allowing the League or its members to achieve anything more than had been possible in previous forms of negotiation or alliance. To put the question in the organic terms often used by contemporaries, what was it that would bring the League to 'life'?

Whether lawyers or not, Anglo-American commentators tended to see the animating force of the League in 'public opinion' or 'popular will'.<sup>31</sup> In 1919, Viscount Bryce, a leading advocate for the League, emphasised the need to create 'not only the machinery of a League, but that moving and guiding power which dwells in the opinion of enlightened and liberty-loving men all the world over'.<sup>32</sup> In a similar vein, but using 'will' instead of public opinion, Alfred Zimmern, the first professor of 'international relations' as an academic discipline in Britain, proclaimed in 1935,

By itself [the League] is nothing. Yet the peoples persistently regard it as Something. That impalpable Something is not a legend or a myth. It exists. It has even exercised authority, controlled the rulers of states and prevented war. But that Something does not reside in a

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<sup>28</sup> To borrow language from an anecdote conveyed by Brierly: 'I remember in the early days of the League meeting [an MP] who had just returned from a first visit to Geneva. He said he had discovered that the League was not "it" but "they"'. In other words, 'the League' as such could do little in its own right; it must be the members which acted: J.L. Brierly, 'The Covenant and the Charter', *British Yearbook of International Law* 23 (1946), 83–94, at 85.

<sup>29</sup> On transposition of this metaphor, Fiti Sinclair, *To Reform the World*, 44.

<sup>30</sup> Wertheim, 'The League of Nations: A Retreat from International Law?'.

<sup>31</sup> Smith also notes the emphasis on transnational public opinion, but takes it as evidence for a narrower Wilsonian redefinition of states as analogous and accountable to reasoning, liberal individuals, something which might not reflect the breadth and diversity of references to 'conscience' and 'will': Smith, *Sovereignty at the Paris Peace Conference*, 30.

<sup>32</sup> Viscount Bryce, 'The Covenant: A Critical Commentary', *Manchester Guardian* (29 March 1919), 25. See also, e.g., 'Commentary on the League of Nations Covenant' (prepared by the FO) in Cmd 151 (1919), 12; William H Taft and others, *The Covenant: An American Exposition of the Covenant of the League of Nations* (Garden City: Doubleday, Page & Co, 1919) 74 (a collection of articles published by some of the League's foremost supporters in the US).

tabernacle at Geneva. It is communicated to Geneva by the peoples of the Member States. It is their will and their will alone which can make the League a living reality.<sup>33</sup>

This invocation of ‘public opinion’ and the ‘will of peoples’ did reflect features of the League’s design, particularly innovative procedures for the settlement of disputes, intended to inform (presumptively peace-loving) publics in the states concerned, and thereby slow governments’ recourse to force.<sup>34</sup> Yet ‘public opinion’ also served as a helpful *deus ex machina* to resolve the larger puzzle of collective agency inherent in the League. A cosmopolitan public opinion would transcend differences between governments, bringing them together and thus sustaining the League as a unitary actor rather than a mere collective of member states. Reference to ‘public opinion’ could also smooth the tensions involved in claims that the League would be a site of new diplomacy, not of mere states and governments, but of peoples. The apparent inclusiveness of ‘public opinion’ obscured the narrow formal membership of the League. It also masked the tensions between (self-identified) ‘peoples’ and ‘nations’, and the statist and imperial order which offered them only uneven and imperfect representation.<sup>35</sup> Even within member states, while ‘public opinion’ seemed to connote broad-based democratic engagement, it could also be limited to a much narrower elite opinion, the ‘*conscience juridique du monde civilisé*’.<sup>36</sup>

Questions about whether the League was, either legally or politically, independent of member states, would persist in discussions among delegates.<sup>37</sup> However, the task of establishing the Secretariat presented the questions in a particularly acute way. Many British internationalists, in particular, had imagined only a small Secretariat, facilitating direct functional cooperation between national ministries and expert delegates.<sup>38</sup> On this conception, the League, while perhaps enjoying formal legal personality, was not really an actor in its own right, but rather a nexus for interstate cooperation. Instead, the first Secretary-General, Sir Eric Drummond, built up a cohort of officials divided into functional areas and constituting an ‘international civil service’. This gave the League a presence in the world, and set of human agents, beyond the periodic gatherings of member-state delegates who remained representatives of their own governments. Of course, the

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<sup>33</sup> Zimmern, *The League of Nations and the Rule of Law*, 284.

<sup>34</sup> For example, the mandated delay of three months from an arbitral award, judgment or Council report before a member state might make war, and requirement for publication of papers and statements at various stages of the Council resolution process: Covenant, arts 12, 15.

<sup>35</sup> On the effect of re-describing the world as one of nations rather than empires, see Pitts, this volume. The internal Secretariat correspondence examined in Part IV below exemplifies recurrent shifts in interwar debates between nation and state, depending on the nature of the argument being made, and the extent to which interlocutors are situating themselves in formalist legal argument.

<sup>36</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001), 15–16, 41–54, 96–97; Stephen Wertheim, ‘Reading the International Mind: International Public Opinion in Early Twentieth-Century Anglo-American Thought’, in Nicolas Guilhot and Daniel Bessner (eds.), *The Decisionist Imagination: Sovereignty, Social Science, and Democracy in the Twentieth Century* (New York: Berghahn, 2019).

<sup>37</sup> Smith, *Sovereignty at the Paris Peace Conference*, 222–8.

<sup>38</sup> Martin David Dubin, ‘Transgovernmental Processes in the League of Nations’, *International Organization* 37 (1983), 469–93.

Secretariat had been understood as purely administrative, *servi*ng the League rather than embodying it, so it was hardly, in Kelsen’s terms, the ‘dryad behind [the] tree’ of the League’s formal personality. Yet the existence of a corps of Secretariat officials, charged under internal regulations with regulating their conduct with the interests of the League alone in view, and enjoying diplomatic privileges and immunities under the Covenant, represented a marked break with the statist legal order.

The extent of this innovation is registered in foreign ministries’ efforts to grasp the new situation. Foreign ministry officials could, in general terms, accept that the League was an independent institution. But they were discombobulated when they realised that they might have to accord their nationals serving on the Secretariat staff diplomatic privileges and immunities *against their own government*. In the early months of the League’s existence, when the infant Secretariat was based in London rather than Geneva, it seemed absurd to the Foreign Office to accord British nationals on the Secretariat staff diplomatic privileges on their home soil, as though they were in the service of some foreign state. Cecil Hurst, the Foreign Office legal adviser, had to spell out to colleagues that a British subject in the service of the League would ‘owe duties to a unit other than his own country’: the League had created ‘a new state of things’.<sup>39</sup> To explain the stakes of this new loyalty, Hurst invoked a familiar context of Anglo-French rivalry. Secretariat staff, he warned colleagues, might be privy to ‘all the secrets’ bearing on any acute political crisis. It was worth the British accepting the international allegiance of British nationals—and concomitant lack of British government access to the ‘secrets’ in their possession—to ensure that the French government was equally unable to assert jurisdiction over *its* nationals in the Secretariat when they passed through France.<sup>40</sup> Of course, it was difficult to envisage the British government seeking to extract such information from British nationals by formal legal process, so the example was hypothetical in the extreme. Yet Hurst was here prescient in linking the independence of the League with the knowledge and communications of the individuals working for the Secretariat, and in grasping that the institution would take ‘life’ not only from the workings of *public* opinion, but from new circulations of secret information.

### III. Speech in the institutional life of the League<sup>41</sup>

Leaders of the Secretariat, as the bureaucratic nucleus of the League, had to animate ‘the League’ as an entity distinct from its members, while also glossing the Secretariat’s own relation to the institution. This challenge played out most systematically in the vexed question of staffing the putatively ‘international’ civil service. Maintaining this ‘international’ quality required Drummond to resist the idea that powerful states had a right to place their nationals in the Secretariat, or that staffing ought to reflect the cross-section of League members (generally an effort by Latin American and Asian states to correct the over-representation of Western European personnel). But there was never a simple opposition between ‘national’ affiliations of recruits and

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<sup>39</sup> Memo Hurst, 15 April 1920, UK National Archives, FO 371/4312.

<sup>40</sup> *Ibid.*

<sup>41</sup> Part III draws extensively on findings in Donaldson, ‘From Secret Diplomacy to Diplomatic Secrecy’.

an ideal of internationalist meritocracy.<sup>42</sup> The presence of nationals of key members in the Secretariat's upper echelons was not a simple acquiescence to member states' demands. It reflected also Drummond's concern that internationalism must remain anchored in national sensibilities, and his recognition of what Hurst had intuited: that the Secretariat's work to animate the League depended on channels of information and influence between Geneva and European capitals.

The Secretariat was reluctant to assert itself as a corporate body, or to speak *for* the institution. The Secretary-General resisted calls to give his annual report as a major public speech. The Information Section within the Secretariat was prohibited by Drummond from producing anything in the nature of pro-League 'propaganda', and as a result churned out primarily dry, factual documents which failed to ignite much interest. The Secretariat's chief contribution was to work, quite literally, behind the scenes. After experimentation in the early days, and negotiation with government representatives, the Secretariat became quite adept at stage-managing, for example, 'public' sessions of the League Council with enough substantive discussion to stimulate press interest, and offer a simulacrum of public diplomacy, and yet not so much dissension that they would reveal and risk escalating genuine conflicts. Although the Secretariat sometimes invoked 'public opinion' as a force in advance of governmental consent, recalling the more dynamic and optimistic visions of the League's future trajectory, the Secretariat tended to restrict, rather than expand, avenues for concrete expressions of opinion in the League apparatus. Circulation of petitions and other unsolicited material from NGOs was limited, particularly where it offended the governments of powerful European member states. And the Secretariat staff were deft in their use of the rhetoric of 'public opinion': as the Secretariat came under increasing scrutiny in 1930, Drummond equated the strength of the League with 'its hold on public opinion' but also 'the Governments and Administrations *through which public opinion acts*', negating any independent action of opinion—potentially oppositional to governments—on the League.<sup>43</sup> Drummond sometimes even denied that the League was 'an institution with an existence separate from Governments', insisting that it was 'organically nothing but the totality of States which are its Members.'<sup>44</sup> Even new transnational work on matters such as mandates and minorities, drugs, trafficking and anti-slavery, in which non-government organisations were actively involved, entailed an interplay between newly formalised and public deliberations, on one hand, and a close but largely informal cooperation, on the other—albeit sometimes with governments and sometimes with non-government organisations, and inspired by quite divergent agendas on the part of individual officials.<sup>45</sup>

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<sup>42</sup> On the dynamics of recruitment, see Klaas Dykmann, 'How International Was the Secretariat of the League of Nations?', *International History Review* 37 (2015), 721–44; Karen Gram-Skjoldager and Haakon A Ikononou, 'The Construction of the League of Nations Secretariat. Formative Practices of Autonomy and Legitimacy in International Organizations', *International History Review* 41 (2017), 257–79.

<sup>43</sup> Drummond, preface to League of Nations Secretariat, *Ten Years of World Co-Operation* (League of Nations 1930) vii (emphasis added).

<sup>44</sup> *Ibid.*, 401.

<sup>45</sup> For detailed accounts, see, e.g., Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford: Oxford University Press 2015); Jane K. Cowan, 'Who's Afraid of Violent Language?: Honour, Sovereignty and Claims-Making in the League of Nations', *Anthropological Theory* 3 (2003), 271–91; Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878-1938* (Cambridge: Cambridge University Press 2004); Suzanne Miers, *Slavery*

Secretariat staff, reflecting on their work in 1939, commented that the League had been a ‘shadow *corps diplomatique*’:

it has been taken for granted that the Secretariat should make suggestions and proffer advice. ... It is expected to know the desires of the various delegations, and to play a large part in reconciling, by private negotiations, any conflicting views. In the case of the Council the silent elimination of conceivable difficulties is carried so far that any unforeseen observation by a Member comes as a disagreeable surprise, and is felt as a reflection upon the Secretariat. Moreover, the Secretariat has frequently been the initiator of proposals on matters of substance.<sup>46</sup>

A colleague observed that

it was the officials of the Secretariat who often indicated, in the corridors, the desired direction that the deliberations of various organs of the League should take, and it was [the officials], too, who in most cases prepared the texts of the reports of these organs as well as of proposals and draft resolutions, and sometimes even the speeches which were to be given by delegates.<sup>47</sup>

These reflections are more candid than some of the public efforts to distil officials’ experiences which would occur during WWII, under the auspices of Chatham House and the Carnegie Endowment.<sup>48</sup> Taken at face value, they arguably imply a greater degree of control by the Secretariat over the ensemble of the League’s work than in fact existed, particularly in instances of acute political controversy. And these reflections head in different directions. For some officials the Secretariat’s activity was a laudable contribution. For others, particularly when considering the years after 1933, when Drummond was succeeded as Secretary-General by Joseph Avenol, this closet diplomacy was less a genuinely internationalist practice than an improper solicitousness of the positions of powerful members (a concern embraced by others, and detailed in Part IV below). Yet these comments are revealing of the *modalities* of the Secretariat’s work, and of the connection between conceptions of the Secretariat and the League, on one hand, and the more intimate and quotidian practices of speech which underpinned this, on the other (speech in corridors, and preparation of the speeches others would give in public).

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*in the Twentieth Century. The Evolution of a Global Problem* (Walnut Creek, CA: AltaMira Press 2003); Amalia Ribi Forclaz, *Humanitarian Imperialism: The Politics of Anti-Slavery Activism, 1880–1940* (Oxford: Oxford University Press, 2015).

<sup>46</sup> [Believed to be J.V. Wilson], ‘The Secretariat after the War’ (written c. 1939–40), League of Nations Archives [hereafter LNA] S559.

<sup>47</sup> [illegible], ‘Quelques idées sur l’organisation et les fonctions du Secrétariat’, 5 (sent to Lester 30 Jan 1942, apparently in response to an invitation to officials to share their thoughts), LNA S559.

<sup>48</sup> On the way in which the Chatham House reflections were instrumentalised by former officials, and steered by the Foreign Office, in different directions, see Benjamin Auberer, ‘Digesting the League of Nations: Planning the International Secretariat of the Future, 1941–1944’, *New Global Studies* 10 (2016), 393–426.

Officials recognised that the Secretariat's acquiescence in an informal traffic in information which these practices sometimes involved was difficult to reconcile with its role as a genuinely international body in the service of all League members. In the course of early efforts to think through the terms on which the Secretariat held information gleaned from governments, an official acknowledged that '[t]he theory that officials of the Secretariat could withhold information from the Members of the League merely by treating it as private would indeed be dangerous.' On the other hand, imposing any more egalitarian principle that information held by the Secretariat must be available to all Member states would choke off the flows of information on which the Secretariat relied.<sup>49</sup> The Director of the Political Section agreed: 'for the moment' the Secretariat must avoid working on 'principles' and instead 'seize the opportunities ... to inform ourselves more completely than [we could] through purely official avenues, by accepting the—inevitable for the present—conditions applicable to this sort of communications'.<sup>50</sup> The Secretariat's need for information, particularly from governments, was such that officials sought and accepted it where they could, and subject to the demands for confidence imposed by individual interlocutors. This position seems never to have been revisited; indeed it was rare to see the problem even articulated again with this clarity.

Governments, for their part, understood well the influence of the Secretariat (periodic squabbles over the share of posts going to individuals of different nationalities were about not only national prestige but also perceived possibilities for steering the Secretariat's decision-making). But the novel role of the Secretariat was only palatable to governments because Secretariat staff were largely effaced in the public presentation of the League as institution. The Secretariat's often-observed influence was to some extent compatible with liberal internationalist understandings of the dynamism and evolutionary character of the League. Nevertheless, the role of the Secretariat as a 'shadow *corps diplomatique*', practising what might be understood as a new secret diplomacy in its inevitable reliance on uneven and confidential sources of information, would have been difficult for even the most ardent League supporter to acknowledge openly. In superficial terms, it would have confirmed longstanding accusations from Germany that the League was merely a front for Anglo-French interests (although, in fact, nationals of these countries were not uniformly serving governmental priorities).<sup>51</sup> This reality lay beyond the intellectual parameters of many juridical views of the institution, and was difficult in normative terms to reconcile even with the more practical and sociological accounts produced by political scientists and internationalists. And yet, the existence of 'the League' as an entity of some political consequence would have been impossible without this hinterland of bureaucratic activity.

The maintenance of this system required discretion on the part of Secretariat staff. Staff were prohibited by internal rules from disclosing matters of which they had knowledge by virtue of their role, and from speaking in public about current political problems. Both rules were, however, often compromised by the need to gather information, and exchange something in return.

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<sup>49</sup> Memorandum by M. Colban regarding the access of Members of the League of Nations to documents in the International Secretariat, Special Circular No 203, 15 Aug 1922, LNA R574 [11/5304/5304].

<sup>50</sup> Minute Mantoux, 13 Jul 1920, LNA R574 [11/5304/5304].

<sup>51</sup> See, in this vein, discussion of Schmitt's criticism of the League, in Smeltzer and Kelly; and Von Bogdandy and Hussain; this volume.

There was a sort of tacit relaxation of these rules within certain bounds: high officials tolerated or even encouraged informal ‘liaison’ work to build relations with governments and internationalist audiences. This craft and compromise in turn depended on a loose camaraderie among Secretariat officials: a shared commitment to a particular vision of the institution and its role. This was always fragile, but broke down completely in the 1930s. An influx of staff supportive of fascist regimes in Italy and Germany meant that Secretariat personnel were increasingly divided (manifest in the felt need, by 1932, for all staff to make a ‘declaration of fidelity’ to the League).<sup>52</sup> Staff with strong pacifist and internationalist commitments distrusted the second Secretary-General, Joseph Avenol, who manifested pronounced fascist sympathies. As the sense of common purpose frayed, control over speech broke down, and questions about the nature of the League, the intellectual preoccupations of jurists and political scientists, became urgent matters of personal conscience for Secretariat staff.

#### IV. Speaking in, and for, the League in a moment of crisis

Struggles within the Secretariat played out particularly starkly in the confrontation between Konni Zilliacus, an official in the Information Section of the Secretariat, and his superiors.<sup>53</sup> Zilliacus had worked for the Information Section since 1920. His role formally involved production of the League’s official documents, but he also undertook ‘informal’ liaison work with labour and socialist groups, tacitly accepted by his superiors. Beyond this, he also pursued further, unsanctioned ‘publicity’ work. In particular, Zilliacus was a prolific pseudonymous author, producing some of the more acute and candid descriptions of the new diplomatic dynamics in Geneva.<sup>54</sup> When League members refused to use the full possibilities of collective sanctions laid out in the Covenant to resist Japanese expansion in Manchuria, Zilliacus stepped up his clandestine publications, and leaked quantities of information about the Japan/China conflict. He was appalled by the League’s failure to respond effectively to the Italian invasion of Abyssinia in 1935, and the efforts of Avenol, to head off confrontation of aggressors within League forums, and in response intensified his unofficial lobbying. This activity did not go unremarked. Annual reports written by Zilliacus’ superiors—generally positive prior to 1934—begin to note ‘a certain tendency ... to be animated by personal considerations of a political character which sometimes undermine the

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<sup>52</sup> With varying degrees of ceremony, officials of different grades had to undertake ‘to exercise in all loyalty, discretion and conscience the functions that have been entrusted to me as an official of the Secretariat ... to discharge my functions and to regulate my conduct *with the interests of the League alone in view* and not to seek or receive instructions from any Government or other authority external to the Secretariat of the League of Nations.’: see register of signatures in LNA S943 (emphasis added).

<sup>53</sup> Zilliacus, the cosmopolitan son of a Swedo-Finnish father and an American mother, had been born in Japan, where his father, a proponent of Finnish independence, was living in exile. Zilliacus graduated with a BA from Yale during WWI, and served with British military missions to Russia, where he opposed the Allies’ anti-revolutionary intervention, and wrote anonymously to the London press detailing British activities which Churchill had denied in the Commons. Zilliacus was a supporter of the British Union for Democratic Control (a small but influential organisation devoted to increasing parliamentary control over foreign policy) and, along with many radical Liberals involved in the UDC, joined the Labour Party after WWI. See Archie Potts, *Zilliacus: A Life for Peace and Socialism* (London: Merlin, 2002), 1–16.

<sup>54</sup> See, e.g., C. Howard-Ellis [Zilliacus], *The Origin, Structure and Working of the League of Nations* (Boston: Houghton Mifflin, 1928).

objectivity of his work'.<sup>55</sup> By mid-1938, Avenol was complaining that Zilliacus had 'created much difficulty and suspicion' in trying 'to propagate [personal] convictions in the press and among the public in defiance of the decisions of the Council and the Assembly'.<sup>56</sup> Zilliacus' official role, coupled with strong political commitments, thus placed him at the heart of tensions over speech—both in the public animation of 'the League' as a political actor, and in the Secretariat's policing of its staff's speech.

In August 1938, Zilliacus wrote Avenol a letter of resignation, condemning the 'official doctrine or political principle' of the Secretariat and urging Avenol to speak out against violations of the Covenant.<sup>57</sup> As Pedersen makes clear, the arguments mobilised by Zilliacus in this correspondence were not new: he was presenting an array of positions taken since the League's inception about the institution's authority, albeit in ways reflecting his experience of Secretariat life.<sup>58</sup> In this moment, though, the very existence of this polemical text raised concerns about renegade speech, as Avenol feared that Zilliacus, a notorious strategic leaker with a known intention to stand for office as a Labour candidate in Britain, would publish the letter and any reply Avenol gave (indeed this fear may explain Avenol's petty initial refusal to accept Zilliacus' letter as a valid letter of resignation at all).<sup>59</sup> Although formal proceedings against Zilliacus seem to have been abandoned in the chaos of the Secretariat's final months, an indignant official in the Personnel department, possibly the Frenchman Henri Vilatte, annotated the letter, challenging Zilliacus' conception of the League and the Secretariat. These marginal notes in response are suffused with irritation, and possibly motivated as much by personal animus than disinterested intellectual engagement. Nevertheless, the two lines of argument, letter and marginal notes, read together, re-stage controversy over the nature of the League and Secretariat in a manner shaped by the authors' personal experience as officials.

Zilliacus' letter opened with an assertion that Secretariat officials were 'responsible to the Secretary-General alone and through him to the whole League', not to individual governments. Insofar as the Secretariat dealt with governments directly, it did so 'in their capacity as Members of the League and subject to our loyalty to the League as a whole.' This entailed that 'The Covenant became our charter. ... we exerci[s]ed our functions of collecting data, drafting reports, giving advice and making suggestions, assuring publicity for League activities ... in such a way as to work on the basis of the Covenant.' This function 'became particularly important when Governments disagreed about what ought to be done'.<sup>60</sup>

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<sup>55</sup> A. Pelt, comments on Certificate as to Grant of Annual Increment, 26 Dec 1934. Unless otherwise indicated, all materials pertaining to Zilliacus here cited are in LNA S912/Zilliacus.

<sup>56</sup> Second meeting of the Appointments Committee, 23 May 1938, re Annual report on Mr Zilliacus.

<sup>57</sup> Zilliacus to Avenol, 9 Aug 1938.

<sup>58</sup> Pedersen, 'The League of Nations as a Site of Political Imagination' (focusing on the letter itself).

<sup>59</sup> Avenol to Zilliacus, 25 Aug 1938; Zilliacus to Avenol, 30 Aug 1938; Avenol to Zilliacus, 1 Sep 1938; Avenol to Zilliacus, 2 Sep 1938.

<sup>60</sup> Zilliacus to Avenol, 9 Aug 1938.

This opening established ‘the League’ as an entity in its own right, above governments (although brought into being by them). Yet by this time ‘the League’ as a unitary actor was crippled; it could not take decisions in accordance with the provisions of the Covenant governing its key organs. Perhaps for this reason, Zilliacus moved quickly from ‘the League’ to the Secretariat, eliding distinctions between the two, and emphasising instead the centrality of the Covenant. However, the spectre of disagreement about ‘what ought to be done’ was difficult to dispel. A marginal annotation challenged Zilliacus’ confidence, asking ‘who is the best judge in last resort?’. Zilliacus’ letter conceded that governments were responsible for taking decisions, but insisted that the Secretariat had to ‘prepare’ those decisions ‘on lines compatible with the obligations of the Covenant.’ The marginal voice returned at this point: ‘are governments and officials agreed on that?’ If not, ‘who can arbitrate?’

These questions—‘who is the best judge?’, ‘who can arbitrate?’—have for us particular echoes (Augustinian, Hobbesian, Schmittian); though their meaning for Vilatte may well have been a more local tussle for authority. And, while such questions have been, for Hobbes, part of the case for a unitary and supreme sovereign, they here amount to an assertion that *no-one* could decide. If the Secretariat would not assert its own interpretation, it was left to members divided amongst themselves, and the failure of the whole project on which the Secretariat’s own position was premised.

Zilliacus’ letter had in fact refrained from asserting any formal interpretive authority on the part of the Secretariat, or even any offering any strong account of custom or previous practice as generating new powers of the Secretariat in some legally cognisable way. Rather, in falling back on the Secretariat’s ‘preparation’ of decisions which would then be ‘taken’ by governments, he was invoking a sociological reality of the institution’s operation as a ‘tradition’; and suggesting merely that this *de facto* role of the Secretariat—‘this unprecedented relationship of the Secretariat to the Governments Members of the League’—be maintained, with conflicts being managed by the craft of Secretariat officials.

Zilliacus admitted that it had grown ‘more difficult’ to function in this way since 1933, but insisted that, if there was some choice to be made, the only course was to ‘stick to the Covenant’. The Secretary-General’s argument that the Secretariat was merely an administrative body was incoherent. If the Secretariat was to function at all, it had to do so on the basis of the Covenant: ‘The political duty of loyalty to the obligations of the Covenant underlies and informs all the administrative and advisory functions of the Secretariat’. This entailed, for Zilliacus, the Secretariat taking a clearer public stand against violations of the Covenant: Secretariat staff animating ‘the League’ more forcefully as against the governments of member states.

This course would have been in accordance with one reading of the staff undertaking to ‘regulate my conduct with the interests of the League alone in view’, but Zilliacus’ repeated invocation of the Covenant as a placeholder for the League itself in fact undercut his position. The Covenant certainly gave the *Secretariat* no substantive role. Perhaps sensing the difficulty of an argument which elevated the Secretariat staff as spokesmen for the League and Covenant over the states which had brought both into being, Zilliacus also offered an alternative approach. He suggested that there was, properly understood, no real conflict between serving the League and serving member states. As he put it, the League ‘is not merely a congeries of governments, but

also the treaty obligations of the Covenant, *by which the nations are bound that the governments temporarily represent*. ... We owe loyalty to those obligations and to the idea behind them as much as we do to the governments.’<sup>61</sup>

This argument echoed efforts to cast the League as a League of peoples rather than governments, and with commentators’ invocations (discussed in Part II) of ‘public opinion’ as an animating force. But this, too, was something of a dead end in the working-out of a credible theory of the League’s authority, and Zilliacus’ place within it. As the marginal annotation put it, ‘who can ... validly represent within the League those nations & responsibly speak for them if not the G[overn]ments? Or are we a superstate?’ Any dismissal of governments as legitimate representatives for the more enduring ‘nations’ entailed an assertion of Secretariat officials’ own authority to act for these nations. Zilliacus had no real answer, other than to invoke technique; what he saw as a peculiarly Anglo-American ‘mingling of idealism and realism’; an indefinable ‘political responsibility to the Covenant’.

For the marginal annotator, Zilliacus’ allegation that the Secretariat was failing in its duty and had ‘incurred a share of the political responsibility for denying the victims of aggression—Abyssinia, Spain, China—their rights’ was a brazen challenge. Zilliacus’ claims to identify the proper course elicited a mocking comment: ‘L’individu contre l’état! Sole arbiter’. Moreover, there was dissensus within the Secretariat, not only between the Secretariat and member states or governments. The marginal voice questioned Zilliacus’ assumption that, ‘there is only one way of conceiving our duty of loyalty to the principles of the Covenant’, including loyalty to the Secretary-General and his professed vision of the Secretariat.

At points, Zilliacus cast officials’ deference to the Covenant as a sort of ethical commitment independent of consequentialist reasoning. Favouring the standards imposed by the Covenant might lead to the Secretariat’s advice being ignored; but ‘the responsibility for disregarding their treaty obligations would rest squarely on [governments], in the eyes of the world including their public opinion’, and ‘the Secretariat would have done its duty’. However, this was not really a disavowal of instrumentalism, but an argument for the one remaining instrumental strategy which seemed open to internationalists. Zilliacus warned that the Secretariat was ‘in danger of losing the respect and confidence of *the Governments and sections of public opinion that are still loyal to what the League stands for*’ (implicitly, especially a future Labour government in Britain).<sup>62</sup> Zilliacus here makes the shift seen elsewhere in League practice, from an abstract ‘public opinion’, figured as the ‘eyes of the world’, which typically underpinned accounts of the League’s authority, to a much narrower, more concrete and strategic notion of ‘public opinion’ as electorally significant views in Britain.

Throughout the letter, Zilliacus is wrestling with some of the same fundamental questions about the nature and authority of the League that had arisen from the first moment of its creation. He switches between different starting points for his analysis, from the Covenant text to the League itself, as an already-existing person to whom political duties of loyalty were owed. The texture of

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<sup>61</sup> Zilliacus to Avenol, 9 Aug 1938 (emphasis added).

<sup>62</sup> *Ibid.* (emphasis added).

his arguments ranged from formalist invocation of the Covenant as a ‘treaty obligation’ to anti-formalist assertion that such obligations bound ‘nations’ in some timeless way distinct from the legal apparatus of states and governments. Zilliacus worked hard to integrate the Secretariat into the juridical identity of the League, but ultimately was forced to fall back on a ‘tradition’ with no formal expression, an ‘unprecedented relationship’ in which the Secretariat’s role within the League remained on a purely *de facto* footing.

Even if this *de facto* authority, crafted from bureaucratic and diplomatic skill, could be attained, it was dependent on the Secretariat taking a unified view, and the whole exchange around the letter itself had grown out of discord *within* the Secretariat. It seemed very difficult to ground the argument that the Secretariat alone could speak for the League, and to claim that, in doing so, the Secretariat had some higher representative function. Efforts to press the Secretariat to speak for the League as an embodiment of the ‘international’ ultimately drove Zilliacus well beyond the universe of legal and political obligation, and abstract ideals, into a *realpolitik* alliance between the Secretariat and perceived internationalist publics in Britain.

## V. Thinking through the international organisation

The League, though superseded after WWII, has had a long afterlife. It furnished the basic model of an ‘international organisation’ which persists today. The United Nations differed from the League in important respects, particularly the powers granted to the Security Council, but it inherited the League’s model of an ‘international civil service’, with staff characterised as ‘responsible only to the Organization’, and such responsibilities having an ‘exclusively international character’.<sup>63</sup> Aspects of the League’s workings, carried over into and developed in the United Nations, have formed the kernel of a ‘law of international organisations’ or ‘international institutional law’. I here turn attention from efforts of interwar thinkers to grapple with the League, to efforts today to think about the longer arc of international organisations and their work.

The model of a (putatively universal) international organisation, and ‘international’ staff, with the somewhat unstable notions of authority and affiliation this entails, has been open to distinct political projects. Whereas Zilliacus’ concern was that the League (or the Secretariat *as* the League) was not doing *enough*, not speaking when it should, international officials in different circumstances have sometimes been able and willing to make far more than Drummond or Avenol had done of the possibilities inherent in ‘international’ authority. Anne Orford, for example, has charted the way in which Hammarskjöld’s posture of a ‘neutral’ international figure underwrote the expansion of UN administration in postcolonial states during the Cold War,<sup>64</sup> and Guy Fiti Sinclair has traced the rhetorical and practical means through which international organisations of

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<sup>63</sup> Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed.) (Oxford: Oxford University Press, 2012), vol. 2, 2024. On this continuity, see also the comments of the UN Secretary-General, Dag Hammarskjöld, ‘The International Civil Servant in Law and in Fact’, lecture delivered at Oxford University, 30 May 1961, available at [https://www.daghammarskjold.se/wp-content/uploads/2019/10/ics\\_100\\_no\\_4\\_oxfordspeech.pdf](https://www.daghammarskjold.se/wp-content/uploads/2019/10/ics_100_no_4_oxfordspeech.pdf).

<sup>64</sup> Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

various kinds have entrenched an influence well beyond the formal powers sketched in their founding instruments.<sup>65</sup> Such accounts illustrate the role played by international organisations in shaping normative expectations of statehood, and setting the terms of decolonisation. Though the UN remains unique in the breadth of its mandate and its ‘constitutional’ position in the international legal order, there are now myriad international organisations, with diverse but far-reaching remits, and secretariats which may play extensive, often under-theorised, roles. International organisations have emerged as important, if unevenly influential, sites of power, operating in an ensemble of states but also corporate and varied ‘civil society’ actors.

Lawyers, historians and many others have shared a conviction that there is something of importance to explore in the development of our present international institutional landscape. They have also shared an intuition that bringing this role to light might demand that we shift the conventional focus of disciplinary inquiries. Thus, to take two recent examples, Orford has argued that, to understand current theories of the state and authority, we must ‘treat the archives of bureaucrats and international civil servants with the care and attention that was previously devoted to glossing the pronouncements of philosophers, judges or legal theorists’.<sup>66</sup> Orford also poses a frontal challenge to contemporary doctrinal reasoning in the area of use of force, peacekeeping and humanitarian intervention, arguing that the chief work of the ‘responsibility to protect’ programme of the 1990s lay in its retrospective legitimisation of powers assumed by the United Nations Secretariat since the 1960s. Susan Pedersen has urged historians and political theorists to pay more attention to the Secretariat (and, by extension, like bodies) as ‘a site for political innovation and political thought’.<sup>67</sup>

Proliferating studies of international organisations have in turn elicited questions about what might be gained and lost by different disciplinary perspectives and, of particular relevance here, the stakes of a legal or juridical, as opposed to historical, account of these institutions.<sup>68</sup> The interaction between law and (intellectual) history in the history of international law has to date been framed primarily as a debate about anachronism and contextualism.<sup>69</sup> The argument that law

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<sup>65</sup> Fiti Sinclair, *To Reform the World*.

<sup>66</sup> Anne Orford, ‘On International Legal Method’, *London Review of International Law* 1 (2013), 166–97, at 183–4. In a similar vein, concerning the general absence of serious study of international bureaucracies within international relations, see Jarle Trondal and others, *Unpacking International Organisations: The Dynamics of Compound Bureaucracies* (Manchester: Manchester University Press, 2010); John Mathiason, *Invisible Governance: International Secretariats in Global Politics* (Bloomfield, CT: Kumarian Press 2007).

<sup>67</sup> Susan Pedersen, ‘2017 Nicolai Rubinstein Lecture’, abstract, <https://projects.history.qmul.ac.uk/hpt/category/the-nicolai-rubinstein-lecture/>.

<sup>68</sup> Orford, ‘On International Legal Method’.

<sup>69</sup> For an articulation of the argument in these terms, see Anne Orford, ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’ in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz-Fabri (eds), *Droit international et nouvelles approches sur le tiers-monde: entre répétition et renouveau* (Paris: Société de législation compare, 2013); Orford, ‘On International Legal Method’; and for responses on these terms, see Kate Purcell, ‘On the Uses and Advantages of Genealogy for International Law’, *Leiden Journal of International Law* 33 (2020) 13–35; Lauren Benton, ‘Beyond

is distinctively concerned with making meaning move across time (to take Orford's vivid phrase), and that its history thus cannot be captured adequately by contextualist historiographical methods—at least without losing the critical potential of historical approaches in the first place—deserves a fuller treatment than I can offer here. But it does not I think determine exhaust the promise of interdisciplinary conversation.

I want here to take the institution, and the League in particular, as an alternative starting-point. The League case allows us to reflect on the role played by legal discourse in the construction of the international organisation as a category, and on the stakes of the disciplinary perspectives we bring to bear on this history. Just as the League seemed to its contemporaries a perplexing thing, resistant to any comprehensive conceptualisation, it can, I suggest, be a (helpful) irritant for us as well. Institutions, like states, are creatures in and of law, bringing facticity close to the surface of legal analysis. They testify also to the power of intellectual construction, while reminding us that this construction is never wholly intellectual; it is a social, cultural, bureaucratic and often extra-textual phenomenon. The institution as an object of inquiry allows us to see anew the diversity within law and history, and the scope for exchange between them.

The League case illustrates the diversity and instability of early 'legal' thinking about the international institution. To the extent that commentators even understood themselves as anchored definitively in law rather than, for example, political science and a then-emergent discipline of international relations, writers across these boundaries were working with similar conceptual resources (corporation, league, confederation and the like). These commentators, and individuals like Zilliacus, argued in intersecting ways—as in Zilliacus' experimentation with treaty interpretation as one technique alongside others. Even among authors most readily characterised as legal scholars, analyses took diverse starting points. They ranged from efforts to foreground the League as an entity, and classify it alongside 'confederations' and other like persons, to efforts to bracket the institution itself and focus on the interpretation of its founding treaty, or on the legal order of which it was a creation. Lawyers reached for analogies in the corporation, national legal institutions, and a universe of extra-legal metaphors, particularly the League as part of a growing organism of world organisation. This was in part a response to the way in which the legal framework of the League itself stipulated openness to contingency and innovation (as in the paucity of provisions concerning the Secretariat in the League Covenant), and it drew on metaphors with resonance in the constitutional law of the common law world, but also undermines the notion that there was any self-contained and closed legal discourse.

The fact that it is difficult to delineate a domain proper to law in contemporary accounts of the League's founding calls into question how we might today demarcate our approaches to the international organisation. Our own disciplinary orientation matters to some extent, but disciplinary identification alone is a crude measure. Historians of empire and internationalism and law and political thought might be interested in quite different things; they will see organisations in different lights. Lawyers, too, will differ in their intellectual and professional stance. Some will be seeking to craft arguments and produce knowledge within protocols internal to contemporary law which, while uneven and elastic, implicit or explicit, substantive or procedural, and changeable

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Anachronism: Histories of International Law and Global Legal Politics', *Journal of the History of International Law* 21 (2019), 7–40.

over time, circumscribe the significance and interpretation of past acts and texts.<sup>70</sup> Others who identify primarily as lawyers may probe how law and legal institutions have evolved, how they work, and what they generate, in ways deeply informed by experience internal to law, but not themselves subject to the protocols which would constrain legal argument today.<sup>71</sup>

This is not to say that the divide between work ‘internal’ to law and beyond it is simple, or closed. It is constructed over time, from both within and without, and politically salient, given law’s peculiar capacity to shape institutional and governmental action. Although Orford’s assertion of a ‘juridical method’ of critically engaging the past—as distinct from a historical method—has been framed primarily as an intervention in the terms of interdisciplinary exchange between law and history, it can also be read as addressing law itself as a discipline: a challenge to the limits of what counts as speaking *within* law, on law’s terms. Although the assertion that there is a—by implication unitary—‘juridical’ mode of engaging the past would seem to flatten distinctions between those writing in a manner internal to law and those less accepting of these strictures, it might also function as an invitation to work precisely at the limits. Orford’s work on the UN can be read in this light: it presents a narrative and pattern of reasoning that is intuitively familiar to lawyers, centred on authority, jurisdiction and powers; but is recognisably *not* speaking within the protocols conventionally considered to shape law’s engagement with the past; the work is illuminating precisely because it, for example, illustrates the intricate and oblique jurisgenerativity of disciplines, documents and practices which have no claim to legal effect on any formal account of sources. Much of the force of this reading comes not from being subsumed within an existing juridical method but from the *partial* intelligibility within law which it produces, and the pressure this places on our judgment of what counts as operating within law.

The League case illustrates the way in which writings within law and history can speak to each other. At the most basic level, accounts which read across the boundaries of law’s internal understanding, whether they are styled histories or something else, help illuminate what is missed in a purely internal legal account of the institutional past, and the work that law (in all its diversity) is doing. While the consolidation of a law of international organisations has drained international organisations of the startling quality they had for interwar commentators, recovery of the earlier perplexity makes clear the extent to which current questions remain connected to foundational puzzles. Questions about the nature of international organisations’ interactions with the wider legal order are related to persistent unease in the legal conceptualisation of the international organisation itself. There is, for example, an enduring oscillation between focusing on the founding treaty as an instrument of institution-creation, with the institution having no ‘objective’ personality as against third states in the absence of their recognition of it, and focusing on the existence of an institution,

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<sup>70</sup> For an example of this, the constraining effect of ‘sources’ doctrine, see Rose Parfitt, ‘The Spectre of Sources’, *European Journal of International Law* 25 (2014), 297–306.

<sup>71</sup> Notably, e.g., Kennedy, ‘The Move to Institutions’; Klabbers, ‘The Transformation of International Organizations Law’; Klabbers, ‘The Emergence of Functionalism in International Institutional Law: Colonial Inspirations’; Guy Fiti Sinclair, ‘Towards a Postcolonial Genealogy of International Organizations Law’, *Leiden Journal of International Law* 31 (2018), 841–69.

however created, as a reality opposable to all states.<sup>72</sup> Problems of corporate agency subsist, as evident, for example, in the challenges of integrating international organisations—particularly those drawing on national forces, personnel and resources in their operations—into a law of responsibility for international wrongs.<sup>73</sup>

The question of speech which recurred in so many different guises in the League, and particularly in the ambiguous relation between Secretariat and institution, remains only partially addressed by law. Although the management of flows of information from governments and non-government networks has been central to the development of complex interrelations between states and international organisations, these have never been fully registered in legal terms. Still today, they barely feature in accounts of the law of international organisations, beyond reference to inviolability of institutional archives and rules prohibiting unauthorised disclosure of information from staff. This studied indifference to bureaucratic processes is part of the formalising and abstracting work that law does. Yet these flows of information and modes of speech cannot readily be separated from questions of responsibility and authority in and through institutions.

Relatedly, a largely statist sources doctrine<sup>74</sup> has obscured the complex ways in which international organisations and their organs act in the international legal order. It is evident that these organisations may catalyse multilateral treaty-making and incubate customary norms in myriad ways (for example, by eliciting official statements and producing material records from which customary law is discerned). But other aspects of organisational action are less readily assimilated. For example, secretariats, in interpreting founding charters, making decisions in matters before them, or pursuing policy work, may also adopt interpretations of law on particular points, and shape the terms in which legal questions are framed and debated.<sup>75</sup> This works too for the secretariats' own status. Bureaucratic craft and rhetorical self-positioning can settle into what Zilliagus called a 'tradition', an 'unprecedented relationship' which, while difficult to reconcile with founding texts, comes to shape the understanding of governments and interlocutors, and help crystallise pathways of influence over substantive points of law.

Of course, as in the interwar period, legal discourse is internally diverse. Some Anglo-American perspectives, in particular, informed by a common law sensibility, animated by a wider sense of 'governance' or 'administration', and increasingly informed by social scientific

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<sup>72</sup> On the International Law Commission's evolution from a 'treaty' conception (at the forefront in the working out of the law governing treaties between international organisations, or between such organisations and states), to a qualified 'subject' conception (in connection with work on the responsibility of international organisations): Fernando Lusa Bordin, *The Analogy between States and International Organizations* (Cambridge: Cambridge University Press, 2018), 53–68.

<sup>73</sup> James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) 188–213.

<sup>74</sup> I.e., the orthodox position that law has its source in treaties (in which case it binds only the parties); custom (theoretically, binding all states other than those which systematically and deliberately object to the norm from its moment of inception); or, less frequently, 'general principle' (that is, a principle, like non-retroactivity of criminal prohibitions, which is widely shared in the domestic legal systems of the world).

<sup>75</sup> For a study which approaches this question, albeit taking sources doctrine as its foil, José E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford University Press, 2006).

investigation of how institutions work in practice, are more likely to capture diffuse and potentially jurisgenerative practice that is not intelligible within a more orthodox emphasis on formal delegation of powers from states. These approaches eschew preoccupation with the legal forms of transnational decision-making and focus instead on its procedure. This may entail careful attention to knowledge and speech: who shapes decision-making and how. But these approaches, while arguably still part of an internal legal account (on a loosely positivist model), will nevertheless face a certain limit to what can be said in a manner internal to law; and the more pressure is put on the outer reaches of this perspective the more one finds oneself confronted with basic questions about the concept of law being invoked.<sup>76</sup>

Law has done much of the work to ensure that we have come in the space of a few decades to accept as familiar fundamentally novel structures of authority and responsibility. However contingent law's operation might be, its vocabularies and techniques offer a powerful vector through which past events can take on new significance in the present. History offers one way of seeing this work of law in a way which is not bound by law's own protocols. Of course, histories which touch on international organisations may do so quite differently—including situating international organisations in a larger matrix of states, corporate actors and social movements in a way which de-centres organisations, or emphasises the constraints on or conditions of their influence in particular moments. Nevertheless, such accounts, even when not framed in a fashion internal to law, can sound in law (for example, by unsettling accepted premises of past legal decisions, dominant interpretations of texts, and the normative horizons of legal practitioners).

This is not to say, however, that history (of one kind or another) offers a stable external viewpoint. What emerges from the League case is how profoundly the institution challenges historical as well as juridical analysis, creating shared dilemmas. The dynamic quality of institution and office—the advent of an entity which then, in its workings, changes the terms on which individuals think and act, and others judge it—is a problem for both history and law. Each confront the interrelation of thought and action ('practice' having elements of each), and the related (but distinct) opposition between the institution's textual and extra-textual workings.

This chapter might, for example, have been framed as a conceptual history. The arguments I trace here could be seen as part of a moment of innovation: the emergence of a 'concept' of the international organisation and international civil service (the two, as presently understood still, being inextricably linked). There is a marked shift around the interwar period in the usage of 'international organisation' which would bear this out. Yet this process of innovation is arguably more iterative and multidimensional than some characterisations of conceptual change in intellectual history.<sup>77</sup> It involves quite marked concrete reforms to the workings of governments and diplomacy, and the invention of new bureaucratic practices, which then feed into a loosely shared endeavour to grasp these new conditions. Intellectual framings work in complex ways with

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<sup>76</sup> See, e.g., the standoff between 'international public authority' and 'global administrative law' conceptions of the increasingly complex realm of law, or law-like governance, beyond the positivist interstate framework underlying conventional public international law: Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge: Cambridge University Press, 2015), 623–35.

<sup>77</sup> On the politics of characterising conceptual change in particular ways, Isaac, this volume.

social and bureaucratic practices: conceptualisation may well precede changes in practice; but the latter (sometimes hesitantly deliberate, sometimes not animated by any unitary plan) also represent the intellectual problem in new guises at different points.

This is borne out by the observations of those whose historical work has been most concerned with how the social history of the international civil service, and civil society mobilisation, meets the formal facets of the institution. To put the issue in Foucauldian terms, this is about the way in which sovereignty as practices of government relates to sovereignty in its more formal juridical (and political) sense. Something of this finds its echo in much recent work. Gram Skjoldager and Ikonomou write of the need to probe ‘the institutional landscape where the individual and ... surroundings meet—where concrete meaning is produced through institutional practice’.<sup>78</sup> Wheatley’s study of the mandate petitioning procedure underlines the complexity of historicising a process in which the actual mobilisation and participation of non-state actors shapes the international legal category of the petitioner. She calls for a ‘history of international legal personality that is always looking around the corners of the concept itself’.<sup>79</sup>

The account of the League in this chapter links the speech of and for an institution, and more fine-grained controls on the speech of its human staff. It forces together formal conceptions of an institution, made possible by the actions of human agents who are both looking to formal notions of authority and working in their interstices. The abstracting work of law introduces limits to how much of this picture can be juridically relevant to any internal legal argument today (though the limits are not stable or impermeable). Historical accounts offer one means of putting these limits in question, but the practice of history encounters its own challenges in the institution. Either disciplinary stance entails questions about what we ourselves would say now, and why.

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<sup>78</sup> Gram-Skjoldager and Ikonomou, ‘The Construction of the League of Nations Secretariat’.

<sup>79</sup> Natasha Wheatley, ‘New Subjects in International Law and Order’, in Glenda Sluga and Patricia Clavin (eds.), *Internationalisms: A Twentieth-Century History* (Cambridge: Cambridge University Press, 2017), 265–86, at 273.