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THE DUMBARTON OAKS PROPOSALS AND THE LEAGUE OF NATIONS COVENANT

BY

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PRESENTED BY MR. THOMAS OF UTAH

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A STUDY OF DUMBARTON OAKS PROPOSALS AND THE LEAGUE OF NATIONS COVENANT

Mr. THOMAS of Utah. Mr. President, there has just come to my attention a comparative study of the Dumbarton Oaks proposals and the Covenant of the League of Nations, prepared by Dr. Herbert Wright, professor of international law at the Catholic University of America and a member of the board of editors of the American Journal of International Law. I have known Dr. Wright for a number of years. In fact, as far back as the summer of 1926 we were both members of a group of some 50 professors of international law and relations who made an intensive study of international organization in Paris, The Hague, and Geneva. For 2 or 3 years Dr. Wright was editor of international conferences for the Department of State and in this capacity he attended the London Naval Conference of 1930. About a year ago he wrote a scholarly study of the Attitude of the United States Toward Austria, which was published as House Document No. 477, Seventy-eighth Congress, second session, and caused wide favorable comment.

In the same scholarly fashion he has endeavored to make this present study as objective as possible by arranging the provisions of the Dumbarton Oaks proposals in parallel columns with the relevant portions of the Covenant of the League of Nations, interspersing comments on the similarities and differences between the two instruments wherever appropriate. I understand it has been read and approved for publication by Dr. George A. Finch, editor in chief of the American Journal of International Law, but, since the April issue of that journal will not appear before the San Francisco meeting on April 25, he has suggested to the author that he publish it elsewhere now and revise it after that meeting in the light of the action taken there for publication in the July issue. Regardless of whether one subscribes entirely to the views which he may have incidentally expressed, it seems to me that it will be a decided convenience for the experts who will attend the San Francisco meeting to have this handy comparative study (Congressional Record, March 16, 1945).

THE DUMBARTON OAKS PROPOSALS AND THE LEAGUE OF NATIONS COVENANT

By Herbert Wright, Professor of International Law, the Catholic University of America

In publishing the tentative Proposals for the Establishment of a General International Organization, as "the unanimously agreed recommendations of the four delegations" of the United States, the United Kingdom, the Soviet Union, and China, reached at Dumbarton Oaks, Washington, on October 7, 1944, and hence popularly called the Dumbarton Oaks Proposals, Secretary of State Cordell Hull declared that: "These proposals are now available for full study and discussion by the peoples of all countries." Moreover, he expressed his—

> earnest hope that, during the time which must elapse before the convocation of a full United Nations conference, discussions in the United States on this all-important subject will continue to be carried on in the same non-partisan spirit of devotion to our paramount national interest in peace and security which has characterized our previous consultations.[1]

The "full" conference is now scheduled to take place in San Francisco on April 25, 1945.[2] It is in the spirit of Secretary Hull's statement that the following comparison and analysis of the similarities and dissimilarities between the Proposals and the Covenant has been undertaken. As a comparison of the purposes and principles of the proposed Organization (DOP, I and II) and the League[3] would extend unduly the length of this study, the discussion here has been confined to a comparison of the application of its purposes and principles as embodied in the technical features of organization (DOP, III and following). For this purpose, the Proposals and the corresponding relevant portions of the Covenant have been juxtaposed in parallel columns, following the order of the former, and analytical comments interspersed where it seemed appropriate or desirable. It should be pointed out, however, that an important difference between the Covenant and the Proposals is that the former constituted Part I of the Treaty of Versailles and the other Paris suburban treaties, while the Proposals would be embodied in an independent instrument.

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[1] Dumbarton Oaks Documents on International Orgaization, U. S. Department of State Publication 2192. The text of the Dumbarton Oaks Proposals used here is that contained in this publication. This publication and Publication 2218 have been reprinted in Publication 2223.

The text of the League of Nations Covenant used here is that contained in Llewellyn Pfankuchen, A Documentary Textbook in International Law (New York, 1940), pp. 558–570.

In order to avoid too frequent repetition of the full name of these two instruments in the parallel quotations therefrom, the abbreviations DOP and LNC have been used.

[2] As of March 29, 1945, 46 nations are expected to participate in the San Francisco meeting. The Department of State Bulletin, Vol. XII, No. 298 (March 11, 1945), p. 295; Washington, the Evening Star, March 29, 1945, p. 8. This number includes India, Lebanon, Liberia, the Philippines, Saudi Arabia, and Syria and excludes Afghanistan, Argentina, Bulgaria, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Poland, Portugal, Spain, Sweden, Switzerland, and Thailand. Ireland, Portugal, Spain, Sweden, and Switzerland are neutrals in the present war. Poland is the only member of the United Nations in this group of noninvited nations.

[3] For a brief comparison, see Hans Kelsen, The Old and New League: The Covenant and the Dumbarton Oaks Proposals, American Journal of International Law, 39 (1945), pp. 45–46.

CHAP. III.—MEMBERSHIP	
Membership of the Organization should be open to all peace-loving states. DOP, III. 1	The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. LNC, I. 1

In a certain sense, the provisions of the Proposals approaches more closely to the idea of a "general association of nations" based upon the broad principles of justice contained in President Wilson's Fourteen Points of January 8, 1918,[4] than did the corresponding provision of the Covenant. The Covenant restricted membership to those states mentioned in the Annex to the Covenant, namely, the Allied and Associated Powers and those other states invited to accede to the Covenant. It excluded from original membership (1) the Central Powers (Austria, Bulgaria, Germany, Hungary, and Turkey), although these states signed the Paris suburban treaties, of each of which the Covenant constituted Part I, and the U. S. S. R., although Russia was originally one of the Allied Powers; (2) those states which had disturbed internal conditions or were not on friendly terms, at the time of signature of those treaties, with the Government of the United States (Costa Rica, Dominican Republic, and Mexico); and (3) a number of other states which had not yet been accorded general recognition by the community of nations (Afghanistan, Albania, Egypt, Estonia, Ethiopia, Finland, Iceland, Iraq, Irish Free State, Latvia, and Lithuania, not to mention Danzig, Liechtenstein, Luxembourg, Monaco, and San Marino.[5]

The Hedjaz (Saudi Arabia) and the United States never exercised their option of original membership. All of the other states mentioned above (except Danzig, Liechtenstein, Monaco, and San Marino) eventually became members of the League, but there have been sixteen withdrawals (Albania, Brazil, Chile, Costa Rica, El Salvador, Germany, Guatemala, Honduras, Hungary, Italy, Japan, Nicaragua, Paraguay, Peru, Spain, and Venezuela) and one expulsion (U. S. S. R.).

Under the Proposals, although no distinction is specifically made between original and other members, membership in the Organization is limited to "peace-loving states." This is none too precise a term.[6] Will it be restricted to those invited to participate in the San Francisco meeting? Is the test of peace-loving to be a declaration of war before February 28? Or will the membership be extended at that meeting to include all states by reason of their very statehood? Costa Rica desires the institution of this Organization to be—

> with so universal a nature that every State, by the very fact of being one, may belong to the international society created, just as there is no individual but belongs to some particular nation.[7]

Similarly, Venezuela declares that—

> * * * The ideal would be for an institution of a universal character to be secured, in which all regularly recognized States are entitled to occupy a position,

[4] U. S. Foreign Relations, 1918, Supp. 1, Vol. I (Washington, 1933), p. 16.

[5] Yet Kelsen, *op. cit.*, p. 46, says that the League had "a universal character" and "was meant to comprise all states of the world" and is therefore different from the Organization, which is to be limited to the "victorious states."

[6] Quincy Wright, A Study of War (Chicago, 1942), Vol. I, Tables 40 and 41, p. 646, gives statistics showing that the following states have participated in the number of wars stated from 1875 to 1941: Great Britain, 13; France, 9; China, Italy, Japan, and Russia, 8 each; Turkey, 7; United States, 6; Germany 5; and Spain, 4.

[7] Pan American Union, Inter-American Conference on Problems of War and Peace, Mexico City, February, 1945, Handbook for the Use of Delegates (Washington, 1945), p. 115.

provided that they are disposed to submit to the obligations and to practice the principles that serve as the basis for such institution.[8]

CHAP. IV.—PRINCIPAL ORGANS

The Organization should have as its principal organs:
a. A General Assembly;
b. A Security Council;
c. An international court of justice; and
d. A Secretariat. DOP, IV. 1

The Organization should have such subsidiary agencies as may be found necessary. DOP, IV. 2.

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat. LNC, II

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. * * * LNC, XIV

The Proposals provide for substantially the same organs as the Covenant, except that there is a General Assembly instead of an Assembly, a Security Council (plus an Economic and Social Council and a Military Staff Committee, to be discussed later, which have evidently been inadvertently omitted here) instead of a Council, and an International Court of Justice is provided for in the Proposals directly, while only a provision for a future plan of such a court is provided for in the Covenant. The latter was subsequently established by a separate instrument, the Protocol of Signature of the Statute of the Permanent Court of International Justice.[9] All of these organs are discussed in greater detail below.

CHAP. V.—THE GENERAL ASSEMBLY

SECT. A.—COMPOSITION

All members of the Organization should be members of the General Assembly and should have a number of representatives to be specified in the Charter. DOP. V. A

The Assembly shall consist of Representatives of the Members of the League. LNC, III. 1

At meetings of the Assembly, each Member of the League * * * may have not more than three Representatives. LNC, III. 4

These provisions are substantially the same, except that the Charter to be elaborated under the Proposals is to specify the number of representatives which each member of the Organization shall have in the General Assembly, whereas under the Covenant each member may not have more than three representatives. The question of the number of representatives seems relatively unimportant, since each member has only one vote in the General Assembly, regardless of the number of representatives (DOP, V. C. 1).

SECT. B.—FUNCTIONS AND POWERS

The General Assembly should have the right to consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments; to discuss any questions relating to the maintenance of international peace and security brought before it by any member or members of the Organization or by

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. LNC, III. 3

[8] Pan American Union, *op. cit.*, p. 116. Kelsen, *op. cit.*, p. 47, likewise says that the Organization would have universal character "only if any state is allowed to join the Organization on the condition that it accepts without reservation the obligations stipulated in the Charter. Its submission to the Charter proves its love for peace."

[9] Text in American Journal of International Law, Supp., 30 (1936), pp. 115–128; Pfankuchen, *op. cit.*, pp. 571–584.

the Security Council; and to make recommendations with regard to any such principles or questions. Any such questions on which action is necessary should be referred to the Security Council by the General Assembly either before or after discussion. The General Assembly should not on its own initiative make recommendations on any matter relating to the maintenance of international peace and security which is being dealt with by the Security Council. DOP, V. B. 1

Here the Proposals give the General Assembly more restricted powers than the Covenant gave to the Assembly. If action is required, the matter must be referred to the Security Council (cf. also DOP, VI. B. 5). If the Security Council is considering a question, the General Assembly may not on its own initiative make any recommendations on the matter. This would seem to mean that the Security Council could forestall any recommendations by the General Assembly at any time by the simple expedient of commencing the consideration of the same question itself.[10]

The General Assembly should be empowered to admit new members to the Organization upon recommendation of the Security Council. DOP, V. B. 2

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accetp such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments. LNC, I. 2

Under the Covenant a state not mentioned in the Annex was allowed to be admitted to the League only upon (1) the agreement of two-thirds of the Assembly, (2) the giving of "effective guaranties of its sincere intention to observe its international obligations" and (3) the acceptance of regulations prescribed by the League for "its military, naval, and air forces, and armaments." No such conditions were exacted of original members of the League. Under the Proposals admission of new members is to be by a two-thirds vote of the General Assembly (DOP, V. C. 2), but the latter is not free to act until the Security Council has first made a recommendation in the matter (DOP, V. B. 2). What is to prevent the Security Council from specifying any conditions it sees fit, when it makes its recommendations to the General Assembly? What is to prevent the Security Council from stymying the admission of a proposed new member by failing to make any recommendation whatsoever?

The General Assembly should, upon recommendation of the Security Council, be empowered to suspend from the exercise of any rights or privileges of membership any member of the Organization against which preventive or enforcement action shall have been taken by the Security Council. The exercise of the rights and privileges thus suspended may be restored by decision of

[10] This would seem to be one answer to Kelsen's query, *op. cit.*, p. 61, "which agency is authorized to answer the question as to whether 'action is necessary,' the General Assembly or the Security Council?"

the Security Council. The General Assembly should be empowered, upon recommendation of the Security Council, to expel from the Organization any member of the Organization which persistently violates the principles contained in the Charter. DOP, V. B. 3

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon. LNC, XVI. 4

Under the Covenant expulsion from membership in the League required a unanimous vote of the Council (exclusive of the member concerned). The U. S. S. R. was expelled under this procedure, although the representatives of two nonpermanent members of the Council (Iran and Peru) were not present. Under the Proposals expulsion from membership in the Organization requires only a two-thirds vote of the General Assembly (DOP, V. C. 2), but the latter cannot act until after the Security Council has first made a recommendation in the matter. The Security Council has the initiative, therefore, but the General Assembly makes the final decision.

Under the Covenant expulsion may be voted for the violation of "any covenant of the League." Under the Proposals it may be voted only for the "persistent" violation of "the principles contained in the Charter." Venezuela declares that—

> there is not seen the purpose of expulsion, which would mean the permanent exclusion of a State from the circle of international Society and is contrary to the ideal of the universality of the institution.[11]

Point is added to this contention by the fact that the Proposals also provide for the partial or complete suspension from the privileges of membership by the General Assembly in the case of a member "against which preventive or enforcement action shall have been taken by the Security Council," which, as in the case of expulsion, can only be done "upon recommendation of the Security Council." It should be noted, however, that the General Assembly has nothing whatever to do with the lifting of such a suspension, since this is left exclusively to the Security Council. No provision is made in the Covenant specifically for suspension from the privileges of membership, although certain sanctions (LNC, XVI and XVII) can be invoked against a covenant-breaking member.

The General Assembly should elect the non-permanent members of the Security Council and the members of the Economic and Social Council provided for in Chap. IX. It should be empowered to elect, upon recommendation of the Security Council, the Secretary-General of the Organization. It should perform such functions in relation to the election of the judges of the international court of justice as may be conferred upon it by the statute of the court. DOP, V. B. 4

* * * These four [nonpermanent] Members of the League shall be selected by the Assembly from time to time in its discretion. * * * LNC, IV. 1

The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly. LNC, VI. 2

There is no substantial difference in the manner of selection of the nonpermanent members of the Council and the Security Council (and the Economic and Social Council, which is to assume some of the functions exercised by the Council of the League).

Apart from the fact that the original Secretary-General of the League (Sir Eric Drummond) was specifically named in the Annex

[11] Pan American Union, *op. cit.*, p. 121. Kelsen, *op. cit.*, pp. 48–50, likewise questions the desirability of expulsion as a sanction for violation, since provision is also made for suspension of the rights of membership.

to the Covenant, there is no substantial difference between the two instruments with regard to the selection of the Secretary-General. Under the Covenant he was appointed by the Council with the approval of a majority of the Assembly. Joseph Avenol was chosen in this way in 1933 to succeed Sir Eric Drummond. Under the Proposals the Secretary-General is to be elected by a majority of the General Assembly, upon the recommendation of the Security Council. (See also DOP, X. 1.) In both cases the larger body plays a subordinate role, the action of the smaller body being decisive.

Article IV of the Statute of the Permanent Court of International Justice provides that—

> The members of the Court shall be elected by the Assembly and the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

Presumably no change was intended in the Proposals from the provisions of the Covenant and the Statute of the Permanent Court of International Justice with regard to the role of the larger body in the election of the judges of the court.

The General Assembly should apportion the expenses among the members of the Organization and should be empowered to approve the budgets of the Organization. DOP, V. B. 5

The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly. LNC, VI. 5

There seems to be no substantial difference on this matter between the provisions of the Proposals and the provisions of the Covenant and the practice thereunder.

[DOP, V. B. 6–8, deal specifically with the power of the General Assembly to initiate studies, make recommendations and consider reports from the Security Council and other bodies of the Organization.]

[Not covered specifically by the LNC, but may be implied from LNC, III. 3, above.]

SECT. C.—VOTING

Each member of the Organization should have one vote in the General Assembly. DOP, V. C. 1

At the meetings of the Assembly, each Member of the League shall have one vote, * * *. LNC, III. 4

There is no substantial difference on this matter between the Proposals and the Covenant.

Important decisions of the General Assembly, including recommendations with respect to the maintenance of international peace and security; election of members of the Security Council; election of members of the Economic and Social Council; admission of members, suspension of the exercise of the rights and privileges of members, and expulsion of members; and budgetary questions, should be made by a two-thirds majority of those present and voting. On other questions, including the determination of additional categories of questions decided by a two-thirds majority, the decisions of the General Assembly should be made by a simple majority vote. DOP, V. C. 2

Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meetings of the Assembly * * * shall require the agreement of all the Members of the League represented at the meeting. LNC, V. 1

All matters of procedure at meetings of the Assembly * * *, including the appointment of Committees to investigate particular matters, * * * may be decided by a majority of the Members of the League represented at the meeting. LNC, V. 2

[LNC, I. 2, provides for two-thirds vote of the Assembly for election of new members.]

[LNC, IV. 2 bis, provides for two-thirds vote of the Assembly for rules

dealing with election of non-permanent members of the Council.]

[LNC, XVI. 4, provides for unanimity of the Council, excepting the offending member, in cases of expulsion.]

Important differences are to be noted here. For expulsion from membership in the League, the Covenant required the unanimous vote of the Council (except the member concerned). For expulsion from membership in the Organization, the Proposals require only a two-thirds vote of the General Assembly of those present and voting. This would seem to be a shift of the control of the question of expulsion from the smaller body (representing the hegemony of the great powers) to the larger body (representing the equality of the states), except that no action in this regard can be taken by the General Assembly until after recommendation by the Security Council (DOP, V. B. 3) and the Security Council would virtually have a liberum veto on such a question by reason of its probable ability to control the votes of one more than one-third of the members of the General Assembly actually voting on the question.

The Covenant required a majority vote of the Assembly on all matters of its procedure, including the appointment of investigating committees, a two-thirds vote of the Assembly for the election of new members of the League and for rules dealing with the election of nonpermanent members of the Council and a unanimous vote of the Assembly on all other matters coming before it not otherwise expressly provided for in the Covenant or the Treaty of Versailles.[12] The Proposals, on the other hand, require a two-thirds vote of those present and voting in the General Assembly on the important questions enumerated in DOP, V. C. 2, but on all other questions, including the addition of new categories requiring a two-thirds vote, only a simple majority of the General Assembly is required. Nothing is said as to whether the reverse would be true, namely, that only a majority would be required to remove a question from the requirement of a two-thirds vote.

The differences in the Proposals are evidently intended to correct some of the ambiguities of the Covenant on the question of voting in the Assembly, which caused so many controversies in the functioning of the Assembly in actual practice.[13]

SECT. D.—PROCEDURE

The General Assembly should meet in regular annual sessions and in such special sessions as occasion may require. DOP, V. D. 1

The Assembly shall meet at stated intervals and from time to time as occasion may require * * *. LNC, III. 2

The Proposals require "regular annual sessions" of the General Assembly instead of merely "at stated intervals" as required for the Assembly by the Covenant.

The General Assembly should adopt its own rules of procedure and elect its President for each session. DOP, V. D. 2

The General Assembly should be empowered to set up such bodies and

All matters of procedure at meetings of the Assembly * * *, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly * * *. LNC, V. 2

[12] Listed in Sir John Fischer Williams' The League of Nations and Unanimity (With special reference to the Assembly), American Journal of International Law, 19 (1925), pp. 485–486.

[13] See Williams, *op. cit.*, pp. 475–488.

agencies as it may deem necessary for the performance of its functions. DOP, V. D. 3

There is no substantial difference here, although the Proposals spell out a little more in detail and with greater preciseness the provisions for procedure of the General Assembly than the Covenant provided for the Assembly. In this it follows what has been the interpretation of LNC, V. 2, in actual practice.

CHAP. VI.—THE SECURITY COUNCIL

SECT. A.—COMPOSITION

The Security Council should consist of one representative of each of eleven members of the Organization. Representatives of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Republic of China, and, in due course, France, should have permanent seats. The General Assembly should elect six states to fill the non-permanent seats. These six states should be elected for a term of two years, three retiring each year. They should not be immediately eligible for reelection. In the first election of the non-permanent members three should be chosen by the General Assembly for one-year terms and three for two-year terms. DOP, VI. A

At all meetings of the Council, each Member of the League represented on the Council * * * may have not more than one Representative. LNC, IV. 6

The Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. * * * LNC, IV. 1

With the approval of the majority of the Assembly, the Council may name additional Members of the League, whose Representatives shall always be Members of the Council; the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council. LNC, IV. 2

Here will be noted some very important differences. The number of members of the Security Council is to be 11, which was that of the Council of the League as of 1922, namely, 5 permanent members and 6 nonpermanent members. The Covenant provided originally that the permanent members should be the United States, the British Empire, France, Italy, and Japan. The United States never claimed the permanent membership to which it was entitled, because it never ratified the Treaty of Versailles or any of the other Paris suburban treaties. Germany was elected to a permanent membership in the Council in 1926, in accordance with LNC, IV. 2. Japan and Germany resigned from the League in 1933, thus relinquishing their permanent memberships in the Council. The U.S.S.R. was "appointed" to a permanent membership in the Council in 1934,[14] but was expelled from the League in 1939 after its invasion of Finland and thus lost its permanent membership in the Council. Italy resigned from the League in 1937, losing its permanent membership in the Council thereby. Since December 1939, only Great Britain and France have had permanent seats, but there has been no meeting of the Council. The Security Council, under the Proposals, will include as permanent members the United States, Great Britain, the U. S. S. R., China, and eventually France.[15] Italy loses its position of influence in Europe, and Japan its position of influence in Asia.

[14] Manley O. Hudson, Afghanistan, Ecuador and the Soviet Union in the League of Nations, American Journal of International Law, 29 (1935), p. 115.

[15] Brazil and Costa Rica have suggested that one Latin-American country have a permanent membership in the Security Council. Pan American Union, *op. cit.*, p. 125.

The Covenant provided originally for 4 nonpermanent members in the Council. This number was increased in 1922 to 6, in 1926 to 9, in 1933 to 10, and in 1936 (at least, temporarily) to 11, the present number. These increases tended to destroy the compactness and balance between the great powers and the smaller powers originally provided for in the Covenant. The 9 memberships provided for in 1926 were divided into 3 groups, each of which was elected for 3 years and was not eligible to reelection unless the Assembly so declared.[16] Since 1936, 5 were supposed to be elected in the year-series 1936, 1939, 1942. Under the Proposals the 6 nonpermanent members are to be elected for a term of 2 years each, 3 retiring each year and not being immediately reeligible. To carry this into effect, at the first election 3 will be chosen for only 1 year. The ineligibility for immediate reelection, while making it possible to secure new blood in the Security Council from among the less powerful members of the Organization, by the same token prevents the building up of any feeling of solidarity of the nonpermanent members of the Security Council.

Under the Covenant, the Council, with the approval of a majority of the Assembly, had the power to increase the number of permanent members of the Council and to name them and also to increase the number of nonpermanent members. All of these prerogatives have been exercised, as noted above. The Proposals contain no specific provisions on this point and presumably such increases would have to come, if at all, by way of amendment of the Charter.

The provision of the Proposals for a Security Council of five permanent and six nonpermanent members is more in keeping with the original idea behind the Council of the League of a substantial balance between the permanent (great powers) and nonpermanent (smaller powers) members.

SECT. B.—PRINCIPAL FUNCTIONS AND POWERS

In order to ensure prompt and effective action by the Organization, members of the Organization should by the Charter confer on the Security Council primary responsibility for the maintenance of international peace and security and should agree that in carrying out these duties under this responsibility it should act on their behalf. DOP, VI. B. 1

In discharging these duties the Security Council should act in accordance with the purposes and principles of the Organization. DOP, VI. B. 2

The specific powers conferred on the Security Council in order to carry out these duties are laid down in Chapter VIII. DOP, VI. B. 3

All members of the Organization should obligate themselves to accept the decisions of the Security Council and to carry them out in accordance with the provisions of the Charter. DOP, VI. B. 4

* * * In case of any such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled. LNC, X

[Similar provisions in LNC, XIII. 4, XV. 1–9, XVI. 2, XXII. 7–8, XXIV. 2–3.]

The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world. LNC, IV. 4

[16] Pfankuchen, *op. cit.*, p. 560, note 2.

There is a fundamental difference to be noted here. Under the Covenant the Council advised the members as to how any threat or danger of aggression was to be met and (LNC, XV. 6) the members agreed that they would not go to war with any party to a dispute which complied with the unanimous (other than the parties to the dispute) recommendations of the Council, reserving their independence of action in case these recommendations were not unanimous. Under the Proposals, however, the Security Council is given "primary responsibility for the maintenance of international peace and security" and the members not only are to "agree that in carrying out these duties under this responsibility it should act on their behalf," but also "should obligate themselves to accept the decisions of the Security Council and to carry them out in accordance with the provisions of the Charter." The purpose of this is to "ensure prompt and effective action by the Organization." The League was handicapped by the cumbersomeness of its procedure in promptly and effectively meeting a threat to peace or an aggression. For instance, in 1931–32, while its Lytton Commission of Enquiry was busy investigating a threat to the peaceful relations between China and Japan, Japan confronted it with a *fait accompli* in the creation of "Manchukuo".[17] Lest it be considered that this provision of the Proposals is giving the Security Council a "blank check" to be filled in at its discretion, the Proposals provide that "in discharging these duties the Security Council should act in accordance with the purposes and principles of the Organization." The comparative powers of the Security Council and the Council are discussed below (under DOP, VIII).

In order to promote the establishment and maintenance of international peace and security with the least diversion of the world's human and economic resources for armaments, the Security Council, with the assistance of the Military Staff Committee referred to in Chap. VIII, Sect. B, par. 9, should have the responsibility for formulating plans for the establishment of a system of regulation of armaments for submission to the members of the Organization. DOP, VI. B. 5

The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations. LNC, VIII. 1

The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments. LNC, VIII. 2

[LNC, VIII. 3–6, also refer to reduction of armaments.]

On the question of the reduction of armaments, the Proposals go a step farther than the Covenant in specifying that the Security Council shall have the assistance of the Military Staff Committee in formulating plans for the establishment of "a system of regulation of armaments for submission to the members." The acceptance or rejection of the plan so formulated would still require action by the individual members.[18] If the regulation is for the purpose of securing "the least possible diversion of the world's human and economic resources for armaments," unless this is mere lip service, it would seem to imply disarmament and abolition of conscription. As far back as

[17] Stephen C. Y. Pan, American Diplomacy Concerning Manchuria (Washington, 1938), pp. 243–256.

[18] Senator Warren B. Austin, who participated in the conferences with the Secretary of State preceding the Proposals, so interprets it. Congressional Record, 79th Cong., 1st Sess., Vol. 91, No. 15, January 25, 1945, p. 498, col. 2.

1939, Pope Pius XII, in his Christmas allocution, called attention to the necessity of this for any peaceful settlement, when he said:

* * * Any peaceful settlement which fails to give fundamental importance to a mutually agreed, organic, and progressive disarmament, spiritual as well as material, or which neglects to ensure the effective and loyal implementing of such an agreement, will sooner or later show itself to be lacking in coherence and vitality.[19]

It will be remembered that—

The German argument in support of the recent action [repudiation of Part V of the Treaty of Versailles] * * * is that the Allied and Associated Powers were bound to Germany by treaty obligations to reduce their own armaments, that Germany's duty to continue to observe the clauses of Part V was conditioned upon the fulfillment by them of their obligations, and that those obligations not having been performed after the lapse of nearly 15 years, Germany's obligations ceased to be binding upon her and might be unilaterally denounced without the consent of the other parties. This reciprocity, it is argued, is to be found in the so-called *Novembervertrag* concluded between Germany and her enemies in the early days of November 1918, in the preamble to Part V of the Treaty of Versailles, in Article 8 of the Covenant of the League of Nations, and in the conditions under which Germany became a member of the League in 1926.[20]

The provisions for military enforcement with a Military Staff Committee operating under responsibility to the Security Council (DOP, VIII. B. 4–9) are presumably intended not only to maintain international peace and security, but also to prevent the slightest justification for the use of such an argument as that put forward by Germany to relieve itself of the obligations of Part V of the Treaty of Versailles. The difference between the Military Staff Committee and the similar assistance rendered to the Council of the League is discussed below (under DOP, VIII. B. 9).

SECT. C.—VOTING [21]

Each member of the Security Council should have one vote. DOP, VI. C. 1

Decisions of the Security Council on procedural matters should be made by an affirmative vote of seven members. DOP, VI. C. 2

Decisions of the Security Council on all other matters should be made by an affirmative vote of seven members, including the concurring votes of the permanent members; provided that, in decisions under Chap. VIII, Sect. A, and under Chap. VIII, Sect. C, par. 1, second sentence, a party to a dispute should abstain from voting. DOP, VI. C. 3

At meetings of the Council, each Member of the League represented on the Council shall have one vote, * * *. LNC, IV. 6

Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the * * * Council shall require the agreement of all the Members of the League represented at the meeting. LNC, V. 1

All matters of procedure at meetings of the * * * Council, including the appointment of Committees to investigate particular matters, * * * may be decided by a majority of the Members of the League represented at the meeting. LNC, V. 2

If the dispute [likely to lead to rupture] is not thus settled, the Council either unanimously or by a majority

[19] Harry C. Koenig (ed.), Principles for Peace, Selections from Papal Documents, Leo XIII to Pius XII (Washington, 1943), p. 637.

[20] James W. Garner and Valentine Jobst III, The Unilateral Denunciation of Treaties by One Party Because of Alleged Non-performance by Another Party or Parties, American Journal of International Law, 29 (1935), p. 574, citing Viktor Bruns, Deutschlands Gleichberechtigung als Rechtsproblem (Berlin, 1934).

[21] This provision was adopted at the Crimea Conference of Prime Minister Churchill, President Roosevelt, and Marshal Stalin at Yalta in February 1945. The Department of State Bulletin, Vol. XII, No. 298 (March 11, 1945), p. 394. This information had already been published from "unimpeachable" official sources by Frederick Kuh, Yalta Formula for Voting by Security Group Revealed, the Washington Post, February 24, 1945, p. 5. Nothing was said about the agreement of China to this provision. The original DOP, C, read: "The question of voting procedure in the Security Council is still under consideration."

> vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto. LNC, XV. 4.
>
> [LNC, XV. 6, refers to a unanimous decision other than parties to the dispute.]

Under the Covenant, at meetings of the Council, each member of the League represented on the Council was to have one vote; and a majority was required for matters of its procedure, including the appointment of investigating committees, a unanimous or majority vote was required for a report on a dispute likely to lead to a rupture of peaceful relations, a unanimous vote (excepting the parties to the dispute) was required for the creation of the obligation of all members of the League to support the recommendations made in such report on a dispute (LNC, XV. 6), and a unanimous vote was required for all other matters coming before it not otherwise expressly provided for in the Covenant or the Treaty of Versailles.[22] In the actual functioning of the Covenant, Sir John Fischer Williams calls attention to the "inevitability of an attempt to escape from unanimity when practical work has to be done." [23]

It is not surprising, therefore, that the Proposals originally postponed the difficult question of voting procedure in the Security Council for further consideration. There is scarcely any part of the Organization envisaged by the Proposals which has occasioned more discussion than that of voting in the Security Council.[24] And rightly so, for upon the satisfactory solution of this problem depends in large measure the success that can be hoped for from the new Organization. To some—

> The omission of voting procedure in the Security Council seems to confirm previous unofficial reports that Soviet Russia has not agreed to an American-British proposal that a permanent member of the Council should not vote when it is accused of aggression. Should the unanimity rule of voting by the great powers be incorporated in the Charter, the new peace organization would be just another international agency to prevent little wars of the small powers but impotent in the case of big wars of the great powers.[25]

The solution of the problem of voting procedure in the Security Council adopted at Yalta seems to mean that, in decisions on questions involving a threat of war, the majority of seven must include the five great powers, except that, if the threat is *not* immediate or is regional, the powers directly involved in the dispute will be excluded from voting. This solution leaves unanswered the doubts of the smaller nations, since—

> If a single vote of a permanent member, whether an aggressor or not, is allowed to veto the use of force, what protection will the smaller nations have against the great powers? [26]

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[22] Listed in Williams, *op. cit.*, pp. 485–486.

[23] Williams, *op. cit.*, p. 485, note 2.

[24] See, for example, the various proposals of Chile, Costa Rica, Guatemala, Mexico, Uruguay, and Venezuela on this question. Pan American Union, *op. cit.*, pp. 129–130.

Kelsen, *op. cit.*, p. 58, suggests a majority vote of the Security Council with a weighted vote for the permanent members.

See also Louis B. Sohn, Weighting of Votes in an International Assembly, The American Political Science Review, 38 (1944), pp. 1192–1203.

[25] George A. Finch, World Court Favored, letter to the Editor, the New York Times, October 22, 1944.

[26] Harry C. Koenig, Dumbarton Oaks, Catholic Digest, 9 (January 1945), p. 5. Cf. George A. Finch, World Peace, letter to the Editor, the Washington Post, October 15, 1944.

Perhaps a more acceptable compromise might conceivably be worked out by weighting the vote of all the members of the Security Council according to the seven classes for the division of the expenses of the Universal Postal Union with a two-thirds vote required for decisions. Such a provision would yield a range of voting necessary for decisions from four permanent members plus one other member down to all the nonpermanent members plus at least two and probably three permanent members.

SECT. D.—PROCEDURE

The Security Council should be so organized as to be able to function continuously and each state member of the Security Council should be permanently represented at the headquarters of the Organization. It may hold meetings at such other places as in its judgment may best facilitate its work. There should be periodic meetings at which each state member of the Security Council could if it so desired be represented by a member of the government or some other special representative. DOP, VI. D. 1

The Security Council should be empowered to set up such bodies or agencies as it may deem necessary for the performance of its functions including regional subcommittees of the Military Staff Committee. DOP, VI. D. 2

The Security Council should adopt its own rules of procedure, including the method of selecting its President. DOP, VI. D. 3

The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon. LNC, IV. 3

All matters of procedure at meetings of the * * * Council, including the appointment of Committees to investigate particular matters, shall be regulated by the * * * Council. LNC, V. 2

Although the Covenant provided that the Council could meet as occasion required, not less frequently than once a year, and might meet at some place other than the seat of the League, it was frequently difficult in practice to assemble a meeting of the Council on short notice to deal promptly with an emergency. This difficulty was aggravated with the increase in the number of nonpermanent members of the Council. The Proposals are evidently intended to meet this difficulty so that the Security Council could function continuously, by reason of the fact that each member of the Security Council is to be "permanently" (a better word would be "continuously") represented at the headquarters of the Organization and, if desired (for instance, if the Security Council meets at some other place), could be represented by a member of the government or some other special representative. The Proposals seem to indicate greater regularity of meetings (at "periodic" intervals) of the Security Council than the irregular ("from time to time") meetings of the Council under the Covenant. The Proposals also spell out a little more in detail and with slightly greater preciseness the provision for procedure of the Security Council than did the Covenant for the Council, although the question of the headquarters of the Organization has been postponed for further consideration, presumably at the San Francisco meeting.[27]

[27] It is rumored that the U. S. S. R. favors Vienna, while Brussels and Luxembourg have also been suggested. Associated Press dispatch, the Washington Post, December 26, 1944.

Any member of the Organization should participate in the discussion of any question brought before the Security Council whenever the Security Council considers that the interests of that member of the Organization are specially affected. DOP, VI. D. 4

Any member of the Organization not having a seat on the Security Council and any state not a member of the Organization, if it is a party to a dispute under consideration by the Security Council, should be invited to participate in the discussion relating to the dispute. DOP, VI. D. 5

Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League. LNC, IV. 5

In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. * * * LNC, XVII. 1

These two provisions approach the same objective from different directions. Under the Covenant (LNC, IV. 5), the Council was obliged to invite a member of the League not represented on the Council to send a representative to sit as a member at any meeting of the Council "during the consideration of matters specially affecting the interests" of that member, but this member was under no obligation under this article to accept such an invitation. Moreover, it was not specified whether the Council or the member concerned was to decide whether the matters specially affected the member or not. As the provision stands, it is susceptible of interpretation either way, but the presumption is that it lay with the Council to decide since it had the initiative. Since the member concerned would "sit as a member" of the Council, it would be entitled to vote where that is called for.

The Proposals, on the other hand, place the determination of whether the interests of that member of the Organization are specially affected expressly in the hands of the Security Council and place the obligation of participating in the discussion of the question specially affecting the member squarely upon the shoulders of the member itself, once the Security Council has decided that that member is affected. There is no necessary implication of the right to vote contained in an obligation to "participate in the discussion."

Under the Covenant (LNC, XVII. 1), in case of a dispute between a member of the League and a nonmember or between two or more nonmembers, the nonmembers "shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just," therefore, not necessarily on a plane of equality with members of the League. Under the Proposals, if a dispute is under consideration by the Security Council, not only a member of the Organization not represented on the Security Council, but even a state not a member of the Organization itself, provided it is a party to the dispute, must be invited by the Security Council to "participate in the discussion" relating to the dispute. The right of nonmembers to vote in cases involving a dispute seems to be excluded under both the Covenant and the Proposals.[28]

[28] For further discussion of the rights accorded nonmembers, see the discussion under DOP, VIII. B. 11, below.

CHAP. VII.—AN INTERNATIONAL COURT OF JUSTICE

There should be an international court of justice which should constitute the principal judicial organ of the Organization. DOP, VII. 1

The court should be constituted and should function in accordance with a statute which should be annexed to and be a part of the Charter of the Organization. DOP, VII. 2

The statute of the court of international justice should be either (a) the Statute of the Permanent Court of International Justice, continued in force with such modifications as may be desirable or (b) a new statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis. DOP, VII. 3

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. LNC, XIV

The Permanent Court of International Justice was not embodied in the original Covenant, although Article XIV provided for the formulation by the Council of plans for the establishment of such a court. An Advisory Committee of Jurists accordingly, by invitation of the Council, met at The Hague in the summer of 1920 and formulated such a project,[29] which was discussed and adopted by the Council and Assembly of the League before the end of that year. This Statute of the Permanent Court of International Justice was annexed to a Protocol of Signature, separate from the Covenant, and this Protocol was opened for signature (exclusively by the members of the League and the states mentioned in the Annex to the Covenant) on December 16, 1920.[30] This Statute provided for the election of its judges by the concurrent action of the Council and Assembly of the League and for its expenses to be borne by the League. Its jurisdiction to render advisory opinions to the Council and Assembly of the League was conferred by Article XIV of the Covenant until the revisions of 1936 mentioned below. In view of the fact that the United States had not ratified the Treaty of Versailles containing the Covenant, some of the advocates of the United States "joining" [31] the Permanent Court of International Justice, particularly those who were also advocates of the United States joining the League itself, argued that the Permanent Court of International Justice was not the League's court,[32] since its Statute was embodied in an international instrument separate from the Covenant. The Proposals leave no doubt as to the integral connection of the International Court of Justice with the Organization, for an International Court of Justice is to "constitute the principal judicial organ of the Organization" and its statute is to "be annexed to and be a part of the Charter of the Organization."

[29] James Brown Scott, The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists (Washington, 1920).
[30] Manley O. Hudson, The World Court, 1921–1934 (4th Ed., Boston, 1934), pp. 5 and 155.
[31] That is, signing the Protocol of Signature of the Statute of the Permanent Court of International Justice.
[32] Manley O. Hudson, The Permanent Court of International Justice, in its Jurisdiction, and in its Application of Law, American Society of International Law, Proceedings, 1931, pp. 92–102; but see David Jayne Hill, The Problem of a World Court (New York, 1927), pp. 108 ff.

The Proposals leave open the question of whether the Permanent Court of International Justice is to be taken over into the Organization "with such modifications as may be desirable" (for example, changing the method of election of judges and the provision for expenses to conform to the new Organization) or whether a new International Court of Justice should be established on the basis of the Statute of the Permanent Court of International Justice. Presumably one factor underlying this provision is the larger question whether the Organization itself will actually supersede the League entirely; and if so, how the transfer of functions and property is to take place.

> All members of the Organization should *ipso facto* be parties to the statute of the international court of justice. DOP, VII. 4
>
> Conditions under which states not members of the Organization may become parties to the statute of the international court of justice should be determined in each case by the General Assembly upon recommendation of the Security Council. DOP, VII. 5

Marked clarifications are to be noted here. Under Article 35, paragraph 1, of the Statute of the Permanent Court of International Justice, that court was to "be open to the Members of the League and also to States mentioned in the Annex to the Covenant," namely, the Allied and Associated Powers and those other states invited to accede to the Covenant, regardless of whether they had ratified or acceded to the Protocol of Signature of the Statute of the Permanent Court of International Justice. It was open, therefore, *ipso jure* only to members of the League or prospective members. Under the Proposals, on the other hand, all members of the Organization are to be *ipso facto* "parties to the statute of the International Court of Justice." This emphasizes the integral connection of the International Court of Justice with the Organization; states cannot be members of the Organization without accepting the International Court of Justice also (states could be members of the League without accepting the Permanent Court of International Justice) nor accept the International Court of Justice without being members of the Organization (after the failure of the United States to ratify the Treaty of Versailles, it was proposed that the United States accept the Permanent Court of International Justice alone).

Under Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice—

> The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

These "conditions" were embodied in a Resolution adopted by the Council on May 17, 1922,[33] and provided that (1) such state, either by a particular declaration or a general declaration, accept "the jurisdiction of the Court, in accordance with the Covenant of the League of Nations";[34] (2) such state "undertakes to carry out in full good faith"

[33] Text in American Society of International Law, Proceedings, 1931, pp. 226-227. The numbering of the "conditions" is mine.

[34] Note this does not say "in accordance with the Statute of the Permanent Court of International Justice," but "in accordance with the Covenant of the League of Nations."

the decisions of the Court; (3) such state undertakes "not to resort to war against a State complying therewith"; (4) if such state accepts compulsory jurisdiction in conformity with Article 36 of the Statute, "such acceptance may not, without special convention, be relied upon *vis-à-vis* Members of the League of Nations or States mentioned in the Annex to the Covenant" accepting the optional clause of compulsory jurisdiction; (5) "the Council of the League of Nations reserves the right to rescind or amend this resolution"; (6) "to the extent determined" by the exercise of this right of revision by the Council, "existing declarations shall cease to be effective" *ad futurum;* and (7) "all questions as to the validity or the effect of a declaration" are to be decided by the Permanent Court of International Justice. It is difficult to see how these "conditions" do not "place the parties in a position of inequality before the Court," since at least conditions Nos. 4, 5, and 6 were not required of the signatories of the Statute.

Be that as it may, under the Proposals it is the General Assembly which, upon recommendation of the Security Council, determines the "conditions under which states not members of the Organization may become parties to the statute of the International Court of Justice." In brief, under the Covenant system, only members or prospective members of the League could be parties to the Statute of the Permanent Court of International Justice; under the Proposals, only members of the Organization can and all such members must be parties to the statute of the International Court of Justice. Under the Covenant system, states not mentioned in the Annex to the Covenant could not be parties to the Statute of the Permanent Court of International Justice, although, by accepting the conditions in the Resolution of the Council of 1922, they could be parties to cases before the Permanent Court of International Justice; under the Proposals, nonmembers of the Organization must become parties to the statute of the International Court of Justice, if they wish to be parties to cases before the International Court of Justice. Since the International Court of Justice is an integral part of the Organization, does this mean that nonmembers of the Organization must become members of the Organization, before they can become parties to the statute of the International Court of Justice, or are the Proposals intended to have the same meaning as that under the Covenant system?

CHAP. VIII.—ARRANGEMENTS FOR THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY INCLUDING PREVENTION AND SUPPRESSION OF AGGRESSION

SECT. A.—PACIFIC SETTLEMENT OF DISPUTES

The Security Council should be empowered to investigate any dispute, or any situation which may lead to international friction or give rise to a dispute, in order to determine whether its continuance is likely to endanger the maintenance of international peace and security. DOP, VIII. A. 1

The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world. LNC, IV. 4

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. * * * LNC, XI. 1

[See also LNC, XII. 1, and XV. 1.]

Under the Covenant, the investigatory power of the Council (as well as of the Assembly) stems out of the provision of LNC, V. 2, concerning "the appointment of Committees to investigate particular matters" of procedure, although it may also be implied from the general authorization (LNC, IV. 4) of the Council to deal "with any matter within the sphere of action of the League or affecting the peace of the world," and (LNC, XI. 1) of the League to "take any action that may be deemed wise and effectual to safeguard the peace of nations." In the latter case, since the Secretary-General is directed, on request of any member of the League, to "forthwith summon a meeting of the Council," the responsibility of the League under LNC, XI. 1, was to be exercised primarily by the Council. Moreover, the members of the League agreed (LNC, XII. 1) that, if there should arise between them any dispute likely to lead to rupture, they would submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and (LNC, IV. 1), if the matter was not submitted to arbitration or judicial settlement, they would submit the matter to the Council. It will be noted, however, that for the most part the authority of the Council to investigate a dispute or threatening situation, apart from an actual request or submission of members of the League, is open to some question. There is no question, however, that under the Proposals the Security Council has the authority to investigate a dispute or threatening situation *ipso jure*, independently of any request or submission of members of the Organization.

Any state, whether member of the Organization or not, may bring any such dispute or situation to the attention of the General Assembly or of the Security Council. DOP, VIII. A. 2

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends. LNC, XI. 2

Under the Covenant only members of the League have "the friendly right to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends." Under the Proposals "any state, whether member of the Organization or not," may bring any dispute or threatening situation to the attention of the General Assembly or Security Council.

The parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security should obligate themselves, first of all, to seek a solution by negotiation, mediation, conciliation, arbitration or judicial settlement, or other peaceful means of their own choice. The Security Council should call upon the parties to settle their dispute by such means. DOP, VIII. A. 3

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council. LNC, XII. 1

Under the Covenant the members of the League agree to submit "any dispute likely to lead to a rupture" either to arbitration or judicial settlement or to inquiry by the Council, but they virtually reserve the right to resort to war at the expiration of 3 months after

the arbitral award, judicial decision, or Council report, a curious provision for a League, most of the members of which are parties to Hague Convention I on the Pacific Settlement of International Disputes of 1899 or 1907.[35] It is curious also that such a provision for resort to war was not removed by amendment of the Covenant after the coming into force of the General Pact for the Renunciation of War (Briand-Kellogg Pact) of August 27, 1928,[36] under Article II of which—

> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Although this instrument did not enumerate the specific "pacific means" to be employed, presumably they included all the means available at the time, namely, direct negotiation, mediation, conciliation, commissions of inquiry, and arbitration (all covered by Hague Convention I), judicial settlement (covered by the Statute of the Permanent Court of International Justice), or other peaceful means of their own choice (such as, for instance, bilateral conventions for "cooling off", like the Bryan Treaties for the Advancement of Peace).

The above provision of the Proposals, therefore, simply spells out the obligation which almost all of the prospective members of the Organization have already assumed under the instruments mentioned above. It is more elastic than the similar provision in the Covenant in that it is not restricted to the three methods of peaceful settlement (arbitration, judicial settlement, or inquiry by the Council), but leaves the member free to select whatever peaceful means will effectively settle the dispute. Lest the member be remiss in complying with this obligation to settle his dispute by some sort of peaceful means, the Proposals direct the Security Council "to call upon the parties to settle their dispute by such means."

> If, nevertheless, parties to a dispute of the nature referred to in par. 3 above fail to settle it by the means indicated in that paragraph, they should obligate themselves to refer it to the Security Council. The Security Council should in each case decide whether or not the continuance of the particular dispute is in fact likely to endanger the maintenance of international peace and security, and, accordingly, whether the Security Council should deal with the dispute, and if so, whether it should take action under par. 5. DOP, VIII. A. 4
>
> The Security Council should be empowered, at any stage of a dispute of the nature referred to in par. 3 above, to recommend appropriate procedures or methods of adjustment. DOP, VIII. A. 5

> If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. * * * LNC, XV. 1
>
> The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate. LNC, XV. 3

Under the Covenant, if arbitration or judicial settlement is not used, the members of the League agree to submit the "dispute likely

[35] As of December 31, 1941, 31 states (including the United States, China, France, Germany, Japan, and the U. S. S. R.) are parties to Hague Convention I of 1907, and 15 more (including Great Britain and Italy) are parties to that of 1899. Treaties in Force, U. S. Department of State Publication 2103 (Washington, 1944), p. 1.

[36] As of December 31, 1941, 63 states (including all those mentioned in preceding note) are parties to this Pact. Treaties in Force, p. 35.

to lead to a rupture" to the Council. Under the Proposals, if any "peaceful means of their own choice" fails to settle the "dispute the continuance of which is likely to endanger the maintenance of international peace and security," the members of the Organization are obliged to refer it to the Security Council, but it is the responsibility of the Security Council to decide in each case "whether or not the continuance of the particular dispute is in fact likely to endanger the maintenance of international peace and security," and, if it decided that it does, to "recommend appropriate procedures or methods of adjustment." But the Security Council does not need to wait until the peaceful means have been exhausted or used and failed before it makes its recommendations. It has the power, "at any stage of a dispute of the nature referred to," to make appropriate recommendations. The Proposals evidently were intended to make it impossible for international peace and security to be endangered simply because of the recalcitrance of any party to its obligations or because of a lack of appropriate authority to deal with the matter.

Justiciable disputes should normally be referred to the international court of justice. The Security Council should be empowered to refer to the court, for advice, legal questions connected with other disputes. DOP, VIII. A. 6

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement. LNC, XIII. 2

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them. LNC, XIII. 3

* * * The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly. LNC, XIV

The question of which disputes are "justiciable" and which "nonjusticiable" has long been discussed by international lawyers.[37] Strictly speaking, "A dispute may be nonjusticiable in the sense that no court has jurisdiction, but in substance there are no nonjusticiable disputes."[38] Or, to state it in other terms, "any dispute which the parties choose to submit to an unlimited court may be determined by them."[39] The definition of justiciable disputes given in LNC, XIII. 2, is also embodied in Article 36 of the Statute of the Permanent Court of International Justice, which provides that, either when signing or ratifying the Protocol of Signature of the Statute of the Permanent Court of International Justice or later, the members of

[37] See, for instance, the discussion by Norman A. M. MacKenzie, Edwin Borchard, Arthur K. Kuhn, and Charles G. Fenwick, American Society of International Law, Proceedings, 1938, pp. 17, 34, 38, and 40, respectively.

[38] Quincy Wright, The Present Status of Neutrality, American Journal of International Law, 34 (1940), p. 402, note 56, citing H. Lauterpacht, The Function of Law in the International Community, pp. 21, 60, 435.

[39] Norman A. M. MacKenzie, *op. cit.*, p. 17, citing Lauterpacht. See also Sir John Fischer Williams, Justiciable and Other Disputes, American Journal of International Law, 26 (1932), pp. 31–36.

the League and the states mentioned in the Annex to the Covenant may "declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes" mentioned above. Otherwise, the Permanent Court of International Justice is competent to hear only cases which the parties agree to submit to it.

Under the Proposals "justiciable" disputes are not defined but presumably include all disputes not settled by other peaceful means (DOP, VIII. A. 3) and are normally to be referred to the International Court of Justice. "Normally" would seem to imply that the International Court of Justice has compulsory jurisdiction unless the parties to a dispute settle their controversy by other peaceful means.[40]

No provision for advisory opinion jurisdiction was contained in the original Statute of the Permanent Court of International Justice, such jurisdiction being exercised solely under Article XIV of the Covenant. In the Eastern Carelia case, for instance, where one of the parties interested, the U. S. S. R., was not a member of the League and refused to give its consent, the Permanent Court of International Justice declined to render an advisory opinion.[41] However, Articles 65–68 of the Statute, added under the Protocol of Revision of September 14, 1929, which went into effect February 1, 1936,[42] filled this gap by granting the Permanent Court of International Justice jurisdiction to render advisory opinions to the Council or Assembly of the League. Presumably these provisions, possibly with some modifications, would be taken over into the International Court of Justice, whether it is the Permanent Court of International Justice itself or a new court on the same basis. It will be noted that in this connection the Proposals cover only "legal questions connected with other disputes" than justiciable disputes normally referred to the International Court of Justice, whereas the Covenant covered "any dispute or question." It will also be noted that, under the Covenant, advisory opinions may be requested "by the Council or by the Assembly," whereas, under the Proposals, only the Security Council is to be empowered to refer questions to the court "for advice." This conforms to the actual practice of the League, as the Assembly has never exercised this right under the Covenant.

The provisions of pars. 1–6 of Sect. A should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the state concerned. DOP, VIII. A. 7

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement. LNC, XV. 8

Under the Covenant the question of whether a dispute arises out of a matter solely within the domestic jurisdiction of one of the parties

[40] Kelsen, *op. cit.*, pp. 59–61, maintains that the Proposals do not provide for any "obligatory" submission of justiciable disputes to the International Court of Justice, although he quotes DOP, VIII. A. 3, which provides that the parties to any dispute likely to endanger international peace and security "should *obligate* [italics mine] themselves to seek a solution by * * * judicial settlement, or other peaceful means of their own choice," and he states that compulsory character is possible only if the Security Council by "calling upon the parties to settle their dispute by such means" creates a legal duty for the parties. The provision of DOP, VIII. A. 4, simply gives the Security Council a club to persuade the parties to comply with their already existing obligation.

[41] Permanent Court of International Justice, Publications, Ser. B, No. 5 (Leyden, 1923), pp. 27–29.

[42] Pfankuchen, *op. cit.*, pp. 583–584; also American Journal of International Law, Supp. 30 (1936), pp. 127–128.

is raised first by the party itself, but the interested party's claim is subject to review by the Council.[43] Under the Proposals nothing is said about such a claim being raised by the interested party nor of its approval by the Security Council, but presumably the Security Council would be the agency which would decide the fact that the dispute arises out of a matter solely within the domestic jurisdiction of the state concerned, unless some provision is subsquently made for such a question to be determined by the Permanent Court of International Justice (or the International Court of Justice, in case the latter is not the same as the Permanent Court of International Justice). Under both the Covenant and the Proposals, if the dispute does so arise, there is no further provision for its settlement.

SECT. B.—DETERMINATION OF THREATS TO THE PEACE AND ACTS OF AGGRESSION AND ACTION WITH RESPECT THERETO

Should the Security Council deem that a failure to settle a dispute in accordance with procedures indicated in par. 3 of Sect. A, or in accordance with its recommendations made under par. 5 of Sect. A, constitutes a threat to the maintenance of international peace and security, it should take any measures necessary for the maintenance of international peace and security in accordance with the purposes and principles of the Organization. DOP, VIII. B. 1

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto. LNC, XV. 4

Under the Covenant, if a dispute (other than one arising out of a matter solely within the domestic jurisdiction of the parties) which is not settled by diplomacy, arbitration, or judicial settlement cannot be settled by mediation by the Council, the Council either unanimously or by a majority vote makes a report on the facts of the dispute with recommendations deemed "just and proper" with regard to the situation. Under the Proposals, in case of a continued threat of the nature described to international peace and security, the Security Council can take "any measures necessary" for peace and security which are in accord "with the purposes and principles of the Organization." As pointed out above (DOP, VI. C. 3), decisions of the Security Council on such matters are "made by an affirmative vote of seven members, including the concurring votes of the permanent members," and if the interested party is a member of the Security Council, it may participate in the voting, unless the threat of war is *not* immediate or the dispute is a regional one. It will be noted that, under the Covenant, only a report with recommendations may be made by the Council and the members have the responsibility of taking appropriate action (LNC, XVI), while, under the Proposals, any measures may be taken by the Security Council not inconsistent with the purposes of the Organization.

Under the Covenant, if the report of the Council is agreed upon unanimously (apart from the parties to the dispute), the members of the League agree not to go to war with the party to the dispute com-

[43] For a discussion of the jurisdiction of the Permanent Court of International Justice in domestic questions, see Sidney B. Jacoby, Some Aspects of the Jurisdiction of the Permanent Court of International Justice, American Journal of International Law, 30 (1936), pp. 242–247, and H. Arthur Steiner, Some Fundamental Conceptions of International Law of the Permanent Court of International Justice, American Journal of International Law, 30 (1936), pp. 419–420.

plying with the recommendations in the report (LNC, XV. 6), while, if the report of the Council is agreed upon by a simple majority, the members of the League reserve their freedom of action (LNC, XV. 7), although it might be argued that there may be some conflict between this provision and the provision discussed below, namely, that, in case of any threat of war, "the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations" (LNC, XI. 1).

In general the Security Council should determine the existence of any threat to the peace, breach of the peace or act of aggression and should make any recommendations or decide upon the measures to be taken to maintain or restore peace and security. DOP, VIII. B. 2

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary-General shall, on the request of any Member of the League, forthwith summon a meeting of the Council. LNC, XI. 1

Under the Covenant, "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League" (LNC, X). Any threat of war, regardless of whether it immediately affects any of the members of the League, is considered "a matter of concern to the whole League" and the League is authorized, indeed obliged, to "take any action that may be deemed wise and effectual to safeguard the peace of nations" (LNC, XI. 1). The rub comes in defining what constitutes aggression. As early as the Fourth Assembly of the League, a special committee of the Temporary Mixed Commission appointed to report on the definition of aggression concluded—

> that no simple definition of aggression can be drawn up, and that no single test of when an act of aggression has actually taken place can be devised. It is therefore clearly necessary to leave the Council complete discretion in the matter.[44]

The report gave detailed reasons why the definition of aggression as "mobilization or violation of a frontier" has lost its value as a test.

The difficulty of defining aggression has not cooled the ardor of those who desire to define aggression, whether they be nations or individuals expert in international law.[45] For instance, the Convention defining Aggression, between Afghanistan, Estonia, Latvia, Persia, Poland, Rumania, Turkey, and the U. S. S. R., signed at London, July 3, 1933, provides:

> ART. 1. Chacune des Hautes Parties contractantes s'engage à accepter dans ses rapports mutuels avec chacune des autres et à partir du jour de la mise en vigueur de la présente convention la définition de l'*agression* telle qu'elle a été expliquée dans le rapport du Comité pour les questions de sécurité en date du 24 mai 1933 (Rapport Politis), à la Conférence pour la réduction et la limitation des armements, rapport fait à la suite de la proposition de la délégation soviétique.
>
> ART. 2. En conséquence, sera reconnu comme *agresseur* dans un conflit international, sous réserve des accords en vigueur entre les parties en conflit, l'État qui, le premier, aura commis l'une des actions suivantes: * * *[46]

[44] Quoted by George A. Finch, A Pact of Non-Aggression, signed editorial, American Journal of International Law, 27 (1933), p. 727.

[45] For a bibliography on aggression, selected by Clyde Eagleton, see Harvard Draft Convention on Rights and Duties of States in Case of Aggression, American Journal of International Law, Supp., 33 (1939), pp. 831–843; also Manley O. Hudson (ed.), International Legislation, Vol. VI (Washington, 1937), p. 411.

[46] 147 League of Nations Treaty Series, p. 70; Hudson, op. cit., pp. 412–413; English text also in American Journal of International Law, Supp., 27 (1933), p. 193, reprinted from Soviet Union Review, Sp. Supp., July–August 1933.

The *actions suivantes* which will make a state committing them an aggressor include: (1) Declaration of war; (2) invasion of territory by armed force, with or without declaration; (3) attack on territory, vessels, or aircraft by land, naval, or air forces, with or without declaration; (4) naval blockade of coasts or ports; and (5) giving of support to armed bands invading territory or refusal to take measures to deprive such bands of assistance, notwithstanding the request of the invaded state. Identical provisions are contained in the Convention defining Aggression, between Czechoslovakia, Rumania, Turkey, the U. S. S. R., and Yugoslavia, signed at London, July 4, 1933.[47]

Typical of the definitions attempted by writers on international law is that of Quincy Wright:

> A state which is under an obligation not to resort to force, which is employing force against another state, and which refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation, is an aggressor, and may be subjected to preventive, deterrent or remedial measures by other states bound by that obligation.[48]

The Harvard Research defined aggression in the following terms:

> "Aggression" is a resort to armed force by a State when such resort has been duly determined, by a means which that State is bound to accept, to constitute a violation of an obligation.[49]

The difficulties attendant upon the attempt to define aggression are indicated in the following statement of Edwin Borchard, whether one agrees with his conclusions or not:

> It must be evident that in modern international relations the line between aggression and defense is metaphysical and incapable of identification, and that if the status of "aggressor" is retained in legal instruments, the determination as to who is the "aggressor" is likely to be political in character. Even the refusal to arbitrate is no infallible criterion of wrongdoing, for it is well known that certain issues affecting great national interests have never been arbitrated, and, under present political organization, are not likely to be. The first armed movement is even less valid as a test, for it overlooks the fact that provocative policy is more important in judging causation than an armed movement consequent upon intolerable conditions thereby created.[50]

Under the Covenant, in case of such a war or threat of war,[51] it devolved upon the Secretary-General of the League, on the request of any member of the League, to "forthwith summon a meeting of the Council," which, as pointed out above, was authorized to "deal * * * with any matter * * * affecting the peace of the world" (LNC, IV. 4).

Under the Proposals, there is a more specific provision authorizing the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and "make recommendations [if these be sufficient] or decide upon the measures to be taken [if action be necessary] to maintain or restore peace and security" (DOP, VIII. B. 2). It will be noted that the Security Council requires no request of a member of the Organization but

[47] Hudson, op. cit., pp. 417–418.
[48] Quincy Wright, The Concept of Aggression in International Law, American Journal of International Law, 29 (1935), p. 395.
[49] Harvard Draft Convention on Rights and Duties of States in Case of Aggression, Art. 1 (a), American Journal of International Law, Supp., 33 (1939), p. 827.
[50] Edwin Borchard, "War" and "Peace", signed editorial, American Journal of International Law, 27 (1933), pp. 116–117.
[51] Yet U. S. Department of State Publication 2223 states that the Covenant "made only outright war illegal." Cf. David Lawrence, New League Principles Called Same as Old, Washington, the Evening Star, October 12, 1944, p. A10.

determines the existence of the threat or of the aggression itself. It will also be noted that the Security Council not only may "make recommendations" dealing with the situation (which is virtually the extent of the powers of the Council of the League), but may also actually "decide" upon the measures to be taken. The Proposals also mention specifically an "act of aggression" (which is not mentioned in LNC, XI. 1), although they do not define what constitutes an act of aggression.

This failure to define aggression has been pointed out more than once since the publication of the Proposals. For instance, the members of the Administrative Board, National Catholic Welfare Conference, in the names of the bishops of the United States, on November 19, 1944, issued a declaration on the peace that is to come, in the course of which they said:

> Nations which refuse to submit their international disputes which constitute a threat to the peace or the common good of the international community should be treated by the international organization as outlaw nations.[52]

Although this is perhaps an oversimplified formula for defining aggression, the statement points out that—

> obligatory arbitration of international disputes which threaten world peace would mark a signal advance in international relations.

An ingenious and more detailed attempt to define aggression for the purposes of the Proposals has been made by George A. Finch.[53] He starts with the premise that—

> Aggression by nations, like guilt for murder or trespass, should be regarded as a judicial question to be tried by a court and not by a political council meeting behind closed doors and dominated perhaps by nations whose selfish interests might influence their votes.

On this basis, he suggests that—

> The Permanent Court of International Justice, which it is proposed to retain, should be vested with jurisdiction to hear and determine in public sessions charges of aggression brought by any member of the international community against any other member. For prompt relief, the court should be empowered to order a cessation of all aggressive acts pending the trial and decision of the case. The court's orders and decisions should be certified to the Security Council, which should thereupon put in motion the appropriate sanctions provided in Chapter VIII, including, if necessary, the armed forces at its disposal. The convicted aggressor should, of course, have no vote on the application of sanctions.

For the guidance of the Permanent Court of International Justice, he proposes "a simple definition * * * which the public can understand." For such a definition he goes to one of the several nonaggression treaties negotiated by the Soviet Government a decade ago with nearly all of its neighbors, specifically, that with Finland of January 21, 1932, which provided (Art. 1, par. 2) that—

> Any act of violence infringing the integrity and inviolability of the territory, or directed against the political independence of the other high contracting party, will be regarded as an aggression even should the said act be carried out without a declaration of war and any evident manifestation thereof.[54]

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[52] The Catholic Review, November 24, 1944, p. 2; the New York Times, November 19, 1944, p. 1. The declaration was signed by Edward Mooney, Archbishop of Detroit, Chairman; Samuel A. Stritch, Archbishop of Chicago, Vice Chairman; Francis J. Spellman, Archbishop of New York, Secretary; John T. McNicholas, Archbishop of Cincinnati; John Gregory Murray, Archbishop of St. Paul; John J. Mitty, Archbishop of San Francisco; Joseph F. Rummell, Archbishop of New Orleans; John F. Noll, Bishop of Fort Wayne; Karl J. Alter, Bishop of Toledo; and James H. Ryan, Bishop of Omaha.

[53] George A. Finch, World Court Favored, letter to the Editor, the New York Times, October 22, 1944, p. E8.

[54] American Journal of International Law, Supp., 27 (1933), p. 172.

As Finch points out—

> The advantages of this legal approach to the solution of the problem of international aggression are threefold: (1) It avoids the difficulty of a unanimous vote by a political body and substitutes the majority opinion of a judicial court; (2) it requires no dubious division of the nations of the world into two groups of potential aggressors and peace-loving nations; (3) it answers the constitutional objection to the delegation of the Congressional war power to an executive agent of our Government. A general act of Congress could confer authority upon the President to use the armed forces of the United States in cooperation with other nations to make effective the decisions of a World Court which the United States would join for the purpose of contributing to the elimination of war and to the administration of international justice.[55]

The Security Council should be empowered to determine what diplomatic, economic, or other measures not involving the use of armed force should be employed to give effect to its decisions, and to call upon the members of the Organization to apply such measures. Such measures may include complete or partial interruption of rail, sea, air, postal, telegraphic, radio and other means of communication and the severance of diplomatic and economic relations. DOP, VIII. B. 3

Should any Member of the League resort to war in disregard of its covenants under Arts. 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. LNC, XVI. 1

Under the Covenant, if a member of the League resorts to war in disregard of its obligations under Articles XII, XIII, or XV, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League. In such a contingency, the members of the League by their signature of the Covenant undertake immediately on their own initiative to sever "all trade and financial relations" and to prevent "all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State" whatsoever. Such sanctions were to be applicable only (1) if there was a resort to war, not if there were merely a threat to peace, (2) if the member of the League resorts to war in the manner described, and (3) if the individual members of the League presumably decided for themselves whether such a resort to war existed in fact.

Under the Proposals, all measures, short of armed force, to be employed to give effect to the decisions of the Security Council with regard to the existence of any threat to the peace, breach of the peace, or act of aggression or with regard to the maintenance or restoration of peace and security are to be determined by the Security Council, which is empowered to call upon—that is, direct—the members of the Organization, and they are obliged (DOP, VI. B. 4) to apply such measures. (See also DOP, II. 5: "All members of the Organization shall give every assistance to the Organization in any action undertaken by it in accordance with the provisions of the Charter.") Such measures may specifically extend to blockade of communications in whole or in part or severance of diplomatic and economic relations.

[55] Subsequently, he explains "the difference between a supposed delegation of Congressional power through the World Court and through the Security Council," by referring to the precedent of the treaty of April 7, 1862, between Great Britain and the United States, establishing mixed courts of justice at Sierra Leone and at the Cape of Good Hope in Africa and at New York to adjudicate violations of the outlawed slave trade. George A. Finch, To Define Aggression, letter to the Editor, the New York Times, November 12, 1944, p. E8.

Instead of the automatic severance of all trade and financial relations by the individual action of the members of the League required by the Covenant, which might be equally injurious to the state applying sanctions and which in some cases might be incommensurate with the objective sought to be attained, the application of sanctions under the Proposals is to be decided by the Security Council and is to be adjustable to the end sought to be attained.

Should the Security Council consider such measures to be inadequate, it should be empowered to take such action by air, naval or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land forces of members of the Organization. DOP, VIII. B. 4

[Members to make available armed forces. DOP, VIII. B. 5.]

[Members to make available air force contingents for combined international enforcement action. DOP, VIII. B. 6.]

[Security Council should determine whether enforcement is to be by combined action or by some members in specific cases. DOP, VIII. B. 7.]

[Security Council to make plans for use of armed force with assistance of Military Staff Committee. DOP, VIII. B. 8.]

[Military Staff Committee should be established, responsible to the Security Council. DOP, VIII. B. 9.]

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

Under the Covenant, only the power of recommendation is given to the Council, in case armed force is necessary to protect the covenants of the League. These recommendations extend to "effective military, naval, or air force" and are to be made to the "several Governments concerned," which may or may not act. Under the Proposals, the Security Council is empowered to do, rather than merely to recommend, such action as may be necessary for international peace and security, including "demonstrations, blockade, and other operations by air, sea, or land forces." Members of the Organization are obligated to "make available to the Security Council, on its call," the armed forces and assistance necessary for international peace and security. By prior agreement the numbers and types of forces and the nature of the assistance to be provided are to be specified. For urgent military measures, national air force contingents are to be made available for combined international enforcement action, the details of which are to be decided by the Security Council with the assistance of the Military Staff Committee, a new agency. The Security Council determines whether enforcement is to be by concerted action of all members of the Organization or by some members only in specific cases, whether members of the Security Council or not. A Military Staff Committee is to be established, composed of the Chiefs of Staff of the permanent members of the Security Council or their representatives, with occasionally association of representatives of nonpermanent members as circumstances require, operating under the Security

Council. "Questions of command of forces should be worked out subsequently."

These provisions are aimed at remedying a weakness of the relevant provisions of the Covenant. The question with regard to the actual command of the Military Staff Committee or of the combined forces, which remains to be worked out, is one that has wrecked other attempts in history to provide for joint forces, but it may be argued that if such a problem can be solved, as it has been and is being solved, in time of war, there is reason to hope that it may be solved satisfactorily in time of peace.

The members of the Organization should join in affording mutual assistance in carrying out the measures decided upon by the Security Council. DOP, VIII. B. 10

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League. LNC, XVI. 3

The object of this provision, both in the Proposals as well as in the Covenant, is to ensure the support of all in all measures taken against a disturber of the peace of the international community. Under the Covenant, the provision is in a sense more specific and, by that very reason, more restricted. Under the Proposals, the provision is comprehensive in that the members are to afford mutual assistance in carrying out the decisions of the Security Council, and these decisions themselves are more far-reaching than those permissible under the Covenant.

Any state, whether a member of the Organization or not, which finds itself confronted with special economic problems arising from the carrying out of measures which have been decided upon by the Security Council should have the right to consult the Security Council in regard to a solution of those problems. DOP, VIII. B. 11

[So far as nonmembers are concerned, covered by LNC, XVII. So far as members are concerned, covered in part by LNC, XVI. 3.]

Under LNC, XVII. 1 and 3, nonmembers of the League involved in a threatened breach of the peace of the international community are invited to accept the obligations of membership in the League for the purpose of such dispute, and if they accept, become subject to LNC, XII–XVI. If they do not accept such an invitation and resort to war against a member of the League, LNC, XVI, becomes operative against them. Under LNC, XVI. 3, the members of the League agree to support one another in measures taken to minimize the loss and inconvenience resulting from the sanctions applied. This "loss and inconvenience" to the states intending to apply such sanctions may have been partially responsible for the breaking down

of the proposal for an embargo by the League on oil and other key products in the Italo-Ethiopian dispute in 1935–36.[56]

Under the Proposals, the Security Council not only decides on the measures of sanctions but also is empowered to adjust the special economic problems arising from the carrying out of the sanctions, whether these problems are those of a member of the Organization or not. Moreover, DOP, II. 6 (2), provides that—

> The Organization should ensure that states not members of the Organization act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.[57]

SECT. C.—REGIONAL ARRANGEMENTS

Nothing in this Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies, either on the initiative of the states concerned or by reference from the Security Council. DOP, VIII. C. 1

The Security Council should, where appropriate, utilize such arrangements or agencies for enforcement action under its authority, but no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council. DOP, VIII. C. 2

The Security Council should at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security. DOP, VIII. C. 3

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace. LNC, XXI

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof. LNC, XX. 1

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations. LNC, XX. 2

Under the Covenant, treaties of arbitration, whether multilateral, like Hague Convention I of 1899 and 1907 and the General Treaty of Inter-American Arbitration of 1929, or bilateral, which were capable of resolving disputes between nations by peaceful means, were not to be superseded by League action, since the purpose of both was to prevent disputes from reaching the stage of war. This was all the more desirable because of the fact that many nations were not automatically eligible to membership in the League, not being mentioned in the Annex to the Covenant, and others which were eligible were unwilling to exercise their right to become members or, having become

[56] Proposal IV (a), adopted by the Committee of Eighteen, November 6, 1935, American Journal of International Law, Supp., 30 (1936), p. 56. . See John H. Spencer, The Italian-Ethiopian Dispute and the League of Nations, American Journal of International Law, 31 (1937), pp. 625 and 636, which, however, does not mention the possibility referred to above. Contemporary press dispatches mention opposition or qualified support on the part of Rumania, the U. S. S. R., Venezuela, and Turkey, among others.

[57] This approximates LNC, XVII (which was never applied), in the attempt to extend to nonmembers the obligations of the Organization for the maintenance of peace and security. See Kelsen, *op. cit.*, pp. 48–49.

members, had resigned, and yet a dispute between any one of these and a member of the League might very easily reach the war stage.

The Covenant also refers to "regional understandings like the Monroe doctrine" among the "international engagements * * * for securing the maintenance of peace," although the Monroe Doctrine was a unilateral declaration of policy by the United States [58] and not an "international engagement" nor a "regional understanding" (except in the limited sense of an understanding by the United States with regard to a particular region) until the adoption of the so-called Declaration of Lima, the Declaration of the Solidarity of America, signed at the Eighth International Conference of American States, Lima, December 24, 1938,[59] and the Act of Chapultepec, signed at the Inter-American Conference on War and Peace, Mexico City, March 3, 1945,[60] which gave it multilateral character.

The confusion that might arise under the possibility of several agencies attempting independently to solve the same international conflict at the same time was exemplified in the Chaco dispute between Bolivia and Paraguay.[61] This dispute reached a climax at the very opening of the International Conference of American States on Conciliation and Arbitration in Washington in December 1928. The Conference immediately took cognizance of the situation and a Special Committee was appointed to offer the good offices of the Conference to Bolivia and Paraguay.[62] Meanwhile, the Pope [63] and the League of Nations [64] made efforts to solve the dispute, and the proposal was even made that the case be submitted to the Permanent Court of International Justice.[65]

It was perhaps to avoid such a situation that the Proposals, while not precluding the existence of other agencies appropriate for regional action, provide that the activities of regional agencies should be "consistent with the purposes and principles of the Organization," that the Security Council "be kept fully informed" of such activities and that no enforcement action should be taken under such regional auspices "without the authorization of the Security Council." The provision that regional agencies must be "consistent with the purposes and principles of the Organization" virtually makes the organization and activities of any regional agencies such as those provided for in the recent Conference in Mexico City, subject to the approval of the Security Council. Presumably, if not inconsistent therewith, there will be no interference with the activities of regional agencies in matters appropriate for regional action. This is the same in principle as LNC, XX. 1 and 2.[66]

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[58] J. Reuben Clark, Memorandum on the Monroe Doctrine (Washington, 1930); Chandler P. Anderson The Monroe Doctrine Distinguished in Principle from Mutual Protective Pacts, signed editorial, American Journal of International Law, 30 (1936), pp. 477–479.

[59] Text in American Journal of International Law, Supp. 34 (1940), p. 199. See also Charles G. Fenwick, The Monroe Doctrine and the Declaration of Lima, American Journal of International Law, 33 (1939), pp. 257–268.

[60] The Department of State Bulletin, Vol. XII, No. 297, March 4, 1945, pp. 339-340; the New York Times, March 4, 1945, Sect. 1, p. 25. This Act continentalizes the Monroe Doctrine.

[61] For a running account of the solution of this dispute, see Lester H. Woolsey, The Bolivia-Paraguay Dispute, American Journal of International Law, 23 (1929), pp. 110–112; 24 (1930), pp. 122–126, 573–577; The Chaco Dispute, 26 (1932), pp. 796–801; 28 (1934), pp. 724-729; all signed editorials.

[62] Herbert F. Wright (ed.), Proceedings of the International Conference of American States on Conciliation and Arbitration (Washington, 1929), pp. 88–89.

[63] Letter Le Notizie Che, to the Presidents of Bolivia and Paraguay, Dec. 18, 1928, in Harry C. Koenig (ed.), Principles for Peace, Selections from Papal Documents, Leo XIII to Pius XII (Washington, 1943), pp. 382–383.

[64] For a list of documents of the League concerning the dispute, see American Journal of International Law, Supp. 33 (1939), p. 841.

[65] Manley O. Hudson, The Thirteenth Year of the Permanent Court of International Justice, American Journal of International Law, 29 (1935), pp. 16–18.

[66] Cf. David Lawrence, New League Principles Called Same as Old, Washington, the Evening Star, October 12, 1944, p. A10.

The inclusion of a provision for encouragement of the settlement of "local disputes through such regional arrangements or by such regional agencies" (which, under the Crimea Conference extension of DOP, VI. C. 3, requires the concurring vote of the permanent members of the Security Council) was probably intended to cover such principles as that American disputes should be settled by Americans [67] or such proposals as an Inter-American Court of International Justice [68] or other regional courts.

CHAP. IX.—ARRANGEMENTS FOR INTERNATIONAL ECONOMIC AND SOCIAL COOPERATION

SECT. A.—PURPOSE AND RELATIONSHIPS

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly and, under the authority of the General Assembly, in an Economic and Social Council. DOP, IX. A. 1

The various specialized economic, social and other organizations and agencies would have responsibilities in their respective fields as defined in their statutes. Each such organization or agency should be brought into relationship with the Organization on terms to be determined by agreement between the Economic and Social Council and the appropriate authorities of the specialized organization or agency, subject to the approval of the General Assembly. DOP, IX. A. 2

[LNC, XXIII, provided for maintenance of fair labor conditions, just treatment of natives, control of traffic in women and children and traffic in opium, supervision of trade in arms and ammunition, freedom of communications and transit, equitable treatment for commerce, and prevention and control of disease.]

[LNC, XXV, provided for promotion of "Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world."]

[Under LNC, III. 3 and IV. 4, the Assembly and Council may deal with such matters. See LNC, IX.]

There shall be placed under the direction of the League the international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League. LNC, XXIV. 1

The success of the League in such humanitarian and social activities as are embraced in LNC, XXIII and XXV, no doubt warrants the attempt to extend the area of such activities in DOP, IX. A. 1, to economic problems in general and to "promote respect for human rights and fundamental freedoms." Attempts to formulate "human rights," whether this term be considered to embrace only the rights of nations or also the rights of individuals and minorities, has long engaged the attention of statesmen, jurists, and moralists. Without going too far back and making only invidious selections, reference might be made to the Declaration of the Rights and Duties of Nations, adopted by the American Institute of International Law at its first session in Washington, January 6, 1916,[69] and the Declaration of the Rights of Man, adopted by the Institute of International Law at its session in the United States, October 12, 1929.[70] The Seventh

[67] Cf. Art. 3 of the General Treaty of Inter-American Arbitration of January 5, 1929; 49 Stat. (pt. 2), p. 3153; U. S. Treaty Series 886; Edward J. Trenwith (ed.), Treaties, etc., Vol. IV (Washington, 1938), p. 4758; American Journal of International Law, Supp. 23 (1929), pp. 83–84.

[68] Pan American Union, Eighth International Conference of American States, Lima, Peru, December 9, 1938, Special Handbook for the Use of Delegates (Washington, 1938), pp. 17–20.

[69] Text in American Journal of International Law, 10 (1916), pp. 124–126.

[70] Text in American Journal of International Law, 24 (1930), p. 560; Jacques Maritain, Les droits de l'homme et la loi naturelle (New York, 1942), pp. 139–142.

International Conference of American States, held at Montevideo, counted among its achievements a Convention on Rights and Duties of States, signed December 26, 1933.[71] The most recent endeavors in this direction on the part of jurists are embodied in the "Postulates and Principles" contained in The International Law of the Future, elaborated "by a number of North Americans actively interested in international law," [72] under the leadership of Judge Manley O. Hudson.

Among the recent attempts by moralists to formulate "human rights" and "fundamental freedoms" might be mentioned *A Code of International Ethics*, prepared by the International Union of Social Studies and first published in Oxford in December 1937, An International Bill of Rights, drafted by Rev. Wilfrid Parsons, S. J., Professor of Sociology and Politics, the Catholic University of America, in 1941,[73] and Jacques Maritain's *Les droits de l'homme et la loi naturelle*, published in New York in 1942 in a small edition of 200 copies.

The Proposals themselves give no hint as to what it was contemplated should be included in the terms "human rights" and "fundamental freedoms." Until the content of these terms is officially and adequately defined,[74] the use of such terms in international agreements may justifiably give rise to such views as those expressed by Fred K. Nielsen, when he says:

> * * * Not infrequently we hear fulsome lip-service to the ethical principles that are the foundation of international law. Lofty generalities are conveniently unaccompanied by any translation into any form of effort concerned with constructive measures indispensable to giving reality to those principles. Then I am reminded of some effective language used by Judge John Bassett Moore, in referring to some vague, guarded declarations in an international act, as an "illustration of the propensity of the human mind to seek, in glib phrases, a refuge from its disinclination and failure to grapple with stern realities." [75]

Some differences will be noted between the League system and the Proposals in the handling of economic, social, and other humanitarian problems. Under the Covenant, presumably the Assembly and Council may concurrently deal with such matters, creating such commissions or other bodies as they may see fit. Under the Proposals, a new agency is to be created to coordinate all of these matters, the Economic and Social Council, which is to operate under the authority of the General Assembly, without reference to the Security Council. In other words, these matters are to be under the ultimate control of all of the members of the Organization on the basis of equality and presumably are not to be dominated by the powers controlling the

[71] 49 Stat. (pt. 2), p. 3097; U. S. Treaty Series 881; Trenwith, *op. cit.*, p. 4807; 165 League of Nations Treaty Series, 19. As of December 31, 1941, it was in force for all of the 21 American republics except Argentina, Bolivia, Paraguay, Peru, and Uruguay. Treaties in Force, p. 30.

[72] The International Law of the Future, American Journal of International Law, Supp., 38 (1944), pp. 54–55.

[73] America's Peace Aims, a Committee Report of the Catholic Association for International Peace, Pamphlet No. 28 (Washington, 1941), pp. 23–24.

[74] The Federal Council of Churches of Christ in America, at the second national study conference, held in Cleveland January 16–19, 1945, recommended that "there be established a special commission on human rights and fundamental freedoms." Cong. Rec., 79th Cong., 1st Sess., Vol. 91, No. 26, February 12, 1945, p. A605.

The Inter-American Juridical Committee at Rio de Janeiro similarly declared that "It would seem desirable to include in the charter of the new international organization an international bill of rights containing the rights that are fundamental for the protection of the individual citizen. An international bill of rights might, if sufficiently comprehensive, preclude the necessity of making provision for the protection of minorities in countries where there are large minority groups that have long possessed a separate national character." Pan American Union, Inter-American Conference on Problems of War and Peace, Mexico City, February 1945, Handbook for the Use of Delegates (Washington, 1945), p. 172.

Senator Warren B. Austin has expressed the "hope that the proposed court will operate on the equivalent of a bill of rights which will comprehend human relations." Cong. Rec., 79th Cong. 1st Sess., Vol. 91, No. 15, January 15, 1945, p. 496, col. 2.

[75] Fred K. Nielsen, Pacific Settlement of International Disputes, an address before the Institute of International Law, Washington, April 28, 1943, p. 3.

Security Council. Moreover, whereas under the Covenant existing international bureaus already established by general treaties are to be placed under the "direction" of the League "if the parties to such treaties consent," under the Proposals each such organization or agency is to be brought into "relationship" with the Organization by agreement between the Economic and Social Council and the appropriate authorities of the specialized organization or agency, of course, subject to the approval of the General Assembly. No independent existence of any international agency is presumably contemplated under the Proposals, if the rather equivocal term "relationship" is interpreted to mean "conformity" or "control." One is constrained to inquire: How is this provision intended to apply, if at all, to such organizations as the Pan American Union or the Universal Postal Union?

SECT. B.—COMPOSITION AND VOTING

The Economic and Social Council should consist of representatives of eighteen members of the Organization. The states to be represented for this purpose should be elected by the General Assembly for terms of three years. Each such state should have one representative, who should have one vote. Decisions of the Economic and Social Council should be taken by simple majority vote of those present and voting. DOP, IX. B

[Under LNC, III. 3, and IV. 4, the Assembly and Council may presumably deal with such matters, except that under LNC, IX, a Permanent Commission was to advise the Council on matters included in LNC, I–VIII, and military, naval, and air questions.]

The provisions of the Proposals with regard to the Economic and Social Council exhibit an intention of establishing a body in between the Security Council and the General Assembly, from the point of view of size, for the determination of the more or less noncontroversial, or at least nonpolitical, matters coming within the competence of the new body as described above. This makes for a more wieldy body in handling such matters with dispatch, while at the same time it provides for widespread participation in the determination of such matters on the part of the members of the Organization at large. Unlike the nonpermanent members of the Security Council, the Economic and Social Council is to be renewed integrally every 3 years. Presumably, but not necessarily, the members of the Security Council will be represented on the Economic and Social Council and the remaining 13 members will be selected from among the other members of the Organization. No provision is mentioned concerning nonreeligibility; unless some such provision is added, there is nothing to prevent members of the Economic and Social Council from being reelected at the expiration of their respective terms. It is more than likely that the large number of members of the Economic and Social Council was considered to afford a desirable elasticity. The Economic and Social Council under the Proposals performs some of the functions of the Assembly and Council under the Covenant, but there is no need to repeat here the comments made above concerning voting in the Security Council and the General Assembly, since the voting here is by simple majority.

[DOP, IX. C, provides that the Economic and Social Council should be empowered to carry out recommendations of the General Assembly, make

[Under the LNC, these functions are performed by the Council and Assembly and agencies created by them.]

recommendations on its own initiative in economic, social, and humanitarian matters, coordinate activities of other organizations and agencies, enable the Secretary-General to provide information to the Security Council, assist the Security Council on request, and perform such other functions as may be assigned by the General Assembly.]

[DOP, IX. D, covers organization and procedure of the Economic and Social Council.]

These provisions cover the setting up of an economic commission, a social commission, and such other commissions as may be required, all consisting of experts, and the establishment of a permanent staff as a part of the Secretariat of the Organization. Suitable arrangements are to be made by the Economic and Social Council for the participation (without vote) of representatives of specialized organizations and agencies in the deliberations of the Economic and Social Council and its commissions. The Economic and Social Council is to adopt its own rules of procedure and method of selecting its President.

CHAP. X.—THE SECRETARIAT

There should be a Secretariat comprising a Secretary-General and such staff as may be required. The Secretary-General should be the chief administrative officer of the Organization. He should be elected by the General Assembly, on recommendation of the Security Council, for such term and under such conditions as are specified in the Charter. DOP, X. 1

The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required. LNC, VI. 1

The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly. LNC, VI. 2

The secretaries and staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council. LNC, VI. 3

Both the Covenant and the Proposals provide for a Secretary-General and such staff as may be required. As the Proposals are silent on the headquarters of the Organization, they likewise do not specify that the permanent Secretariat should be established at such headquarters. Presumably this is one of the "other questions" mentioned in a note appended to the Proposals as "still under consideration." [76] The Proposals do, however, specify that the Secretary-General should be the chief administrative officer of the Organization, a more or less self-evident fact which was omitted from the Covenant but corresponds with the actual practice thereunder. The Covenant provided that the first Secretary-General was to be the person named in the Annex, namely, Sir James Eric Drummond (British).[77] The Covenant did not specify his term, but his successor was appointed by the Council with the approval of the Assembly. Under the Proposals, however, the Secretary-General is to be elected from the very beginning by the General Assembly, on the recommendation of the Security

[76] See above, note 27.

[77] He was succeeded on July 1, 1933, by Joseph Avenol (French). It may be noted in passing that the first Director of the International Labor Organization was Albert Thomas (French), who was succeeded in 1932 by H. B. Butler (British).

Council, for such term and under such conditions as are eventually specified in the Charter.

The Secretary-General should act in that capacity in all meetings of the General Assembly, of the Security Council, and of the Economic and Social Council and should make an annual report to the General Assembly on the work of the Organization. DOP, X. 2

The Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council. LNC, VI. 4

There is no substantial difference here, except that under the Proposals the Secretary-General is required to make an annual report to the General Assembly on the work of the Organization.

The Secretary-General should have the right to bring to the attention of the Security Council any matter which in his opinion may threaten international peace and security. DOP, X. 3

* * * In case any such emergency war or threat of war should arise, the Secretary-General shall, on the request of any Member of the League, forthwith summon a meeting of the Council. LNC, XI. 1

Herein the Proposals give much broader powers to the Secretary-General than did the Covenant. Such limited initiative as was accorded him under the Covenant could only be exercised on the request of a member of the League. Under the Proposals he would have the right to bring to the attention of the Security Council on his own initiative any matter which he thought desirable in the interest of maintaining peace and security.

CHAP. XI.—AMENDMENTS.

Amendments should come into force for all members of the Organization, when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by the members of the Organization having permanent membership on the Security Council and by a majority of the other members of the Organization. DOP, XI

Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly. LNC, XXVI. 1

No such amendments shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League. LNC, XXVI. 2

A fundamental difference is to be noted here. Under the Covenant amendments could become effective only when ratified by all the members of the Council and by a majority of all the members of the Assembly. In this way, all of the members of the Council have a double voice, once in the Council and once in the Assembly. But, if so adopted, an amendment would bind every other member of the League unless it dissented and thereby forfeited membership in the League. Under this procedure each member of the Council has a veto.

Under the Proposals, however, amendments are to become effective when adopted by two-thirds of the members of the General Assembly and ratified by the permanent members of the Security Council and a majority of the *other* members of the Organization. If so adopted, an amendment would bind every other member of the Organization, even without its specific consent, as in the case of Amendments to the Constitution of the United States. Under this procedure only each *permanent* member of the Security Council has a veto. There seems little ground for believing that such a provision would prejudice the

rights of the smaller States, since any amendment which can command the vote of two-thirds of the members of the General Assembly and the ratification of all of the permanent members of the Security Council plus a majority of all the other members of the Organization—which means ratification by 55 to 60 percent of all of the members of the Organization, depending on the number of members constituting the Organization—is not apt to be one to which objection could reasonably be made.

Chap. XII.—Transitional Arrangements

[DOP, XII. 1, provides for consultation for joint action pending the coming into force of special agreements referred to in DOP, VIII. B. 5, and in accordance with par. 5 of the Four-Nations Moscow Declaration of October 30, 1943.]

In paragraph 5 of the Four-Nations Moscow Declaration of October 30, 1943, the Governments of the United States, the United Kingdom, the Soviet Union, and China jointly declare:

> That for the purpose of maintaining international peace and security pending the reestablishment of law and order and the inauguration of a system of general security, they will consult with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations.[78]

Presumably this provision covers the Cairo Conference of President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill, November 22–26, 1943,[79] the Teheran Conference of Premier Stalin, President Roosevelt, and Prime Minister Churchill, November 26–December 2, 1943,[80] and the Crimea Conference of Prime Minister Churchill, President Roosevelt, and Marshal Stalin, at Yalta, February 6–12, 1945.[81]

> No provision of the Charter should preclude action taken or authorized in relation to enemy states as a result of the present war by the Governments having responsibility for such action. DOP, XII. 2

These innocent-looking words may contain the dynamite disruptive of the entire scheme for a general international organization, since they underwrite the agreements arrived at at Moscow, Cairo, Teheran, and Yalta, whatever may have been their undisclosed contents. In plain words, this means that the eventual Charter and the Organization operating thereunder will be prohibited ("preclude" means "hinder," "prevent," or "render ineffectual") any "action taken or authorized in relation to enemy states"—that is, Germany, Bulgaria, Finland, Hungary, Italy, Japan, Rumania, and Thailand[82]—"by the

[78] War Documents, U. S. Department of State Publication 2162 (Washington, 1944), p. 10; American Journal of International Law, Supp., 38 (1944), p. 5.
[79] War Documents, p. 26; The Department of State Bulletin, Vol. IX, No. 232 (December 4, 1943), p. 393; American Journal of International Law, Supp. 38 (1944), pp. 8–9.
[80] War Documents, pp. 27–28; The Department of State Bulletin, Vo. IX, No. 233 (December 11, 1943), pp. 409–410; American Journal of International Law, Supp. 38 (1944), pp. 9–10.
[81] Crimean Conference, Senate Doc. No. 8, 79th Cong., 1st Sess.; The Department of State Bulletin, Vol. XII, No. 295 (February 18, 1945), pp. 213–216.
[82] Alignment of the Nations at War, as of November 1, 1943, The Department of State Bulletin, Vol. IX, No. 230 (November 20, 1943), pp. 349–372.

Governments having responsibility for such action." It is not indicated whether such "responsibility" is assumed by the Government or Governments in question on their own initiative or is only that accorded by the joint action or agreement of the United Nations or any group thereof. That it conceivably covers both may be argued from the use of the words "action taken or authorized" in the preceding phrase. Moreover, the term "enemy states" might be alleged equivocally as including states at one time or another completely occupied by the enemy, in which case Belgium, Czechoslovakia, Denmark, Greece, Luxembourg, Netherlands, Norway, Poland, and Yugoslavia would be included in the provision.

An example will suffice to show how this provision might be applied. The Crimea Conference, while professedly reaffirming "faith in the principles of the Atlantic Charter" of August 14, 1941,[83] and corroborating the "pledge in the declaration of the United Nations" of January 1, 1942,[84] decided that "the eastern frontier of Poland should follow the Curzon line" in general, with compensation for the lost territory to the east by "substantial accessions of territory in the north and west." Under the Proposals such action cannot be "precluded"—that is, rendered ineffectual—by any provision in the eventual Charter. It might be remarked in passing that it was the invasion of Polish territory which was largely responsible for the outbreak of the war and that Poland is a signatory of the United Nations Declaration of 1942.

It has also been maintained that—

> the Anglo-Soviet mutual assistance agreement of May 26, 1942, the Soviet-Czechoslovak treaty of December 12, 1943, the Franco-Soviet treaty of alliance and mutual assistance of December 10, 1944, and any similar agreements which might be made—

such as the Anglo-Soviet-United States agreement which was suggested by Senator Arthur H. Vandenberg, "fit the pattern of the general international organization for security and peace," since "they run against Germany and her Axis specifically." [85] It is difficult to see how the parties to these treaties could fulfill their obligations under DOP, VIII. B. 3, and DOP, II. 5, if any of the other parties were to be adjudged an aggressor by the Security Council.

NOTE

In addition to the question of voting procedure in the Security Council referred to in Chap. VI, several other questions are still under consideration.

Among the topics covered by the Covenant and not covered by the Proposals are the right of withdrawal from membership after 2 years' notice (LNC, I. 3) or after dissent from an adopted amendment (LNC, XXVI. 2),[86] the designation of a headquarters (LNC, VII. 3),

[83] War Documents, p. 1; The Department of State Bulletin, Vol. V, No. 112 (August 16, 1941), pp. 125–126; American Journal of International Law, Supp., 35 (1941), pp. 191–192.

[84] War Documents, pp. 2–3; The Department of State Bulletin, Vol. VI, No. 132 (January 3, 1942), pp. 3–4; American Journal of International Law, Supp., 36 (1942), pp. 191–192.

[85] Senator Austin, *op. cit.*, p. 489, col. 1. The Inter-American Juridical Committee raised "the question whether the alliances recently contracted and now being proposed are not *ipso facto* incompatible with the terms of the Charter." Pan American Union, *op. cit.*, p. 200. David Lawrence, Grew's Speech Seen Bow to Expediency, Washington, the Evening Star, January 19, 1945, also denies this consistency, since both the Soviet-Czechoslovak and the Franco-Soviet treaties "are committed to render aid to Russia, irrespective of whether the latter nation is herself guilty of aggression," and vice versa.

[86] Kelsen, *op. cit.*, p. 50, hopes that the omission of the right of withdrawal was intentional "so that the United Nations may become a permanent League for the maintenance of peace, in the true sense of the term."

already discussed above, the equality of women in official positions (LNC, VII. 3), the diplomatic privileges and immunities of representatives of members engaged in official business (LNC, VII. 4), the inviolability of League property (LNC, VII. 5), the registration of treaties as a condition precedent to binding obligation (LNC, XVIII), the revision of treaties (LNC, XIX), at least, specifically,[87] and the specification of mandates (LNC, XXII. 1–6).

Finally, as Koenig points out, the—

> principal defect of the League was the fact that the sole motivating force behind observance of its provisions was utilitarian interests of individual nations, who supported the articles of the League as long as they favored their national advantage.[88]

Cheerfully granting that "Many of the League's ordinances were wise," he continues:

> * * * But these injunctions failed during the existence of the old League because they were not founded on justice and the moral law. And they will fail again more disastrously if the United Nations are guided by the same slippery utilitarianism.

There is no reference to justice [89] in the Proposals except the provision for the creation of an International Court of Justice, and there is no reference to the moral law except the veiled one to "the respect for human rights and fundamental freedoms" (DOP, IX. A. 1). This defect in the Proposals is probably what induced the Catholic Bishops of the United States, in their declaration of November 19, 1944, to say:

> * * * The gilded dreams of a new era, which these systems [like that of the League] heralded, have proved to be hideous nightmares. If we are to have a just and lasting peace, it must be the creation of a sane realism, which has a clear vision of the moral law, a reverent acknowledgment of God as Author, and a recognition of the oneness of the human race underlying all national distinctions.[90]

[87] Cf. Walter Lippmann, Senator Vandenberg's Thesis, the Washington Post, March 15, 1945, p. 13, who argues that revision of treaties is implicit in DOP, VIII. A. 1.

[88] Koenig, Dumbarton Oaks, Catholic Digest, 9 (January 1945), p. 6. See also James Brown Scott, A Single Standard of Morality for the Individual and the State, American Society of International Law, Proceedings, 1932, pp. 10–29; H. Lauterpacht, The Law of Nations, the Law of Nature, and the Rights of Man, paper read before the Grotius Society, London, December 7, 1942; and Herbert Wright, The Moral Bases of International Law, American Society of International Law, Proceedings, 1941, pp. 52–63.

[89] The Inter-American Juridical Committee declares that international law "must represent the sense of justice of the international community." Pan American Union, *op. cit.*, p. 170.

[90] The Catholic Review, November 24, 1944, p. 2; The New York Times, November 19, 1944, p. 1.

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