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The Withdrawal From the League of Nations Revisited

Konstantin D. Magliveras*

I. Introduction

The formation of the League of Nations (League) was the first attempt ever to regulate and to bind the legal relationships among the different members of the international community. The original thirty-two countries that agreed to be bound by the Covenant of the League of Nations (Covenant) wanted to ensure that the League was only a concert of independent states and not a federal union. The League did not aim at establishing a supranational government. The insertion of a withdrawal clause in the very first article of the Covenant contained a manifestation that the League was not intended to be an eternal association of sovereign states.

An examination of the Covenant's withdrawal clause is the subject of this article. Although the withdrawal clause was worded in an elaborate fashion, it created many problems which at times threatened the League's existence. In Sections II and III, the analysis commences with an account of how the withdrawal clause was drafted and continues with questions of its interpretation that were not addressed during its drafting. As examples of how the League functioned in different countries, Section IV deals with the secession of Germany in 1933, and Section V deals with the subsequent withdrawal of three Latin American countries: Honduras, Nicaragua, and Paraguay. Sections VI and VII offer further analysis of the obligations that were mandated in accordance with the withdrawal clause at the time of secession, as well as discussion on who would decide whether such obligations had been properly fulfilled.

Section VIII addresses the possibility of *de facto* withdrawal from the League resulting from events that occurred either in the interior of a Member State or in her association with foreign relations, such as: the Italian annexation of Ethiopia in 1936, the Italian annexation of Albania in 1939, and the German annexation of Austria in 1938. Additional case analysis is presented in Sections IX and X where there is an examination of both Japan's withdrawal and the

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innovative provision of Article 26(2) of the Covenant. The secession of Japan in 1933 raises the question of whether after having withdrawn from the League, Japan could validly continue her mandate on certain Pacific Ocean Islands when the mandate was granted by the League in 1926. Finally, Sections XI and XII are an overview of why a withdrawal clause is not part of the United Nations at the present time.

II. The Drafting of the Withdrawal Clause

The first draft of the Covenant of the League of Nations was published on February 14th, 1919, and it was to be incorporated *inter alia* into the Treaty of Versailles (Treaty of Peace).¹ The Covenant was not the constitution of a super state as many argued at that time when interpreting its title. Instead, it was a consent agreement between sovereign states to limit their complete freedom of action in certain areas. This limitation was designed to achieve the greater benefit of cooperation on international problems not only for the states concerned, but also for the world at large.

The Commission of the League of Nations drafted the Covenant based on two assumptions: (1) that one generation could not hope to bind its successors by written words, and (2) that the League must continue to depend on the free consent of its component states.² Surprisingly, none of the numerous proposals prepared by the Allied Powers for the League's Constitution included the right of the signatories' states to withdraw from the League.³ The German scheme for a League of Nations (*Völkerbund*) of April 1919 provided in Article 1 that "the League shall be permanent," thus, it excluded any right of secession.⁴

When President Wilson⁵ brought this draft Covenant back to the United States, fierce criticism was launched against the docu-

1. The Covenant was embodied in the following Treaties of Peace: Treaty of Versailles (with Germany signing on June 28, 1919); Treaty of Saint-Germain (with Austria signing on September 10, 1920); Treaty of Neuilly (November 27, 1919); Treaty of Trianon (June 4, 1920); and Treaty of Sévres (August 10, 1920).

2. See the Commentary on the League of Nations Covenant presented to the Parliament by the British Foreign Office in June 1919, reprinted in 14 AM. J. INT'L L. 407-18 (1920) [hereinafter Commentary].

3. The Plenary Session of the Preliminary Peace Conference of February 1919 prepared the proposals. See Feinberg, *Unilateral Withdrawal from an International Organization*, 1963 BRIT. Y.B. INT'L L. 189, 193, where reference is made to the various drafts and proposals. See also 13 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, THE PARIS PEACE CONFERENCE 1919 230 (1943) [hereinafter PAPERS RELATING . . .].

4. The scheme is reprinted as Appendix III in F. POLLOCK, *THE LEAGUE OF NATIONS* (1920). The author concludes that: ". . . as a whole the scheme is much more formal and elaborate than the Covenant." *Id.*

5. The establishment of a League of Nations was the last of President Wilson's Fourteen Points on the basis of a new world order of January 1918. He had envisaged a general association of nations formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to all states regardless of their power.

ment with regard to the omission of the right to secede. In late 1919 the United States Senate discussed the draft Covenant. Senator Lodge, the Republican Chairman of the Committee on Foreign Relations, pointed out the dangers that were inherent in the omission of the right to secede.⁶ He said that prior treaties that began by swearing eternal friendship had been abandoned entirely.⁷ In modern times, an indissoluble treaty without the right of secession was very unusual. Although any treaty could be abrogated, violated, overruled, or denounced by action of Congress, forming a treaty without an option to withdraw was very unsatisfactory. Lodge was concerned that peace among nations could not be promoted by forcing countries to remain in the League if they wanted to terminate membership. Naturally such countries would "tear everything to pieces," shattering the League and impairing in every possible way, the sanctity of treaties to cut the bonds with the League.⁸

On November 19, 1919, the Senate accepted four resolutions proposed by the Committee on Foreign Relations. These resolutions were to be added to the resolution of ratification of the Treaty of Peace when it was offered for ratification.⁹ One of these referred to the right of withdrawal: "The United States reserves to itself the unconditional right to withdraw from the League of Nations."¹⁰ The appropriate legal instrument for a notice of withdrawal would be a concurrent resolution of the Congress.¹¹ Republican Senators wanted the President to have an energetic involvement in such an important decision, therefore, they suggested an amendment which provided that "notice of withdrawal may be given by the President or whenever a majority of both Houses of Congress may deem it necessary."¹² No decision was ever reached on this proposed change.¹³

When President Wilson returned to Paris to continue discussions on the draft Covenant, the Democratic Senate Leader demanded "some provision by which a Member State of the League can, on proper notice, may withdraw from membership."¹⁴ President Wilson indicated to the participants in the meeting in Paris that the

6. H. LODGE, *THE SENATE AND THE LEAGUE OF NATIONS* 253-54 (1925). Senator Knox also expressed his dissatisfaction with the lack of a right of secession. See Burns, *Conditions of Withdrawal from the League of Nations*, 29 AM. J. INT'L. L. 40 (1938). An isolationist, he led the group of Republican Senators who rejected the Treaty of Versailles and who prevented United States membership into the League.

7. H. LODGE, *THE SENATE AND THE LEAGUE OF NATIONS* 253-54 (1925).

8. *Id.*

9. These reservations were commonly known as the "Lodge Reservations." See Q. Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM. L. REV. 121 (1920).

10. H. LODGE, *supra* note 7, at 172.

11. *Id.* at 782.

12. *Id.* at 199.

13. See generally *id.*

14. See MILLER, *THE DRAFTING OF THE COVENANT* 277 (1928).

United States would not accept the Covenant unless a withdrawal provision was added.¹⁵ Wilson believed that the majority of the Covenant's drafters viewed withdrawal from the League as permissible, even in the absence of any express provision.¹⁶ However, Lord Cecil¹⁷ challenged President Wilson's assumption and considered the denunciation of the treaty to be illegal under international law unless expressly provided for in the Covenant.¹⁸ As a result of considerable pressure from many sides, the Commission on the League of Nations introduced the following withdrawal clause:

After the expiration of ten years from the ratification of the Treaty of Peace of which this Covenant forms a part, any State or member of the League may, after giving one year's notice of its intention, withdraw from the League, provided all its international obligations and all its obligations under this Covenant shall have been fully fulfilled at the time of its withdrawal.¹⁹

In the opinion of some delegations, this amendment created more problems than it solved. In particular, the French argued that the ten year period, which had to elapse before a state was able to exercise its withdrawal right, would have a bad psychological effect on Member States.²⁰ The ten year period could be regarded as a trial period at the end of which the League could be easily dissolved.²¹ Finally, after much deliberation on this point, the right to secede from the League was formulated in the following words and incorporated in the Covenant as paragraph 3 of Article 1:

Any Member of the League may, after two years' notice of its intention to so do, withdraw from the League, provided that all its international obligations and all its obligations under the Covenant shall have been fulfilled at the time of its withdrawal.²²

15. See Burns, *supra* note 6, at 41.

16. *Id.*

17. At that time, Lord Cecil was in charge of the League of Nations Section at the Foreign Office.

18. The opinion of the legal adviser of the United States Delegation to the Conference supported by Lord Cecil's contention. The opinion was that only states under the doctrine of changed circumstances (*rebus sic stantibus*) could exercise an unwritten right to withdraw from a treaty. See Feinberg, *supra* note 3, at 193.

19. This was an amendment to the Covenant of the League of Nations (1919) [hereinafter Covenant]. The original withdrawal clause stated in Article 1:

Any member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant have been fulfilled at the time of its withdrawal.

Id.

20. See Miller, *supra* note 14, at 342.

21. *Id.*

22. The right of secession was among the very first provisions of the Covenant. However, provisions addressing withdrawal from an international organization or denunciation of a treaty normally are dealt with in the final provisions of the relevant instruments. Under this

Pollock, a leading British commentator of that era, expressed in similar lines that the withdrawal clause was not very likely to be acted upon: "If the League were to break up, it would break up in a different fashion and so long as it holds firm one can hardly conceive what should make it desirable for any other state to secede."²³ The Commentary of the British Foreign Office on the question of the withdrawal clause was euphonious, but it failed to materialize:

The last paragraph [of Article 1] is an important affirmation of the principle of national sovereign, while providing that no state shall be able to withdraw simply in order to escape the consequences of having violated its engagements. It is believed that the concession of the right of withdrawal will, in fact, remove all likelihood of a wish for it, by freeing States from any sense of restraint, and so tending to their more whole-hearted acceptance of membership.²⁴

III. Questions Arising from the Withdrawal Clause

The language of Article 1(3) raised a number of questions. The two most important questions were: (1) what constituted international obligations under this Covenant, and (2) who was to determine fulfillment of these international obligations. The Commission that drafted the Covenant failed to interpret the second part of the withdrawal clause, and it failed to designate which League organization would determine whether a country, expressing her intention to withdraw, had fulfilled her League obligations. The Commission was primarily concerned with the language of the withdrawal clause and the period of time within which a state should be allowed to exercise it.²⁵

The language of the withdrawal clause requires that a state must fulfill its obligations prior to exercising its option to withdrawal from the League. The obligations are classified into two categories: (1) international obligations and (2) conventional obligations in the

provision sixteen states withdrew: Costa Rica (1927); Brazil (1928); Germany and Japan (1935); Guatemala, Honduras, and Nicaragua (1938); El Salvador, Italy, and Paraguay (1939); Chile and Venezuela (1940); and Spain, Hungary, Peru, and Romania (1941).

Article 17(2) of the Havana Convention of Treaties also recognized the right to denounce a treaty when the denouncing party had complied with all obligations stipulated under the treaty in question. This right was present even though the Treaty lacked an express right of denunciation. The Havana Convention was signed by eight South American States (all of which were members of the League) on February 20, 1928; HUDSON'S INTERNATIONAL LEGISLATION 2378 (1937) [hereinafter Havana Convention]; 22 AM. J. INT'L L. Supp. 138 (1928).

23. F. POLLOCK, *supra* note 4, at 47.

24. See Commentary, *supra* note 2, at 407, 408.

25. The only contribution appears to be that of the French delegation which emphasized that withdrawal from the League should only take place on terms that would not injure the League. See Fenwick, *The Fulfilment of Obligations as a Condition of Withdrawal from the League of Nations*, 27 AM. J. INT'L L. 516, 517 (1933).

sense of financial, fundamental, and formal obligations.²⁶ "Fundamental" and "formal" obligations have yet to be distinguished since a distinction does not serve any real purpose. Many commentators have expressed the view that the desire to make the fulfillment of general international obligations a condition of withdrawal from the League as being difficult to explain,²⁷ "superfluous,"²⁸ and without earnestness.²⁹ Other commentators placed little importance on the fact that these obligations were not dependent upon the country's membership in the League. These international obligations (e.g., duties stemming from signing or acceding to a treaty) were not more binding because a state was a member of the League; they were international obligations stemming from the legal force of international law in which even secession from the League would not impair their legal validity. However, although the obligations had to be observed and fulfilled before exercising the withdrawal clause,³⁰ it was almost impossible to establish at any given date whether or not a state had fulfilled all its international obligations.³¹ Therefore, a literal interpretation of Article 1(3) was contrary to common sense.³² No state could show at a moments notice that it had not fulfilled all of its international obligations, no matter how well it conducted its affairs.³³

The importance of including "international obligations" in the wording of Article 1(3) was to prevent it from becoming the perfect vehicle for states to violate obligations under international law and escape the consequences. Under that wording, international or regional organizations could put pressure on those countries that failed to follow their international obligations. Also, the dependency between membership in the various organizations and accession to treaties meant that breaching obligations for one membership could trigger rapid action in a chain of other organizations.³⁴

26. SINGH, *TERMINATION OF MEMBERSHIP IN INTERNATIONAL ORGANISATIONS* 38, *et seq.* (1958).

27. Fenwick, *supra* note 25, at 517.

28. J. RAY, *COMMENTAIRE DU PACTE DE LA SOCIÉTÉ DES NATIONS* 111 (1930).

29. G. HARASZTI, *SOME FUNDAMENTAL PROBLEMS OF THE LAW OF TREATIES* 246 (1973).

30. I SCHÜCKIND & WEHBERG: *DIE SATZUNG DES VÖLKERBUNDES* 373 (3rd ed. 1931).

31. G. HARASZTI, *supra* note 29, at 246.

32. Covenant, *supra* note 19, at art. 1(3).

33. G. HARASZTI, *supra* note 29, at 23.

34. Because of the policy of apartheid, South Africa has been subjected to restrictions on its rights to participate in the work of international organizations (e.g., World Health Organization (WHO) in 1964, International Civil Aviation Organization (ICAO) in 1974, and World Meteorological Organization (WMO) in 1975). Furthermore, the United Nations General Assembly has constantly denied recognition of the credentials of its representatives. Also, the various Conventions that were concluded under the aegis of the Council of Europe provide that any party which ceases to be a member of the Council ceases to be a party to the individual Conventions which it signed. *See, inter alia*, European Convention of Human Rights, November 4, 1950, art. 65(3), 213 U.N.T.S. 221; Convention for the Peaceful Settlement of

Unlike the present, in the period between the two World Wars, the League of Nations was the only entity in the world community that could exercise worldwide pressure. Although this pressure was limited and mostly ineffective, it did influence the governments of those Member States that chose to violate their international obligations. The inclusion of "international obligations" was the drafters' aim at ensuring the longevity and stability of the League; however, this never materialized. The Convention did not effectively control and prevent negative actions undertaken by its Member States, thus, this led to the eventual failure of the experiment with the League.

Nonetheless, areas of effectiveness within the Covenant included its strong advocacy of the dependence of the League on international law as well as the close relationships formed among the Member States and the rest of the world. In fact, the Preamble of the Covenant states that the contracting parties agree to "a scrupulous respect of all treaty obligations in the dealings of organized peoples with each other."³⁵ There are also other parts of the Covenant which portray the interdependence of the League. The all-embracing Article 1(2) stipulated that any country which was not a signatory of the Peace Treaties or was not invited to accede to the Covenant could be admitted as a new member provided that it could guarantee its sincere intention to observe its international obligations.³⁶ Article 11(1) provided that any war or threat of war, irrespective of whether any League member was directly affected, would be declared a matter of concern to the League as a whole.³⁷ The League had to ensure that the peace of all nations, not just peace among members of the League, was safeguarded.³⁸ Article 13(2) stipulated that disputes which would constitute a breach of any international obligation might be submitted to arbitration or judicial settlement.³⁹ Article 17 referred to disputes between Member States and non-members and held that non-members should be invited to subject themselves to the objectives of League membership for the purpose of dispute solving.⁴⁰

Even if a Member State failed to observe all the major obligations due, that country remained a member of the League and was fully bound by the Covenant. A more forceful withdrawal clause, which was not acceptable to the majority of Member States, would

Disputes, April 29, 1957, art. 40, 320 U.N.T.S. 243.

35. Covenant, *supra* note 19, at Preamble.

36. Under this provision, Austria and Germany became members in 1920 and in 1926, respectively.

37. Covenant, *supra* note 19, at art. 11(1).

38. This article should be contrasted with Articles 12 and 13 which expressly referred to disputes, including war, that might arise among Member States.

39. Covenant, *supra* note 19, at art. 13(2).

40. *Id.*

have provided that secession could not be affected unless the state in question had fulfilled all its duties. Such formulation would have made clear that withdrawal from the League did not happen automatically after the period of two years had expired.

By adding fulfillment of all international obligations at the time of a state's withdrawal, the Covenant provided a sanction which the League could use against a withdrawing member that had not fulfilled its international duties.⁴¹ Observance of these obligations became more difficult for Member States to evade because the Covenant itself placed added emphasis on them.⁴² However, if the League had used this sanction properly, results would have been two-fold.⁴³ First, the withdrawing state would have been branded in the public opinion of the world community as having deliberately violated its obligations.⁴⁴ Second, the League organs would have retained jurisdiction in regard to that state's membership even after the two years' notice of withdrawal had elapsed.⁴⁵ Whereas the former argument is undisputed, legal justification was never given for the latter.⁴⁶ If the drafters' aim was to enable the League to retain jurisdiction, there was nothing in the Covenant to suggest it. An express provision to that effect was made in Article 35 of the Convention Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface;⁴⁷ Article 35 stipulated that denunciation was possible on six months' notice, but the Convention would continue to apply for the purpose of calculating any damages that arose before the denunciation period had expired.⁴⁸

IV. The Withdrawal of Germany

The withdrawal of Germany is an example of a Member State who breached her international obligations during the two year notice period prior to secession.⁴⁹ The notification of Germany's intention to leave was sent to the Secretary General of the League on

41. J. Burns, *supra* note 6, at 42.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* It is difficult to see why the author characterized a single condition of withdrawal as "sanction." Not all states withdrew from the League merely in order to escape their obligations, and it would be inappropriate to regard the fulfillment of their international duties as a punishment for seceding from the League. *Id.*

46. As Fenwick correctly pointed out: "No sanction was contemplated in the event of the withdrawal of a state without observing the conditions laid down." C. Fenwick, *supra* note 25, at 518.

47. Convention Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface, October 7, 1952, 310 U.N.T.S. 181 (signed in Rome).

48. Convention, *supra* note 19, at Article 35.

49. See C. FRASER, *DAS AUSTRITT DEUTSCHLANDS AUS DEM VÖLKERBUND: SEINE VORGESCHICHTE UND SEINE NACHWIRKUNGEN* (1969).

October 19, 1933,⁵⁰ and thus, secession would have become effective on October 18, 1935.⁵¹ The reason given by Germany for withdrawing was that the League had failed to carry out the terms of Article 8 (Disarmament) of the Covenant.⁵² Article 8 required all members of the League to reduce their national armaments to the essential minimum "consistent with national safety and the enforcement by common action of international obligations."⁵³ They also agreed to discourage the manufacture "of munitions and implements of war" by private enterprises.⁵⁴

In fact, implementation of Article 8 was the purpose of the Disarmament Conference which opened in Geneva on February 2, 1932, amid Germany's growing advocacy for withdrawal from the League. When Brüning, the head of the German delegation, addressed the Conference, his theme was to articulate Germany's legal and moral claim to general disarmament.⁵⁵

At the beginning of October 1933, the Conference was not progressing well. Having the support of President von Hindenburg, Chancellor Hitler regarded the Conference as an excellent opportunity to leave the League. Hitler knew that such action would not face opposition in Germany and the League would not impose any penalties. Furthermore, it was not likely that the Western powers would agree on concerted action against him.⁵⁶

On October 14, 1933, the German government announced that it was "compelled to leave the Disarmament Conference."⁵⁷ The reason Germany gave was that the Conference had failed to fulfill its objective which was "due solely to the unwillingness on the part of the highly armed states to carry out their contractual obligations to disarm."⁵⁸ None of the Great Powers delivered a direct protest to

50. 15 LEAGUE OF NATIONS O.J. 16 (1934).

51. The withdrawal clause required a two year notice prior to a Member State's secession. It emerged during the Nuremberg Trials that Chancellor Hitler was preoccupied with taking Germany out of the League. In a secret speech delivered to all supreme commanders on November 23, 1939, Hitler said:

. . . while organizing the interior I undertook the task to release Germany from international ties. Two particular characteristics are to be pointed out: secession from the League of Nations and denunciation of the Disarmament Conference. It was a hard decision . . . I was supported by the nation, which stood firmly behind me, when I carried out my intentions. After that the order for rearmament . . . In 1935 the introduction of compulsory military service.

See THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, Part I, 154 (1946).

52. Covenant, *supra* note 19, at art. 8.

53. *Id.*

54. On the evolution of art. 8, see A. ZIMMERN, THE LEAGUE OF NATIONS AND THE ROLE OF LAW 326-33 (1936).

55. See KIMMICH, GERMANY AND THE LEAGUE OF NATIONS 160-62 (1976).

56. Japan had started the procedure for withdrawing from the League in March 1933. Without encountering any problems, the reaction of the Powers to Germany's attempt to subvert Austria was confined to paper protests. *Id.* at 186.

57. *Id.* at 189.

58. *Id.*

Germany, nor contemplated the imposition of effective sanctions. They preferred to remain neutral and to settle the situation individually. The Conference confined itself to refuting the allegations made against it and declared its intention to continue deliberations.⁵⁹ Only France stood out and warned that Germany was rearming and had no intention of observing her international obligations.

Having faced such a mild reaction, on October 17, 1933, Hitler assured his cabinet that the "crucial period" was over. A few days later the German consul at Geneva presented a brief note to the Secretary General of the League that Germany was withdrawing. Chancellor Hitler, wanting to present himself as a truly democratic leader, put his policy (called "policy of peace") towards the League of Nations by a referendum on November 12, 1933. The results were overwhelming — 95% of the population approved Germany's secession.⁶⁰

Although Germany had initiated the procedure to withdraw from the League, she was still bound by the Treaty of Versailles; this posed the main obstacle to Hitler's plans. Part V of the Versailles Treaty ordered almost total disarmament of Germany. It consisted of four relevant provisions: (1) Article 159 provided that Germany's military forces were to be demobilized and reduced; (2) Article 173 abolished universal compulsory military service and provided for the constitution of a Germany army;⁶¹ (3) Article 198 prohibited the existence of military or naval air force, and Article 213 empowered the League to exercise supervision over German armaments;⁶² and (4) Article 213 remained a dead letter and the gap created by the abolition of compulsory conscription⁶³ was filled with non-official organizations that eventually developed into private armies.

During the first months of 1935, Chancellor Hitler did everything possible to admit publicly that the disarmament clauses of the Versailles Treaty were repudiated. In pursuance of this policy, he sent a note to the British government referring to the existence of a German Air Force which directly contravened Article 198.⁶⁴

Germany's official unilateral denunciation of Part V occurred in March 1935, when Germany re-established the compulsory military

59. This reaction was quite pathetic. Since all delegations were well aware that without the presence of Germany, the Conference was virtually meaningless.

60. KIMMICH, *supra* note 55, at 191.

61. In pursuance of this article, a law for the disarmament of the German population was enacted on August 7, 1920.

62. See GRENVILLE, *THE MAJOR INTERNATIONAL TREATIES, 1914-1945*, 68 (1987).

63. "Conscription" is the obligation that is placed on male citizens to serve a certain period of time in the national army. It still exists in most European countries.

64. P.J.N. BAKER, *TERMINATION OF MEMBERSHIP IN THE LEAGUE OF NATIONS* 66 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 153 (1935).

service.⁶⁵ The law ordering compulsory conscription was promulgated on March 16, 1935, and was communicated to the Ambassadors of France, Great Britain, Ireland, and Poland who were convened by the Germany Foreign Minister especially for this announcement.⁶⁶ France was most concerned with these developments, and by invoking Article 11(2) of the Covenant,⁶⁷ France presented the matter before the Council. She argued that in both cases the German government had repudiated by a unilateral act, the contractual engagements embodied in the treaties that it had signed. France also drew the Council's attention to the fact that Germany remained a member of the League until the withdrawal notice had expired and that Germany had undertaken, by virtue of the Covenant's Preamble, "to observe a scrupulous respect for all treaty obligations in the dealings of organized people with each other."⁶⁸

On April 17, 1935, the Council unanimously adopted a resolution which declared that Germany had failed in the duty which lay upon all members of the International Community to respect the undertakings which they had contracted.⁶⁹ The Council also condemned any unilateral repudiation of international obligations. The resolution concluded that such repudiation should call into play all appropriate measures on the part of the members of the League within the framework of the Covenant. In other words, the resolution contained an indirect threat to impose sanctions on those states that repudiated their obligations.

The Council watered down its reaction to Germany's actions. It confined itself to empty words and it failed to agree on the adoption of a resolution expressly condemning conscription in Germany because the Council feared that such a resolution would make Germany's return to the League impossible. Even at this late stage, there were still governments which strongly believed Hitler's pronouncement that the "honest desire" of all Germans was to regain membership in the League.⁷⁰ Finally, the Council took the typical action of that era — it requested that a committee be appointed to

65. Following defeat in World War I, Article 173 was regarded as the everlasting humiliation. See Fenwick, *The Denunciation of the Disarmament Clauses in the Treaty of Versailles*, 29 AM. J. INT'L L. 675 (1935). See also A. DAVID, *THE STRATEGY OF TREATY TERMINATION* 68 (1975).

66. The text of this law is reprinted in PAPERS RELATING . . . , *supra* note 3, at 330.

67. Covenant, *supra* note 19, at art. 11(2). The text of this paragraph read:

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

Id.

68. 16 LEAGUE OF NATIONS O.J. 569 (1935).

69. The resolution of the Covenant contained an indirect threat to impose sanctions on those states that repudiated their obligations.

70. KIMMICH, *supra* note 55, at 193.

propose

. . . measures to render the Covenant more effective in the organization of collective security and to define in particular the economic and financial measures which might be applied, should in the future a state, whether a Member or the League of Nations or not, endanger peace by the unilateral repudiation of international obligations.⁷¹

This act was not of any real importance. Apparently the committee was never set up.⁷²

In a note addressed to the governments of the States represented on the Council on April 20, 1935, Germany contested these States' right "to set themselves up as judges of Germany" and rejected the resolution as an attempt at a new discrimination against her.⁷³ Opposition to the German *fait accompli* also came from a specially convened conference between Britain, France, and Italy which was held at Stresa, Italy in late April 1935. These three states adopted the following Declaration:

The three powers, the object of whose policy is the collective maintenance of peace within the framework of the League of Nations, find themselves in complete agreement in opposing by all practicable means any unilateral repudiation of treaties that may endanger the peace of Europe and will act in close and cordial collaboration for this purpose.⁷⁴

The German justification for the unilateral action of March 1935 was based on the principle of reciprocity. Germany argued that the Allied Powers were bound to her by treaty obligations to reduce their own armaments, and her duty to continue to observe the clauses of Part V of the Versailles Treaty was conditional upon the fulfillment of the Allied Powers' duties. When the obligations were not performed fifteen years following World War I, Germany's obligations ceased to be binding upon her. Part V of the Versailles Treaty, therefore, could be unilaterally denounced without the consent of the other parties.⁷⁵

71. The resolution of the Council is reprinted in PAPERS RELATING . . . , *supra* note 3, at 317-18.

72. *Id.*

73. KIMMICH, *supra* note 55, at 194.

74. See A. DAVID, *supra* note 65, at 42. Germany was not expressly mentioned as the state endangering the peace of Europe. *Id.*

75. *Novembervortrag* was concluded between Germany and her enemies in the early days of November 1918. This argument was elaborated in V. BRUNS, DEUTSCHLANDS GLEICHBERECTIGUNG ALS RECHTSPROBLEM, (1934). See also Garner & Jobst, *The Unilateral Denunciation of Treaties by one Party because of Alleged Non-Performance by another Party or Parties*, 29 AM. J. INT'L L. 569, 574 (1935). See generally M. Sorensen, *The Modification of Collective Treaties without the Consent of all Contracting Parties*, ACTA SCANDINAVICA JURIS GENTIUM 150 (1939).

The situation got even more perplexing when on June 18, 1935, the Anglo-German Naval Agreement (Agreement) was concluded.⁷⁶ This Agreement had the result of nullifying Articles 181-197 of the Treaty of Versailles and all of Part V.⁷⁷ The paradox was that the Agreement authorized a level of German naval armament which was inconsistent with those provisions of the Versailles Treaty since they remained technically in force for the other parties. By virtue of Article 181 et. seq., Germany's naval forces were limited to six battleships, thirty smaller warships, and no submarines. Under this Agreement the total tonnage of the German fleet was not to exceed 35% of the aggregate tonnage of the naval forces of the members of the British Commonwealth of Nations. In respect to submarines, under certain conditions, the Agreement gave her the right to possess a tonnage equal to the total submarine tonnage of the British Commonwealth.⁷⁸

The legal force of this Agreement vis-a-vis Germany's position toward the Treaty of Versailles and Germany's international obligations is not very clear. According to the rules of Public International Law, Germany did not free herself from the duties imposed by Part V of the Versailles Treaty. Support for this submission is offered by the Protocol signed in London on January 17, 1871, which declared that it is "an essential principle of law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, except as the result of the consent of the contracting parties, by means of an amicable understanding."⁷⁹

Article 10 of the Havana Agreement provided in similar terms that it was not possible for a state to relieve herself of the obligations of a treaty or modify its stipulations, except by agreement secured through peaceful means of the other contracting parties.⁸⁰ Although the Havana Convention was not applicable to both Great Britain and Germany, some of its provisions may be invoked in order to reach the opposite conclusion, i.e., that the Naval Agreement had the legal effect that Germany was not violating her international obligations any more.⁸¹ Furthermore, Article 14 of the Havana Convention stip-

The Allied Powers' obligations were founded on the so-called *Novembervvertrag* on the preamble of Part V; on Article 8 of the Covenant; and on the conditions under which Germany joined the League in 1926.

76. Anglo-German Naval Agreement (1935).

77. 22 United Kingdom Treaty Series (1935). All treaties issued by the United Kingdom are issued annually.

78. See GRENVILLE, *supra* note 62, at 166-68. The Agreement was denounced by Germany on April 27, 1939. *Id.*

79. See also Garner & Jobst, *supra* note 75, at 585. Garner and Jobst concluded that "Germany's right to maintain naval forces in excess of those permitted by the Treaty of Versailles in effect acquiesces in the German repudiation of the naval clauses."

80. Havana Convention, *supra* note 22.

81. Declaration as to Non-Alteration of Treaties without Consent of Contracting Par-

ulated that treaties ceased to be effective either by renunciation of the party exclusively entitled to a benefit under the treaty or by the incapability of execution.

Both of these grounds could be applicable in the present case. The practical abolition of the German naval forces under the Versailles Treaty could be regarded as a "benefit" to Great Britain because a weak military for Germany might have led to Britain's prosperity. Also, Part V had become "incapable of execution," and Article 213, which referred to supervision of the German military forces by the Allied Powers, had failed to materialize since the other signatory states, including Great Britain, had failed to fulfill the condition of general disarmament for which the preamble of Part V provided.

In addition, Article 18 of the Havana Convention stipulated that "two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other States."⁸² The Versailles Treaty could be regarded as a "general convention" in the sense that it regulated relations between Germany and the rest of Europe in the aftermath of World War I. To a large extent, the Treaty prescribed what she was or was not allowed to do. In order for this agreement to be sustained, Britain and Germany lawfully concluded the Naval Agreement, by which they consented to have the rearmament of the German navy governed by different rules which were to apply between them.

However, despite these agreements, Germany breached its international obligations and she continued to do so even after she had officially seceded from the League. In fact, on March 7, 1936, Germany unilaterally repudiated her obligations under Articles 42 and 43 of the Versailles Treaty with respect to demilitarization of the Rhineland zone guaranteed by the Treaty of Locarno.⁸³ Under the Locarno Treaty, Germany and France guaranteed the maintenance of the territorial status quo in their frontiers, the inviolability of these frontiers, and the observance of the stipulations concerning the demilitarized Rhineland zone. They also agreed not to attack, invade

ties, 2 Hertslet Map of Europe by Treaty, at 1904. The occasion for its issuance was the denunciation by Russia of certain provisions of the Treaty of Paris of 1856 concerning the demilitarization of the Black Sea. The Treaty of Paris of 1856, Russia-Turkey, 114 Parry's T.S. 402-403.

82. Covenant, *supra* note 19, at art. 18.

83. Locarno Treaty, Oct. 16, 1925, 54 L.N.T.S. 239. This was also a "Treaty of Mutual Assistance." The argument put forward was that the Treaty of Locarno was incompatible with the Franco-Soviet Pact of May 2, 1935, which was described as a "Mutual Assistance Pact." 167 L.N.T.S. 395, GRENVILLE, *supra* note 62, at 152-54. The Pact was ratified by the French Chamber of Deputies on February 27, 1936. Ratification by the Senate remained in suspense but was brought about dramatically on March 12, 1936, following the dispatch of German troops into the Rhineland.

or resort to war with each other. The agreement was guaranteed by both the United Kingdom and Italy. In a statement before the Council on March 19, 1936, the German Foreign Minister, Baron Von Ribbentrop, argued for the automatic invalidation of the Locarno Treaty, when there had been "a showing of an open and avowed repudiation" of it by France.⁸⁴

V. The Withdrawal of Honduras, Nicaragua and Paraguay

The Covenant's Article 1(3) deals with fulfilling all obligations prior to withdrawal. Proper payment of financial contributions is a fundamental obligation because without the necessary funds, not only the function of an international organization suffers, but also the organization itself is crippled. The Secretary General of the League stated: "Where a principal purpose of the agreement is to maintain an organization out of funds contributed by the parties, persistent failure to contribute would be a breach of a material obligation."⁸⁵ The financial obligations of a Member State were based on Article 6(5) of the Covenant, which stipulated that the Assembly was to decide the proportion of the expenses of the League to be borne by each member.

The relation between Article 1(3) and non-payment of financial contributions was evaluated when the notices of withdrawal were submitted by Honduras, Nicaragua, and Paraguay.⁸⁶ Honduras gave its notice of withdrawal on August 10, 1936.⁸⁷ A year earlier the Assembly had arranged to cancel part of its debt to the League and settle the balance in annual installments up to 1955. A very strict condition was inserted in this agreement; if even a partial default on an installment in the year in which it was due occurred, the arrangement was to be automatically canceled and the debt was to become due in full. The two legal questions that arose were: (1) whether Honduras could be permitted to continue paying installments on consolidated contributions for seventeen years after leaving the League, and (2) whether Honduras had to pay the full agreed amount before her notice of withdrawal became effective on August 9, 1938, in or-

84. Fenwick strongly opposed this argument because it was "against every accepted rule of the binding force of treaties." Fenwick, *The Relation of the Franco-Soviet Pact to the Locarno Treaty*, 30 AM. J. INT'L L. 265, 269 (1936). See also, Wright, *The Rhineland Occupation and the Enforcement of Treaties*, 30 AM. J. INT'L L. 486 (1936).

85. 8 LEAGUE OF NATIONS O.J., 506 (1928).

86. During the Eighteenth Ordinary Session of the Assembly (1937), the Fourth (Financial) Committee asked the First (Legal) Committee a number of questions concerning the debts of these states. The decision to submit these questions was made on September 22, 1937. See Meyers, *Membership and Indebtedness in the League of Nations*, 32 AM. J. INT'L L. 148 (1938) and *Effect of Non-Payment of Financial Obligations*, BRIT. J. INT'L L. 218 (1938).

87. In 1922, Honduras was the first member of the League to take steps for notifying her intention to secede. However, this notice was never effected. See Hudson, *Membership in the League of Nations*, 18 AM. J. INT'L L. 436, 457 (1924).

der to comply with the requirements of the Article 1(3).

In another Member State, Nicaragua's notice of secession was received on June 27, 1936. She had already proposed a settlement. Her financial obligations towards the League were to be made payable by installments after her withdrawal. Her debt for not paying her contributions for fiscal years 1920 to 1937 was to be reduced from c.356,500 to c.41,500 gold francs. The Special Committee on Contributions proposed to the Assembly an arrangement identical to that of Honduras.⁸⁸ The legal questions in this case were: (1) whether the Assembly was empowered to grant a reduction of debt to a country that had notified the Assembly of its decision to leave the League, and (2) whether the withdrawal of such a state could become effective at the end of the two years' period, notwithstanding the fact that her debt had not been repaid.

The case with Paraguay was far more complicated.⁸⁹ On February 23, 1937, the date of the expiration of the two years' statutory period, Paraguay was in default on a consolidated debt agreement, on nine entire years in arrears and on budget year 1937.⁹⁰ She had allowed the withdrawal period to expire without answering the communications of the Commission on Contributions and without making any arrangements. Paraguay's behavior was to be expected after its notification of the League on February 19, 1937, that its withdrawal "[was] not to be regarded as complete and definite."⁹¹ A report, which was adopted by the Assembly three days after her notice of withdrawal, was received by the League; this report categorically stated that before leaving the League, Paraguay would be required to fulfill all her financial obligations up to the actual date of secession. Consequently, the legal question was whether Paraguay should continue to be a member of the League and incur liability for additional contributions until it had settled its financial position.

Although the Legal Committee could have invoked Article 14 of the Covenant requesting the Permanent Court of International Justice (PCIJ) to deliver an advisory opinion on the proper interpretation of

88. The Committee's arrangement called for part of Nicaragua's debt to be canceled and the rest to be paid by annual installments spread over a period of twenty years.

89. Paraguay had been condemned, by a decision of the Council, as an aggressor state that had violated her obligations under Article 12 and Article 15 of the Covenant. In pursuance of this condemnation which concerned the hostilities that had broken out between Bolivia and resulted in the declaration of war in May 1933, the embargo of arms imposed on Bolivia was raised, and the embargo imposed on Paraguay was maintained. Under these circumstances, on February 24, 1935, Paraguay notified the League of the withdrawal. See ZIMMERN, *supra* note 54, at 424-30. However, these political considerations were not taken into account when the Assembly was discussing Paraguay's financial default.

90. Paraguay's unpaid contributions amounted to c.290,000 gold francs. In addition, Paraguay had not repaid its share in the expenses of maintaining the Chaco Commission, which was an emanation of the League trying to settle the Chaco dispute between her and Bolivia.

91. LEAGUE OF NATIONS O.J. 589 (1937).

Article 1(3), the Committee preferred to deal by itself with all three cases. The Committee affirmatively answered the question of whether the Assembly had the right to agree on reduction of a member's debt that had already communicated the intention to withdraw. According to the Covenant, the Assembly had the power to fix a member's contributions.⁹² The Assembly also retained the power to reduce the amount of contributions retrospectively and to allow deferred payments.⁹³ A notice of withdrawal altered neither the power of the Assembly nor the League status of that withdrawing state. The state remained a Member State and its treatment was equal to that of the remaining states. The right to secede was enshrined in the Covenant, and a state could not be "punished" for expressing such intention.

This answer given by the Committee was incorrect even though the affirmative response was in accordance with the Covenant. The question presented was whether "a reduction of debt" could be granted and not whether "a reduction in the financial contributions in arrears" was possible. The answer provided, based on Article 6(5) of the Covenant, covered the latter but failed to answer the former. Whereas in the majority of cases, the debt owed to the League was the result of non-payment of contributions, there were cases where debt resulted from non-payment of other financial obligations (e.g. repayment of loans). The Legal Committee made no comment on this point. It is doubtful whether the Assembly had the right to arrange a reduction in any debt owed by a state to the League, other than a debt made up exclusively from financial contributions in arrears. As argued, the purpose of Article 1(3) was to prevent states that had violated their various obligations to escape the negative effects of their action by just seceding from the League. If a member was not paying its debt (other than contributions) to the League, and that Member State decided to notify its intention to withdraw, the Assembly could not grant a reduction to its debt or it would destroy all intents and purposes of Article 1(3).

The second question was whether a notice of withdrawal could become effective on the expiration of the two years' period, even if at that date, the state in question had not paid its entire debt. The Legal Committee stated that if an arrangement for paying the debt in installments was concluded with the state in question, withdrawal would become effective if that state was not in default with respect to any of the installments due before secession.⁹⁴ The fact that the

92. See Covenant, *supra* note 19.

93. *Id.*

94. This answer followed to a large extent from the recommendation of the Special Committee on Contributions on Arrears, which was approved by the Assembly in 1935. See

debt was still not paid in full was irrelevant because under the arrangement which regulated the relationship between that state and the League, the only financial obligation to be fulfilled was the proper payment of the installments. Therefore, the cases of Honduras and Nicaragua presented no difficulty provided that the relevant annual installments were made on time.

The complete default of Paraguay's financial obligation made her case quite different.⁹⁵ A literal interpretation of Article 1(3) was inappropriate because it led to the irrational conclusion that a defaulting state could remain in the League as a Member State enjoying all the advantages and privileges of its membership and all the obligations of the League towards it, while the deficit of the League's budget increased year after year. It was illogical to maintain that a state remain in the League when it not only refused to participate in League activities but also denied its membership. The Committee took the view that the teleological interpretation was more appropriate. The drafters of the Covenant had intended that upon expiration of the notice of withdrawal, the state in question was still bound by all obligations which had accrued either under the Covenant or otherwise. Having dealt with this preliminary point, the question was then referred to a sub-committee whose reply did not seek to give an interpretation applicable in all cases, but concentrated on the particular case of Paraguay.

In the sub-committee's opinion, Paraguay ceased being a member of the League, notwithstanding her undoubted default regarding her financial obligations. Paraguay would remain liable for this debt, and the League was free to recover it by all the means at its disposal. Although this opinion represented the actual situation created after her withdrawal, the First Committee did not regard it as advisable to include it in its reply. The main reason was that the Bolivian representative expressly stated that he would not accept such an opinion because as long as the territorial dispute with Paraguay (Chaco Dispute) remained *sub judice*, Bolivia would regard Paraguay as a member of the League. From the representative's point of view, pecuniary obligations could not be separated from political or legal obligations.⁹⁶

Interestingly enough, the Assembly endorsed the opinions of the subcommittee. Although it refrained from declaring that Paraguay had legally withdrawn from the League, it made clear that in all

Meyers, *supra* note 86, at 150.

95. When the Legal Committee was deliberating the position of Paraguay, more than seven months had elapsed since her "official" withdrawal. In effect, the whole discussion was rather philological.

96. This was a typical example of how the insistence of only one member could paralyze the League at crucial moments.

circumstances Paraguay owed to the League the full amount of its arrears of contributions until the date of withdrawal. The Assembly expressed its certainty that the component Committees would take the necessary measures to deal with this matter. It was typical of the Assembly to pass on responsibility to other organs rather than take upon itself the affirmative action required under the circumstances. The Assembly reached the conclusion that it would be to the League's detriment to treat Paraguay as a state which was contributing to its expenses because this would have resulted in complicating the financial situation of the League.

During October 1937 the League was under the illusion that the states that had withdrawn would eventually resume membership or at least assume close co-operation with the League. In furtherance of this deception the Assembly left a door open to Paraguay to settle its financial obligations and to be treated once more as Member State of the League. It reaffirmed that it was entitled to exercise its power to take special decisions with regard to contributions of certain League members "where it has thought it equitable to do so in the interests of those Members . . . of the League itself and of sound budgeting."⁹⁷ There is no doubt that the Assembly was referring to the examples of Honduras and Nicaragua, whose debts were considerably reduced and every possible arrangement was made to facilitate payment. But the Assembly failed (and apparently did so purposely) to distinguish the striking difference between the two cases.

The reduction of the debts of Honduras and Nicaragua was negotiated and arranged while these states were still active members of the League. The envisaged settlement of Paraguay's financial contributions, however, had to be negotiated in a situation in which she had declared *de jure* withdrawal from the League and the League had *de facto* accepted that she was not to be regarded as a Member State anymore.⁹⁸ Furthermore, the unwillingness of the Assembly to clarify the legal position of Paraguay vis-a-vis the League⁹⁹ created in theory the following problem: suppose that Paraguay entered into

97. See Meyers, *supra* note 86, at 150.

98. *De jure* withdrawal means that Paraguay officials argued that she seceded from the League in accordance with Article 1(3) of the Covenant (the withdrawal clause of the Covenant) and, in effect, there was nothing illegal in her secession.

The fact that the League had *de facto* accepted that Paraguay was not to be regarded as a Member State, means that the League did not recognize that Paraguay's secession was lawful under the terms of the Covenant, but because there was nothing much that the League could have done about it, the League decided to act as if Paraguay had ceased to be a Member State.

99. In this connection, see BAKER, *supra* note 64, at 154, Baker, commenting on the notices of withdrawal of Germany, Japan, and Paraguay, suggested that a resolution at the 1936 Assembly should "make it plain to the withdrawing states and to the world at large" that it did not consider that these states "have legally freed themselves from the obligations which the Covenant involves." *Id.*

negotiations in order to have its debt reduced, and at a later stage it repaid its debt, what would have been her legal position then? Would Paraguay's withdrawal become effective according to Article 1(3), or would she be regarded as a Member State with full status whose previous notice of withdrawal was null and void because on the date that notice expired, Paraguay had fulfilled none of its financial obligations?

Contrary to Paraguay's persistent refusal to settle its financial obligations toward the League, the practice was that withdrawing states had to meet the obligation of contributing their quota to the budget before the period of notice expired. After they withdrew, Brazil and Costa Rica received distributions of budget surpluses that had accrued during their membership.¹⁰⁰ In addition, following Germany's submission of its notice of withdrawal, the German government paid part of its contributions in arrears in gold. Most of its accounts were settled before secession became effective. Like Honduras, Nicaragua, and Paraguay, however, Hungary and Peru were also in arrears in their contributions to the League's budget at the expiration of their membership. After 1940, all these states failed to keep up their annuities under the consolidated arrears contracts.

VI. Which Other Obligations Had to be Fulfilled

It is not clear, apart from the financial obligations, what other obligations the drafters of the Covenant had envisioned when they provided in Article 1(3) that "all obligations under this Covenant shall be fulfilled at the time of withdrawal."¹⁰¹ Article 18 stipulated an obligation that every treaty, to which a League member was a contracting party, had to be registered with the League's Secretariat. Article 18 acted in conjunction with Article 20 whose purpose was to insure that members of the League never entered into engagements that were inconsistent with the terms of the covenant.¹⁰² This never happened in practice, however, because in May 1920, the Council approved the Memorandum on Article 18 which declared that one

100. See Meyers, *supra* note 86, at 148. Costa Rica's letter to the Secretary General of the League expressing its decision to withdraw (December 1924) was accompanied by a check to cover its contributions from 1921 to 1924. *Id.*

101. Covenant, *supra* note 19, at art. 1(3).

102. Judge Schukind, in his separate Opinion in the Oscar Chinn Case stated that: ". . . Article 20 would possess little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void; that is to say, as being automatically void." See Oscar Chinn Case, 1934 PCIJ (ser. A/B) No. 63, at 90 (1934).

Criticizing Judge Schukind's view, G. Schwarzenberger stated that strict adherence to the obligation that every member register every treaty could have led to the following paradox. If a treaty had already been registered with the Secretariat by another signatory party-member of the League, thus satisfying the purpose of Article 18, but another signatory party-member had not registered the treaty, such state would have been held to have violated its obligations under the Covenant. 1 SCHWARZENBERGER, INTERNATIONAL LAW 466 (1945).

party could register a treaty in the name of all parties at the same time.¹⁰³

Article 18 also contained its own means of compliance because it stipulated that "no such treaty shall be binding until so registered."¹⁰⁴ Therefore, it would have been to the detriment of a Member State to fail to register a treaty because such treaties would have been unenforceable. It appears that this was only the theory, however, because in practice things were fundamentally different. There are two relevant cases on this matter.

The first case concerned the *French-Mexican Claims Convention*, which was signed on September 25, 1924, at a time when Mexico was not a member. By virtue of this Convention, a Mixed Claims Commission was set up. In July 1928, a Mexican agent contended, during the case of *France (Pablo Najera) v. Mexico*,¹⁰⁵ that the Convention was not binding because the French government had failed to show that it had been presented for registration with the League's Secretariat. Based on Article 18, the Commission's President commented that although such an omission did not affect the validity of a non-registered treaty between the parties, it did preclude them from invoking the treaty before any organ of the League and any international tribunal.¹⁰⁶ Article 18 neither impaired the binding force among the members of the League of a duly ratified treaty nor did it impair the members' option to withdraw from the League. However, Article 18 precluded parties from invoking the treaty as obligatory before the Assembly, the Council, and the PCIJ.

The second case concerned the *General Treaty of Peace and Amity*, which was signed in Washington, D.C. on February 7, 1923, by the five Central American Republics but was never registered with the Secretariat.¹⁰⁷ Then, in late 1931 a military coup d'etat assumed the Presidency of El Salvador. This action directly contravened Article 2 of the General Treaty of Peace and Amity, which read:

[E]very act . . . which alters the constitutional organiza-

103. Memorandum on the Registration and Publication of Treaties, May 19, 1920, 1 L.N.T.S. 7.

104. Covenant, *supra* note 19, at art. 18.

105. Annual Digest of International Law Cases 1927-28, Case No. 271); 1 SCHWARZENBERGER, *supra* note 102, at 176; H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 339 (1952); Hudson, *Legal Effect of Unregistered Treaties in Practice, Under Article 18 of the Covenant*, 28 AM. J. INT'L L. 546 (1934).

106. On August 4, 1928 the Convention was registered with the Secretariat at the request of the French Government, 79 L.N.T.S. 417 (1928). It appears that the President was not informed of the registration.

107. All five states were members of the League in 1923 and, with the exception of Costa Rica, continued to be Member States until the League's dissolution in 1945. General Treaty of Peace and Amity of the Central American States, signed in Washington, D.C. on Feb. 7, 1923, 2 HUDSON 901, 17 AM. J. INT'L L. Supp. 117 (1923) [hereinafter Amity].

tion in any of [these states] is to be deemed a menace to the peace of the said republics . . . the governments will not recognize any other government which may come into power in any of the five republics through a coup d'etat¹⁰⁸

The National Assembly in the new regime in El Salvador took action to denounce this Treaty. In August 1933 by unanimous vote, the National Assembly declared that the Treaty was legally non-existent because it had not been registered with the League's Secretariat. The PCIJ did not address itself to the possible legal effects of the non-registration of treaties, nor did it refuse to take into consideration instruments that had not been registered.

Although Article 1(3) had problems in practice as is evidenced by these two cases, one of the main aims of the Covenant's Article 1(3) was to prevent States from violating their various obligations under the Covenant and then leaving the League. Exclusion of Article 12 (submission of all disputes to arbitration of judicial settlement); Article 13 (carry out in full faith any award or decision rendered); and Article 15 (submission of disputes to the Council) from the ambit of Article 1(3) would destroy these intents. The purpose of including Articles 12, 13, and 15 was to eliminate the possibility of war among the Member States. These articles formed part of a treaty that signalled the end of World War I, one of the bloodiest wars ever fought. The obligations imposed by Articles 12, 13, and 15 could be characterized as international obligations which stemmed from either statutory or customary provisions of international law. Some of these obligations include: the duty of states to give effect to any award or decision that was delivered against them;¹⁰⁹ the duty not to resort to war against a country that had complied with a judgment emanating from a recognized international court or tribunal; and the duty to have a case heard by its natural judge.¹¹⁰

It cannot be accepted that the obligation undertaken by the signatories to diminish the probability of war was contemplated by the League's founders. The primary function of the League was the maintenance of a world order which was to be achieved through peaceful settlement of international disputes.¹¹¹ An intriguing question is whether participation in the workings of the Assembly was one of the duties under the Covenant which a state needed to fulfill in order to secede from the League. This duty would have been imposed by a strict interpretation of Articles 3 and 5; Article 3 pro-

108. *Id.*

109. See Article 59 of the Statute of the PCIJ: "The decision of the Court has no binding force except between the Parties and in respect of that particular case." This article, in an contrary fashion, obliged states to carry out the award made.

110. See Covenant, *supra* note 19, art. 13(3) and art. (4).

111. 1 SCHWARZENBERGER, *supra* note 102, at 48.

vided that the Assembly was composed of all Member States of the League and that the Assembly had to meet at fixed intervals, and Article 5 provided that most decisions of the Assembly required unanimity. The refusal of a member to participate in the Assembly would have resulted not only in blocking the activities of this organ, but also in obstructing the proper functioning of the League.

Argentina's position toward the League during its very first years provides an answer to this question. During the First Assembly in 1920, the Argentine delegation instituted the most revolutionary proposal connected with the problem of admitting new members to the League. The proposal was for Article 1 to be amended to read: "all sovereign states recognized by the community of nations be admitted to the League of Nations in such a manner that if they do not become Member States this can only be a result of a voluntary decision on their part."¹¹² The Argentine delegation was pressing for universal membership in the League.¹¹³

The First Assembly proposed postponement of all amendments to the Covenant. The Argentine government regarded this decision as a personal injury and its representative voted against it. Once the arrangement was adopted, the Argentine representative issued simultaneous notes to both the President of the Assembly and to the press, announcing that Argentina was withdrawing from the meetings of the Assembly, however, she would continue to be a Member State of the League; the representative considered the delegation's mission to be at an end.¹¹⁴

Despite the Argentine proposal, the wording of Article 1 was never amended. Consequently, Argentina withdrew from active support of the League, thus, constituting a breach of a Covenantal obligation. Although Argentina never expressed her willingness to secede from the League, if we suppose for the sake of argument, that such willingness was communicated to the Secretary General, it becomes obvious that her withdrawal could not have become effective because she was fulfilling a duty prescribed by the Covenant. In other words,

112. See Friedlander, *The Admission of States to the League of Nations*, 1928 BRIT. Y.B. INT'L L. 84, 94. What actually happened to the Argentine proposal is unclear. Friedlander wrote that the Legal Committee of the Second Assembly thought that the suggested amendment was "unsatisfactory, unreasonable and unacceptable" and, thus, it was summarily rejected. *Id.* at 95. In contrast, Hill argued that the proposal was considered at length during that session of the Assembly, but in the absence of the Argentine delegation a decision was deferred. D. Hill, *The Second Assembly of the League of Nations*, 16 AM. J. INT'L L. 59 (1922).

113. The Assembly decided that no amendments to the Covenant should be considered before the League was firmly established, but it did agree to appoint a Committee on Amendments and await its report at the next annual session. See Gregory, *The First Assembly of the League of Nations*, 15 AM. J. INT'L L. 240, 245 (1921).

114. Hudson, *supra* note 87, at 457, also notes that it was in Argentina's capacity as a League Member that she was represented at a meeting of the Governing Body of ILO at Stockholm in July 1921.

Argentina would have had to resume active participation in the League to lawfully exercise its right of secession. Here lies the paradox of a literal interpretation of Article 1(3).

One of the consequences of such a literal interpretation of the withdrawal clause was that no Member State could have left it after the eruption of the Sino-Japanese conflict. At the time of the Sino-Japanese conflict all the States had failed to fulfill their obligations of preserving the territorial integrity of China under Article 10 of the Covenant.¹¹⁵ The best solution would have been to examine every notice of withdrawal in the light of the relevant issues and circumstances, to decide whether strict adherence to the relevant clauses was imperative and justified.

VII. Who Was to Decide Whether Obligations were Fulfilled — The Withdrawal of Brazil

The next problem was the failure of the drafters to include any description of the method which was to be used to determine whether a withdrawing state had fulfilled all its prescribed duties. On August 19, 1919, President Wilson noted this problem when he informed the U.S. Senate Committee on Foreign Affairs at the Covenant's inception, it was not determined who would determine whether obligations had been fulfilled.¹¹⁶ It was recognized that it must be left to be resolved by the conscience of the nation proposing to withdraw. Wilson explained his thoughts on the issue when he said:

. . . and I must say that it did not seem to me worthwhile to propose that the article be made more explicit because I know that the United States would never itself propose to withdraw from the League if its conscience was not entirely clear as to the fulfillment of all its international obligations. It has never failed to fulfill them and never will.¹¹⁷

President Wilson concluded that the only restraining influence for a country that had violated her obligations to secede from the League would be the public opinion of the world.¹¹⁸ Future developments proved that Wilson was wrong.

The stance taken by Wilson was echoed both in the Senate and in the Lodge Reservations of November 1919. In the text accompanying the first reservation, the Senate made it quite clear that the "United States, which has never broken an international obligation, [could not] permit its conduct and honor [to be] questioned by other

115. See X, *Termination of the League of Nations*, 1935 BRIT. Y.B. INT'L L. 154.

116. See, H. LODGE, *supra* note 7, at 297, 309.

117. *Id.*

118. This is the so-called Wilsonian interpretation. *Id.*

nations. The same must be said in regard to the fulfillment of the obligations to the League."¹¹⁹ In effect, the United States alone was to determine this question and its right of withdrawal had to be unconditional, as provided in the reservation.¹²⁰

During the drafting of the Covenant, it was argued that some organ of the League should be competent to decide this question. The discussion, however, was cut short of actually reaching an agreement. M. Burgoes, the representative of Panama, put the argument eloquently:

If any doubt arose in regard to the precise meaning of the text of the Rules of the League, would it not be desirable to create an organization for the purpose of setting at rest any possible doubts in regard to the interpretation of the text of the Statutes of the League and even to deal with questions as to whether the Covenant of the League had been violated or not?¹²¹

Burgoes changed his mind on the issue of whether a new organization had to be created because he argued: "Is that not indeed the proper task of the Assembly of Delegates, as they constitute the Supreme International Tribunal and is not the Assembly which gives the Covenant its life?"¹²²

David Hunter Miller, the Senior Legal Advisor to the U.S. delegation, vigorously attacked the argument that the right of withdrawal had to be passed upon by a League organ. Miller was of the opinion that this contention was totally unfounded. Not only the text of the Covenant was silent on this point, but no argument could be advanced that one way or another either the Council or the Assembly could pronounce a decision that the various obligations had been observed. His argument was based on the theory of state sovereignty. Under state sovereignty, no foreign entity (even if such entity was created by the consent of the state in question) could pass judgment on such a delicate and subtle matter, unless the relevant jurisdiction had been expressly conferred upon it. The right of withdrawal was given to each member of the League to be exercised at its own unfettered discretion¹²³ because no such jurisdiction was mentioned or even implied in the draft Covenant.

There is no doubt that the right to secede had general application. The League of Nations was just an experiment in international political cooperation. The right to secede needed to be unqualified

119. See Commentary, *supra* note 2.

120. See H. LODGE, *supra* note 7, at 173. See also C. Fenwick, *supra* note 25, at 518.

121. See PAPERS RELATING . . . , *supra* note 3, at 309.

122. *Id.*

123. See Burns, *supra* note 6, at 47.

because otherwise a number of states would have been unwilling to join it. When a Member State chose to leave the League, however, it was under the unwritten obligation to exercise this right with the minimum possible trouble for the League.

When in June 1926 Brazil relinquished its nonpermanent seat in the Council and gave the statutory notice of withdrawal, it selected "a time when it [could not] affect the League's word."¹²⁴ Brazil's withdrawal occurred during the so-called Council crisis of 1926, which concerned the eventual membership of Germany in the League.¹²⁵ When Germany was finally persuaded to apply for membership, it was with the supposed understanding that such a Council seat would be afforded. Germany dispatched its application to become a Member State on February 8, 1926. Four days later, the Council called an extraordinary session of the Assembly for March 8, 1926 to finalize its acceptance.¹²⁶

Several Member States of the League attempted to use the forum of the Assembly in order to achieve permanent seats for themselves. There were three main contestants: Brazil, Spain, and Poland.¹²⁷ By virtue of Article 4(1) of the Covenant the former two states already enjoyed the status of a nonpermanent member of the Council.¹²⁸ Poland based its claim on its importance as a major power in the European scene. Spain's candidacy was based on the historical grounds that it once was a great power.¹²⁹ Brazil based her application upon a claim for a more appropriate representation of the American Continent. It appears that Brazil put forward this argument only to further her candidacy. The ten American delegations at this special session of the Assembly disassociated themselves and did not support this claim. Uruguay was another state that had applied for a permanent seat. M. Guani, the President of the Council and a Uruguay citizen, referred to fuller American representation, but disagreed that the Brazilian ambassador had attempted to meet that end.

Meanwhile, Germany was not willing to accept admission to the League if another state beyond itself were to increase the member-

124. See D. Meyers, *Representation in the League of Nations Council*, 20 AM. J. INT'L L. 689 (1926). [hereinafter *Representation*].

125. For the background and course of the crisis, See G. SCALLE, *UNE CRISE DE LA SOCIÉTÉ DES NATIONS* (1927).

126. See KIMMICH, *supra* note 55, at 76-91.

127. According to KIMMICH, nine states applied for permanent seats; the number given by MEYERS is only four. See *Representation*, *supra* note 124. See also KIMMICH, *supra* note 55.

128. Until the Assembly had selected the four nonpermanent members of the Council, the Covenant provided that the representatives of Greece, Belgium, Brazil, and Spain would occupy the relevant seats.

129. As the Spanish Representative in the Council stated: "My government is unable to accept a classification which would place Spain among the second rank of powers."

ship in the Council. There was resentment on the German side that "lesser powers" might join the Council with a permanent seat and its importance would be diminished. In February 1926 the German cabinet had unanimously agreed that unless it was assured a permanent seat without further enlargement of the Council, it would withdraw its application.

The crisis came on March 15, 1926, when the Brazilian delegate to the Council declared that his government was determined to veto Germany's admission to the Council unless Brazil was given the much desired permanent seat. Brazil took advantage of the unanimity rule in Article 5(1) of the Covenant. Article 5(1) provided that decisions at any meeting of the Council required the agreement of all Member States represented at the meeting. No agreement was produced because Brazil and Spain would not be persuaded to alter their course of action.¹³⁰ The question of Germany's admission had to be postponed until the Assembly's ordinary meeting in September 1926.

The Council tried during various meetings to resolve the crisis. In the final meeting of the 40th session of the Council on June 10, 1926, Brazil resigned her nonpermanent seat selecting "a time when it [could not] affect the League's work."¹³¹ The next session of the Council would have coincided with the ordinary September session of the Assembly. The session of the Assembly would have been empowered to fill Brazil's vacant seat without delay, and thus, the unanimity required for the admission of Germany as a permanent member of the Council would have been achieved. However, the relinquishment of Brazil's seat in the Council and its subsequent withdrawal from the League were preceded by an interpretation by its representative of Article 5(1). In the opinion of the Brazilian representative, although the Council could meet without the presence of all members' representatives,¹³² it did not have the competence to take any decision or any action if one of its Member States had either resigned or severed its relations with the League.

The Brazilian representative reassured the Council that his country "was anxious to avoid giving rise by her resignation to any difficulty concerning the interpretation of Article 5(1)."¹³³ The importance Brazil attached to the legal question concerning the proper

130. In the Council's meeting of March 15, 1926, Brazil materialized her threat by voting against Germany's membership. See N. Hill, *Unanimous Consent in International Organizations*, 22 AM. J. INT'L L. 318 (1928).

131. See *Representation*, *supra* note 124, at 690.

132. According to Article 6 of the Rules of Procedure of the Council, actions might be taken when a quorum consisting of only a majority of its Member States was present. Hill described this provision as "a concession to practical necessity, which no smooth running organization can fail to make." D. Hill, *supra* note 112, at 327.

133. See Stone, *The Rule of Unanimity*, 1933 BRIT. Y.B. INT'L L. 18, 29-30.

interpretation of this provision was not shared by the other states concerned. Italy did not commit itself, and M. Paul-Boncour, the chairman of the Assembly's Foreign Affairs Committee, summarily rejected the Brazilian proposition because ". . . nothing can prevent the Council from continuing its work in case of necessity."¹³⁴

The Council itself totally ignored this legal question. In the beginning of September 1926, the Council sat for five days carrying out its business in a normal way, notwithstanding the absence of Brazil.¹³⁵ On September 8, 1926, the Assembly voted unanimously to accept Germany as a Member State with a permanent seat on the Council. Brazil's course of action was incorrectly calculated because it had exactly the opposite result from what Brazil had originally contemplated. Instead of securing its election as a permanent member of the Council, Brazil found itself out of the League altogether.

Meanwhile, the Wilsonian interpretation of the withdrawal clause, in which the state giving notice of withdrawal would be the sole judge of whether it had fulfilled all obligations, did not find any support. Although this interpretation was in accordance with the principle of state sovereignty and might be acceptable in bilateral agreements, it was unacceptable in an entity with an international dimension where the action or inaction of one Member State had direct consequences on the action of the other members.

Another question that arose during the drafting of the Covenant, but apparently was not dealt with at that time of the Covenant's construction, was whether determining the question of observance of all obligations was necessary every time a Member State announced its intention to secede or only if there was some doubt over the existence of unfulfilled obligations. The literal interpretation of Article 1(3) (i.e., every single international obligation and every single obligation under the Covenant had to be fulfilled) would lead to the conclusion that every withdrawing state had to prove that such duties were observed. This interpretation would have been most undesirable, however, because it would have added further problems to the cumbersome workings of the League.

Commentators have suggested different entities for dealing with this question. One proposal was that the Council should decide the question by virtue of its power under Article 16(4) to expel a Member State who had violated any covenant of the League.¹³⁶ This proposal was not very persuasive, however, because it did not explain

134. *Id.*

135. Spain also did not participate during that session, owing to its insistence on turning its nonpermanent seat into a permanent one, but it did not withdraw, although at one point it had signified its intention to do so.

136. Burns, *supra* note 6, at 49.

why the Council's function under Article 16(4) should be enforced by analogy in Article 1(3). More importantly, the decision of whether international obligations were fulfilled or not remained outside the power of the Council. Expulsion could only have been ordered for violation of duties under the Covenant, and not for international obligations.

Other commentators have urged that the proper body was the Assembly because it was the entity of the League that represented the entire membership. The Assembly could draw its power to decide from the wording of Article 3(3) of the Covenant: "The Assembly may deal at its meetings with any matter within the sphere of action of the League."¹³⁷ Definitely the examination of the performance of a withdrawing state fell into the Assembly's "sphere of action." Schückind and Wehberg,¹³⁸ authors of the authoritative commentary of the Covenant, have argued that both the Assembly and the Council were inappropriate to reach a decision because the League would have been a party. In their view, such arrangement would have been contrary to the demands of impartial justice because the League would simultaneously be the applicant, the prosecutor, and the judge. Schückind and Wehberg's suggestion was that under Article 14 the Council should submit a request to the PCIJ for an advisory opinion, and on the basis of this opinion reach a decision.¹³⁹

Wright, a leading international law writer, also shared this view. He argued that treaty interpretation was generally declared suitable for submission to arbitration or judicial settlement in Article 13(2) of the Covenant. It would also seem in accord with the wording of Article 13(2) and with the established practice, for the Council to submit the question of whether a state had fulfilled her duties and consequently was entitled to withdraw to the PCIJ for advisory opinion.¹⁴⁰

This proposal would not have altered the situation. At the end of the day it would have been the Council that would have rendered the decision that may or may not have been in accord with the non-binding advisory opinion of the PCIJ. The League accepted that once the withdrawal notice had expired, nothing could prevent a state from severing her relations with the League completely, thus, there was little sense in trying to determine whether duties were breached or obligations were neglected. The withdrawing state was

137. Covenant, *supra* note 19, at art. 3(3).

138. 1 SCHÜCKING & WEHBERG, *supra* note 30, at 373.

139. See also Fenwick, *supra* note 25, at 518 (He questioned whether the PCIJ could "survey the whole range of International relations of the withdrawing state" in order to detect unfulfilled duties.) *Id.*

140. Wright, *Some Legal Aspects of the Far Eastern Situation*, 27 AM. J. INT'L L. 509, 514 (1933).

the sole judge in this case and only the embarrassment of the public opinion of the international community could have restrained her from leaving the League.

Although many amendments to the Covenant were proposed at various stages, none referred to the inclusion of a new provision dealing with this rather subtle question of who was to determine whether a withdrawing state had fulfilled all her obligations. The perfect solution would have been if the Assembly adopted an exhaustive list stipulating which duties were to be observed at all times and appointing a special committee. The special committee members would be selected at random and would offer a binding decision to the withdrawing state explaining that secession could not legally take place unless and until that state had honored the committee's decision.

VIII. De Facto Withdrawal

In its Ordinary Session of September 1936, the Assembly was concerned with the problem of *de facto* withdrawal of a League member.¹⁴¹ This problem surfaced during the Italian-Ethiopian dispute. It raised the legal question of whether Ethiopia continued to enjoy its right of representation in the Assembly and its right of participating in the League's activities when its territory had been invaded, occupied, and formally annexed by Italy. This is especially true when Italy's actions, as a fellow Member State, constituted an indisputable and clear breach of the Covenant.

On May 3, 1936, the Emperor of Abyssinia left his country and six days later an Italian royal decree purported to place Ethiopia under Italian sovereignty. Although the Emperor was in exile, he officially continued to represent Ethiopia in her foreign relations. On September 16, 1936, the Abyssinian delegation in London announced that its country was sending a delegation in the forthcoming session of the Assembly. The Credential Committee of the Assembly was faced with the difficult task of deciding whether the credential of the Abyssinian delegation issued by a Head of State in exile should be recognized.

The Committee considered the credentials as sufficient to permit that delegation to sit at the present session. The reasoning was that the Emperor was still recognized by all Great Powers as the lawful sovereign of Ethiopia. It was also in the powers of the Emperor to issue credentials. If the Committee had refused recognition, this would have meant a suspension from the exercise of rights of mem-

141. "*De facto* withdrawal" occurs when a League member withdraws without observing the relevant procedure.

bership with the concomitant provisional cessation of its duties to the League. It was improper for the League to envisage a situation in which Ethiopia was deprived of her membership's rights, but at the same time the League expected her to fulfill all her obligations. It was at the Emperor's discretion to inform the League of suspension from the exercise of such rights in view of the occupation of his country by a hostile army, and the cessation of normal governmental functions. As long as Ethiopia was observing its duties, it had the right to be represented in the Assembly and to participate in the activities convened under the aegis of the League.¹⁴² In fact, the League did continue to regard her as a full member, and at the beginning of 1938, Ethiopia rendered payment of its membership dues.

The position of Member States vis-a-vis their membership when they were occupied and administered by other states was examined in two other cases. On April 7, 1939, the Kingdom of Albania was invaded by the Italian armed forces. Once in power, the Italian authorities convened a body called the "Constituent Assembly," which was composed of Albanians and which duly offered the Albanian Crown to the King of Italy. Following its acceptance by Italy on April 14, 1939, an Albanian puppet government set up along Italian fascist lines gave notice of withdrawal to the League.¹⁴³ This notice was not taken at face value by the Secretary General because of those surrounding circumstances. Ultimately, the Council referred the question of Albanian's withdrawal to the Assembly for it to reach a decision. However, the Assembly did not consider this question at its December 1939 session, and subsequently, Albania was retained in the budget for a token annual payment of financial contributions as well as retained on the International Labor Organization (ILO) list of Member States.

As a result of the progressive decline of the League, the vigorous protests of the exiled King Zog of Albania failed to lead anywhere. The British Government afforded asylum to King Zog on the strict condition that he agreed not to engage in any political activity. However, in November 1939 the British government also granted *de facto* recognition to the new fascist regime when it applied to the

142. A leading commentator argued that the decision of the Credentials Committee was immaterial to the question of Ethiopia's membership in the League. Even if the Assembly were to decide that the issued credentials could no longer be recognized, this would not have affected the position towards the League. Ethiopia would continue to enjoy its membership as long as the League as a whole, or the substantial majority of its members had not *de jure* recognized her annexation by Italy, or terminated her membership as a result of voluntary withdrawal or expulsion. Lauterpacht, *The Credentials of the Abyssinian Delegation*, 1937 BRIT. Y.B. INT'L L. 184, 186.

143. See PAPERS RELATING . . . , *supra* note 3, at 75; K. MARACK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* (1968); R. LANGER, *SEIZURE OF TERRITORY* 245-50 (1947).

Italian government for an exequatur for the British consul in Durazzo. Contrary to the British attitude, most countries refused to accept the Italian conquest, yet the United States of America, Egypt, and Turkey allowed the Albanian legations to remain on their soil.

It is submitted that Albania never ceased being a member of the League. Article 31 of the Italian Peace Treaty of February 10, 1947 reads: "Italy recognizes that all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7, 1939 to September 3, 1943 are null and void."¹⁴⁴ The notice of withdrawal falls into the ambit of such an "arrangement," because it was a unilateral decision of the occupying Power which followed from Italy's withdrawal from the League. By virtue of the Covenant's Article 31 it was null and void *ab initio*, and Albania was neither bound nor was it in any way affected by it.

The second case concerned the annexation of Austria by Germany. The emergence of Austria at the end of World War I as the Austrian Republic and the protection of her independence was one of the cornerstones of the Peace Treaties.¹⁴⁵ On March 13, 1938, the Federal Constitutional Law was promulgated by the Austrian government (in reality a Nazi regime set up by Germany) by which Austria was united with the Third Reich. From that day forward Austria enjoyed the status of a German Land.

By proceeding with the so-called annexation (*Anschlöss*), Germany clearly violated her conventional obligations arising out of Articles 80 and 434 of the Versailles Treaty. According to Article 434, Germany recognized in advance the treaties concluded by the Allied Powers with her ex-allies, which covered the Saint Germain Treaty. Germany further violated her freely accepted obligations under the Gentlemen Agreement of July 11, 1936.¹⁴⁶

144. Italian Peace Treaty, Feb. 10, 1947, 49 U.N.T.S. 53 (Albania ratified it on October 20, 1947).

145. Article 80 of the Treaty of Versailles provided that:

Germany acknowledges and will respect strictly the independence of Austria within the frontiers which may be fixed in a Treaty between that State and the Powers; she agrees that this independence shall be inalienable, except with the consent of the Council of the League of Nations.

Covenant, *supra* note 19, at art. 80. The Treaty of Saint-Germain was a boundary-fixing treaty. A provision to the same effect was included in the Treaty of Saint-Germain, where Article 88 imposed upon Austria the obligation "to abstain from any act which might compromise her independence." *Id.* at art. 88.

This obligation and the importance that the Powers placed upon her independence was reaffirmed on a number of occasions. See the Restoration of Austria Protocol No. 1 (Declaration), signed in Geneva, October 4, 1922, 12 L.N.T.S. 385. The Protocol was interpreted by the P.C.I.J. in its *Advisory Opinion in the Austro-German Customs Regime Case*, 2 Hudson World Court Reports, series A/B, no. 41, 711-43 (1931), annotated by Borchard in 25 AM. J. INT'L L. 711 (1931). See also the Geneva Protocol of July 15, 1932, 135 L.N.T.S. 285, 6 HUDSON 84. K. MARACK, *supra* note 143, at 338, wrongly refers to this Protocol as the "Lausanne Protocol."

146. The Gentlemen Agreement committed Germany to respecting the independence of

Then, on March 21, 1938, the German Foreign Office communicated to the Secretary General that because of the Constitutional Law, "the federal state of Austria ceased to be a League member" from the date of its promulgation. The Secretary General stated that there was no place in the League for an entity that had only the legal status of a German Land.¹⁴⁷ However, the Assembly took a different course of action and decided that Germany's communication was not a proper notice of withdrawal. The Assembly accepted that the *Anschlöss* had resulted in a completely different situation, and it made no claim for payment by Austria of her budgetary obligations after March 18, 1938.

The annexation of Ethiopia by Italy differed from the annexation of Austria by Germany in three very important respects:

- A) Italy's annexation of Ethiopia did not lead to Ethiopia's termination of League membership, whereas Germany's annexation of Austria did lead to Austria's termination of League membership;
- B) No government body of the Austrian State was left to assert and carry on its legal continuity;
- C) Ethiopia's annexation to Italy was never officially recognized either by its Emperor or by any League Member,¹⁴⁸ whereas Austria's annexation to Germany was recognized both by Austria herself¹⁴⁹ and by a large membership of the League. With little delay, the state governments in the international arena, including Great Britain and France, recognized that Austria had ceased to exist as a sovereign and independent state and accordingly withdrew their legations from Vienna and replaced them with consulates.

On April 6, 1938, the U.S. Secretary of State declared that the United States was "under the necessity for all practical purposes of accepting" that Austria was a part of Germany. As a result, the U.S. Legation in Austria was closed and a Consulate General was

Austria. The Agreement is reprinted in GRENVILLE, *supra* note 62, at 172-74.

147. Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 1938 BRIT. Y.B. INT'L L. 421, 423. See also Wright, *The Legality of the Annexation of Austria by Germany*, 38 AM. J. INT'L L. 621 (1944). See also KLINGHOFFER, *LES ASPECTS JURIDIQUES DE L' OCCUPATION DE L' AUTRICHE* (1943).

148. However, it should be noted that in 1938 Great Britain withdrew her recognition of Abyssinia as an independent state by recognizing *de jure* that the Italian annexation of the Ethiopian Empire. The British government stated on December 21, 1936, that its act of closing the Legation in Addis Abbaba and replacing it with a consulate did not constitute a *de jure* recognition of the Italian annexation. See H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW*, 351-52 (1948). See also ROUSSEAU, *LE CONFLIT ITALO-ETHIOPIEN DEVANT LE DROIT INTERNATIONAL* 241-42 (1938).

149. On April 10, 1938, a plebiscite was held in which the Austrian peoples were asked whether they approved of the incorporation into Germany. 99.73% of the population voted for the *Anschlöss*. "The very result . . . is sufficient to indicate its untrustworthiness," WRIGHT, *ATTITUDE OF THE UNITED STATES TOWARDS AUSTRIA* 89 (1944).

established in its place.¹⁵⁰ This pronouncement contradicted the Stimson Doctrine.¹⁵¹

The United States government declared that it did not intend to recognize any territories created by force contrary to the obligations prescribed by the pact of Paris of August 27, 1928.¹⁵² In agreement with the Stimson Doctrine, the United States government refused to recognize the annexation of Ethiopia by Italy, and later the Italian invasion in Albania. According to the principles of international law of that era, to be recognized as a state, the following five requirements¹⁵³ had to be satisfied:

- 1) Be represented by a government which received *de facto* allegiance from its subjects;
- 2) Be a sovereign independent state;
- 3) Exhibit reasonable purpose of durability;
- 4) Possess definite territories;
- 5) Be recognized as a member of the family of nations.

Austria definitely was lacking the second and fourth requirements. This situation raised several issues. First, how was League membership affected by a state's extinction resulting from conquest or annexation. When Austria was annexed by Germany, it had to secede from the League since Germany was no longer a Member State. The problem could have been resolved if Austria had communicated the required notice of withdrawal. This would have been unacceptable to Germany, however, it would have indicated that Austria was to be regarded as an independent and sovereign state for the next two years. Another solution to the problem would have been amending the Covenant to cater to such instances, but it is doubtful

150. The almost general recognition of Austria's annexation and its consequent extinction as a state under international law removed any possible basis for the contention that it sustained a *de jure* relation to the League. Its name disappeared from the League's roster as well as from the list of Members of the International Labor Organization (ILO) and the Universal Postal Union (UPU). The legal significance created a Consulate General in Austria and was made known by the State Department on July 29, 1942: "This Government very clearly made known its opinion as to the manner in which the seizure of Austria took place . . . [it] has never taken the position that Austria was legally absorbed into the German Reich." This explanation was quoted in *United States ex rel. Zdunic v. Uhl*, 46 F. Supp. 688 (S.D.N.Y. 1942). See also *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2nd Cir. 1943).

151. The Stimson Doctrine was made after the Japanese invasion in Manchuria and dominated its foreign relations at that time. The declaration was issued on January 7 in a note addressed to China and Japan. In March 1932 Great Britain together with other members of the League declared to be bound by a similar and, having regard to the provisions of the Covenant, wider obligation. For commentary, see Wright, *The Stimson Note of 7 January 1932*, 26 AM. J. INT'L L. 342 (1932). See also McNair, *The Stimson Doctrine of Non-Recognition*, 1933 BRIT. Y.B. INT'L L. 65.

152. Treaty providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57. This Treaty was also known as the Briand-Kellog Pact of which both China and Japan as well as the United States were parties. The Treaty was effectively replaced by Article 2(4) of the United Nations Charter.

153. See BIRKENHEAD, *INTERNATIONAL LAW* 31-32 (6th ed. 1927).

whether such an amendment would have enjoyed retrospective effect in Austria's case.

A second issue that arose was whether the law of state succession included an obligation on Germany, the successor country, to assume the payments owed by Austria to the League. When Austria ceased to be a Member State, it was in arrears of its membership dues. Also, Austria was under a financial obligation to the League because it had not repaid the advances it had received under the Guaranteed Reconstruction Loan of 1923.¹⁵⁴

The doctrine of the jurists was formulated in which the responsibility for the payment of the annexed state's debts was assumed by the annexing country.¹⁵⁵ It was irrelevant whether annexation was achieved through conquest or voluntary merger.¹⁵⁶ On June 16, 1938, the German Minister for Economics emphatically rejected the validity of this proposition and asserted that "neither by international law nor in the interests of economic policy, nor morally, is there any obligation on the part of the Third Reich to acknowledge the legal responsibility for Austria's Federal Debt." Even if Austria had wanted to repay her debts, this would have been impossible because Austria was deprived of both its fiscal autonomy and sources of revenue, consequently leaving left no means for such repayment.¹⁵⁷

IX. The Withdrawal of Japan

Japan gave her notice of secession on March 27, 1933.¹⁵⁸ The reason for this action was that Japan along with Germany and Italy, the signatories to the Treaty of September 7, 1940, established the

154. This Loan, popularly known as the "League Loan," was envisaged in the Geneva Protocol of October 4, 1922. The loan had the following main purposes and intentions: 1) to save Austria from complete economic ruin and bankruptcy by enabling it to meet pressing financial obligations, and 2) to rehabilitate it and keep it from being annexed by Germany. The Loan was floated under the aegis of the League and the sum involved was the equivalent of \$126 million. See Salter, *The Financial Reconstruction of Austria*, 17 AM. J. INT'L L. 116 (1923).

155. See E. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION (1931). See also A. SACK, LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEUR DETTES PUBLIQUES (1927).

156. See Garner, *supra* note 147, at 426-27. According to the Treaty of Versailles, certain parts of German territory were ceded to other states (such as France and Poland). Pursuant to Articles 254 and 255, these states assumed liability for a portion of the German pre-war debt as well as the public debt. In a similar situation under Article 203 of the Treaty of Saint Germain (the Treaty of Peace with Austria), the pre-war debt of the Austrian-Hungarian Monarchy was divided among succession states and the states that had acquired territory.

157. Garner, *Germany's Responsibility for the Austrian Debt*, 32 AM. J. INT'L L. 766, 772 (1938).

158. Japan was the third country ever to secede from the League, while two others were Costa Rica in 1927 and Brazil in 1928. Costa Rica and Brazil withdrew from the League as a result of disagreements with certain general principles upon which the League was operating. Meanwhile, the secession of Japan resulted from whether international and Covenantal obligations had been fulfilled.

totalitarian "Axis." Japan wanted to gain freedom from the obligations of the Covenant.¹⁵⁹ This raised the following two issues: (1) what was the reaction of the League as a result of Japan's notice of withdrawal, and (2) whether a withdrawing state had to surrender territories which it was controlling under the League's mandate system. In notifying her intention to withdraw, Japan stated that not only was the League's opinion in interpreting the Covenant and other treaties diametrically opposed to its thinking, but the League also had failed to grasp the realities of the situation in the Far East; in fact five months later the German government accused the League of failing to realize the situation in disarmament. Neither the Council nor the Assembly made any direct statement regarding the fulfillment or violation of Japan's obligations and no interpretation of the withdrawal clause was attempted.¹⁶⁰ When Japan's two year notice expired on March 27, 1935, the Secretary General of the League and the Japanese Consul General in Geneva exchanged notes and declared that Japan no longer had any rights or obligations under the Covenant. Meanwhile, the Chinese representative objected to this communication on the grounds that the Secretary General had no such authority to receive the note subsequent to withdrawal.¹⁶¹

The tactic to refrain from dealing with Japan's notice of secession might be explained by the Assembly's February 24, 1933 adoption of a report on the Manchurian affair, that was damaging for the Japanese side. This report, which was adopted under Article 15(10) and read in conjunction with paragraph four, formed part of the dispute settlement procedure under the Covenant: if arbitration, judicial settlement, or the Council itself had failed in achieving an amicable solution to the conflict, the Assembly was given the power to make and publish a report referring to the dispute's facts as well as propose just recommendations. Part III of his report disclosed the Assembly's opinion with respect to Japan's and China's fulfillment of their duties under the Covenant. Although it was recognized that they had legitimate grievances against each other in Manchuria

159. It is undisputed that Japan violated its obligations in the Sino-Japanese dispute of September 1931 when it displayed a complete disregard for the traditional laws of warfare. The dispute concerned the Mukden Incident. On September 18, 1931, Japan invaded and militarily occupied Manchuria. By March 9, 1932; the hold on the country was sufficient to justify the setting up of the new "independent" state, Manchuko. Manchuko was formally recognized by Japan on September 15, 1932, and lasted until Japan's defeat in 1945.

160. See Burns, *supra* note 6, at 47. See also Lauterpacht, *Resort to War and the Interpretation of the Covenant during the Manchurian Dispute*, 26 AM. J. INT'L L. 43, 44 (1932).

161. China's argument was credible because the subject matter of the notes could only have been decided by a resolution of the Assembly or of the Council; the entity of the Secretariat comprising the office of the Secretary General was subordinate to these bodies, according to Article 2 of the Covenant. See Wright, *The Effect of Withdrawal from the League upon a Mandate*, 1935 BRIT. Y.B. INT'L L. 104, 105 [hereinafter *Effect*].

prior to September 18, 1931, both states were blamed for the Manchurian affair.¹⁶² Ultimately, China was cleared from any responsibility, however, Japan was held to be in breach of Article 10 for not respecting the territorial integrity and existing political independence of a League member as well as in breach of Article 12 for not submitting the dispute to arbitration, judicial settlement, or to inquiry by the Council.

Within one month after the adoption of this report, Japan notified her intention to secede the Assembly; concurred with by all members of the Council,¹⁶³ They had already decided that Japan had violated her Covenantal obligations. International obligations have been assumed under the following international treaties:

- A) The Convention Relative to the Opening of Hostilities¹⁶⁴ which was signed and ratified by both Japan and China. According to Article 1 the contracting Parties recognized "that hostilities between them must not commence without a previous and explicit warning in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war" and that "the existence of a state of war must be notified to the neutral Powers without delay and shall not be held to affect them until after the receipt of a notification which may, however, be given by telegraph."¹⁶⁵ Professor Brownlie of Oxford University has noted that at no time either Japan or China declared war, broke off their diplomatic relations or requested third states to observe neutrality;¹⁶⁶
- B) The Convention Respecting the Laws and Customs of War on Land and the Regulations annexed thereto;¹⁶⁷ and
- C) The Convention on Treatment of Prisoners of War.¹⁶⁸

It is difficult to comprehend what political considerations resulted in the members' decision not to enforce the provisions of Article 1(3) in the Manchurian Affair when Japan engaged in military action against China without first declaring war. One conclusion is

162. Japan tried to solve the difficulties by unacceptable military means — namely by forcibly seizing, occupying, and separating a large part of Chinese territory and declaring it an "independent" state.

163. According to Article 15(10) only a simple majority was required. The present report was adopted unanimously except for the negative vote of Japan and Siam's abstention. Covenant, *supra* note 19, at art. 15(10).

164. The Hague Convention III, Oct. 18, 1907, U.K.T.S. 8.

165. *Id.* at art. 2. See BIRKENHEAD, *supra* note 153, at 191-92.

166. I. BROWNLIE, INTERNATIONAL FORCE AND THE USE OF FORCE BY STATES 386 (1963). The fact that China did not declare war is irrelevant. What is under examination is whether Japan, as a withdrawing state, had fulfilled her international obligations.

167. The Hague Convention IV, October 18, 1907, 8 U.K.T.S. (1910); see ROBERTS AND GUELF, DOCUMENTS ON THE LAWS OF WAR, 169 (2nd ed., 1989).

168. The Convention on Treatment of Prisoners of War, July 27, 1927, 37 U.K.T.S. (1931). Although both China and Japan signed the Convention on September 1, 1935, they never ratified it.

that the League interpreted this paragraph to mean that secession came automatically once the two years of the withdrawal notice had lapsed. Japan's secession was a test case crystallizing not only that the rule of law did not function well, but also that Article 1(3) was no obstacle for a state to violate her obligations, and by subsequently accusing the League, to withdraw graciously. Both Germany's decision to secede in 1933 and Italy's decision to secede in 1937 were based on this unfortunate reality.

After March 27, 1935, the issue was whether Japan remained a mandatory power.¹⁶⁹ The academic opinion was divided on whether Japan would automatically cease to be a mandatory once she retired entirely from the League.¹⁷⁰ One view was that the legal status would not be affected in the slightest degree and this would have been true even if Japan had been evicted from the League as a violator of the Covenant under Article 16(4).¹⁷¹ The issue of whether a country had violated its Covenantal obligations did not deal with the issue of whether that country had breached its obligations as a mandatory.¹⁷² The Council probably had power to remove a mandatory¹⁷³ and designate a new one in the event that there was clear evidence of a violation of duties prescribed under Article 22.¹⁷⁴ It was unclear whether its right to do so was because the mandatory had violated other provisions of the Covenant. Furthermore, in interpreting Article 22, the wording of this article did not suggest that a mandatory had to be a Member State since being an "advanced na-

169. At the end of World War I, a number of underdeveloped colonies and territories ceased to be under the sovereignty of the states that had previously governed them. The League refused their natural law right of self-determination and decided that guardianship of such peoples should be entrusted to advanced nations. This principle was embodied in Article 22 of the Covenant, and tutelage was to be exercised by advanced nations that fulfilled the criteria of adequate resources, experience and geographical position, as mandatories on behalf of the League. The basic thesis in the area is Q. WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* (1930) [hereinafter *MANDATES*]. Upon the demise of the League the mandate system was transmitted into the United Nations' trusteeship system under Chapters XII and XIII of the United Nations Charter.

170. Japan's Type C mandate was the former German islands in the Pacific Ocean north of the equator. The mandate was confirmed and its terms defined by a Declaration of the Council made in Geneva on December 17, 1926, published in 1 HUDSON 47. See 1 OPPENHEIM, *INTERNATIONAL LAW* vol. I, at 220 (8th ed. 1955); Gregory, *Mandate over Yap*, 15 AM. J. INT'L L. 419 (1921).

171. Evans, *Would Japanese Withdrawal from the League Affect the Status of the Japanese Mandate?*, 27 AM. J. INT'L L. 140, 142 (1933).

172. Wright, *Some Legal Aspects of the Far Eastern Situation* 27 AM. J. INT'L L. 509, 515 (1933).

173. Under Article 22, it was the Council's duty to oversee the mandate system. In effect, this would have been the competent body and not the Assembly to disqualify a mandatory. However, Article 22 was completely silent in this respect. Covenant, *supra* note 19, at art. 22.

174. Wright argued that the Council would probably refuse to act until such delinquency had been recognized by the PCIJ or another judicial authority. *Effect, supra* note 161, at 109. As it has already been mentioned, Wright took the view that the PCIJ was the competent body to adjudicate on alleged violations of covenantal obligations. *Id.*

tion" was sufficient. However, the Council's understanding was that the mandatory had to be a Member State in order to submit mandate disputes to the PCIJ.¹⁷⁵ The opinion that it was the intention of the drafters of Article 22 that the mandatory had to enjoy membership in the League at the same time because otherwise it would have been very difficult to administer the system.¹⁷⁶

By virtue of Article 23(b) of the Covenant, the members of the League undertook "to secure just treatment of the native inhabitants of territories under their control."¹⁷⁷ How could a non-member be bound by this provision, since it is a general principle of international law that the legally binding effect of a treaty is only upon signatory states (*pacta tertiis nec nocent nec prosunt*)? Of course, it could be argued that nonparties may be bound in an indirect fashion in the sense that they may, by their conduct, indicate their intention to accept such provisions as general rules of international law and be bound by the legal force that these rules enjoy.¹⁷⁸

It was thought that, as a general rule, the mandatory power had to take the initiative to terminate its mandate, but this rule was not exclusive. Also, if the Council terminated the mandate the mandatory's consent was required. This was deemed necessary because "otherwise the termination would be equivalent to an act of deposition or to a unilateral decision incompatible with the decision of the Principal Powers, which conferred the mandates and with the acceptance by the Mandatories of the burdens and responsibilities of the mandate."¹⁷⁹ If the normal course was followed, a mandatory

175. This requirement was imposed by virtue of Article 7 of the 1926 Declaration. See MANDATES, *supra* note 169, at 146.

176. Under Article 81 of the UN Charter, a nonmember state may be designated as an administering authority. At its 316th Plenary Meeting, the General Assembly approved a trusteeship for Somalia to be administered by Italy, although at that time Italy was not a United Nations member.

177. Covenant, *supra* note 19, at art. 23(b).

178. See STARK, INTRODUCTION TO INTERNATIONAL LAW 44 (1989). Stark furnishes as an example the decision of the International Court of Justice (ICJ) in the North Sea Continental Shelf Cases, 1969 ICJ 3, where it held that Article 6 of the Geneva Convention on the Continental Shelf (Apr. 29, 1958, 499 U.N.T.S. 311) had been subsequently accepted by West Germany — a nonparty — in the necessary manifest manner. The problem is not quite solved by the Vienna Convention on the Law of Treaties, May 29, 1969, 1155 U.N.T.S. 331 reprinted in 8 I.L.M. 679 (1969) (in force since January 27, 1980). The relevant Article 35 mentions only "treaties providing for obligations for third states." Covenant, *supra* note 19, at art. 35.

179. Evidence is adduced from the wording of the second paragraph of this article: ". . . tutelage should be exercised as Mandatories on behalf of the League" and the eighth paragraph: "The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council." The issues that arose were: 1) how could the Covenant bind a nonmember to exercise guardianship on behalf of the League; 2) could a mandatory nonmember have agreed upon the degree of authority, control or administration since this issue was to be dealt with exclusively between League members; and 3) how could a state outside the League participate in the Council in order to define in its particular case the degree of authority, or administration? See Evans, *The General Principles Governing the Termination of a*

would recommend such termination and would submit full evidence in support of it to the Council, and then the Council would decide whether the recommendation was justified; if so, it would draw up an "act of termination" containing the conditions and guarantees to be signed by the representatives of the new state.

After Japan's withdrawal in late March 1935, Japan recognized her obligations under the mandate system, and it regularly observed her duty under Article 22(7) of the Covenant to submit an annual report and accredit a representative to appear during the discussion of the reports before the Permanent Mandates Commission where a Japanese official continued to serve as one of its members by virtue of Article 22(9). The system worked until a Japanese official notified the Mandates Commission that he was not taking part in its work of the October 1938 session as a result of the League's decision in September 1938 to authorize sanctions against Japan for her involvement in the Chinese hostilities. The action escalated on November 2, 1938, when Japan decided to discontinue cooperation with the organs of the League.¹⁸⁰

The legal issue that arose was whether Japan's failure to accredit a representative was a breach of an international obligation. The answer depended on whether Japan, who in 1920 as a Member State of the League and of the Council, had agreed on this resolution and was still bound by it. This appeared to be the case since at Japan's 1935 succession, she recognized the continuance of her obligations under Article 22 in order to maintain legal power to administer the Pacific Islands. Not all members of the Mandates Commission reached the same conclusion; some of them were influenced by the fact that Japan did send the required report. Since the Commission could not reach a common stance on the legal issue, it turned to examine the practical aspects of the problem and, finally, agreed that it served no real purpose if Japan were to submit an annual report and took no part in its examination.¹⁸¹

Officially, Japan renounced all its rights, title, and claim in connection with its mandate by virtue of Article 2(d) of the Peace Treaty with the Allied Powers which was signed in San Francisco on September 8, 1951. In its seating of April 2, 1947, the United Nations Security Council extended the trusteeship system to the Pacific Islands;¹⁸² according to Article 3 of the Peace Treaty, Japan was

Mandate, 26 AM. J. INT'L L. 735, 747 (1932).

180. See Wright, *The Mandates in 1938*, 33 AM. J. INT'L L. 342, 347-48 (1939).

181. Apparently, the report was practically identical year after year.

182. The Pacific Islands Trust Agreement was approved, according to which: "Japan, as a result of the Second World War has ceased to exercise any authority on these islands." An amendment to the Agreement to say that Japan, having violated the terms of her mandate, "has thus forfeited her mandate" was endorsed by the United States. However, in the end the

obliged to concur in any decision of the United Nations to appoint the United States of America as the sole administering authority of these islands.¹⁸³

X. Withdrawal by not Ratifying Amendments to the Covenant

The Covenant envisaged another situation in which withdrawal of a Member State from the League was permitted: Article 26(2) stated that if a country dissented from an amendment made to the Covenant and this dissent was made known, then this amendment would not bind the Member State in question, but at the same time, that state would cease to be a member.¹⁸⁴ Any amendment to the Covenant had to obtain the unanimous approval of the permanent and nonpermanent members of the Council; in effect, every single state represented in the Council could have blocked any amendment by exercising its veto against it. Article 26, as it appeared in the Draft Agreement for a League of Nations presented to the Plenary Inter-Allied Conference of February 14, 1919, was stricter because it demanded that amendments were ratified by three-fourths of the states whose representatives composed the Body of Delegates (later it became the Assembly),¹⁸⁵ and there was no mention of the withdrawal option. The latter was added at the request of the Brazilian delegation in order to avoid certain difficulties that arose under its Constitution¹⁸⁶ and of the representatives of Switzerland and the Netherlands who argued that the amendment provision would constitute a limitation of the sovereignty of the small states. Since revision of the Covenant was allowed by less than unanimous vote, the principle of consent by all signatories was preserved by the right to secede.¹⁸⁷

The Second Assembly during its October 1921 session tried to

amendment was dropped. See Hall, *The Trusteeship System*, 1947 BRIT. Y.B. INT'L L. 33, 52. Presently the Trusteeship Council is responsible for the Trust Territory of the Pacific Island. See I. BRONWIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 567 (4th ed. 1990).

183. See KELSON, *supra* note 105, at 166.

184. The possibility of having the Covenant revised was regulated in the first paragraph of Article 26. Although the procedure to amend the Covenant was not mentioned, it was stipulated that any amendment would only become operative if all states that had a seat in the Council ratified it and if the Assembly approved it by a simple majority. Note the principle that no state will be bound by any new obligation to which it refuses its consent: *ex consensu advenit vinculum*.

185. The three-fourths majority was retained for amendments to the Constitution of the International Labor Organization (ILO). See art. 422 of the Versailles Treaty.

186. Note that in 1930, Brazil stated that she could not agree without parliamentary authorization to the provision of the 1929 Revision Protocol to the Statute of the PCIJ. Brazil would enter into force provided that the Council of the League had satisfied itself that those states that had not ratified it by the given date had no objection to the addition of the amendments. By the end of 1935, although almost every Member State of the League had ratified the Revision Protocol, Brazil was still seeking for the necessary approval by her legislature. See HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 140 (1943).

187. See E. HOYT, *THE UNANIMITY RULE IN THE REVISION OF TREATIES* 53 (1959).

amend the wording of this withdrawal clause by making it more comprehensive; it proposed that Member States were allowed to leave the League when they had not ratified the amendment and had notified the Secretary General accordingly within one year of their refusal to accept the revision.¹⁸⁸ The proposed amendment took the form of a protocol which embodied the resolution of amendment as noted by the Second Assembly and it remained open for signature and ratification by the Member States. Since the required number of ratifications were never achieved within the stipulated period of twenty-two months after the vote of the Assembly, the wording of Article 26 was never changed.

The innovative withdrawal clause enshrined in Article 26(2) was not repeated in the Charter of the United Nations (UN). After the Second World War, it appears that only in a small number of treaties that set up international organizations included such a withdrawal clause. One treaty was the Convention on the Grant of European Patents, under which established the European Patent Office, refers to revision.¹⁸⁹ It provides that for the Convention to be revised a conference of the Contracting States must be convened. The conference will decide how many states should ratify the amended text in order to enter into force and those states that have not ratified it at the time of its entry into force shall cease to be parties to the Convention from that time.¹⁹⁰ While Articles 175 and 176 of the European Patents Convention dealt with the position of a former contracting State vis-a-vis the organization,¹⁹¹ Article 26(2) of the Covenant made no mention in this respect. The issue whether a League member had to fulfill all international and Covenantal obligations in pursuance of Article 1(3) remained rather theoretical,

188. See Finch, *Proposed Amendments to the Covenant of the League of Nations*, 16 AM. J. INT'L L. 263, 271 (1922).

189. Convention on the Grant of European Patents, Oct. 5, 1973, 13 I.L.M. 270 (1970). In the territory of the European Economic Community, this Convention was given effect by the Convention for the European Patent for the Common Market, Dec. 15, 1975, 19 O.J. EUR. COMM. (No. L 17) 1 (1976).

190. *But see* the Convention on the Prevention of the Pollution of the Sea by Oil, May 12, 1954, art. 16(6), 327 U.N.T.S. 3. Article 16(6) provides that an amendment will come into force for all Contracting Governments, except for those countries which make a declaration that they do not accept the amendment before it comes into force. Such declaration, however, does not have the effect of forcing the governments that made it to cease being parties to the Convention. See Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law*, INT'L & COMP. L.Q. 146, 188 (1959).

Another means of securing ratification of amendments to a treaty is to omit those states that can validly be expected not to ratify them from the list of those states whose ratification is required before the amendments come into force. This happened in 1945 when an amendment to the Agreement for the Regulation of Whaling, 8 June 1937, 190 L.N.T.S. 79; 7 HUDSON 754, was opened for signature stipulating that the ratification of Ireland was not necessary. See HOYT, *supra* note 187, at 43-44.

191. The former article guarantees the preservation of acquired rights, and the latter refers to the financial rights and obligations.

since no Member State had ever made use of this option.

A second relevant treaty is the 1944 Chicago Convention, which founded the International Civil Aviation Organization (ICAO).¹⁹² Although for a proposed amendment to come into force it is not necessary that the whole membership ratifies such amendment, Article 94(b) grants to the ICAO Assembly the right to demand "that any state which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention."¹⁹³ The fact that so far the Assembly has not used its powers under Article 94(b) has led to the observation that "the Assembly will not invoke Article 94(b) unless the amendment in question involves a fundamental change of the entire Convention scheme."¹⁹⁴

A third treaty is the Pact of Arab States which set up the League of Arab States.¹⁹⁵ According to Article 19, if the Charter is amended by the required two-thirds majority, a dissenting Member State has the right to withdraw without advance notice. This provision should be contrasted with the normal withdrawal clause that is embodied in Article 18 of the Charter and which provides that a member must inform the Council of its intention to secede one year prior to withdrawal. Since the League's inception none of these two withdrawal clauses has ever been invoked.¹⁹⁶

XI. Withdrawal from the United Nations

It is often said that the League of Nations collapsed because of the secession of so many of its Member States. By April 1942, seventeen States out of a total membership of sixty-three had exercised their right to withdraw. When American technical experts were working on detailed plans for a permanent international organization in the winter of 1942-1943, they felt that the experience of the League had indicated that the right of withdrawal weakened the authority of an international institution, especially if membership were to be global and automatic.¹⁹⁷

192. Since 1947 the Chicago Convention has been amended eleven times; the 1977 and 1980 amendments have not yet entered into force because of lack of ratifications and it appears that some of the Contracting States have not ratified any of the amendments. Convention on International Civil Aviation, Sept. 7, 1944, 15 U.N.T.S. 295 (signed in Chicago).

193. This was the situation as of June 1990. The first, the so-called Montreal Protocols of 1977 (Misc. 12, 13 (1978)), amended the final paragraph of the Convention so as to allow for an authentic Russian text and the second, the 1980 Protocol (Misc 2 (1980)), amended art. 83.

194. BURGENTHAL, *LAW-MAKING IN THE ICAO* 39 (1969).

195. Pact of Arab States, Mar. 22, 1945, 70 U.N.T.S. 237.

196. See Shihab, *The League of Arab States*, 6 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 21 (1984); Pogany, *The League of Arab States: An Overview*, 21 *BRAC. L.J.* 41 (1989).

197. See RUSSELL, *A HISTORY OF THE UN CHARTER* 350 (1958).

During the 1944 Dumbarton Oaks round of negotiations for the creation of a United Nations Organization, the United States proposed that no provision for withdrawal be included in the Charter. The assumption was that Member States would normally remain part of the Organization. It appears that this proposal was accepted by the other states participating in the negotiations. The United States government interpreted its position as meaning that a sovereign state was not barred from withdrawing, but that this possibility should be played down by omitting any reference to it.¹⁹⁸ The British position was similar: "States would have no right to withdrawal voluntarily; the intention is that membership of the Organization shall be permanent."¹⁹⁹

In early 1945 the question of secession surfaced during the San Francisco Conference, the entity that adopted the United Nations Charter in the summer of that year. A sub-committee was set up to clarify the issue of membership and its conclusions were communicated to Committee ½. This committee dealt with questions of membership. The Chairman of the Committee said that the main conclusion was that "the Dumbarton Oaks Proposals deliberately omitted provisions for withdrawal in order to avoid the weakness of the League Covenant" and that was accepted by the representatives of a number of states at a later meeting of Committee ½.²⁰⁰

Whether withdrawal should be permitted and whether a withdrawal clause should be inserted in the Charter was further discussed in a second sub-committee appointed on May 21, 1945, at which all four Great Powers were represented. The sub-committee's conclusions complicated things because it suggested there be a qualified right of withdrawal in case the Organization proved was not able to establish peace or to do so only through turmoil. It is submitted that the sub-committee's opinion was a manifestation of the international law doctrine of *rebus sic stantibus*. This doctrine, applied to the present circumstances, meant that although a country joined the United Nations with the understanding that her membership would be eternal, if the United Nations itself failed to fulfill its role and objectives, then that country should be given the option to withdraw from it. Committee ½ decided that the Charter should be silent on the question of secession. An interpretative declaration was adopted, however, which read as follows:

If a Member because of exceptional circumstances feels restraint to withdraw, and leave the burden of maintaining inter-

198. *Id.* at 438.

199. See the British Commentary on Dumbarton Oaks Proposals for the Establishment of a General International Organization, Cm6571 (1944), at 6.

200. See Feinberg, *supra* note 3, at 197-198.

national peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization.²⁰¹

Committee ½ also tackled the issue of a Member State should be allowed to withdraw, if an amendment to the Charter was agreed to by the majority of UN Members but the state was unable to accept the amendment. The Committee declared that should such a case occur, it would not be "the purpose of the Organization to compel a Member to remain in the Organization."²⁰² The Soviet delegation criticized the interpretative declaration. It felt that the right of withdrawal was a manifestation of state sovereignty, and therefore, should be granted in the Charter itself.²⁰³

After the declaration of Committee ½ had been accepted by the San Francisco Conference, a number of participants commented upon the question of secession.²⁰⁴ These participants agreed that the right of withdrawal existed but it could not be exercised automatically, as was the case with the League of Nations. Very good reasons had to be shown before secession would be permissible. The opinion of leading commentators of the day was the opposite, however, when you look at the 1948 writing of Hans Kelsen, a leading authority on the United Nations: "There can be little doubt that . . . a right of withdrawal from the United Nations would require an express provision in the Charter."²⁰⁵

The effectiveness of this declaration has only been tested once so far. In January 1965 Indonesia formally notified the Secretary General of the United Nations by letter that it "had decided at this stage and under the present circumstances to withdraw from the United Nations."²⁰⁶ This move was the direct consequence of Indonesia's position in relation to Malaysia's seat in the Security Council. Indonesia's President had promised the population that "if neo-colonialist 'Malaysia' was seated in the Security Council" he would take Indonesia out of the United Nations.²⁰⁷ The presence of Malaysia was thought to be against the "lofty principles of the UN Charter"

201. Documents of the United Nations Conference on International Organizations, 273 (Vol. 7, 1943).

202. *Id.*

203. For the Soviet position, see the report sent by A Gromyko, then Head of the Soviet delegation, to the Ministry for Foreign Affairs on June 6, 1945. DIE KONFERENZ DEN VEREINigten NATIONEN VON SAN FRANCISCO, VERLAG PROGRESS/STAATSVERLAG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIC 426 (1988).

204. For an account of these statements, see Feinberg, *supra* note 187, at 200-201; TUNKIN, THEORY OF INTERNATIONAL LAW 349-50 (1974).

205. Kelsen, *Withdrawal from the UN*, W. POL'Y Q. 29, 43 (1949).

206. Unni, *Indonesia's Withdrawal from the UN*, IND. J. INT'L L. 128 (1965) [hereinafter Unni]; Schweb, *Withdrawal from the UN, the Indonesian Intermezzo*, 61 AM. J. INT'L L. 661 (1967); Blum, *Indonesian's return to the UN*, INT'L & COMP. L.Q. 522 (1967).

207. Unni, *supra* note 206, at 128.

and made "a mockery of this function and purpose of the UN Security Council."

A month later the Secretary General acknowledged receipt of the letter of withdrawal. Although stating that the incident had given rise to a situation for which no express provision was made in the Charter, the Secretary General arranged for the secession to be effective as of March 1, 1965.²⁰⁸ The reaction of Member States was diverse: Great Britain felt that the reason given was insufficient to warrant withdrawal, whereas Italy regarded the incident as an excellent opportunity for putting forward a strong case of regulating secession from the United Nations formally.²⁰⁹

From its weak action it appears that the UN Secretariat accepted that secession was possible even though some UN members still regarded Indonesia as a Member State.²¹⁰ The incident ended in September 1966 when the Indonesian Ambassador communicated to the Secretary General the decision of his government to "resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty first [1967] session of the General Assembly."²¹¹ The wording of the communication offered the President of the General Assembly leeway to state in its 1420th plenary session that Indonesia's action constituted only an absence from the Organization based on cessation of cooperation and not upon a withdrawal from the United Nations but upon cessation of cooperation. There were no objections to this statement and Indonesia was allowed to return to the United Nations and its specialized agencies even though she had withdrawn without having to be readmitted. In theory, because Indonesia's membership had continued uninterrupted during the eighteen months of "non-participation" she had to pay a token contribution of ten percent of the monies she would have been assessed in the UN budget.

XII. Epilogue

- The League of Nations was a novel experience in international relations. It served the international community well in the period between the two World Wars and set the fundamentals of contemporary international law. The League's activities were not only political in nature but the League was also engaged in social and humanita-

208. See *Matters Pertaining to Indonesia's Membership in the UN*, 1964 U.N.Y.B. 1989-92.

209. See 1964 U.N.Y.B. 191; 1965 U.N.Y.B. 237.

210. During 1965 Malaysia lodged several complaints to the Security Council alleging aggressive acts by Indonesia and a military build up along the Borneo border. See 1965 U.N.Y.B. 194.

211. See *Indonesian's Resumption of Participation in the Work of the UN*, 1966 U.N.Y.B. 207-8.

rian activities. Its efforts in the fields of health, international labor legislation and refugee settlement set the pace for the intensification of international cooperation.

It is often quoted that the League failed in its main aim, which was to maintain international peace and order because it did not prevent the outbreak of war in September 1939; that was the direct consequence of the fact that it lacked "teeth," in other words, it lacked the necessary means of enforcing its will on its Member States. But these are rather political considerations that fail to take into account the fact that the creation and working of the League have altered pre-existing doctrine on almost every question of public international law. It is true that the massive secession from the League contributed to the subsequent destruction, but this was the price that had to be paid for granting to its members an unrestrained right of withdrawal.

In our era, the two most important international organizations, namely the United Nations and the European Economic Community, deprive their members of their sovereign right to choose secession, thus, to avoid a troublesome relationship within these organizations. It is submitted that in the question of secession the approach taken by the League of Nations was the correct one, but unfortunately it was abused by a number of states which put their narrow nationalistic interests over and above those interests to which they had subscribed when they first joined the League.

