

The combined dissolution and liquidation of the League of Nations constituted the first example of the complete disappearance of a major multilateral international organization. The necessity that the League take some action toward dissolution had been acknowledged by the United Nations Preparatory Commission<sup>1</sup> and United Nations General Assembly.<sup>2</sup> Thus, the

## The Legality of Dissolving the League of Nations

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purpose of the twenty-first and final session of the Assembly of the League of Nations was to dispose of its functions, activities, and assets in some manner, as well as to take the necessary steps to enact its own dissolution.<sup>3</sup> The session lasted from April 8 to 18, 1946, with participation of thirty-four states members of the League, and culminated in a Resolution on Dissolution. Prior to the convocation of the Assembly the United Kingdom had circulated a draft note to all League members setting forth its view on dissolution. These proposals were examined and approved by the First (General Questions) and Second (Financial and Administrative Questions) Committees of the League Assembly, and by the unanimous vote of the member states present, the Assembly adopted, on April 18, 1946, the following Resolution:

The Assembly of the League of Nations,

Considering that the Charter of the United Nations has created, for purposes of the same nature as those for which the League of Nations was established, an international organisation known as the United Nations to which all States may be admitted as Members on the conditions prescribed by the Charter and to which the great majority of the Members of the League already belong;

Desiring to promote, so far as lies in its power, the continuation, development and success of international cooperation in the new form adopted by the United Nations;

Considering that, since the new organisation has now commenced to

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1. See Chapter IX of the Report by the Executive Committee of the Preparatory Commission, PC/EX/113/Rev. 1 (12 November 1945), at 110-14, and Chapter XI of the Report of the Preparatory Commission, PC/20 (23 December 1945), at 116-20.

2. U. N. General Assembly Resolution 24 (I), 12 February 1946.

3. League of Nations, O. J., Sp. Supp. No. 194: Records of the Twentieth (Conclusion) and Twenty-first Ordinary Sessions of the Assembly (1946).

exercise its functions, the League of Nations may be dissolved; and

Considering that, under Article 3, paragraph 3, of the Covenant, the Assembly may deal at its meetings with any matter within the sphere of action of the League:

Adopts the following resolution:

#### Dissolution of the League of Nations

1 (1) With effect from the day following the close of the present session of the Assembly, the League of Nations shall cease to exist except for the sole purpose of the liquidation of its affairs as provided in the present resolution.

(2) The liquidation shall be effected as rapidly as possible and the date of its completion shall be notified to all the Members by the Board of Liquidation provided for in paragraph 2.

2 (1) The Assembly appoints the persons named in the Annex to form a "Board of Liquidation," hereinafter called the Board, which shall represent the League for the purpose of effecting its liquidation . . . .

. . . . .

21 On the completion of its task, the Board shall make and publish a report to the Governments of the Members of the League giving a full account of the measures which it has taken, and shall declare itself to be dissolved. On the dissolution of the Board, the liquidation shall be deemed to be complete and no further claims against the League shall be recognized.<sup>4</sup>

A number of commentators have raised doubts concerning the competence of the League Assembly to take the measures of dissolution that it did. In his separate opinion in the *International Status of South West Africa* Advisory Opinion, Judge Read stated: "There is no doubt that the Assembly succeeded in its purpose. The League has, in fact, come to an end. The only question, and one which has been raised by eminent jurists, is whether the Assembly was legally competent to do what it did."<sup>5</sup> Similarly, Hugh McKinnon Wood, one of the Assembly delegates, admitted that "methods immune from theoretical criticism, but highly inconvenient and cumbrous in practice, could have been found." Two more acceptable methods would have been: negotiation of a treaty by the League members vesting in the Assembly the necessary power, or alternatively, deposition of instruments by states members formally agreeing to the dissolution of the League. It was felt, however, that both would result in unacceptable delay.<sup>6</sup>

4. *Id.*, at 269-72 (1946).

5. [1950] ICJ Rep. 128, at 167.

6. Wood, "The Dissolution of the League of Nations," 23 *BYIL* 321 (1946)

Three specific legal questions arise from the Assembly action. 1) Could the League take the action it took without the presence of all members of the Organization? 2) Could a treaty or organization concluded for an unlimited period of time and providing no explicit possibility of dissolution be abrogated? and 3) Was the last League Assembly legally entitled to terminate the League Covenant or otherwise end the Organization?

While the decision to dissolve the League and to take measures regarding its functions, activities, and assets was adopted unanimously by all members of the League present, a number of states were not represented. The question may therefore be raised whether the Assembly's action can be reconciled with the often asserted rule of customary international law that "a treaty may not be terminated or revised without the consent of all of the parties."<sup>7</sup>

Past state practice provides an excellent example of the difficulties of revising or terminating a treaty without consent of all parties. The Convention of St. Germain of September 10, 1919, purported to modify the General Act of Berlin of 1885, although many of the parties to the Berlin General Act were not among the parties to the Convention of St. Germain. When the Convention was invoked before the Permanent Court of International Justice in the *Oscar Chinn* Case in 1934, two dissenting judges castigated the Convention. In their view, the Convention of St. Germain was invalid because in thus purporting to modify the General Act of Berlin the signatories of the Convention were acting "contrary not only to an essential principle of international law but also to Article 36 of the General Act, which expressly provided that modifications might only be made in the General Act by common accord."<sup>8</sup>

One must conclude, nonetheless, that the absence of certain states does not necessarily undermine the legality of the Assembly's action. All the states still members had been invited to attend. Of the states which did not take part, Bulgaria later undertook ". . . to accept any arrangements which have been or may be agreed for the liquidation of the League of Nations and the Permanent Court of International Justice. . ." <sup>9</sup> while Estonia, Latvia and Lithuania had ceased to be independent states. One is left, therefore, with only Ethiopia, Iraq, Liberia and Thailand. None of these states which were absent from the last League Assembly expressed any disagreement with the method followed in

7. Hoyt, *The Unanimity Rule in the Revision of Treaties: A Re-examination* 1 (1959).

8. Dissenting Opinion of Judge van Eysinga, *Oscar Chinn* Case, [1934] PCIJ, ser. A/B, No. 63, at 134-5. Similarly, see the Dissenting Opinion of Judge Schucking, *Id.*, at 150. For other cases of modification without unanimous consent, see H. J. Tobin, *Termination of Multi-partite Treaties*, 206-49 (1933).

9. Peace Treaty with Bulgaria, Article 7. Similar clauses were included in the Peace Treaties with Hungary (Article 9), Rumania (Article 9), Finland (Article 11 - unnecessary since Finland was represented at the last League Assembly) and Italy (Article 39). Only Bulgaria and Finland were still members of the League, but the rest remained parties to the Statute of the Permanent Court of International Justice.

liquidating the League and disposing of its functions, activities, and assets. In fact, the first three of the states, as original members of the United Nations, had taken part in the work of the Preparatory Commission which initially considered the matter, and had accepted General Assembly Resolution 24 (1) which resulted from the Commission's work. One might thus treat the silence of the absent members as equivalent to acquiescence in the League decision on its dissolution.

The second question that must be raised concerns the possibility of dissolution of a treaty or organization concluded for an unlimited period of time. Hans Kelsen questioned the Assembly's action on this ground:

It is more than doubtful whether a dissolution of the League by a resolution of the Assembly was in conformity with the Covenant. Article 3, paragraph 3, of the Covenant, referred to in the resolution, does hardly authorise the Assembly to dissolve the League. The procedure for a dissolution of the League is not expressly provided for by the Covenant. As dissolution of the League means terminating the validity of the Covenant, such termination might be brought about by an amendment under Article 26.<sup>10</sup>

Kelsen denies the possibility of using Article 3 (3) of the Covenant<sup>11</sup> to dissolve the League "since dissolution of the League means terminating the validity of the Covenant." In fact, the League Resolution dissolved the League of Nations *qua* organization, but specifically abstained from pronouncing on the continued status of the Covenant.<sup>12</sup>

Kelsen suggested as well that dissolution might be brought about by an amendment under Article 26 of the Covenant,<sup>13</sup> and in an earlier article he pointed out how such a far-reaching action might be carried out:

The term "amendment" may be interpreted in a broad way as comprising "dissolution." Paragraph 2 of Article 26 may be understood as referring not to all possible amendments, but only to amendments by

10. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, 595 (4th ed., 1964).

11. Article 3 (3) states: "The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world."

12. "It is legally significant that the Assembly dissolved the 'League of Nations' and did not abrogate, denounce, declare null and void or otherwise pronounce on the status of the Covenant, which contains no provision for its cessation either in itself or as Part I of four treaties of Peace." Myers, "Liquidation of League of Nations Functions," 42 *AJIL* 332 (1948).

13. According to Article 26: "1) Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly. 2) No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League."

which the members are to be bound, not to amendments by which the members are to be freed from obligations. Paragraph 1 of Article 26 may be considered as applicable to an amendment the purpose of which is to dissolve the League. Such an amendment requires nothing but an agreement ratified by all members of the Council and by a majority of the members of the League whose representatives compose the Assembly.<sup>14</sup>

One might in fact argue that the Resolution adopted by the League Assembly could fall into an amendment category since paragraphs 1 (1) and 2 (1) of the Resolution on Dissolution envisage future action under League authority. While the term "amendment" is not used, the facts of the situation do not depart appreciably from Kelsen's analysis.

In his Separate Opinion, Judge Read considered the League Assembly competent to dissolve the League on two grounds, the first of which being Article 3 (3) as indicated in the preamble to the Resolution. Read, unlike Kelsen, limits the required scope of Article 3 (3) to the dissolution of the League and not of the Covenant. Mortality was, for Read, an essential attribute of human organization:

In the field of municipal law, it is possible to provide, by legislation, for supervised liquidation, but, in international law, there is no super-State or supreme legislative authority. In the case of an international organization, and in the absence of express provisions in its charter, a legal power of liquidation arises by necessary implication. Under the Covenant, the Assembly, representing all of the Members, was clearly justified in proceeding upon the assumption that this power to liquidate could be exercised by it, and by no other organ or agency of the League.<sup>15</sup>

Judge Read's conclusion, that the League as a whole had an implied power under the Covenant to dissolve itself, is not beyond question, nor is his assertion that the Assembly was the proper organ to carry out that dissolution.<sup>16</sup> Opposition to Read's conclusion of an implied power of dissolution has been forthcoming in a recent book by Georg Schwarzenberger.<sup>17</sup> Prof. Schwarzenberger initially proves willing to accept Read's comparison of domestic and international law subject to two reservations:

In any case, States make provision only for the dissolution of legal persons

14. Kelsen, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals," 39 *AJIL* 82 (1945).

15. [1950] ICJ Rep. 167.

16. *See infra*,

17. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. III: *International Constitutional Law: Fundamentals, the United Nations, Related Agencies* (1976).

other than themselves. They regard themselves as permanent institutions and, as a rule, do not make provision for their own dissolution, voluntary or otherwise.<sup>18</sup>

Second, he posits that “[i]n the case of comprehensive international institutions of a confederate character,” such as the League of Nations, it was the typical intention of the parties to create a permanent international order or quasi-order.<sup>19</sup> Schwarzenberger’s analysis relies heavily upon a categorization of international institutions into four general types: 1) institutions created for a limited period, e.g., the European Coal and Steel Community; 2) Provisional institutions, e.g., GATT; 3) Institutions of indefinite duration, e.g., the European Economic Community; and 4) Permanent Institutions.<sup>20</sup>

Schwarzenberger gainsays Judge Read’s reasoning on necessarily implied powers of dissolution on the grounds that “it would be less far fetched to imply a different intent of the contracting parties at the time of the establishment of the League of Nations. This was to create a permanent organisation and, therefore, not to anticipate any possibility of the dissolution of this international order or quasi-order.”<sup>21</sup> By this line of logic, the expressed intention of creating a permanent institution negates the “implication” of there being an intention of granting powers of dissolution.

Schwarzenberger adduces meagre evidence to support his characterization of the League as a “permanent institution.” He dismisses the right of members of the League to withdraw as a “nominal concession to the principle of State sovereignty.”<sup>22</sup> Textually, he points out that it was the common intent of the Allied and Associated Powers to “create a framework of world order that would be able ‘to promote international cooperation and to achieve international peace and security.’ ”<sup>23</sup>

If, as the Allied and Associated Powers asserted, it was their desire to “secure the permanent peace of the world,” it was necessary for the League of Nations to have a permanent organization. Thus, at the Paris Peace Conference of 1919, the permanent character of the League of Nations was taken for granted.<sup>24</sup>

18. *Id.*, at 96.

19. *Id.*, at 96-7.

20. *Id.*, at 90-3.

21. *Id.*, at 97.

22. *Id.*, at 94.

23. *Id.* In his note 41, Prof. Schwarzenberger cites Section I of Part XIII of the Treaty of Versailles, the I. L. O. Statute, as the source of this quotation. That is incorrect. This language comes from the Preamble to the League of Nations Covenant.

24. *Id.*

But the phrase, "secure the permanent peace of the world" occurs in the Preamble to Section I of Part XIII of the Treaty of Versailles, which deals with the International Labor Organization, rather than in the Preamble to the League's Covenant.<sup>25</sup> There is, in fact, no language in the Covenant promoting the League as a permanent institution. Schwarzenberger does argue, however, that since the I. L. O. was conceived as a permanent organization and was established "as part of the organization of the League" (Article 392 of the Treaty of Versailles), therefore, "by implication, the League of Nations must have been envisaged as being of a permanent character."<sup>26</sup> This line of logic is somewhat strained. In fact, the I. L. O. had a separate Secretariat and a large measure of autonomy. Finally, neither the membership nor the pattern of voting in the two organizations was identical.<sup>27</sup>

Schwarzenberger credits institutions of indefinite duration with possessing a power of dissolution by necessary implication. If the League falls into that category it therefore possesses that power. Even assuming, for the moment, that Schwarzenberger has satisfactorily proved the League's permanent character, there remains no reason to deny validity to the League's dissolution. For, in an earlier section he states:

Yet, even in this [Permanent Institutions] model, dissolution of the institution is always possible. Anything that is done on a consensual basis may be undone in the same manner. Moreover, if organs of an international institution are granted unlimited powers to amend the constituent instruments, they remain free to modify the objects of the institution. If these objects can no longer be attained, the termination of the institution's activities may be considered to fall within the scope of the authority granted to change objects in other circumstances. To proceed in this way would be a controlled application of the *clausula rebus sic stantibus* rule.<sup>28</sup>

Schwarzenberger's reasoning closely approximates the second ground Read gives for assuming the existence of a competence to dissolve the League. It is a general principle of law recognized by civilized nations, Read states, that any legal position, or system of legal relationships, can be brought to an end by the

25. *Id.* In note 42, Prof. Schwarzenberger correctly refers the reader to the provision of the Treaty of Versailles dealing with the I. L. O. Because of the error in note 41, however, the unfortunate impression is given that both quotations from the Treaty of Versailles refer to the League of Nations Covenant.

26. *Id.*, n. 42

27. In the Advisory Opinion, the *Free City of Danzig and the I. L. O.*, the Permanent Court ruled that under certain conditions the Free City might in fact become a member of the I. L. O. although not a member of the League. Judge Anzilotti in dissent argued that legally the two memberships should remain identical. [1930] PCIJ, ser. B, No. 18. In practice, however, the memberships diverged as happened in 1937 when the United States became a member of the I.L.O.

28. Schwarzenberger, *supra* note 17, at 93.

consent of all persons having legal rights and interests which might be affected by their termination.<sup>29</sup>

Significantly Prof. Schwarzenberger finds little to disagree with here.

In the last resort, such an abstraction from the world's most representative legal systems would probably meet with little objection. Yet, in the case of any consensual super-structure, based on a multilateral treaty, it suffices to refer to the more concrete rule on *actus contrarius* in the law of treaties. As this forms part of international customary law, no need exists in this case to fall back on the general principles of law, the third, and most subsidiary, of the three law-creating processes of international law.<sup>30</sup>

One may therefore reach the conclusion that either on a basis of necessarily implied powers, *actus contrarius*, or general principles, there existed in the League the power to terminate itself.

The last question that must be considered is whether the League Assembly itself had the legal competence to dissolve the League. A certain doubt must understandably exist in light of the circumstances by which it assumed the right. On April 12, 1946, the League Assembly unanimously passed a Resolution stating that: "The Assembly with the concurrence of all the Members of the Council which are represented at its present session Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council."<sup>31</sup>

The issue of Assembly competence is largely overlooked by the various publicists who have addressed the issue. For example, Judge Read merely states that "under the Covenant, the Assembly, representing all of the Members, was clearly justified in proceeding upon the assumption that this power to liquidate could be exercised by it, and by no other organ or agency of the League,"<sup>32</sup> an answer that merely defines away the problem.

There are, however, a number of reasons to consider that the League Assembly did have the legal competence to take the measures on dissolution

29. [1950] ICJ Rep. 167. A similar point is made by Prof. Leo Gross: "As international law in its conventional and customary form is not the product of the will of one state but emanates from the free will of two or more states, so is the competence of authentic or authoritative interpretation vested in the community of nations or in the states parties to the treaty. In the advisory opinion on the Jaworzina case, the Permanent Court of International Justice referred to the 'established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.' This is so, it is submitted, because, as Kelsen pointed out, an 'authentic interpretation . . . is a law-creating act.' An authentic interpretation, being binding, is within the competence of the norm-creating body." "States as Organs of International Law and the Problem of Autointerpretation," in Lipsky (ed.) *Law and Politics in the World Community* 81 (1953).

30. Schwarzenberger, *supra* note 17, at 96.

31. L. N., O. J., Sp. Supp. No. 194, at 212, 48 and 277 (1946).

32. Separate Opinion of Judge Read, [1950] ICJ Rep. 167.