The League of Nations, autonomy and collective security

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Abstract: This article tests the assumption that in institutional and legal design the League of Nations was incapable of providing collective security. The lens through which this issue is scrutinised is the concept of institutional legal autonomy, in other words the legal separation of the organisation from its member states. The thinking is not necessarily that the greater the autonomy the greater the potential of the organisation to fulfil its functions, but that the organisation already had *sufficient* autonomy in international relations to provide an effective form of 'collective security', a term that was not found in the Covenant but, by 1935, was being used to describe the response of the League to the Italian invasion of Abyssinia in 1935. This article tests the assumption that the League did not have sufficient autonomy in terms of collective judgment and power to deliver collective security.

In 1936, CJ Fenwick wrote of the 'failure of the League', particularly the 'failure of the plan of collective security' contained in the Covenant of the League of Nations 1919. Fenwick recognised that the other important functions of the League in social and economic activities remained 'substantially unaffected by the failure of collective security'. However, these achievements appeared to Fenwick 'to be of little consequence in the face of the inability of the League to meet the most vital problem of any legal system—the maintenance of order in the international community and the protection of rights of person and property'.[1] Fenwick's explanation for the failure of the League's collective security system was that it did not have 'sufficient corporate unity to overcome the conflicts of nationalistic interest within the dominant group of the Great Powers'.[2]

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[1] CG Fenwick, 'The "Failure" of the League of Nations' 30 *American Journal of International Law* (1936) 506, 506.

[2] Ibid 508.

The aim of this article is to re-consider the League of Nations in order to test the assumption that in institutional and legal design it was incapable of delivering collective security and that, in part at least, it was culpable for failing to prevent the Second World War. The lens through which this issue is scrutinised is the concept of institutional legal autonomy, in other words the legal separation of the organisation from its member states (what Fenwick called 'corporate unity'). Of course it was entirely possible that a loose association of states, acting in concert (and perhaps calling itself the League of Nations),[3] could have acted to confront aggression and keep the peace. However, in no sense would such actions have been those of a separate organisation and they would simply have been further manifestations of the shifting balances of power that preceded the advent of the League. The article tests the hypothesis that the Covenant was designed to create a separate source of rights and powers, which should have been invoked when a state breached the undertakings given in the Covenant and associated treaties, in particular by unjustified acts of war.

The thinking is not necessarily that the greater the autonomy the greater the potential of the organisation to fulfil its functions, but that the organisation already had *sufficient* autonomy in international relations to provide an effective form of 'collective security', a term that was not found in the Covenant but, by 1935, was being used to describe the response of the League to the Italian invasion of Abyssinia in 1935.[4] For Fenwick, 'collective security' must be based on 'the principle of law . . . that the collective judgment of the community of nations must replace the right of each State to be the judge in its own case and the collective power of the community be substituted for the old right of the individual State to take the law into their own hands'.[5] In a sense this article tests Fenwick's assertion that the League did not have sufficient autonomy in terms of collective judgment and power to deliver collective security.

In terms of structure, the article begins with different visions of international organisation put forward by the leaders of the victorious states towards the end of the Great War and demonstrating significant differences as well as common ground. This section provides the wider political as well as theoretical context for subsequent discussion, as it reflects on different visions of a liberalist world order debated by leading statesmen and their advisers at the Paris Peace Conference. Could the compromise between these differing positions provide

[3] Just as during the Second World War, the Allies termed themselves the 'United Nations' in a Declaration made on 1 January 1942.
[4] JF Williams, 'Sanctions under the Covenant' 17 *British Year Book of International Law* (1936) 130, 136.
[5] Fenwick (1936) 506-07.

for autonomy in the form of collective security, would it simply reinforce the hegemony of the victorious powers, or would it try to combine the two?

This is followed by an analysis of the drafting process where these visions took on legal forms, which themselves inevitably embodied further compromises achieved as part of the wider bargaining surrounding the Treaty of Versailles. The balance between the sovereignty of states and the competence of the organisation in the resulting Covenant seemed, superficially at least, to be firmly in favour of sovereign states given the predominance of members' rights and duties as well as the requirement for unanimity in decisions by League organs, thereby seemingly excluding autonomy in terms of independence of League action. However, the provisions of the Covenant were remarkably informal,[6] providing the potential for constitutional growth that could produce a confluence of collective security action based on the rights and duties of member states and the powers of the League. A sliver of autonomy perhaps, but present nonetheless, and present thirty years before the International Court of Justice delivered its verdict in 1949 on the then disputed international legal personality of the UN.[7]

The Covenant and the League are then re-assessed through engagement with a sample of the legal literature of the period found in the *British Year Book of International Law*, which was first published in 1920 and, therefore, attracted a number of commentaries on the League and Covenant. Although this approach privileges a certain type of writer, the purpose is not to collate all views on the nature of the League, but to examine a slice of thinking from what quickly became one of the established and highly regarded publications on international law. Indeed, Tony Carty characterises the work of a number the authors of the 1920s and 30s highlighted in this article, including those of Arnold McNair, JL Brierly and Hersch Lauterpacht, as laying 'the intellectual foundations for the so-called practitioners' approach to the discipline',[8] suggestive of an orthodox formalism. But this body of work involved innovative analysis of constructs and concepts that now form the architecture of the modern law of international organisations—supremacy, impartiality, personality, powers, sovereignty, and constitution. The purpose is not to review all academic discussion of the period, or to review institutional practice except where it is illustrative of the powers of the

[6] JL Brierly, 'Matters of Domestic Jurisdiction' 6 *British Year Book of International Law* (1925) 8, 15.
[7] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 174.
[8] A Carty, 'Why Theory? The Implications for International Law Teaching', in P Allott et al. (eds), *Theory and International Law: An Introduction* (BIICL, 1991) 75, 77.

League,[9] but to examine a significant enough sample of the rich academic thinking of the period to help evaluate the autonomy of the League especially in its main purpose of 'promoting international co-operation and to achieve international peace and security',[10] or what became termed 'collective security'.[11]

The 'failure' of the League, then, is reassessed and this inevitably includes a consideration of whether a strengthening of the legal autonomy of the League would have improved the performance of the League, an assumption of the drafters of the UN Charter of 1945. Would increased institutionalisation, centralisation and, indeed, constitutionalisation, produce an organisation capable of keeping the peace? Or, could it be argued that the drafters of the Covenant struck the right balance or, at least, an adequate balance between the rights and duties of member states and the powers of the organisation? That the League did not prevent the Second World War is a matter of historical record, but the question this article seeks to answer was whether that was due its institutional design and in particular its perceived lack of autonomy.

ORGANISATIONAL VISIONS

When considering the visions of world order of the statesmen from the victorious powers emerging from the First World War there were clear but not irreconcilable differences in the conceptions of the League. Although these are broadly conceived and do not directly address legal autonomy as such, some had less potential to deliver an autonomous organisation than others. Lloyd George foresaw a League placing procedural hurdles in the way of potential aggressors preventing a slide into war and, thereby, eliminating the diplomatic blunders that triggered the First World War.[12] While this would necessitate some independent League machinery, it would limit the collective powers of any organisation to a supervisory role. Wilson had more ambitious aims, outlined in a speech to the US Senate on 22 January 1917, wanting a League to embody a significant element of autonomy not as 'balance of power, but a community of power; not organized rivalries, but an organized common peace'.[13] The

[9] For an excellent review of doctrine and practice under each article of the Covenant, see R Kolb (ed.), *Commentaire sur Le Pacte de la Societe des Nations* (Bruylant, 2015).
[10] Covenant of the League of Nations, 28 June 1919 (entered into force 20 January 2020) preamble.
[11] A McNair, 'Collective Security' 17 *British Year Book of International Law* (1936) 150, 154.
[12] R Henig, *The League of Nations* (Haus Publishing, 2010) 43.
[13] W Wilson, Address to the US Senate, 22 January 1917, http://www-personal.umd.umich.edu/~ppennock/doc-Wilsonpeace.htm.

League, moreover one with collective powers, was more central to Wilson's vision when compared to Lloyd George or Clemenceau who were greatly concerned with the multiple territorial, economic and military disputes and matters that were the fall-out of the Great War. Europe was in chaos and the Paris Peace Conference had to restore order by securing numerous peace settlements backed by the dwindling forces of the victorious powers. However, the idea of crafting a new world order remained, especially for Wilson who, according to AJP Taylor, understood the essence of the League as 'something other than a meeting place for the representatives of sovereign states'; instead it was to be 'a conscience of humanity to which all states would become obedient'.[14] The problem was how to elevate the League from a meeting place for states without creating a new form of sovereign power, which most states whether established or aspiring were not prepared to accept. Nevertheless, the League had to be strong enough to face the growing tide of nationalism that followed from the Paris Peace Conference. As Zara Steiner states: 'the League was never intended to be a super state; it was an experiment in internationalism at a time when the counter-claims of nationalism were running powerfully in the opposite direction'.[15]

By April 1917 the US had been forced into the war by German submarine warfare, but Wilson saw American engagement as a means of securing a new world order in which peace could only be maintained by a 'partnership of democratic nations',[16] with America as the ultimate 'arbiter of global power'.[17] Nonetheless, his January 1917 vision of the League as a 'community of power' was modified by Point 14 of his Fourteen Points of January 1918, which contained a more orthodox commitment to a 'general association of nations . . . formed under specific covenants for the purposes of affording mutual guarantees of political independence and territorial integrity to great and small states alike'.[18] This suggested that his initial idea of a 'community of power' had been replaced by a template for a more orthodox web of covenants or contracts between sovereign equals.

Wilson's ideas for organisation ran alongside his support for a broadening of the society of sovereign states beyond Europe. In August 1916 Wilson had spoken of 'England having the earth and of Germany wanting it'.[19] The First World War was in part a battle over empires—

[14] AJP Taylor, *Europe: Grandeur and Decline* (Penguin, 1967) 368.
[15] ZS Steiner, *The Lights That Failed: European International History 1919-1933* (Oxford UP, 2005) 349.
[16] A Tooze, *The Deluge: The Great War and the Reaming of Global Order* (Penguin, 2015) 67.
[17] Ibid.
[18] B Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (Routledge, 2009) 184-86.
[19] Tooze (2015) 45.

a dispute over their ownership—it was not a dispute to eliminate empire altogether at least until the US, in particular Wilson, became involved. However, even Wilson's Fourteen Points did not contain a clear declaration of democracy and self-determination for all peoples, but a 'gradated view of the capacity for self-government that was typical of nineteenth-century liberalism'.[20] Nonetheless, the negotiation of the peace treaties in Europe at the Paris Peace Conference involved extensive discussion and debate about self-determination and its imperfect application.[21] Winston Churchill 'estimated that 90% of Europe's peoples were placed under governments of their own nationality',[22] demonstrating that self-determination played an important role in the re-shaping of Europe, while still leaving states with significant minorities and a potential for instability and insecurity. Furthermore, self-determination was not deemed applicable beyond the continent at least in the sense of independent statehood for colonial territories.[23] This meant that the League would not achieve the status of a universal organisation but, in a sense, this should have enabled the Great Powers to focus the need for an autonomous organisation to manage European rivalries, and address the growing influence of the US, the Soviet Union and Japan. In other words, collective security should still have been achievable, but this depended on the League being given sufficient autonomous powers of enforcement to tackle those states violating the covenants. The surrender of Germany in 1918 was due as much to a collapse of its economy as a military victory for the Allies,[24] so it is unsurprising that the first attempt at a world organisation put emphasis on the obligation of member states to impose economic sanctions as a means of ensuring compliance with the norms of the Covenant.[25] While the League's sanctioning competence rested on the duties of member states, it was the duty of the Council of the League to recommend military action to protect the Covenants of the League.[26] Reflecting French concerns about future German aggression, Clemenceau had argued for an international army,[27] but this was not acceptable to the British and the Americans,[28] although

[20] Ibid 121.
[21] M Macmillan, *Peacemakers: Six Months that Changed the World* (John Murray, 2001); M Macmillan, *Peacemakers: Six Months that Changed the World* (John Murray, 2001) 496.
[22] H Elcock, *Could the Versailles System have Worked?* (Routledge, 2018) 35.
[23] It was remarkable, for instance, that 'a young kitchen assistant at the Ritz sent in a petition [to the Supreme Council at Paris Peace Conference] asking for independence from France for his little country. Ho Chi Minh—and Vietnam—were too obscure even to receive an answer'. Macmillan (2001) 67.
[24] Tooze (2015) 39.
[25] Covenant of the League of Nations, art. 16(1).
[26] Ibid art. 16(2).
[27] See further 'Draft adopted by the French Ministerial Commission for the League of Nations', in F Wilson, *The Origins of the League Covenant: Documentary History of its Drafting* (Hogarth Press, 1928) 189, sec. III(i).
[28] Tooze (2015) 264.

the establishment of a permanent commission 'to advise the Council' on the execution of the disarmament provisions of the Covenant and 'on military, naval and air questions generally' was a concession to French concerns.[29]

THE DRAFTING OF THE COVENANT

Wilson is often credited with both the idea and the form of the League of Nations. In reality, the Covenant was a 'compound of various suggestions'.[30] As Margaret Macmillan writes: '[t]he picture sometimes painted of Wilson sailing across the Atlantic bearing the gift of the League of Nations from the new world to the old is compelling but, alas, false.'[31] The term 'League of Nations' can be traced to a book, *La societe des nations,* published in 1908 by Leon Bourgeois who became a member of the drafting Commission, and there were various other plans and proposals coming from different authors and pressure groups in Europe.[32] The British government accepted the idea of a League of Nations as early as 1915, two years before the US entered the war, and, at the beginning of 1918, the UK appointed the Phillimore Commission to consider the consequences of creating a League. The report of the Commission was premised on the idea of a democratic peace, that an international organisation for peace and security would only work if based on democratic states, but many of its other elements emerged in the drafts of the Covenant.[33]

According to John Maynard Keynes (who had resigned from membership of the British delegation to Paris):

> These were the personalities of Paris—I forbear to mention other nations or lesser men; Clemenceau aesthetically the noblest; the President morally the most admirable; Lloyd George intellectually the subtlest. Out of their disparities and weaknesses the Treaty was born. Child of the least worthy attributes of its parents, without nobility, without morality, without intellect.[34]

Keynes encapsulates the common criticism of the Treaty of Versailles, namely that it embodied the 'lowest common denominator of the emotions and attributes of its three

[29] Covenant of the League of Nations, art. 9.
[30] Wilson (1928) xi.
[31] Macmillan (2001) 94.
[32] Reinalda (2009) 180-81.
[33] Ibid 180-82.
[34] JM Keynes, 'Mr Lloyd George: A Fragment', in *Essays in Biography* (Hart Davies, 1933) 40-41.

principal makers',[35] therefore was doomed to fail and, indeed, was a contributory cause of a further descent into global violence in 1939.

Other analyses of the outcome of the Paris Peace Conference do not share this scepticism. Macmillan argues that 'they tried, even cynical old Clemenceau, to build a better order',[36] while Ruth Henig points out that 'there is some truth in the many sketches painted of the Council of Four' consisting of Wilson, Lloyd George, Clemenceau and Orlando, 'but the records show that this process of bargaining was complex, with attitudes by no means fixed'.[37] Moreover, the criticisms of Keynes tended to focus separately on the territorial and reparations aspects of the Treaty of Versailles on the one hand, and the Covenant on the League of Nations on the other.[38] This was not the intent of the drafters, the Treaty was negotiated as a whole package and the Covenant was a key element in that package. Although the idea of the League was contained in the last of Wilson's Fourteen Points it was integral to achieving many of the other Points.

The Covenant was contained in the first section of the Treaty of Versailles and was seen not only by Wilson but also by the other two leading statesmen 'as the key to securing a peaceful Europe and world during the years following the Conference'.[39] Indeed, according to Wilson and Lloyd George the League would be the agency by which the faults in the Versailles system could be corrected. The idea was that the League would adjust the treaties of settlement arrived at the end of the First World War in order to avoid conflict, with Lloyd George stressing its role to 'remedy . . . repair and redress—the League of Nations will be there as a Court of Appeal to readjust crudities, irregularities, injustices'.[40] Wilson wrote that he realised 'more than ever before, that once established, the League can arbitrate and correct mistakes which are inevitable in the treaty we are trying to make at this time'.[41] According to Taylor, Wilson's idea that became formulated in the Covenant, was to protect all states, victors and vanquished, 'under the rule of law'.[42]

[35] Elcock (2018) 7.
[36] Macmillan (2001) 500.
[37] R Henig, *Versailles and After: 1939-1933* (Routledge, 1984) 14-15.
[38] Elcock (2018) 12-13.
[39] Ibid 36.
[40] Henig (2010) 47.
[41] Quoted in A Sharp, *The Versailles Settlement: Peacemaking in Paris 1919* (Macmillan, 1991) 59.
[42] Taylor (1967) 368.

Clemenceau and Lloyd George did not attend the League Commission responsible for drafting the Covenant.[43] Wilson, on the other hand, insisted on chairing it reflecting his belief that the League 'was the centrepiece of the peace settlements',[44] while British and French interests were protected by their representatives on the Commission: General Smuts and Lord Cecil for Britain, Ferdinand Larnaude, a Professor of Law at the University of Paris, and Leon Bourgeois, a French politician and jurist for France. Smuts played a pivotal role, arguing that the League should be a means of continuing empire on the basis that the British Empire was 'the only successful experiment in international government'.[45] The French representatives reflected Clemenceau's view that the League should be able to prevent and confront (German) aggression with preponderant economic and military force,[46] and should be part of a wider repressive package in the Treaty of Versailles for keeping Germany weak. It should be borne in mind that it was the whole package of the Treaty of Versailles that was being negotiated in Paris, so that concessions made by Wilson over the reparations clause in the Treaty, for example, enabled him to secure the adoption of the Covenant in an acceptable form.[47]

According to Florence Wilson the basis of the Covenant was a draft presented by Wilson, which was 'used as a basis for discussion at the suggestion of the British delegation'.[48] Wilson did not claim it as 'wholly his own creation', the supreme Council minutes showing that its generation could be traced back to the Phillimore Report, which had been rewritten by Colonel House and Wilson. Wilson revised it again after having received General Smuts' draft and Lord Robert Cecil's reports, making the draft 'a compound of various suggestions'. This draft was further refined by the Commission on the League of Nations tasked by the Peace Conference with working 'out the details of the constitution and functions of the League', and consisting of two delegates each from the Great Powers alongside nine delegates selected by the smaller states represented at Paris.[49]

The initial draft discussed by the Commission was quite imprecise, containing little by way of detail regarding the rights or powers of the organisation or voting rules.[50] Apart from using

[43] Macmillan (2001) 100.
[44] Ibid 94.
[45] M Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton UP, 2009) 37-45.
[46] Macmillan (2001) 101.
[47] Reinalda (2009) 187.
[48] Wilson (1928) xi.
[49] Ibid citing Supreme Council minutes of 21 January 1919.
[50] See 'Draft Covenant', in Wilson (1928) 173.

the term 'constitution of the League of Nations' in the preamble of the draft,[51] there was little in concrete terms concerning League autonomy and how it might be balanced with the rights and duties of member states in order to produce collective action by the League. Smuts' *The League of Nations: A Practical Suggestion*, supported by Lloyd George, influenced the League Commission in February 1919.[52] According to Lloyd George, Wilson swallowed Smuts' proposal whole, meaning that the League 'was really a British production although fathered by President Wilson'.[53] Smuts' version reflected his and the British concern for preserving empire by including stronger provision for the former colonies of the defeated nations, which was largely carried forward into the final Covenant. However, Smuts' version was more forward looking than the final Covenant in terms of promoting League autonomy and action. In particular Smuts' proposal provided for a much more powerful Council with executive, administrative and lawmaking powers and, importantly, providing that only 'a minority of three or more' members of the Council could 'veto any action or resolution of the Council'.[54] This was clearly not acceptable to the other members of the Commission. Unanimity of decision-making was chosen in the final version at the suggestion of Lord Robert Cecil reflecting his plan for the League of Nations.[55] The powers of the Council were reduced and dispersed in the Covenant and appeared to be secondary to the right and duties of member states.

The first draft of the Covenant emerging from the Commission after two weeks was declared by Wilson as a 'living thing' and as a 'constitution of peace, not as a League of War'.[56] However, he had to return to the Commission in March 1919 to propose changes to the draft Covenant in order to try to persuade Congress to support it; changes that included a withdrawal clause, an exclusion of matters within a member state's domestic jurisdiction, and a recognition of regional understandings such as the Monroe Doctrine.[57] Despite these changes, Lloyd George remained of the view that had such an organisation existed in the summer of 1914, war would not have broken out as Germany would automatically have been called to account before the permanent machinery of the League.[58] The processes of delaying resort to war, the provisions for conciliation, arbitration or reference to the Permanent Court

[51] Ibid.
[52] Henig (2010) 26-28.
[53] Ibid 28.
[54] 'Proposals Made by General Smuts for a League of Nations', in Wilson (1928) 184, paras 12-14.
[55] Wilson (1928) 38. See 'Plan for a League of Nations by Lord Robert Cecil', in Wilson (1928) 181.
[56] Henig (2010) 38.
[57] Ibid 40; Covenant of the League of Nations, arts 1(3), 15(8), 21.
[58] Henig (2010) 43.

of International Justice, as well as the guarantee against aggression,[59] would have led to a cooling-off period in which statesmen would have resolved their differences and reached a peaceful settlement. There was crucially, however, a feeling, too, that a procedural approach by itself would not stop a government set on a long-term policy of aggression.[60] This raises the question of whether the drafters had created an organisation capable of reaching beyond the procedures of the Covenant and the sovereign interests of individual states, in order to shape and enforce a collective security system through marshalling the duties of member states.

The idea that the League would manage the peace, making adjustments and addressing injustices as well as confronting aggressions, strongly indicates the necessity of institutional legal autonomy from member states, enabling the League to act as an impartial third party peacemaker when trying to settle disputes but, if necessary, as a coercive peace enforcer when faced with aggression. However, the crafting of the Covenant, in particular the requirement in Article 5 for unanimity of decision making, seemed to lean too much towards preserving the sovereignty of member states. This was just one of a number of paradoxes contained in the Covenant between preserving the sovereignty of states, including the sovereignty over colonies of the victorious colonial powers, and the powers of the organisation. Furthermore, the focus on dispute settlement in the Covenant seemed to be premised on preventing a further descent into the type of violence between European states as occurred in the lead up to the First World War, rather than the emerging post-1919 world of aggressive nationalism.

It is true that the statesmen and drafters of the Covenant did not appear to envisage new kinds of ideological and revolutionary warfare, or further advances in technology where airpower would challenge sea power. However, this did not necessarily mean that the Covenant failed to create a framework for a collective security system capable of being developed and adjusted to meet changing international conditions. Nonetheless, even if that were the case, its success depended upon member states not only taking their obligations under the Covenant seriously, but also acting creatively through the Council and the Assembly to shape a system of collective security. To be able to do this, the Covenant would have to provide sufficient autonomy for the organisation so that states, acting through the Council and the

[59] Covenant of the League of Nations, art. 10.
[60] Henig (2010) 44.

Assembly, could effectively address the policies and actions of powerful states that might threaten world peace.

JURISTIC ANALYSIS

Much of the remainder of this article is devoted to exploring aspects of League autonomy identified by jurists writing in the *British Year Book of International Law* over the period of the League's existence, much of which was concentrated on the meaning of the provisions of the Covenant and, more broadly, on the nature and functions of the League. By removing the 'benefits' of hindsight,[61] the purpose is to explore whether academic opinion of the time thought the League had the potential to provide collective security. Although the literature under review includes some discussion of the practice of the League especially its failure to reverse aggressions spanning the 1930s, principally in Manchuria, the Rhineland, Czechoslovakia, Poland and Finland, the purpose here is to expose the underpinning legal analysis of the Covenant in order to discern any perceived elements of autonomy. This means that practice will not be reviewed in any great detail, with the limited exception of the most tangible League action, which took the form of sanctions against Italy for its invasion of Abyssinia in 1935. Even this response had petered out by 1937, prompting the majority of the League's Assembly to replace the obligation to impose sanctions against a Covenant breaker with an option to do so.[62] Despite this poor record in practice, it remains the case that the Covenant and the League might have provided collective security if it its autonomy had been fully explored and utilised.

The following review of the jurisprudence of the period as found in the *British Year Book* is divided into narrower aspects, which focused on the League's voting rules and its competences; and wider questions, which considered whether the Covenant was a higher law, and whether the League represented a transfer of sovereign powers away from states to the organisation. This is supplemented by considering an opinion of the Permanent Court of International Justice on the issue of domestic jurisdiction and its protection under the Covenant. In the end, the arguments and analyses were remarkably convergent even though they focused on different aspects of the League.

[61] Although there is some spillage into the discussions of the League Covenant and the UN Charter in the *British Year Book of International Law* in the immediate post-1945 period.
[62] Reinalda (2009) 219.

Figure 1. The Palais des Nations, Geneva, final home of the League of Nations, was built between 1929 and 1936. This impressive physical manifestation of the autonomy of the League emerged during the period of its decline as a collective security organisation. This photograph shows the progress made in 1933. Source: United Nations Library Geneva.

IMPARTIALITY

Sanctions and armed force envisaged under Article 16 of the Covenant would pit the League and its members against an aggressor but, before that stage was reached, peaceful methods of dispute settlement should have been attempted if not exhausted. The idea shared by the drafters was that the League would be an independent and impartial actor in the settlement of disputes. For example, a detailed draft produced by the French Ministerial commission in June 1918 included the proposition that '[t]he object of the League of Nations shall not be to establish an international political State. It shall merely aim at the maintenance of peace by substituting Right for Might as the arbiter of disputes'.[63] One key element in organisational autonomy is to remove any party to a dispute from blocking a collective response: in other words, from being a judge in its own cause. When compared to the Charter of the UN, the Covenant was in some ways potentially more effective in preventing a member state from blocking resolutions on matters in which it was involved.

[63] Wilson (1928) 190.

Article 15 of the Covenant provided that member states agreed to submit disputes to the Council, which 'shall endeavour to effect a settlement of the dispute'. If unsuccessful, this resulted in the production of a report by the Council, either unanimously or by majority vote, containing a statement of the facts of the dispute and 'the recommendations which are deemed just and proper in regard thereto'. Article 15(6) stated that if the report was agreed unanimously by members of the Council 'other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report'. These were significant departures from the basic principle of unanimity found in Article 5 and they maintained the impartiality of the Council by disregarding the votes of disputants. In particular, a great power was unable to block the adoption of a resolution that purported to address it as a party to a dispute. As McNair pointed out, the Report generated in Article 15(6), 'which when adopted unanimously (excluding the disputing parties) has certain definite legal consequences, as has been illustrated by the dispute between Italy and Abyssinia',[64] when sanctions were ultimately imposed by states on Italy despite its opposition. It should be remembered that Italy was one of the great powers in the Council of Four at the Paris Peace Conference. McNair's example shows how the exclusion of disputants could transcend the Covenant's provisions for both peaceful settlement in Article 15 and enforcement in Article 16.

Furthermore, Article 16, which envisaged non-forcible and forcible measures being taken against member state resorting to war in breach of the covenants, provided in paragraph 4 that any such state could be declared to be no longer a member of the League by a vote of the Council 'concurred in by the Representatives of all the other Members of the League represented thereon',[65] thereby excluding the transgressing state from blocking any measures under Article 16. In effect, the Covenant enabled the League to pursue dispute settlement and enforcement without being stopped by the negative vote of a member state, including those of the great powers, if such a state either was either a party to a dispute or had resorted to war in violation of the Covenant.[66]

Although these provisions of the Covenant were under-utilised, in design they were potentially stronger than Article 27(3) of the UN Charter, which contains the right of veto for each of the

[64] AD McNair, 'Collective Security' 17 *British Year Book of International Law* (1936) 150, 155.
[65] Covenant of the League of Nations, art. 16(4).
[66] There was an amendment made by the Second Assembly to Article 16, which, if it had come into force, would have discounted the votes of the covenant breaker and other immediately affected states. PE Corbett, 'What is the League of Nations?' 5 *British Year Book of International Law* (1924) 119, 125.

permanent members, but also makes it clear, in the words of Jenks, that the 'parties to a dispute are to abstain from voting while the Council is discharging its quasi-judicial function of promoting pacific settlement as distinguished from its political function of action for the maintenance of peace and security'.[67] As Wortley states, this aspect of Article 27 of the UN Charter contains a basic principle of natural justice that 'a party to a dispute shall not be a judge of its own cause and shall abstain from voting'.[68] The requirement for abstention on proposals made under Chapter VI has barely touched the permanent members. In practice, the Security Council 'not only decides whether a dispute has arisen but also, ultimately, who the parties to the dispute are'.[69] In effect, each permanent member has the power of veto over the issues of whether there is a dispute and who the parties to it are. It is not just practice that has driven this, but the design of a Charter in which it is impossible to draw a clear line between the Security Council as corporate actor and the powers and privileges of each permanent member. Design and practice have allowed each permanent member a veto over proposed resolutions purporting to tackle disputes in which it, or one of its clients, is a party.[70]

UNANIMITY

In design the League appeared to be hobbled by the requirements of unanimity, seemingly potentially giving every member state a veto, but this was not the case. The rule of unanimity in Article 5(1) of the Covenant stated that '[e]xcept where otherwise expressly provided for in this Covenant or by the terms of the present Treaty [of Versailles], decisions at any meeting of the Assembly or of the Council shall require the agreement of all the members of the League represented at the meeting.'[71] In reviewing the unanimity rule, Julius Stone pointed out that, according to Article 4(5), member states whose interests were specially affected by a matter being discussed by the Council were to be invited to 'sit as a member' at the relevant meeting of the Council. This signified that an invited state had the same rights as any other member

[67] CW Jenks, 'Some Constitutional Problems of International Organizations' 22 *British Year Book of International Law* (1945) 11, 39.
[68] BA Wortley, 'The Veto and the Security Provisions of the UN Charter' 23 *British Year Book of International Law* (1946) 95, 102.
[69] A Zimmerman, 'Article 27', in B Simma (ed.), *The Charter of the United Nations: A Commentary*, 3rd ed. (Oxford UP, 2012) 925.
[70] Wortley (1946) 105.
[71] Covenant of the League of Nations, art. 5(1).

including the right to vote.[72] Its blocking ability, however, like any member state, was curtailed by the provisions of Articles 5(2), 15(4)(5), and Article 16(4), which discounted the votes of parties to a dispute, as well as practice by the Council which disregarded negative votes in certain cases involving arbitration,[73] as well as not counting abstentions as violating the unanimity rule.[74]

Further practice, though not entirely consistent, distinguished 'decisions' under Article 5(1) where unanimity was required, from recommendations by the Council and Assembly as well as 'voeux' (expressions of desire) in the Assembly where majority vote was permissible.[75] Although there were debates about the extent of the unanimity rule in the organs of the League, Stone concluded that the rule, 'if wisely interpreted', was not prejudicial to the activities of the Assembly or Council. 'The organs of the League, and particularly the Council, have been reluctant to bind themselves more rigidly than necessary, lest they should hinder their action in unforeseen future contingencies.'[76] Although unanimity appeared to be an insurmountable design fault at least in allowing for League autonomy, juristic analysis showed that it was not the case.

THE COMPETENCES OF THE LEAGUE

The Covenant and the League were described by Charles Manning as having an 'organic character'.[77] In institutional law, this character often finds expression in terms of international legal personality and powers of the organisation, along with the interpretation and development of those powers by its organs. There was a rich discussion of these matters in the period of the League of Nations, with a majority of authors arguing that the League was an international legal person.[78] Percy Corbett provided a thorough review and critique of these debates, treading a careful path between analyses that suggested a new form of

[72] J Stone, 'The Rule of Unanimity: The Practice of the Council and the Assembly of the League of Nations' 14 *British Year Book of International Law* (1933) 18, 20. In contrast, under Article 31of the UN Charter an invited state does not have voting rights.
[73] Ibid 20-21.
[74] Ibid 32.
[75] Ibid 35-7.
[76] Ibid 42.
[77] CAW Manning, 'The Proposed Amendments to the Covenant of the League of Nations' 11 *British Year Book of International Law* (1930) 158, 160.
[78] Corbett (1924) 120. Corbett identifies the following authors arguing in favour of the personality of the League: Oppenheim, Schucking and Wehberg, Rougier, Vilini, Bonfils-Fauchille, Kleintjes; and the following against: Huber, Rolin, Makowski.

sovereignty and those that reduced the League to a simple standing conference. Corbett's approach to whether the League had personality was both inductive and deductive; his object was 'to consider the League of Nations, not merely as it is established and defined by the Treaties of Peace, but as a living organism with a character formed partly by its origin and partly by life'.[79] He summarised the views of those authors who, while arguing for the personality of the League, put forward 'examples of the rights and powers which, as a person in international law, it possesses . . . the right of legation, rights of sovereignty (e.g. over the Saar and the mandated territories), the right of intervention for the protection of minorities, the capacity to hold a protectorate (e.g. over the Danzig), and to declare war and peace'.[80]

Corbett doubted whether all of these claimed rights and powers should have been described in such absolute terms and argued that together they gave a misleading impression of the character of the 'constitution of the League'. All the listed rights and powers were, according to Corbett, qualified versions of those rights that belonged to states. For example, although the League employed agents who, 'when engaged on the business of the League' enjoyed diplomatic privileges and immunities',[81] this was 'only a power with some of the incidents of that traditional attribute [of legation] of sovereign states'.[82] On the claimed right to declare war and make peace, Corbett was even more critical stating that the alleged right was 'derived from a somewhat violent interpretation of Articles 10, 11 and 16 of the Covenant'.[83] While it was true that that the Council could be called upon to take measures, which may have included a recommendation 'that the Members of the League should concert to carry on war against a State guilty of territorial aggression or breach of the Covenant', this did not by itself render the League a separate 'belligerent power'.[84] Covenant breaching acts by a member state amounted to acts of war against all the other members of the League according to Article 16(1), and Article 16(2) empowered the Council to recommend to the 'several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the Covenants of the League'.[85] According to Corbett, whether war was 'to be carried on' was 'decided not by any of the organs of the League but by each Member itself'. Corbett confined the role of the

[79] Corbett (1924) 119.
[80] Ibid 121.
[81] Covenant of the League of Nations, art. 7.
[82] Corbett (1924) 123.
[83] Ibid 124.
[84] Ibid.
[85] Covenant of the League of Nations, art. 16(2).

Council to 'a certain directive influence by means of recommendations'.[86] He was making the point that a violation of the Covenant primarily triggers the obligation of member states to take measures. According to Corbett this was not confined to sanctioning duties as explicitly stated in Article 16(1) but, implicitly and logically, must have extended to the power to take military action under Article 16(2). Under this conception, the Council played a secondary and directive role assuming that it commanded the necessary support amongst its member states.

Corbett also pointed out that Article 10, 'another provision whose effective application is most likely to involve the use of armed force', placed the obligation to respond to aggression on members of the League with the role of the Council being confined to an advisory one.[87] He applied the same logic to Article 11, although the text of that provision was stronger in providing that 'any war or threat of war' was a 'matter of concern to the whole League, and the League shall take any action which may be deemed wise and effectual to safeguard the peace of nations'.[88] Although a meeting of the Council may be summoned under this Article, the right to take action was not expressly granted to that organ but to the 'League'. Article 11 too fell short of giving the Council an express power to make war or peace and reflected the nature of the Covenant as creating rights and duties for member states, which could act together as the League to respond to aggression and other breaches, with the organs of the League playing facilitatory, advisory and recommendatory roles when agreement was possible. Article 2 of the Covenant, however, seemed to shift more power than this to the organs of the League when it stated that 'the action of the League under this Covenant shall be effected through the instrumentality of the Assembly and of a Council, with a permanent Secretariat'.[89] Arguably, this empowered the Council to declare war under Article 11. Nevertheless, Corbett appeared to be correct when he stated that a war carried out to enforce the Covenant 'would doubtless be described as a League war, but it would be a war undertaken not at the command of the League, but on the voluntary decisions of the participating states'.[90]

Corbett's analysis of the other alleged sovereign powers of the League included pointing out that the League had not been vested with sovereignty over Danzig or the Saar, only with

[86] Corbett (1924) 125.
[87] Ibid 126.
[88] Covenant of the League of Nations, art. 11.
[89] Ibid art. 2.
[90] Corbett (1924) 126.

some of the attributes of sovereignty.[91] As regards the mandated territories, sovereignty did not reside in the mandatory state or in the League, but sovereign powers were exercised by the former under the supervision and control of the latter.[92] There was a stronger right of intervention invested in the Council by the treaties on minorities: 'what marks this as a veritable right in the hands of the League, as contrasted for instance with the alleged right of peace and war, is the fact that the decision to intervene rests with the Council, whereas the decision to apply the sanction of war can only be taken by each state for itself'.[93]

Corbett's conclusion was that the League did possess separate rights and powers bearing a relation to certain rights possessed by states, meaning that it was not simply an abbreviation for members of the organisation but a 'unit with independent existence'. Although the Covenant created rights and duties for member states in matters of collective security, and these outweighed the separate rights and powers of the organisation, the presence of the latter meant that the League was an independent 'juristic person' on the international stage,[94] bearing 'certain striking resemblances to the various treaties of confederation', albeit 'a looser species of the genus, established to comprise an indefinite number of self-governing political communities'.[95]

SANCTIONING POWERS

In examining the sanctioning powers of the League, John Williams assessed the balance between the obligations of member states and the powers of the League.[96] He provided further clarification that under Article 16(1) each member state had to decide whether a breach of the Covenant had occurred and, therefore, its obligation to impose sanctions against transgressor was triggered, and 'by collective action to make a reality of what is now usually described . . . as "collective security"'.[97] As to the role of the Council in the sanctioning process, Williams refuted the contention made before sanctions were imposed on Italy in 1935, namely

[91] Ibid 128, 141.
[92] Ibid 135.
[93] Ibid 138.
[94] Ibid 143-44.
[95] Ibid 147-48.
[96] Williams (1936) 130.
[97] Ibid 136.

> that action could only be taken as a result of a decision of the Council, or even of the Assembly, that such a decision must be unanimous, that there is no provision in Article 16, as there is in Article 15, for disregarding the vote of a party to a dispute, and that therefore, especially in any case where the conduct of a member of the Council was to be condemned, the League must be helpless.[98]

Williams strongly rejected this position in the following terms: 'neither the letter nor the spirit of Article 16 give any support to that view', given that the sanctioning process in Article 16(1) made no reference to the Council. The Council was to play a coordinating role on sanctions as a 'necessary development of the Covenant', but, as the Council practice on sanctions against Italy showed, it was primarily a forum for member states to express their views that the covenants of the League had been breached and, therefore, sanctions should be imposed.[99] The Assembly followed suit with each delegation recording 'its concurrence or dissent from the opinions expressed by the fourteen members of the Council'.[100] The President of the Assembly made it clear that 'no organ of the League has the power to decide, in such a way as to bind all the Members, that one of them has violated the Covenant', rather 'that obligation derives directly from the Covenant, and must be observed by Members of the League'.[101]

Williams' position was that Article 16(2) on the use of armed force limited 'the duty of the Council to recommending' to governments the forces to be used, and that such recommendations could not be blocked by a negative vote in the Council. Here Williams states that 'recommendations of the Council, not being decisions, may be made by a majority and do not require unanimity'.[102] He followed the view that the unanimity rule in Article 5(1) was confined to 'decisions' by the Assembly or the Council. He pointed to the practice of the Assembly, which had made it clear that recommendations only required a majority and argued that it was not possible 'to interpret Article 5 of the Covenant differently in relation to the Council and Assembly'.[103]

[98] Ibid 137.
[99] Ibid 138.
[100] Ibid 139.
[101] Ibid.
[102] Ibid 137.
[103] Ibid.

Considering the enforcement aspects of the Covenant, economic sanctions in response to violations of the Covenant were obligatory, but the duty to apply them was placed on member states and, while military measures were discretionary, it was at least not clear whether they required a recommendation from the Council, arguably by majority vote, to activate them. Williams concluded thus: 'Article 16(2) contemplates that war in defence of the Covenant should be regulated by the Council; whether the authority of the Council is a condition precedent to an entry on war by a Member of the League against another Member which has resorted to war in violation of the Covenant is another question'. He then stated that 'the assumption is usually made that this authority is not required',[104] citing in support a Resolution of the General Assembly regarding 'the economic weapon', adopted on 4 October 1921, which stated that 'the unilateral action of the defaulting state cannot create a state of war; it merely entitles the other Members of the League to resort to acts of war or to declare themselves to be in a state of war with the covenant breaking state'.[105]

What Williams' analysis showed was that despite, or even because of, ambiguity, the Covenant did contain sufficient potential sanctioning autonomy for the organs of the League and, moreover, this was balanced by the obligations of member states. This had the potential to produce a collective security system that was capable, if the political will of members was present, of addressing acts of war by a state. Churchill saw the League's response to Italy's aggression against Abyssinia in 1935 as a critical juncture and while sanctions were a positive step, he believed there was 'still time for an assertion of Collective Security, based upon the avowed readiness of all members concerned to enforce the decisions of the League of Nations by the sword', given that the 'democracies were still actually and potentially far stronger than the dictatorships'.[106] The League remained relevant in 1935, but its failure to take the next step to confront Italy and then to respond to Germany's violation of the Rhineland in 1936 beyond declaring it to be a breach of the Treaty of Locarno,[107] was the beginning of the end for the League.

[104] Ibid 141.
[105] Ibid 148.
[106] WS Churchill, *The Second World War: Volume I The Gathering Storm* (Cassell, 1948) 171.
[107] Ibid 182.

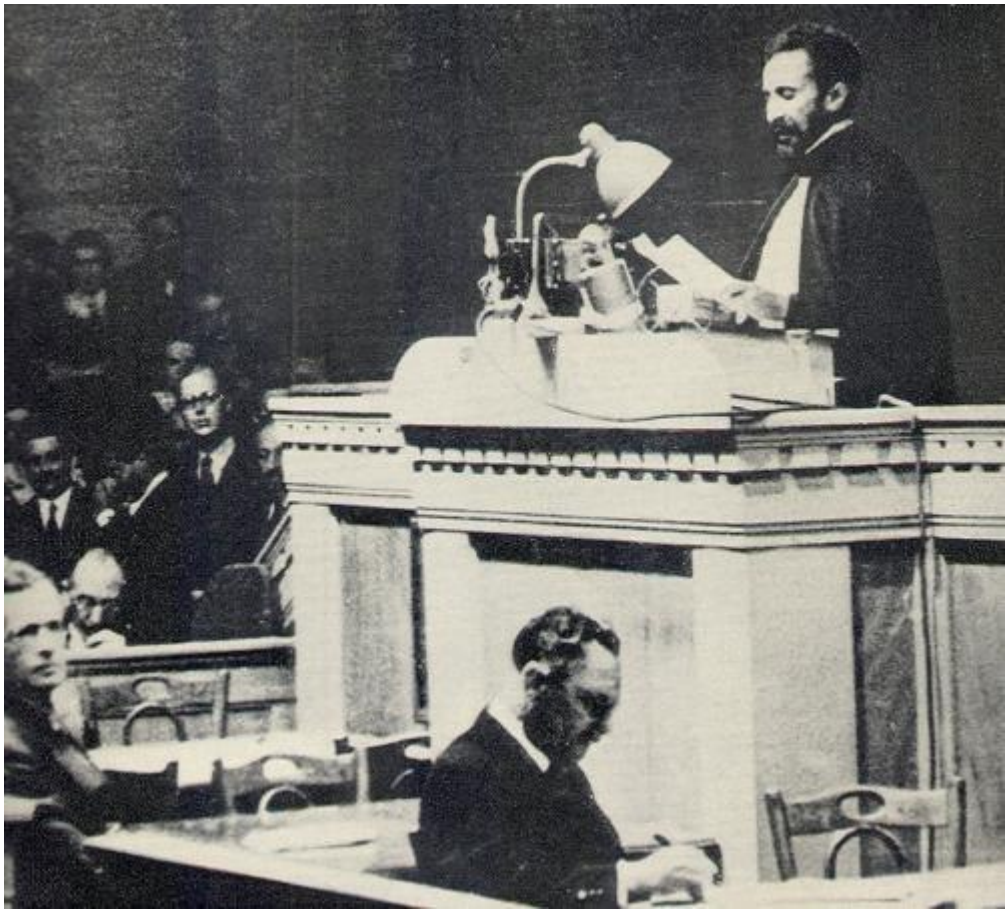

Figure 2. Emperor Haile Selassie appealing to the Assembly of the League of Nations, 30 June 1936. The League's response to the Italian invasion of Abyssinia demonstrated the sanctioning powers of the League but also, ultimately, its lack of collective political will to enforce its decisions fully. Source: Blackpast.

A NEW LEGAL ORDER?

Although the old order of empires was preserved by the Covenant albeit with the introduction of some organisational supervision for the former colonies of the defeated nations,[108] the rules on the use of force and the machinery for collective security represented a clean break with the pre-1919 international legal order according to McNair. Writing in 1936 towards the end of the organisation's existence, he retained a very positive view of the League of Nations.[109] Prior to 1919 'war itself was no illegality'; the outbreak of war might involve the breach of a specific treaty but it remained 'extra-legal rather than illegal'.[110] The deep-felt public revulsion caused by the death and devastation of the Great War led to a fundamental

[108] Covenant of the League of Nations, art. 22.
[109] McNair (1936) 150.
[110] Ibid 152.

change in the international legal order with a significant majority of states pledging themselves to the principle of 'collective security'. The potential of this principle had been evidenced by economic sanctions imposed by fifty states against Italy in 1935 for its resort to war in disregard of its covenants to the League.[111] McNair wrote that '[i]nstead of the traditional legal indifference to the question of responsibility for the outbreak of war there is substituted machinery for determining the party responsible and for condemning as illegal a resort to war without previously exhausting the machinery of the League for the settlement of disputes'.[112]

Taking on board the simple clarity of the Kellogg-Briand Pact of 1928, McNair captured the essence of individual and collective rights and duties in the following terms:'[i]n addition to the traditional right and duty of individual self-defence there is created a collective obligation to apply economic pressure in order to restrain an illegal resort to war, with an option to contribute armed force if necessary.'[113] The shift to a prohibitive *jus ad bellum* governing unilateral action and a permissive collective use of force through the League was made clear by McNair: 'on the one hand, war in breach of the Covenant is made illegal; on the other, force which is collectivized and placed at the service of the international community is made legal'.[114] McNair captured the balance between League autonomy and the duties of member states in the application of force for, while the judgment was a collective one for the League, 'the manner of its exercise' remained national. When collectively authorised, force acquired 'the character of a public sanction, while its actual exercise' remained 'in private hands'. However, this balance was only just becoming clear by the mid-1930s: '[h]itherto there has been a tendency to assume that it is the League whose duty it is to afford security, but we are now beginning to realize that it is upon the League's members that this duty rests'.[115]

This understanding of the League accorded with McNair's view, expressed in an earlier article, that the Covenant was a 'fundamental, organic, constitutional law' which, together with other treaties including the Statute of the Permanent Court of International Justice and the Pact of Paris, created 'a kind of public law transcending in kind and not merely in degree

[111] Ibid 152-53.
[112] Ibid 154.
[113] Ibid. For discussion of proposed amendments to the Covenant in the light of the Pact of Paris 1928, see Manning (1930) 158.
[114] McNair (1936) 155.
[115] Ibid 161.

the ordinary agreements between states'.[116] Intriguingly, McNair hinted at a deeper problem that might have derailed the League system when he wrote that 'a system which collectivizes the use of force and provides no machinery for the collective revision of the *status quo* is certain to fail', referring in particular to the continuation of colonies.[117]

The Italian war with Abyssinia in 1935 also demonstrated the relevance of Article 20 of the League, revealing what Lauterpacht described as 'its hitherto unexplored implications'.[118] Article 20 contained the equivalent of the UN Charter's 'supremacy' clause,[119] providing that the members 'agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof'. As outlined by Lauterpacht:

> a number of questions arising out of the application of sanctions against Italy have helped to draw attention to the interpretation of that article as establishing the absolute primacy of the Covenant over any other treaty engagements of Members of the League *inter se* whether concluded prior to or subsequent to the membership of the League, and, in some contingencies, over treaties concluded with non-Member states.[120]

Furthermore, the inconsistencies referred to in Article 20 were not only of the patent kind, for example, an offensive alliance, but also of a latent kind such as a treaty of commerce that may become inconsistent with the obligations flowing from the Covenant.[121] Intriguingly, Lauterpacht did not see this as evidence *per se* of the Covenant being of a different nature to other treaties, but rather as a particularly broad and effective version of the principle of treaty law whereby a later treaty supercedes an earlier one and by its terms, agreed to by state parties, restricts their future treaty making freedom: 'the Covenant, like any other treaty, is the "higher law"; or, as a purist would have it, it is the *law*. The expression "abrogates" means in effect "is superior to"—now and for the future'.[122] Lauterpacht conceded that while

[116] AD McNair, 'The Functions and Differing Legal Character of Treaties' 11 *British Year Book of International Law* (1930) 100, 101, 112.
[117] McNair (1936) 159.
[118] H Lauterpacht, 'The Covenant as the Higher Law' 17 *British Year Book of International Law* (1936) 54, 55.
[119] UN Charter, 26 June 1945 (entered into force 24 October 1945) art. 103.
[120] Lauterpacht (1936) 55 analysing the findings of a legal sub-committee set up by the Co-ordinating Committee of the Assembly.
[121] Ibid 58.
[122] Ibid.

the Covenant was 'no more "law-making" than any other treaty, the substance of its law differs so radically from other international conventions in its scope and significance as a purposeful instrument in the process of political integration of mankind as to deserve the designation of a "higher law"'.[123] The Covenant represented a sufficient break from the previous discredited legal order, and was placed in a 'higher' position to older and later treaties, creating a potential legal platform upon which the League could have built, through acts of collective will, a system of collective security for member states. To do this, however, the League's public nature had to be married to the private actions of its members in order to harness a collective power to preserve the covenants and the peace.

SOVEREIGNTY, SOVEREIGN EQUALITY AND DOMESTIC MATTERS

Corbett clearly demonstrated that sovereign powers had only been partially granted to the League. Furthermore, by itself, this did not necessarily equate to limitations placed on the sovereignty of member states.[124] Other authors traced the broader potential impact of the League on the sovereignty of states. In the first issue of the *British Year Book* of 1920-21 Geoffrey Butler referred to the commonly acknowledged 'official' position that 'the framers of the League of Nations did not have it in mind to erect a superstate'. He contrasted this with the view that conceived of the 'League's formation as a great federating act of all the nations, and which sees in the Paris Conference, which gave it birth, nothing less than a constituent assembly'.[125] Butler followed a middle path between these views, surveying the potential functions of the League for example, 'in suppressing disorder in the remoter parts of Europe, Africa and Asia', as 'real and important' but not occupying a 'primary position'. He compared them to 'constabulary work within a state' rather than 'the conduct of its foreign policy'.[126]

Nonetheless, Butler concluded that, although 'the prospects of the League are still uncertain',

> if the rights of humanity and the real values, for the expression and for the securing of which it has been formed, do come into their own through its machinery . . . the conception of sovereignty . . . can for the first time be

[123] Ibid 64.
[124] Corbett (1924) 123.
[125] G Butler, 'Sovereignty and the League of Nations' 1 *British Year Book of International Law* (1920-21) 35, 39.
[126] Ibid 40.

> applied to external affairs in a more adequate sense than as a mere assertion of the unchecked power either of the states or of some central federation.[127]

Presaging McNair's view,[128] Butler argued that the League represented a potential check on sovereign power, 'which for three hundred years has hardly known a limit . . . a lawless, freedom from control', finding its more recent expression in 'imperialism, a period in which sovereignty in international affairs could never be conceived apart from a confusion of it with arbitrary power'.[129]

In considering the impact of the League on the traditional dominance of states in the international legal order, PJ Baker argued that 'the doctrine of legal equality of every State is a redundant theoretical abstraction'. He argued, following John Westlake, that the rights and duties of states 'can only be adequately explained by the principle of independence; in other words, it is only so far as they have been independent that States have really been equal'.[130] Such independence was limited by the power of intervention of the Concert of Europe formed in 1815 and, furthermore, in 1919 by the 'important branch of international law which is beginning to develop around the international political institutions of the League of Nations'. Baker labelled this 'new branch of international law' as 'international constitutional law', creating obligations 'many of which in a greater or lesser degree narrow and restrict those typical rights of sovereign States which are properly classified under the heading of independence'.[131] The inequality present in the Concert was formalised in the Covenant by the great powers having permanent seats on the Council thereby playing a central role in the exercise of the powers of the organisation.[132]

Baker identified the 'typical and basic rights which resulted from the fundamental fact of independence' as: 'the right of a State not to be bound by any rule of law without its own consent; the right of a State to be judge in its own case, and the right of a State to take the law into its own hands'. All of these rights, according to Baker, had, 'in a greater or lesser degree', been 'curtailed by the movement towards international organisation which has culminated in the obligations of the Covenant and the creation of the political institutions of the League of Nations'. Further, he declared that 'the movement towards an organised

[127] Ibid 41.
[128] McNair (1936) 159.
[129] Butler (1920-21) 41-22.
[130] PJ Baker, 'The Doctrine of Legal Equality of States' 4 *British Year Book of International Law* (1923-24) 1, 3-4.
[131] Ibid 4.
[132] Ibid 16-17.

international political system necessarily means the restriction of the typical rights of independence which were the foundation of the old system of international law'.[133]

The impact of the League on sovereignty and sovereign equality was potentially curbed by the clause in the Covenant inserted at the insistence of the US designed to protect domestic matters from the purview of the League. However, Brierly's analysis of this provision actually demonstrated the League's potential for further encroachment on state sovereignty.[134] Article 15 of the Covenant, which outlined the processes for the peaceful settlement of disputes, included paragraph 8: 'if the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement'.[135] According to Brierly: 'its effect is to exclude the class of disputes to which it refers, not indeed from submission to or consideration by the Council, for without these the Council obviously could not make the necessary finding as to the nature of the dispute, but from the power vested in the Council by Article 15 in the case of other disputes';[136] namely unanimously or by majority vote to produce 'a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto'.[137] The effect of this provision was to exclude disputes arising out of domestic matters not only from 'the quasi-coercive powers of the Council when acting under Article 15', but also from the 'provision for sanctions by which these powers are backed in Article 16'.[138]

Although its impact is broad, the domestic jurisdiction clause could not have been triggered unilaterally by a state, but must have been determined to be applicable by the Council, enabling that body to delineate between domestic and international matters. This was illustrated when the Council sought the advice of the Permanent Court of Justice in the case of the *Tunis and Morocco Nationality Decrees*. The Court stated that the 'question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations'.[139] Although the Court found that the matter before it was a domestic one, this statement reinforced Brierly's point

[133] Ibid 18.
[134] Brierly (1925) 8.
[135] Covenant of the League of Nations, art. 15(8).
[136] Brierly (1925) 9.
[137] Covenant of the League of Nations, art. 15(4).
[138] Brierly (1925) 9.
[139] *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, PCIJ Reports (1923) 24.

that the League had the potential competence to act as a channel to convert domestic matters of international concern, such as the largely untouched massacres in Armenia, into matters of international law.[140]

In addition to the oft-cited statement above, the Court reflected on the balance of the powers of the Council versus the rights of member states. The Court opined that 'Article 15, in effect, establishes the fundamental principle that any dispute likely to lead to a rupture which is not submitted to arbitration in accordance with Article 13 shall be laid before the Council'. The Court regarded this as 'a very wide competence possessed by the League of Nations', which was why a 'reservation protecting the independence of States' was inserted in paragraph 8, without which, 'the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations'. At some point the League's powers must 'give way to the equally essential interest of the individual State to maintain intact its independence in matters which international law recognises to be solely within its jurisdiction'. The Court made it clear that the balance of organisational powers and a state's right of independence should not automatically be in favour of the latter:

> It must not, however, be forgotten that the provision contained in paragraph 8, in accordance with which the Council, in certain circumstances, is to confine itself to reporting that a question is, by international law, solely within the domestic jurisdiction of one Party, is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation.[141]

The analysis in this section has shown that the sovereignty and independence of member states were restricted by the Covenant and the League of Nations. There was potential for the organisation to address and restrict the worst aspects of unrestrained state freedom, both in terms of aggression against other states but also in terms of the worst abuses committed by a state against its own population. There was, at least in design, sufficient autonomous space in the Covenant to allow for the channelling of acts of collective will to address both.

[140] Brierly (1925) 19.
[141] *Nationality Decrees* 24-25.

CONCLUSION: THE LEAGUE, THE UN AND COLLECTIVE SECURITY

The evolution of autonomous international organisation depicted in the above analysis appeared to have been continued with the deepening of organisational rights and powers in the UN Charter of 1945. In all the aspects examined above, the UN appeared to have greater autonomy than the League. In the Charter, majority voting is the norm, the powers of the organs especially the Security Council seem extraordinary and obligations arising from it could form a higher law.[142] Despite proclaiming that the UN is based on sovereign equality,[143] the powers of intervention granted to the Security Council by the Charter suggest a different reality.[144] It is pertinent to conclude with some comparison between the Covenant and the UN Charter to assess whether the latter made up for the alleged deficiencies of the League, in particular whether the greater apparent autonomy of the UN was better capable of delivering collective security than its predecessor.

Writing in the 1946 *British Year Book*, Brierly saw both Charter and Covenant as capable of constitutional change, particularly in terms of institutional practice so that 'they are overlaid with precedents and conventions which change them after a time into something very different'.[145] However, Brierly did not see the UN as an improvement on the model of collective security embodied in the League, but argued that in crucial ways it was weaker than its predecessor. The League, although based on a constitution, only set up an association of states, it did not purport to set up the beginnings of a system of world government. The League's effectiveness depended upon the 'conduct of the members individually', and their willingness to comply with their obligations.[146] The UN, on the other hand, represented a significant move away from 'the purely cooperative basis of international organization',[147] through greater institutionalisation and constitutionalisation, which is one of the reasons why the Charter is so much longer than the Covenant (111 articles compared to 26). The Covenant contained the outlines of a constitution, enabling members to adjust the working of the Council and Assembly to suit the changing geopolitical context, whilst the Charter details the powers of each UN organ, and gives key decision-making competence to the Security Council. What this meant, however, was that the exercise of the undoubted supranational

[142] UN Charter, arts 25, 36.
[143] Ibid art. 2(1).
[144] Ibid arts 2(7), 39, 41, 42.
[145] JL Brierly, 'The Covenant and the Charter', 23 *British Year Book of International Law* (1946) 83.
[146] Ibid 85.
[147] Ibid.

powers of the Security Council was subject to the consent of each of the five permanent members. This led Brierly to claim that the UN was 'not a system of collective security at all'.[148]

Brierly recognised that the Covenant was premised on the lessons of history and the events that led to the First World War—'that in 1914 the world had stumbled into a war which no one had really desired or intended; most men everywhere were peacefully inclined, but there had been obstacles which had prevented their desires from finding expression, and if these could be removed then peace might be made secure'.[149] Hence the Covenant provided for

> open diplomacy and publicity for the engagements to which statesmen committed their nations; provisions for the delaying of the outbreak of a threatened war in the belief that war delayed would probably be war averted; reduction of armaments because the sooner or later the piling up of armaments must lead to their being used; and if war should in spite of all of these precautions, then it would be enough to rely on the economic weapon, whose decisive effects the recent war seemed to have proved, and the use of military sanctions might be relegated to the hazy background.[150]

Whether such a framework of state duties and autonomous institutional powers was adequate to tackle the 'gathering storm' of the late 1930s remains debatable.[151]. What is clear from the above analysis is that the League had in design at least sufficient legal autonomy by which a much more effective collective security system could have been created. To achieve its potential, however, the League and its members would have to explore and develop that autonomy by triggering peaceful settlement processes as a matter of course, and by using sanctions and deploying military measures in the face of continuing belligerence between states or violence within states that threatened international peace. The above analysis has shown that the potential limitations of the Covenant in the form of unanimity, domestic matters, and the ambiguity surrounding the powers of the Council of the League especially regarding military action, all contained within them sufficient leeway to allow a system of collective security to be developed by the member states acting through the League. In addition, by exploring the League's broad competence in peace and security member states

[148] Ibid 90.
[149] Ibid 91.
[150] Ibid.
[151] Churchill (1948) 14.

could have built a greater deterrent to potential aggressors. While its autonomy remained underexplored, it is clear that the Covenant and the League had greater potential to address the growing threats than is commonly the view. Furthermore, the flaws in its make-up, for example by its lack of clarity on the sanctioning powers of the League in Article 16 of the Covenant, were not remedied by the drafters of the UN Charter; instead they were compounded by dramatically shifting the balance between members' duties and institutional powers towards the organisation and away from member states. Under the Covenant the duties of member states to take collective security action were not dependent upon a Council decision, whereas under the Charter the obligations on member states to take enforcement measures under Chapter VII are dependent upon a decision of the Security Council. As made clear by Brierly: 'we have been led into a cul-de-sac by the over-hasty pursuit of a perfectionist policy, and by a too shallow diagnosis of the causes of failure of the League. By insisting that only an institution which has the power to decide can act effectively we have created one that can neither decide nor act'.[152]

Churchill wrote that

> up till the year 1934 the power of the conquerors [of 1918] remained unchallenged in Europe, and indeed throughout the world. There was no moment in these sixteen years when the three former Allies, or even Britain and France with their associates in Europe, could not in the name of the League of Nations and under its moral and international shield have controlled by a mere effort of the will the armed strength of Germany'.[153]

It was earlier envisaged by Wilson that in the event of aggression against a member of the League, other member states of the League 'would fly to the assistance of those who are attacked'.[154] This basic understanding of the right of collective self-defence does not depend upon an organisation to underwrite it, but the League system not only allowed for such action, the Covenant required it through placing duties on member states to respond to aggression, responses which could be directed towards achieving wider aims of peace and security by the Council. The weak responses of the UK and France to Germany's invasion of Poland in 1939 fell far short of the sort of collective military action against aggression

[153] Ibid.
[154] Wilson quoted in Tooze (2015) 266.

envisaged by Churchill, Wilson or the Covenant but, in any event, by 1939 a system of collective security had not been built from the foundations laid by the Covenant only 20 years previously.