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The Great Rehearsal

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The Great Rehearsal

*“Let us raise a standard to which
the wise and honest can repair; the
rest is in the hands of God.”*
George Washington,
Philadelphia, 1787

One Small Step

The undersigned participated, in the autumn of 1972, in an international law seminar at the School of Law at the University of Texas at Austin. At the first meeting, they decided to take as their objective to work out the minimum changes in the Charter of the United Nations and the Statute of the International Court of Justice that would revive world interest in both bodies, and give them at least a chance of becoming what was hoped for them in 1945: a powerful force for keeping the peace.

The undersigned considered approaching this by role-playing, assigning each member of the group to represent a given state or group of states. However, it was feared that this would make agreements extremely difficult to reach (*i.e.*, it would be too much like reality!), so it was decided to sit as a drafting committee of the whole, with different members acting as rapporteurs for different parts of the task.

Attached is the result. It has been hard work, but it has been stimulating and the authors have learned a great deal. If it is of any interest to others, the authors will be well repaid.

Two or three meetings were enough to convince the group that they were going to fall far short of the goal set and attained at the “Great Rehearsal” in Philadelphia in 1787. (The reference of course is to the title of Carl Van Doren’s book and its thesis.) They simply could not envisage an even remotely acceptable way to make the United Nations into a true world government, with a true legislative branch enacting laws that would

*Woodfin L. Butte is Professor of Law at the University of Texas at Austin. The ten other participants were second- or third-year law students who were enrolled in the seminar under the general direction of Professor Butte.

be binding on all states and their citizens. The judiciary branch was relatively simple. The executive branch required little modification of the existing Security Council. But the legislative branch stumped the group.

The Security Council seemed to the authors to be plainly executive in make-up, purposes and power. Trying to recast it as the upper house of a bi-cameral legislature would have been a radical alteration of its functions, and would have forced the drafting committee to create a new executive branch, presumably by enlarging the powers of the Secretary General. Nor is the Security Council adequately representative of all the members to be an upper house of a national legislature.

Keeping the Security Council as the executive was discussed, but making it responsible to the General Assembly, as in states with a parliamentary system. But here the group ran head on into the problem that plagued them throughout, as indeed it fatally plagues the present organization of the United Nations: the absurdly "unequal equality" in the General Assembly of every Member, with Guyana having the same voting power as Great Britain, Uganda the same vote as the United States, and Senegal the same vote as the Soviet Union.

Nor would the inspired compromise of 1787 work here. Dividing the unicameral General Assembly into two chambers, with voting strength in one distributed by population, and in the other equally to all states, produced completely unacceptable results, with some of the world's most advanced states relegated to voting inferiority to some of the most primitive and impoverished.

So, reluctantly, the true world government was given up, not as undesirable, but as unattainable either by way of amending the existing structure or by gaining unanimous acceptance of a new Charter.

This decision taken, it followed that the drafters would not try to insert into the Charter anything like the United States' Bill of Rights. They did not however feel completely defeated here. Many of the protections of the Bill of Rights are at least findable in the Preamble and Article 1 of the Charter; and if enlargement of the competence of the International Court of Justice is successful, a jurisprudence may evolve which would serve the same purpose.

The group turned then to the task of strengthening those provisions which have not proved adequate to enable the United Nations to attain its first stated Purpose: "To maintain international peace and security."

Here a number of things were done:

First of all, access to the International Court of Justice was made easy—even mandatory—and its jurisdiction compulsory, and the Security Council was required to provide means for the enforcement of the Court's orders and decisions.

Second, the Security Council voting rule which permits a veto by one permanent member was changed to a more balanced rule which allows a veto by any three members. The permanent members ought not to object to this: if there is any merit in their opposition to a proposal, they ought to be able to persuade two other members to join with them to block it. And it is hoped that this change will put an end to the current practice under which a permanent member will block a vote on a cease-fire until its client state has won.

Third, and most important, for a standing peacekeeping force under the immediate command of the Secretary General was provided. This force will be made up of national contingents seconded to the UNPF on rotating three-year assignments. The unworkable, paralyzing "Military Staff Committee of the present Charter is discarded, and the military Commander of the UNPF will establish his own staff and command organization.

The authors eliminated, at least as an absolute, the requirement of consent of the state in which the peace-keeping force is to operate. And although the Secretary General is always to be subject to control by the Security Council, the group built in "fail-safe" provisions under which delay or inaction by the Security Council will not block his going ahead for a limited period of sixty days. The use of the peace-keeping force has been limited to the Charter purpose of avoiding, limiting or ending breaches of the international peace.

The group is aware that the proposed peace-keeping force will have severe budgetary implications for the United Nations and its Members. But having it in being, ready and able to put out a fire anywhere in the world on twenty-four hours' notice, is the primary purpose of the United Nations and ought to have first call on its resources.

The group has permitted itself only a few suggestions not directly related to the peace-keeping power, but which seem to be desirable and not likely to be controversial.

The authors have eliminated any voting on the admission of new members if they qualify as "states" in international law, and provisions for suspension or expulsion have been eliminated. Indeed, a description of the United Nations as "indissoluble" has been inserted.

The Security Council has been enlarged from fifteen to seventeen members by the inclusion, for obvious reasons, of India and Japan as permanent members. As already noted, the veto by one permanent member has been changed to a required affirmative vote by any fifteen members, which means a veto by any three members, permanent or not.

Budgetary control has been tightened somewhat, and specified maximum and minimum percentages to be borne by Members have been specified.

It has been made clear that agreements to submit disputes to arbitration,

or to the International Court of Justice, may refer to existing disputes or to future disputes or both.

For the sake of brevity, the major portions of the Charter and the Statute which it is not proposed to change have not been reproduced. To make any sense of our suggestions, the reader will thus need to have before him a copy of the existing Charter and Statute. May he find it as challenging as have the authors.

Austin, Texas, December 8, 1972

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International Law Seminar
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*Draft Amendments to
The Charter of the United Nations
and
The Statute of the I.C.J.*

CHARTER OF THE UNITED NATIONS

(Preamble)

“... scourge of war which ~~twice~~ repeatedly in our lifetime . . .

“... full powers found to be in good and due form, and through appropriate amendments duly adopted to the original Charter, have agreed to the present Charter of the United Nations and do hereby establish ~~an international~~ a sovereign, indissoluble Federal union to be known as the United Nations.

Chapter I

Purposes and Principles

Article 1.

“1. . . . to take effective ~~collective~~ measures . . . (remainder of Article 1 unchanged.)

Article 2.

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

“1. The Organization is based on the principle of the sovereign equality of all its Members. *The United Nations shall itself be a sovereign entity, with power to sue and be sued, shall be entitled to full diplomatic immunity to be recognized by all states, and shall have those powers and only those powers delegated to it by its Members, by this Charter or reasonably inferable as necessary to enable it to carry out purposes and exercise powers specifically delegated to it by this Charter.*

(Remainder of Article 2 unchanged.)

Chapter II
Membership

Article 3.

(Delete original wording entirely.)

The Members of the United Nations shall be all those states which are now Members, plus any new Members which may join the Organization in accordance with the provisions of Article 4.

Article 4.

~~"1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter, and, in the judgment of the Organization, are able and willing to carry out those obligations.~~

~~"2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.~~ *automatic upon notification by that state of its desire to become a Member and its acceptance of the obligations contained in the present Charter. If question is raised by any three Members as to whether the new Member is in international law a state, that question will be decided by an Advisory Opinion of the International Court of Justice.*

Article 5. (Delete)

Article 6. (Delete)

Articles 7 through 16 (Unchanged)

Article 17.

"1. The General Assembly shall consider and approve the budget of the Organization. *Action by the General Assembly with regard to the budget, whether approval, increase, decrease or any other amendment, shall be by affirmative vote of Members who together are to contribute at least two-thirds of that budget under the formula prepared under paragraph 2 of this Article.*

"2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. *This apportionment shall not require any state to bear more than twenty-five percent of the budget of the Organization for any year, nor any six states to bear more than sixty percent of such budget, not permit any state to bear less than one tenth of one percent of such budget.*

"3. (Unchanged).

Article 18.

"1. Each member of the General Assembly shall have one vote.

"2. Decisions of the General Assembly . . . Paragraph 1(c) of Article 86, ~~the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members,~~¹ questions relating to the operation of the trusteeship system, ~~and budgetary questions.~~²

"3. (Unchanged).

Article 19 through 22 (Unchanged)

Chapter V

The Security Council

Composition

Article 23.

"1. The Security Council shall consist of ~~fifteen~~ *seventeen* Members of the United Nations. The Republic of China, France, *India, Japan*, and the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. . . .

"2. (Delete second sentence.)

"3. (Unchanged)

Functions and Powers

Article 24. (Unchanged)

Article 25. (Unchanged)

Article 26.

"In order to promote . . . , ~~with the assistance of the Military Staff Committee referred to in Article 47,~~³ plans to be. . . .

Voting

Article 27.

"1. (Unchanged)

"2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of ~~nine~~ *ten* members.

¹This is to reflect the changes in Article 4 and the deletion of Articles 5 and 6, regarding admission, suspension and expulsion of Members.

²This is to reflect the changes in Article 17.

³This is to reflect the deletion of Article 47 and, in fact, the whole Military Staff Committee apparatus.

~~“3. Decisions . . . affirmative vote of *nine fifteen* members including the concurrent votes of the permanent members, provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting and the number of affirmative votes required for a decision of the Council shall be correspondingly reduced.~~

Procedure

Articles 28 through 32 (Unchanged)

Chapter VI

Pacific Settlement of Disputes

Articles 33 through 36 (Unchanged)

Article 37.

“1. Should the parties to a dispute of the nature referred to in Articles 33, 34, 35 or 36 fail to settle it by the means indicated in ~~that those~~ Articles, they shall *on the initiative of any such Party* refer it to the Security Council.

“2. *Whether or not the parties have so referred it, and at any stage of the dispute, if the Security Council deems . . . action under Article 36 or to recommend require and impose such terms of settlement as it may consider appropriate.*”

Article 38. (Unchanged)

Chapter VII

Action with Respect to Threats to the Peace,
Breaches of the Peace, and Acts of Aggression

Article 39 (Unchanged)

Article 40.

“. . . measures provided for in Article 39, ~~call upon~~ order the parties concerned . . . or position of the parties concerned. *Any party which fails to obey any such order of the Security Council shall from that time be considered the aggressor in the particular situation,*⁴ and the Security Council shall. . . .

Article 41. (Unchanged)

Article 42. (Unchanged)

⁴Specific designation of a party to a dispute as the aggressor can be useful on a number of counts. Failure to obey a temporary restraining order of the Security Council seems good grounds on which to attach such a label.

Articles 43 through 45
(Delete, and substitute the following)

Article 43.

1. *The United Nations Peacekeeping Force (UNPF) is established in order to take emergency action as required to maintain or restore international peace and security.*

2. *All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Secretary-General, on his call and in accordance with the following paragraphs of this Article, armed forces, assistance, transport and facilities, including rights of passage and land bases, necessary for the purpose of maintaining international peace and security.*

3. *Non-permanent Members of the Security Council will each dispatch one 1,000 man battalion to the current headquarters of the Commander-in-Chief of the UNPF for a term of three years upon each member's election to the Security Council.⁵*

4. *Two permanent Members of the Security Council each year will dispatch one 2,500 man battalion to the current headquarters of the Commander-in-Chief of the UNPF for a term of two years; these Members shall be determined on a rotating basis by agreement among the permanent Members of the Security Council.*

5. *Thirty Members of the General Assembly who are not members of the Security Council will each dispatch one 500 man battalion to the current headquarters of the Commander-in-Chief of the UNPF for a term of three years. Ten such contributing Members will be selected each year by the Secretary-General with the approval of a majority of the General Assembly.*

6. *The Secretary-General shall appoint an officer of general rank as Commander-in-Chief of the UNPF. The Commander-in-Chief shall be under the direct command of the Secretary-General of the United Nations and shall assume full command of the UNPF in accordance with his orders from the Secretary-General.*

7. *The Secretary-General shall prepare and submit to the Security Council for its approval rules for the organization and functioning of the UNPF.*

⁵The make-up of the UNPF was the one point on which the group failed to reach unanimous agreement. Professor Butte preferred a smaller standing force of UN troops. "Hired mercenaries," cried the rest of the group, seeing real advantages in (1) a larger group, (2) rotating membership and (3) a sense of participation to small states. Professor Butte deferred to them.

8. *The Commander-in-Chief shall establish a corps of officers to assist him in carrying out the responsibilities of his command. The Commander-in-Chief shall determine the qualifications of all officers in the UNPF subject to the approval of the Secretary-General, and shall make recommendations to the Secretary-General for individual promotions. The Commander-in-Chief shall be responsible for the training and duties of all officers and ranks in or assigned to the UNPF, including the rank in which officers shall function.*

9. *The Secretary-General shall select permanent bases for billeting and training the UNPF, preferably on islands in the Pacific and Atlantic Oceans, sovereignty over which might be acquired by the United Nations. The Secretary-General shall designate the headquarters of the Commander-in-Chief.*

10. *All men and women, officers or ranks, for so long as they are assigned to duty with the UNPF, shall wear the uniform of the UNPF and shall be absolved of all allegiance other than to the United Nations. They shall not seek or receive instructions or guidance from any person other than their duly authorized superiors in the UNPF. At the same time, the Commander-in-Chief and his subordinates, in assigning contingents of the UNPF to any duty, shall bear in mind the national origin of each individual or unit to avoid embarrassment or conflict.*

Article 44.

1. *The Commander-in-Chief shall acquire by agreement with members of the United Nations or by purchase all arms, armament, transport equipment and supplies necessary to support the UNPF in its training and in carrying out its assigned missions. The Commander-in-Chief shall ensure that the UNPF sustains a state of readiness to enable it to be present as a force in being anywhere in the world within twenty-four hours after he receives appropriate instructions.*

2. *The Commander-in-Chief shall advise the Secretary-General on all questions relating to support of the UNPF, contingency plans for the maintenance of international peace and security, and deployment of the UNPF. The Commander-in-Chief shall present his recommended budget to the Secretary-General on or before May 1st for the succeeding calendar year.*

Article 45.

1. *Whenever the Secretary-General deems that a situation is so dangerous to the international peace as to require intervention, he may give an "alert" order to the Commander-in-Chief of UNPF, instructing him in*

detail the mission the UNPF is to undertake, and at the same time inform the members of the Security Council that he has done so, and convene an emergency meeting of the Security Council to meet within twelve hours. If the Security Council does not, within twenty-four hours of the "Alert" order, and by a vote of at least fifteen of its members, give other instructions to the Secretary-General, he may at or after the expiration of such twenty-four hours give an "execute" order to the Commander-in-Chief, which order is to be carried out immediately.

2. In preparing "Alert" and "Execute" orders the Secretary-General shall bear in mind, and in carrying them out the Commander-in-Chief shall bear in mind, that the primary purpose of any intervention by the UNPF is to prevent, stop, or reduce any breaches of the international peace. It may do this, if it will be effective, by observation of the movement of opposing forces, or by interposing its forces between the opposing forces, and it may use whatever force is necessary to protect itself. As representing the sovereign power of the United Nations to avoid war, the UNPF may go and remain, establish itself and conduct operations, anywhere in the world, with the consent and cooperation of the relevant state or states if it is forthcoming but without it if it is not.

3. The Secretary-General shall keep the Security Council continuously informed of all activities of the UNPF and shall submit himself at all times to the Security Council's instructions. Unless the Security Council shall, by affirmative vote of at least fifteen Members, give him further authority or different instructions within sixty days from the issuance of his "Execute" order, he shall immediately after the expiration of such sixty days order the Commander-in-Chief to cease all military operations and to withdraw all UNPF forces to their base in good order as promptly as their safety will permit it to be done.

4. At the request of the parties to any agreement for the reduction or limitation of armaments the Secretary-General may, if he deems it feasible without detriment to the primary purpose of UNPF, assign units of the UNPF to perform duties of inspection, policing and reporting in connection with such agreement. The cost of such assignment and performance shall be borne by the parties to the particular agreement.

5. The expense of organization, supply and maintenance of the UNPF shall be included in the annual budget of the Organization, and this shall include a standing appropriation of \$50,000,000 to cover immediate expenses of any intervention it is called on to make. The Secretary-General is authorized to assess expenses incurred by deployment of the UNPF against those states whose armed hostilities require the interposition of the Force.

Articles 46 through 50 (Delete)

Article 51. (Unchanged)

Article 52. (Unchanged)

Article 53.

“1. The Security Council . . . without the authorization of the Security Council, ~~with the exception of measures~~ (Delete remainder of paragraph 1).

“2. (Delete)

Articles 54 through 59

Chapter X

The Economic and Social Council
Articles 60 through 67 (Unchanged)

Article 68.

With the prior approval in each case of the General Assembly,⁶ the Economic and Social Council shall set up commissions . . . (unchanged)

Articles 69 through 91 (Unchanged)

Chapter XIV

The International Court of Justice

Article 92. (Unchanged)

Article 93.

“1. (Unchanged)

“2. (Unchanged)

“3. *Any international organization, regional or specialized agency may become a party to the Statute of the International Court of Justice by filing with the Secretary-General of the United Nations its acceptance of the rights and obligations contained in the Statute.*

Article 94.

“1. (Unchanged)

“2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which ~~may, if it deems necessary, make recommendations~~ or shall decide upon measures to be taken to give effect to the judgment.

⁶This was of course designed to put a brake on the proliferation of bureaux and commissions in Geneva and elsewhere, which the group regarded as profoundly disturbing.

Article 95.

“... Such agreements may refer to existing disputes or to future disputes or both.

Articles 96 through 111 (end of Charter)

(Unchanged)

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Articles 1 through 33 (Unchanged)

Article 34.

~~“1. Only states may be parties in cases before the Court. The Court shall have competence and jurisdiction in all disputes enumerated in Article 36:~~

a. between states, or between a state or states and the United Nations;

b. between states and regional agencies or specialized agencies referred to in Articles 52 and 57 of the Charter of the United Nations;

c. between such agencies inter se;

d. between states and public bodies on the one hand and individuals and private legal entities on the other in cases in which the parties concerned have consented in advance by specific agreement to appear before the court. Such agreement may refer to existing disputes or to future disputes or both.

“2. (Unchanged)

“3. (Unchanged)

Article 35.

“1. (Delete)

“2. (Delete)

~~“3. When a state which is not a Member of the United Nations is a party to the case, the Court shall in its decision fix the amount which that each party is to contribute toward the expenses of the Court in that case, leaving out of account parties already bearing a share of the regular expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.~~

Article 36.

“1. (Unchanged)

“2. The ~~states~~ parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agree-

ment, ~~in relation to any other state adopting the same obligation,~~ the jurisdiction of the Court in all legal disputes concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation *or of international law*;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.

(Delete paragraphs 3 and 4 and substitute the following:

“3. When any such question or questions are raised before a court or tribunal of a member state, such court or tribunal may (and at the request of a state which is a party or a state a national of which is a party to the suit shall) once only request the International Court of Justice to give a special decision thereon, and shall thereupon stay further proceedings until the decision of the International Court is had. Such special decision shall be accepted as controlling the legal questions within the International Court’s competency which the decision covers.

“4. The General Assembly shall select a council of three jurists, no two of whom shall be from the same state and who shall hold office without compensation for a period of ten years and may be re-elected, to be known as the Ombudsman Council. This Council shall, in its sole discretion, have power to request advisory opinions from the International Court of Justice at the request and on the behalf of any state, or any individual or legal entity.

“5. (Unchanged)

“6. (Unchanged)

Articles 37 through 70 (end of Statute)

(Unchanged)