Fordham Law Review

Volume 14 | Issue 1 Article 4

1945

The Dumbarton Oaks Proposal

Amos J. Peaslee

COMMENT

THE DUMBARTON OAKS PROPOSALS

Amos J. Peaslee†

Two basic assumptions are permissible:

First, we enthusiastically support the settlement of international disputes by judicial and pacific means. We would limit the legal right of "self-help" by any nation about as tightly as it is limited respecting individuals under the New York Penal Law, where the right is granted in six specific and restricted cases.[1]

Second, we are fairly hard-headed lawyers, and are not open to the criticism of being "visionary" or "perfectionists." We appreciate the practical difficulties of procuring agreement among the nations upon any plan.

We endorse, presumably, almost unanimously the Dumbarton Oaks Proposals as being a distinct advance in the right direction. Since the Secretary of State tells us that they are better than any plan proposed by any single nation,[2] some of us may be a little disappointed, however, that our own government did not present a still better plan, even if unsuccessful in procuring assent of the other three participating nations.

For many years I have had a theory that our leaders in public affairs have tended to underestimate the popular desire in this country and among the so-called common people throughout the world to create more perfect organs of world government. I think that desire may be underestimated in the Dumbarton Oaks Proposals.

There are two chapters in these proposals which deal with the settlement of international disputes. The Court Chapter[3] is satisfactory as far as it goes. Its ultimate sufficiency will depend upon the details yet to be worked out regarding the proposed judicial statute.

The Chapter which relates to the "pacific settlement of disputes,"[4] suggests procedures which have wrecked many confederations in history.

The Court Chapter

The Dumbarton Oaks Proposals contemplate either a continuance of the present World Court or the creation of a new one as the "principal" judicial organ, under a statute to be prepared. That statute is to be either the existing one of the Permanent Court of International Justice with some modifications, or a new similar statute. The proposals are broad enough to permit

†Member of the New York Bar.

Address at a joint session of members of the American Bar Association and the Committee on International Law of the New York State Bar Association on January 19, 1945.

1. N. Y. PENAL LAW §§ 42, 246.
2. Rep. Sec'y State (Oct. 7, 1944).
3. Chap. VII, entitled "An International Court of Justice."
4. Chap. VIII, entitled "Arrangements for the Maintenance of International Peace and Security Including Prevention and Suppression of Aggression."

a complete *system* of permanent international courts which the American Bar Association[5] and a number of other legal societies have already endorsed.[6]

Whether the jurisdiction of the proposed international court or courts would be "obligatory" or whether it would remain optional as now provided under Article 36 of the Permanent Court Statute, is not stated in the Dumbarton Oaks Proposals. Many Bar Associations are on record as favoring obligatory jurisdiction.[7] The categories which are set forth in Article 36[8] are probably acceptable to the majority of constitutional lawyers. Most such lawyers would recommend that the statute of the court itself confer obligatory jurisdiction regarding all disputes within those categories.

Two features of the present World Court are objectionable to many lawyers, (1) the power to give "advisory opinions" which is a function of an attorney general, not of a court; and (2) the plan of appointing national judges to sit on the court in a case affecting a nation not already having one of its nationals on the court. That detracts from judicial impartiality and savors of having a party be a judge in its own cause. Both of those features should be eliminated, if possible.

The ultimate "Charter" for the proposed General International Organization, or the final proposed judicial statute, should therefore include provision for both (a) a complete international judicial system, and (b) obligatory jurisdiction of international courts over disputes which fall within the categories enumerated in Article 36 of the Statute of the present Court. It should also discard advisory opinions and the plan of permitting nations to sit as judges in their own cause.

The Council Chapter

The underlying theory of conferring jurisdiction upon the Security Council to deal with certain types of disputes between nations, is that the public peace must at all costs be preserved and that there is a class of disputes of a political character not susceptible of treatment judicially.

The old League Covenant and the Dumbarton Oaks Proposals encourage the Council to investigate such matters and to endeavor to induce the parties to settle them. If such efforts are not successful the new Security Council is to "take any measures necessary for the maintenance of international peace and security," including the "use of armed force . . . to give effect to its decisions." Emphasis is laid upon "demonstrations, blockade and other operations by air, sea or land forces of members of the organization."

The plan is unquestionably responsive to a world-wide determination not

5. (1944) 30 A. B. A. J. 545.

6. American Society of International Law; American Foreign Law Association; Federal Bar Association; American Branch of the International Law Association.

7. See notes 5 and 6 *supra*.

8. "(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; (d) the nature or extent of the reparation to be made for the breach of an international obligation."

to tolerate perpetual bullying and banditry by nations any more than we do by individuals. We may not be able to change the leopards' spots, but we are going to control the leopards.

My criticism of the proposed functions of the Council is not of the objectives contemplated, but of the wisdom of having the Council assume judicial functions and of emphasizing bristling threats of compulsion.

History has demonstrated repeatedly that prolonged public debate of delicate disputes between nations by political bodies often tends to aggravate the disputes rather than to pacify them. Minor issues develop into major crises. National sentiments become solidified beyond the power of any diplomatic representations to change them. National alignments of third parties are encouraged respecting matters in which other nations have no direct interest.

The nations by united action should outlaw self-help except as expressly authorized in specific circumstances. International crime and breaches of the peace must be sternly prevented or punished. The basic rights of all nations should be defined and declared. The nations by united action should provide an adequate judicial system whereby any aggrieved nation may have its day in court. There must also be a deliberative body or bodies, properly and fairly constituted, with power to change the *status quo* of international law.

But the Security Council plan as outlined in the Dumbarton Oaks Proposals savours ominously of the political coalitions which have plagued Europe for centuries. It is certainly not the American plan of constitutional government, which has been adopted by the vast majority of the people of the world in their own national organizations. One of the smartest political actions ever taken in history was when our forefathers in 1789 lifted the settlement of inter-state disputes out of the old Continental Congress—a deliberative body composed of diplomatic representatives of states in their political capacities—and vested jurisdiction over such controversies in a supreme judicial body.[9] There are, it is true, some political questions which the Supreme Court will decline to determine, but the practice has become well nigh universal of having the states settle their differences by suit before the Supreme Court rather than by Congressional action.

No practical constitutional lawyer expects to see an international federation precisely in the pattern of the United States of America or of any other federated nation, but it is wise to ponder upon experience gained in such governmental organization. If a political or diplomatic body such as the new proposed Security Council is to be encouraged to take up and try to settle all delicate political disputes between nations, the program may lead to further impasses and crises which may imperil again the entire system.

The promise of "demonstrations," sanctions, and armed force will not, in practice, prevent fanatical national sentiment from forcing issues. Nor will solemn declarations of solidarity now assure united action by individual na-

9. The old Articles of Confederation had said: "The United States *In Congress assembled* shall . . . be the last resort on appeal in all disputes . . . between two or more States." ART. IX.

tions when a crisis arises. An avalanche of threats of force, even if originally accepted in a signed document, may tend, as time proceeds, to injure sensitive feelings of small nations, to create irritations because of divers interpretations of the words, and eventually to cause disintegration of the organization and another still more bloody war.

There was no wiser man in the American Constitutional Convention than James Madison. He was even wise enough in one instance to change his own mind. Madison drafted a proposed clause for incorporation in our Constitution almost identical in purport to Section VIII of the Dumbarton Oaks Proposals and Article 10 of the League Covenant.[10] Alexander Hamilton, though the staunchest supporter of Union in the entire convention, convinced Madison and the Convention that the inclusion of such express threats in the Constitutional document would cause the system to break down.[11]

If the answer to my questioning of the wisdom of these clauses of the Dumbarton Oaks Proposals be that Hamilton and Madison were planning a "super-government," whereas the Dumbarton Oaks Proposals involve no such creation, I can only say that I do not know what a "super-government" is, and I do not care what the proposed new organization is called. I cannot conceive of international law at all, nor of any kind of an international organization, except as limiting to some extent the sovereign powers of individual governments.

What I do want is an organization powerful and enduring enough to insure a reasonable amount of peace and justice, and, if possible, to prevent my sons and yours, and their sons and grandsons, from being killed on the field of battle. If that is feasible under any plan I want my government to stand for that plan and to insist upon it, and I will not quarrel about the language on the label.

---

10. The "Virginia plan" introduced May 29, 1787 proposed that Congress be authorized "to call forth the force of the Union against any member of the Union failing to fulfill its duties under the Articles thereof." 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION (rev. ed. 1937) 21.

11. In his articles in The Federalist, Hamilton developed this thought further, as follows:

"Whoever considers the populousness and strength of several of these states singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws, to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is little less romantic than the monster-taming spirit, which is attributed to the fabulous heroes and demigods of antiquity.

Even in those confederacies which have been composed of members smaller than many of our counties, the principle of legislation for sovereign states, supported by military coercion, has never been found effectual. It has rarely been attempted to be employed, but against the weaker members; and in most instances attempts to coerce the refractory and disobedient, have been the signals of bloody wars; in which one-half of the confederacy has displayed its banners against the other half." XVI HAMILTON, THE FEDERALIST (new ed. 1852) 73, 74.