But if this paragraph does apply—as it must in the stated cases of *force majeure* and distress—then the first sentence of the paragraph is in error. The article continues to specify the coastal state's right of regulation and the applicability of Article 20 (right to prohibit). Submarines must navigate on the surface. The fourth paragraph, prescribing the right of warships to pass through straits connecting parts of the high seas, is drafted in reliance on the International Court of Justice's judgment in the *Corfu Channel Case.*

Article 27, paragraph one, which states that warships are bound to respect the laws and regulations of the coastal state, seems redundant, since this duty naturally flows from the right of the coastal state to make such appropriate laws and regulations, as provided in paragraph 2 of Article 26. The second paragraph is sound in providing that, if the warship does not comply, it may be required to leave the territorial sea. Only this second paragraph was included in the *Rapporteur's* draft in his reports to the Commission.

As Professor Briggs has pointed out,[29] governments have not co-operated well in responding to requests for comments or information to assist the International Law Commission. In regard to the project on the territorial sea, governments were requested to reply only on the problem of "the delimitation of the territorial sea of two adjacent States." Sixty requests elicited only twelve replies, of which, Professor Briggs dryly notes, ten "contained information of value." One of the most important by-products of the League's codification effort was the compilation of data on state practices. Even though one is not sanguine that the International Law Commission can make much progress in actually codifying international law,[30] a relatively slight effort on the part of governments could contribute a like supplementary promotion of the rule of law. As has been pointed out, however, the International Law Commission's work will not be of enduring value if the United Nations does not reproduce its documentation in printed form. The present hard-to-get and perishable mimeographed documents imply an unjustifiable disparagement of the value of its work.

PHILIP C. JESSUP

PREPARATION FOR REVIEW OF THE CHARTER OF THE UNITED NATIONS

The Tenth General Assembly of the United Nations, in the fall of this year, will have to decide whether it shall summon a conference for review of the Charter of the United Nations. Article 110 provides this opportunity to take stock, after ten years of experience.[1] Various factors, such as the "cold war," the demand for economic development, and the rise of the anti-colonial majority, have shaped the course of the United Na-

[29] This JOURNAL, Vol. 48 (1954), p. 603.

[30] *Cf.* Charles de Visscher, *Théories et Realités en Droit International Public* (1953), p. 181.

[1] See the editorial by P. B. Potter, in this JOURNAL, Vol. 48 (1954), p. 275.

tions in somewhat different directions from those originally planned, but the basic elements of the institution remain the same.

The Members of the United Nations appear to be uncertain whether they should call such a conference or not, and even more uncertain as to how it should be handled. There has been little definite antagonism to holding the conference, except from the Soviet bloc, which regards it as a conspiracy on the part of the United States to get rid of the principle of unanimity. Some Members, and a great many individuals scattered throughout the world, regard it as an opportunity for improvement of the United Nations; others feel, as Secretary Dulles expressed it, that there is a moral obligation, deriving from the San Francisco Conference, to provide an opportunity for reconsideration. It is probable that a conference of some kind will be held at some time; attention has thus far been concentrated on whether or how preparation should be made.

The considerations which moved delegates in the debate at the Eighth Assembly have been summarized in an earlier issue of the JOURNAL.[2] They hesitated to ask for preliminary suggestions or recommendations from governments, for fear that the positions taken would be maintained and frozen, so that the opportunity for later reconciliation of conflicting views would be reduced; they did not like the idea of a committee composed of representatives of governments, and thought that the Secretariat could do a better job of preparation. On the other hand, they were not willing to turn the Secretariat staff loose, and limited it to objective statement of the experience of the United Nations, without criticism or recommendation. Resolution 796 (VIII) called for preparation of a systematic compilation of the documents of the San Francisco Conference not yet published, with an index of all those documents; and for an indexed repertory of the practice of the United Nations organized by articles of the Charter. Two additional volumes of the United Nations Conference on International Organization have now been published, covering the Coordination Committee and the Committee of Jurists; and the index to these documents, done on an outside contract, has been finished.[3]

There are reasons for the uncertainty concerning the calling of the conference. If it were to be held and accomplish nothing—as now seems probable—would this cause serious dissatisfaction among some Members? The chief opponent of Charter revision is the Soviet Union; what is the United States prepared to offer in order to obtain Soviet consent to desired changes in the Charter? For that matter, what changes would the American people accept? Or other nations? Are they willing to submit to a stronger United Nations?

A great deal of advance could be accomplished without amending the Charter, if agreement could be had for such advance. If adequate and

[2] Yuen-li Liang, "Preparatory Work for a Possible Revision of the United Nations Charter," *ibid.*, pp. 83–97.

[3] It should be noted that a repertory of Security Council practice was ordered in 1951, and this has now been issued as Doc. ST/PSCA/1 (Sales No. 1954. VII. 1). Apparently, another such study must be made under the resolution of the Eighth Assembly.

authoritative means of interpretation were accepted, much could be done through interpretation, as has happened with the Constitution of the United States. A few important usages seem to have been established, such as not counting an abstention as a veto; if agreement such as this could be obtained on other procedures, these might be put into practice likewise. If agreement of this sort is lacking, agreement to amend the Charter can hardly be anticipated. It would be possible also for those Members who were sufficiently interested to enter into supplementary agreements, supporting the Charter; *e.g.*, to submit to a certain vote in the Security Council for the settlement of their disputes, or to pledge in advance a certain supply of armed forces for use against an aggressor.[4]

A few proposals may be mentioned to illustrate the possibilities of Charter amendment. The usual complaint is against the veto, and one can feel sure that the Soviet Union would use its veto to block any amendment modifying the rule of unanimity. For that matter, the United States would be unwise to surrender it, in the face of the strong majority of small states which can now be lined up against her in the General Assembly and which could, in the absence of the veto, control the action of the Security Council.[5] The suggestion that the use of the veto be modified in practice, for settlement of disputes and for admission of new Members, is a more feasible one; but for this, no amendment of the Charter is required.

Weighted representation has been proposed as a substitute for the veto, and this might furnish a more satisfactory distribution of voting power in the General Assembly. Amendment of the Charter would be needed for this change, and it would in all probability be unobtainable. It is inconceivable that the stronger Powers would agree to representation based upon population. Perhaps some formula combining various elements could be devised, but it is almost as inconceivable that the smaller states—forty-three of which pay each less than one percent of the budget —would give up "sovereign equality" for any form of weighted representation.

There are many who are eager for an international police force; the technical problems involved alone would make its realization very doubtful; and the response of states would probably be discouraging. Doubtless the voluntary response of states shown in their contribution of armed forces for use against aggression in Korea is encouraging, but it was not a magnificent response; nor was the response to the inquiry of the Collective Measures Committee concerning pledging of forces for future use. However, assuming that nations would be willing to maintain—and to submit to—an international police force, no amendment of the Charter

[4] For example, the so-called Thomas-Douglas resolution, S. Con. Res. 52, 81st Cong., 1st Sess.

[5] This majority can only recommend, of course; and its present composition and course of action lead to the reflection that, in the present voting arrangement in the Assembly, no greater power than that of recommendation would be granted to the Assembly as part of Charter revision.

would be necessary; there is nothing in the present Charter which forbids its establishment.

Compulsory jurisdiction over disputes would also be desirable. Perhaps we are nearer to this than to any other improvement, insofar as it refers to the compulsory jurisdiction of the International Court of Justice over disputes of a legal character. However, there are barely thirty states which are now bound under the Optional Clause. Again, no amendment would be needed to give the Court compulsory jurisdiction; all that is needed is for Members to accept the Optional Clause, and without reservations. It is asking a good deal more to give the Security Council authority to impose a settlement between disputants by political vote. This would require amendment of the Charter—except for those who might be willing by supplementary agreement to submit to such decisions; it would probably also require disuse of the veto, and it would raise questions as to the ability of the Security Council to enforce such settlements.

Without seeking further for illustrations, it would appear that we are now in the following dilemma: If there were enough agreement to obtain amendment of the Charter, most of the desired changes could, under the present liberal interpretation of the Charter, be achieved without necessity for amendment; and if there is not enough agreement among Members to take such steps as are now possible, what chance is there to amend the Charter?

This statement of the dilemma pushes the problem back to the attitudes of Members, to the actual support which they now give to the Charter, to the sincerity of their desires to reach agreements in the community interest. Thus far, they have shown little self-discipline in this regard, little respect for the Charter. They call upon the Court to interpret the Charter only when they are frustrated; each organ, and each Member, reserves the right to interpret the Charter as it wishes on each occasion separately—and often inconsistently. Those who made the Charter provided no authoritative manner in which to interpret it; and, while it is claimed that each organ may decide for itself, there have been very few cases in which the Assembly or its committees have formally voted upon a challenge to competence—even though Rules 80 and 110 of the General Assembly assert that when a challenge to competence is raised, it must be voted upon immediately. What usually happens is that an action is voted, and it is then claimed that the vote for that action proves that the organ thinks it is competent to take the action. In the very few cases on which a vote as to competence was taken as to Article 2 (7), the domestic questions clause, it will be found that competence was upheld by the anti-colonial majority on matters which interested them, such as the treatment of Indians in South Africa or the right of the United Nations to pass upon the status of non-self-governing territories; and that where competence was denied, it was upon matters proposed by the Soviet Union.

In the ten years of its operation the United Nations has tended more and more to become a political machinery and less and less a legal order. This is perhaps natural in so disorderly a world, and in an institution in

which there is a majority of smaller states who are naturally little interested in upholding the vested rights of the larger Powers under the old international law.[6] This majority can and does use its voting power to override the restrictions set in the Charter. The Report of the Commission on the Racial Situation in the Union of South Africa, in the only study made by the United Nations of the domestic questions clause, maintained that interpretation is a political matter, and noted that no question of interpretation in this connection had been referred to the International Court of Justice.[7]

This trend should be of interest to international lawyers who, it is to be supposed, are interested in the maintenance of an international legal order.

If Members do not pay respect to the present Charter, can it be expected that they would pay respect to a revised and stronger Charter? Or that they would support revision toward a stronger Charter? Any strengthening of the Charter must be based upon law, for the Charter is both a constitution and a treaty; but in the United Nations today, legal procedures and constitutional restrictions arouse no enthusiasm. The temper of the times does not favor legal order and, therefore, does not favor Charter revision.

Nevertheless, a conference for review of the Charter may be useful. It might serve to give more understanding to peoples, who desire international peace and security and who think that this must be based upon law, of what is really needed for strengthening the United Nations, and what price must be paid for it. Even though risky, the conference might be worth while for its educational value.

In any case, more preparatory work is needed than is now planned. Much more study is being made by unofficial bodies than by the United Nations, and the proposals made by such bodies need to be considered carefully by United Nations experts, and in advance of a conference. Such a study could well occupy a year or so before a conference meets, and the Assembly might, if and when it decides to hold a review conference, postpone its meeting for a year or so in order to allow adequate study to be made of the changes which are needed and the extent to which, from a practical viewpoint of possibility of adoption, it is worth while to spend time upon them. Such a study might result in a limited agenda, so that the conference would not be used for vain proposals, for propaganda and for long-winded oratory. The Secretariat is best equipped for such a study; the experience of committees of representatives for such a purpose has not, as the delegate of the United Kingdom remarked, been encouraging.[8] Thus far the Assembly has not permitted the Secretariat to make such a study; if it cannot be trusted for the purpose, the task could be

[6] This, of course, brings into prominence, among needed improvements, the procedure by which new international law can be made. Though this raises the whole question of peaceful change, little attention has been paid to the question.

[7] U. N. General Assembly, 8th Sess., Official Records, Supp. No. 16 (A/2505), p. 22.

[8] U.N. General Assembly, 8th Sess., Official Records, Sixth Committee, p. 67 (Vallat).

turned over to the International Law Commission or, since its time is well taken, to an outside body of experts. It is such a group which should make the preliminary study; the representatives of governments who, of course have the final decision, would find their work eased and accelerated by such an objective study.

CLYDE EAGLETON

MEMBERSHIP AND REPRESENTATION IN THE UNITED NATIONS

The questions of membership and representation in the United Nations have been present in the minds of students and friends of that institution from the time of its inception onward, as is, or was, quite natural. The distinction between the two phases of the problem has not always been borne in mind, but has been raised to prominence and accentuated by the case of Communist China, without being entirely novel.

The distinction mentioned is in some ways nothing but the old distinction between the existence of a state and the existence of a government, or their recognition. This distinction was not mentioned in the United Nations Charter and the "Republic of China" was made a Member of the Organization and given permanent representation on the Security Council. At the moment this seemed sufficient for the purpose.

We are not considering here, it should be noted, membership or representation in the Specialized Agencies of the United Nations. Each of these has its special conditions of membership or representation and/or may modify these conditions at will. An attempt by the United Nations to control membership in one of the Specialized Agencies on political grounds did not enjoy great success. At all events the problem here is not nearly as serious as it is in the case of the United Nations itself.

There has arisen, as is well known, the problem of admitting or not admitting certain states, as states, to membership in the United Nations. On this issue Russia and the United States, to put the matter bluntly, have disagreed sharply. As a result fifteen or twenty states have been denied membership in the United Nations in spite of various efforts at compromise and agreement, mainly promoted by the United States. It hardly needs to be added that the crucial element in these cases has been and is the character (Communist or non-Communist) of the governments in those countries.

When we come to Communist China, however, the difficulties multiply, partly due to the attitudes of other countries, especially Russia and India. In the cases of most other countries eligible for membership, no great amount of propaganda or promotion has been undertaken, at least by the countries themselves. In the case of Red China, on the other hand, the issue has become a feud, if not a *casus belli*. And the issue has not yet been decided.

It will be remembered that a few years ago the International Court of Justice was asked for its opinion on the propriety of states Members of the United Nations taking into account factors other than those specifically mentioned in the Charter as qualifications for membership, qualifications