U.N. PEACE-KEEPING FORCES
A REAPPRAISAL OF RELEVANT CHARTER PROVISIONS

by

AHMED SHEIKH, Ph.D.

Associate Professor
Department of Political Science
Western Illinois University

There is no lack of agreement among the scholars in the discipline and the delegates to the U.N. as to the significance of the legal basis of the United Nations peace-keeping activities. The question of legal limits to the use of force by the world organization has been debated before in the international arena and no doubt will come up again and again, for it is directly related to the future effectiveness of the organization in keeping world peace. Several times in the last two decades or so, the United Nations has authorized military forces to deal with a threat to peace. In each instance there were some who have pointed out that the U.N. operation may have averted a third world war. But in each instance there were others who have argued that perhaps the world organization is not equipped, within the constitutional framework of the Charter, to deal with such actual or potential threats to world peace [1]. There are still others who have argued, and convincingly, that the present stalemate stems from the basic differences among the members in the *interpretation* of the Charter with regard to the legal limits of U.N. activity on behalf of international peace. They further point out that the Soviet Union and France are the chief exponents of a « strict constructionist » view of the Charter. That is, the Charter, being a treaty between sovereign sates, should be read simply as conferring only those powers upon the U.N.'s various organs which are explicitly stated.

All moves which have the slightest appearance of having been designed to extend the powers of any U.N. organ beyond those explicitly given to them

[1] Consider, for example, Brazilian delegates' repeated urgings that the U.N. Charter must be revised to « provide for a new chapter on peace-keeping operations », U.N. Doc. *A/AC 121/PV. 33,* March 29, 1968, p. 2.

by the Charter are regarded as illegal so long as they are not formally approved by all parties. All powers beyond those expressly granted to the U.N. organs are reserved to the Member States and can be exercised by the U.N. only if and when an expressed consent of the members has been obtained [2].

On the other hand, it is argued that there are a number of countries led by the United States and a number of other nations which have, at times reluctantly, but nevertheless supported the General Assembly's right to call for peace-keeping forces in emergencies, and particularly if the Security Council has been incapacitated by the usage of veto. These countries also defend the Assembly's right to apportion expenses of all peace-keeping operations whether initiated by the General Assembly or the Security Council, and proceed to demand payments [3]. Followers of this school are in full agreement on the Council's right to take the initiative in peace-keeping activities of all sorts. In fact, they insist that the Security Council has the primary responsibility in this area, *but* they maintain that they have turned to the Assembly only when the Council was unable to take action in grave crisis situations calling for a peace-keeping force. They also believe that the General Assembly has the right to apportion expenses of such operations on the basis of Article 17, paragraph 2 of the Charter [4]. Despite the advisory opinion of the International Court of Justice, affirmed by 9-5 votes of the judges in July 1962 [5], that the expenditures authorized by the General Assembly for operations in the Congo and the Middle East were « expenses of the Organization » within the meaning of Article 17, paragraph 2 of the U.N. Charter, and despite the acceptance of this opinion in the General Assembly [6], and the resolution entitled « General Principles to Serve as Guidelines for the Sharing of the Costs of Future Peace-Keeping Operations Involving Heavy Expenditures », which was adopted by an overwhelming majority of the General Assembly [7], it must be pointed out

[2] For a comprehensive discussion of this point, see U.N. Doc. *A/AC. 121/WG. A/PV. 2*, March 22, 1967, pp. 11-13; see also, « Issues before the 22nd General Assembly », *International Conciliation*, nº 564 (September, 1967), pp. 28-33; « Financing of United Nations Peace-Keeping Operations » : *Report of the Working Group on the Examination of the Administrative and Budgetary Procedures of the United Nations* (U.N. Doc. *A/5407*, March 29, 1963); PADELFORD, N.J., « Financing Peace-Keeping : Politics and Crisis », in N. J. Padelford and Leland M. Goodrich, eds., *The United Nations in the Balance : Accomplisments and Prospects*, New York (A. Praeger), 1965, pp. 82-83.

[3] For further information on the views of countries supporting this school of thought see *U.N. Monthly Chronical*, 1, nº 5, October 1964, pp. 50-56.

[4] *Ibid.*

[5] For details read *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the U.N. Charter), Advisory Opinion of July 20, 1962; I.C.J., *Reports*, 1962, pp. 151-308.

[6] G. A. Res. 1854 (XVII), December 19, 1962, which was adopted by a vote of 76 to 17, with 8 abstentions.

[7] G. A. Res. 1854 (S-IV), June 27, 1963, which was adopted by a vote of 92 in favor, 11 opposed, with 3 abstentions.

that followers of this school have not been able to convince the other side of the legal soundness of their position. Debate between the two camps continues without any signs of compromise. The legal issues today seem more confused than ever.

Starting with the Korean and Suez operations and moving on to U.N. involvement in the Congo and Cyprus, one thing becomes quite clear, that now there is an urgent need for a greater understanding and clarity of legal implications of international military actions. While much of the public attention has been focused mainly upon the military and political aspects of U.N. peace-keeping, the past operations, particularly the Congo operation, have given rise to many new legal developments and problems of Charter interpretation which are still far from being resolved.

With the experience of these several U.N. operations one might have thought that by this time the United Nations would have a solid legal foundation on which to establish the most desirable kind of force needed for any future crisis. But for two reasons this has not been possible : Firstly, the existing political climate in the U.N. and elsewhere simply did not permit past forces to be established under the most ideal or consensual interpretations of the Charter concerning the use of force by the organization; and, secondly, the very fact that these forces were put together in direct response to crisis situations, the legal authority of various U.N. organs responsible for their creation has remained unclear and unsatisfactory up to the present time.

Because of this continued confusion and lack of consensus, resulting in persistent stalemates, fresh and determined efforts must be made to liquidate the legacies of the past so-called « illegal » peace-keeping operations. Relevant Charter provisions must be reviewed in the hope of possible future meeting of minds between the various factions of U.N. membership on the question of legal competence of various U.N. organs in the area of peace-keeping activities. What follows in this article is merely an effort, for a modest but new assessment of the legal competence of the three major U.N. organs, namely, the Security Council, the General Assembly and the Secretariat in the area of peace-keeping activities. In the interest of comprehension, this effort was extended to include a critical analysis of the July 1962 advisory opinion of the International Court of Justice on *Certain Expenses of the United Nations* and a treatment of the problem of multinational forces acting collectively on the basis of Articles 51-53.

THE COURTS ADVISORY OPINION

Before attention could be turned to the legal competence of the three major organs of the U.N. in the area of peace-keeping, it seems profitable to analyze the July 1962 advisory opinion of the International Court of Justice in some detail and assess its legal and political implications.

As stated earlier the advisory opinion of the International Court of Justice in July 1962 (that the majority of U.N. General Assembly under Article 17 extended to all expenses of the U.N. whether included or not in the regular budget), and the recommendations of the Working Group on finance which met at the Fourth Special Session of the General Assembly in May-June 1962, have helped to highlight the nature of United Nations current politico-financial problems.

It is interesting to note that the Court arrived at the above conclusion by an amazingly simple process of reasoning : First it ruled that the contents of Article 17, paragraph 2 were significantly related to the expenses incurred in carrying out the purposes of the Organization; secondly, it examined the expenditures referred to above and ruled that they were incurred with that objective in mind; and finally, it examined arguments which had been advanced against its ruling and found them without merit.

It can be argued that the opinion of the Court has great significance for at least two reasons : In the *first* place, in this decision, one can see the beginnings of a new doctrine which may have already strengthened the United Nations in some ways. This doctrine has been referred to as « institutional effectiveness ». The Court started to elucidate the importance of this concept first in the *Reparation for Injuries* case [8], in which it declared that the « United Nations had an international personality in some jurisdical matters and therefore legally could perform certain acts which up till now traditionally have been regarded as being within the exclusive prerogative of sovereign states » [9]. However, the Court had been careful to point out that it does not consider the International Organization a super-state in any sense. In that case the Court first enhanced the stature of the United Nations and in the present case, it may be argued that the Court went substantially further. Without giving an adequate definition anywhere in its proceedings of that all-important term « expenses of the Organization », the Court declared :

> « In determining whether the actual expenditures authorized constitute " expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter ", the Court agrees that such expenditures must be tested by their relationship to the purpose of the United Nations in the sense that if an expenditure were made for the purpose which is not one of the purposes of the United Nations, it could not be considered an " expense of the Organization " [10]. »

After providing for the above functional test of the expenditures and after

[8] *I.C.J. Reports,* 1949, p. 179.

[9] GROSS, L., « Some Observations on the International Court of Justice », *A.J.I.L.,* 56, nº 1, January 1962, 53.

[10] *I.C.J. Reports,* 1962, p. 167.

analyzing the purposes of the United Nations set forth in Article 1 of the Charter the Court concluded :

> « The primary place ascribed to international peace and security is natural, since the fulfillment of the other purposes will be dependent upon the attainment of that basic condition. The purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organizations with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization [11]. »

It is submitted that the above stated conclusion by the International Court of Justice is significant for the Member States and the Organization itself. Though the Charter does not explicitly state the fact that « primary place is ascribed to international peace and security », the Court's conclusion accurately reflects the thoughts of the authors of the Charter on the importance of international peace and security. This, of course, is not to say that the Organization does not have other important, and long-term objectives. For instance, the realization of basic universal human rights of self-determination are just as, even more, important. The essence of the argument here is simply this : In the Court's conclusion the so-called « sovereign rights » of « freedom of action » of members are limited not merely by the explicit provisions of the Charter, but more importantly by the multiple ends to the accomplishment of which the United Nations is dedicated.

However, several scholars in the field of international law have been in agreement, alongs with the Court on the limiting nature of the role the General Assembly is entitled to play. Johnson's remarks below are indicative of this attitude :

> « The Assembly is empowered to do no more than to issue political or socio-economic recommendations of a general or specific character, themselves lacking obligatory character [12]. »

On the other hand, a number of scholars have taken a stronger position in support of the powers of the General Assembly. For instance, Leo Gross has this to say :

> « ... The Court's holding and dictum amounts to saying that even though such recommendations are not binding upon the members, the General Assembly has the power to commit the members either directly or through the medium of the Secretary-General to expenditures which it is in the discretion and power of the Assembly to apportion among the members. Thus, the General Assembly

[11] *Ibid.*, p. 168.

[12] JOHNSON, D.H.N., « The Effect of Resolutions of the General Assembly of the United Nations », Royal Institute of International Affairs, *B.Y.I.L.*, 1955-1956, London (O.U.P.), 1962, vol. 32, p. 99.

> may impose upon its members binding financial obligations for the realization of non-obligatory recommendations... [13] »

Gross goes on to argue that the General Assembly, within the scope of the Court's Advisory Opinion, can similarly apportion expenses and therefore impose financial obligations for the purpose of implementing resolution of the Security Coucil such as those relating to the Congo, which the Court construed as non-obligatory [14].

Despite the differences of opinion among the various scholars, it can be said with certainty that the Court's advisory opinion has a constitutional significance to the extent it affirmed the validity of the « Uniting for Peace » resolution and to the extent it affirmed « the third force » role assumed by the Secretary-General acting on the directions of either the General Assembly or the Security Council in the area of peace-keeping activities with tremendous political implications generated by the financial problems related to these activities.

A few other factors also become clear : The Court found Article 14 a perhaps more congenial and less controversial legal basis for the peace-keeping activities of the General Assembly. It also interpreted Article 89 in the most comprehensive and inclusive sense. By declaring a new principle that what the Organization is not prohibited from doing, it may do. This literally amounted to reversing the earlier decision taken by the Permanent Court of International Justice in the *Lotus* case, with its implication that what it not explicitly surrendered by the states is retained, the limitations upon the sovereignty of states cannot be presumed.

It also furthered « institutional effectiveness » by authorizing the Organization to exercise tremendous budgetary powers. The full impact of its affirmation that the General Assembly can legally and with binding force authorize expenditures for the purposes of implementing non-obligatory resolutions of either the Security Council or General Assembly is yet to be felt. It affirmed that the financial resolutions as related to expenditures of UNEF and ONUC were apparently not *ultra vires* the United Nations if they were in the service of one of the purposes of the Organization as stated in the Charter. Having said this, it further concluded that maintenance of peace and security is one of the major purposes of the Organization.

It is interesting to note that in handing out this Advisory Opinion the Court has undoubtedly reversed itself from its previous position as to what the role of the Court should be. On a different occasion the Court pointed out that

[13] Gross, L., « Expenses of the United Nations for Peace-Keeping Operations : The Advisory Opinion of the International Court of Justice », *Int. Org.*, 18, nº 1, Winter 1963, 5-6.

[14] *Ibid.*, 6.

« it is the duty of the Court to *interpret* treaties, not to *revise* them »[15]. And yet, it can be argued that the acceptance of this Opinion by the General Assembly[16] has created a situation where the Charter may well have to be revised to accommodate this Opinion.

[15] For this position in detail, see *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania* (Second Phase), Advisory Opinion of July 18, 1950, *I.C.J. Reports*, 1950, p. 229.

[16] At its 1199th Meeting on December 19, 1962, the General Assembly by a vote of 76 to 17, with 7 abstentions, adopted Resolution 1854-A (XVII), accepting the opinion of the Court, and at the same time by a vote of 78 to 14, with 4 abstentions, adopted Resolution 1854-B (XVII), the text of which is considered important and therefore is quoted in detail :

The General Assembly

« *Recognizing* that the peace-keeping operations of the United Nations, such as those in the Congo and in the Middle East, impose a heavy financial burden upon member States, and in particular on those having a limited capacity to contribute financially,

» *Recognizing* that in order to meet the expenditures caused by such operations a procedure is required different from that applied to the regular budget of the United Nations,

» *Taking into account* the advisory opinion of the International Court of Justice of July 20, 1962 in answer to the question contained in Resolution 1731 (XVI),

» *Convinced* of the necessity to establish at the earliest possible opportunity financing methods different from the regular budget to cover its future peace-keeping operations of the United Nations involving heavy expenditures, such as those for the Congo and the Middle East,

» (1) *Decides* to re-establish the Working Group of Fifteen with the same membership to twenty-one by the addition of six Member states to be appointed by the President of the General Assembly with due regard to geographical distribution as provided for in Resolution 1620 (XV), to study, in consultation as appropriate with the Advisory Committee on Contributions, special methods for financing peace-keeping operations of the United Nations involving heavy expenditures such as those for the Congo and the Middle East, including a possible special scale of assessments.

» (2) *Requests* the working Group of Twenty-One to take into account in its study the criteria for the sharing of the costs of peace-keeping operations mentioned in the past resolutions of the General Assembly, giving particular attention to the following :

(a) The references to a special financial responsibility of Members of the Security Council as mentioned in Resolutions 1619 (XV) and 1732 (XVI);

(b) Such special factors relating to a particular peace-keeping operation as might be relevant to a variation in the sharing of the costs of operations;

(c) The degree of economic development of each Member State and whether or not a developing state is in receipt of a technical assistance from the United Nations;

(d) The collective financial responsibility of the Members of the United Nations;

» (3) *Requests further* the Working Group of Twenty-One to take into account any criteria by Member States at the Seventeenth Session of the General Assembly or submitted by them directly to the working Group;

» (4) *Requests* the Working Group of Twenty-One to study also the situation arising from the arrears of some Member States in their payment of the contributions for financing peace-keeping operations and to recommend, within the letter and the spirit of the Charter, arrangements designed to bring up to date such payments having in mind the relative economic positions of such Member States;

» (5) *Requests* the Working Group of Twenty-One to meet as soon as possible in 1963

An analysis of the opinions of the five dissenting judges indicates that there were alternatives opened to the Court. The Court could have simply declined to give any opinion at all. Previous activities of the Court indicate that in its capacity as one of the most important organs in the international arena the Court has always tended to collaborate with the political organs of the United Nations. But in this instance the Court has proved to be more than that — it is capable of handing out opinions related to issues on which there are strong political differences even among the major powers. This, of course, does not mean that the Court could not have done more. As a matter of fact in the opinion of one of the majority judges « it did not dispose satisfactorily of all the difficulties encountered in gaining an affirmative opinion to the request addressed to it »[17].

If the Court was unable to give a more satisfactory opinion on the subject it might well be because of « judicial caution » which every court feels constraint to exercise.

On previous occasions, the Court has found it necessary and profitable to rephrase somewhat (through interpretation) the question directed to the Court for an advisory opinion. It is also suggested that in matters of advisory opinions the Court has greater latitude in formulating an appropriate and legally acceptable answer than it does in contention cases. The Court could have utilized this latitude, according to Gross, by basing its reasoning on Article 17, paragraph 1. Gross further comments :

> « ... If the term " budget " were taken to mean " regular " budget and the term " expenses " in paragraph 2 of Article 17 were construed as related to that, than it might have been possible to consider the expenditures in question as expenses of the Organization without tying them in what that clause... [18] »

It is interesting to note here that the exclusive powers of the General Assembly in budgetary affairs were really never disputed [19].

The third possibility was suggested to the Court by a number of powers who were concerned about the negative reaction of the Soviet Union to any suggestion of giving supra-national financial authority to the General Assembly. In a nutshell, this alternative suggested that the Court should start out by

and to submit its report with the least possible delay and in any case not later than 31st March, 1963;

» (6) *Requests* the Secretary-General to distribute the report of the Working Group of Twenty-One to Member States as soon as possible with a view to its consideration when appropriate by the General Assembly. »

[17] Further details on this point of view can be noted in the separate opinion of Judge Sir Gerald Fitzmaurice, *I.C.J. Reports,* 1962, p. 210.

[18] Gross, L., « Expenses of the United Nations for Peace-Keeping Operations : The Advisory Opinion of the International Court of Justice », *op. cit.*, p. 29.

[19] See the dissenting opinion of President Winiarski, *I.C.J. Reports,* 1962, p. 228.

re-affirming the distribution of powers between the Security Council and General Assembly as stated in the Charter on the one hand, and that between the United Nations and its Members on the other hand. The force of the Argument in the latter context is whether non-obligatory recommendations made by the Organization can be implemented as a legal basis for binding financial resolutions. The point was argued in the Court and the majority opinion decided that it can be implemented on the basis of Article 17 and in view of U.N. practices.

It is disappointing to note that the Court was unable to give more convincing arguments in favor of its action to give supra-national status to an international organization, mostly by relying on Article 17 and the so-called « practice of the U.N. ». It may also be noted when the Collective Measures Committee had the same matter under advisement, it reached a conclusion diametrically opposite to that reached by the Court.

Pursuing further the problems of the distribution of authority between the Security Council and the General Assembly, the Court could have easily separated the question asked to it into two points : one relating to U.N.E.F.'s expenses and the other relating to O.N.U.C.'s expenses. But the Court preferred to keep them together under « peace-keeping operations » and ruled that since the consent of the host government (Egypt and the Congo) were needed, neither of the actions could be regarded as obligatory or enforced actions and therefore both fall within the recommendatory powers of the Security Council and General Assembly, authorized by the Charter. The Court could have conceivably distinguished the two operations on the basis of the Charter alone and have refrained from any reference to « the practice of the U.N. » altogether. Judge Sir Percy Spender puts the matter this way in his separate opinion :

> « In the present case, it is sufficient to say that I am unable to regard any usage or practice followed by any organ of the United Nations which has been determined by a majority therein against the will of the minority as having any legal relevance or probative value [20]. »

Despite the fact that his conclusions were different, one might have guessed from his above remarks as regard to the principal issue, he still agreed with the French position by indicating :

> « Once a question is put to the Court, it passes on to the legal plane and takes on a new character, in the determination of which legal considerations and legal considerations only, may be invoked [21]. »

The position of the French Government was as follows :

> « The Governement of the French Republic would first of all point out that too great an importance should not be attached to statements [declarations]

[20] *I.C.J. Reports*, 1962, p. 197.

[21] *Ibid.*

> noted on a political plane and during a lengthy examination of a difficult question : just as, in negotiations between States, the Court has decided that the successive proposals of one of the States cannot be relied upon against it after the end of negotiations and when the cases pass on to the legal plane, the same way the Government of the French Republic recognizes that a case brought before the Court as the result of a request for an advisory opinion takes on a new character, and that only legal considerations should and can henceforth be invoked [22]. »

If one accepts the argument of Sir Percy and leaves the notion of « practice of the U.N. » out of the picture, then it can be easily argued that Articles 24 and 25, and Article 11, paragraph 2 of the Charter provide more than sufficient evidence that the responsibility for the maintenance of peace and security rest squarely on the shoulders of the Security Council. It would also follow that O.N.U.C. must be distinguished from U.N.E.F. for, one was the creation of the Security Council and the other of the General Assembly, and unless one accepts the view that the General Assembly may recommend action short of enforcement action then U.N.E.F. was *ultra vires* the power of the General Assembly. It is not necessary for our purpose to go into extensive details as to the legal implications of acts *ultra vires* or its applicability to the Charter, for the Court barely touches on this concept in its Advisory Opinion. One may also accept the proposition that the expenses of U.N.E.F. were the expenses of the Organization and all the Member States should be honor bound to pay it, it does not follow and cannot necessarily be accepted that these expenses were within the meaning of Article 17, paragraph 2, or subject to the sanction laid down in Article 19.

On the other hand, the operation in the Congo was carried out under the authority of Security Council resolutions. There also has been some difference of opinion as to whether these resolutions are binding or not [23]. The Court declared these resolutions as non-obligatory as well for the same reasons as the U.N.E.F. operation, carried out under the resolutions of the General Assembly and as such combined them both. It is submitted the opposite of the Court's view seems more appropriate. It is legally conceivable that certain parts of the Council's resolutions relating to O.N.U.C. may be binding upon all Members. This is what Judge Koretsky has to say in this matter :

> « The references made to Articles 25 and 49 of the Charter [in the Security Council Resolution of August 9, 1960, Doc. S/4426] reaffirmed that the Council's appeals were nothing else but decisions binding on all Members of the United Nations... Moreover the Security Council should, from the very beginning, have acted in compliance with Article 39 of the Charter... [24] »

[22] *Pleadings*, p. 132. Translation in English provided by the Registry.

[23] For details on this subject see MILLER, E.M., « Legal Aspects of U.N. Action in the Congo », *A.J.I.L.*, 55, n° 1, January 1961, 4, and also, see Security Council Resolution of August 9, 1960, U.N. Doc. *S/4426*.

[24] *I.C.J. Reports*, 1962, pp. 270 and 275.

It is difficult to see why the Security Council failed to act under Chapter VII of the Charter as far as O.N.U.C. was concerned because the use of force was authorized by the Council in order to maintain peace and security and as such peace-keeping operation fits better into the framework of Chapter VII than any other part of the Charter. Accordingly, it would have been easier for the Court to find sufficient authority for the Council's decision in Articles 24 and 2, paragraph 6, along with Articles 25 and 49 (invoked by the Council itself) in order to give the operation a binding force. Then taking this position as a starting point the Court could have concluded that the expenditures incurred in the larger of the two operations were the expenses of the Organization. That would have been the minimal solution.

The main difference between the paths to a solution suggested here and that followed by the Court, and its advantage lies in the connection between the expenditures authorized and the Security Council's powers under Articles 24 and 25. This connection would have limited the Court's decision to the extent of precluding the inference that any expenditure authorized for the fulfillment of any of the expressed objectives of the Organization can properly be made an expense of the United Nations within the meaning of Article 17, paragraph 2, by two-thirds majority of the General Assembly [25].

In this manner, the Court could have successfully avoided implying supranational financial powers for the Organization, except in the context of only Security Council's authority under Article 24 and within the specific framework of Chapter VII of the Charter. It is submitted that a Court's opinion along these lines would have upheld the proper distribution of powers not only between the Assembly and the Council, but also between the Member States and the Organization itself. The Members, as a result, would have been held responsible only to what they agreed the moment they joined the United Nations.

As the events since the time the Court's Advisory Opinion was handed out in 1962 have shown that legal rulings, without taking political realities into account, mean somewhat less than desired, it is interesting to determine the binding effects of the Security Council resolutions. There is no doubt that the legal considerations are not the only considerations the Council takes into account when passing resolutions. There is some validity to the French Government's assertion that it is unrealistic to attach too much legal weight to statements made in a political context or votes cast for political expediencies in search of pragmatic solutions. One could further argue that it is extremely hard to see how the Court could act in accordance with the conscience of

[25] Further elaboration of this point is made by Judge Sir Gerald Fitzmaurice in his separate opinion, *I.C.J. Reports*, 1962, p. 203.

the Member States when they are simply participating in the Security Council vote. There is enough evidence in the literature to argue the point that « official » explanations of the vote, offered before and after casting it, frequently have no hearing as to how they will vote if the question of the corporate personality of the Organization was involved.

In support of the above position consider Judge Sir Gerald Fitzmaurice's opinion further [26]. The Security Council and the General Assembly are two distinct organs of the Organization and the Court might have done well not to put them on the same footing through this Opinion.

Along the same line the argument advanced by Judge Koretsky in refusing to give full support to the Council's resolutions (on the basis that the Secretary-General was given too much authority and responsibility to organize, direct and finance O.N.U.C.) is something less than persuasive. Obviously there were compelling political and military reasons for giving much of the authority to the Secretary-General in this operation and the Soviet Union or France could have vetoed the Council resolutions but they did not. Since favorable votes were cast by these countries they automatically accepted the responsibility to uphold the resolutions.

In determining its Advisory Opinion the Court could have considered Members' changing political motivations and their explanations prior to and since their votes cast for the resolutions, but it preferred to hold them to their affirmative votes and the subsequent responsibilities which flowed from them. The Court had a perfect right to do so. Because of this, both the Members and the Organization may well develop in the future more respect for the Charter law. It must be admitted that in the final analysis, an international Organization must be responsive to both legal and political forces. Up till now, it is the political considerations that have been catered to at the expense of legal doctrines of the Charter. From this perspective, the Court decision was a welcome one. If the interest of law is to be upheld, the judicial controls of all acts of the international Organization must remain a major objective but *not* with total disregard to political realities. It is a thin line between the two concepts [27].

In conclusion, it is submitted that despite the fact that the question asked to the Court was simply to give its opinion whether or not certain financial resolutions fall under Article 17, paragraph 2, of the Charter, the Court took it upon itself, of its own choice to examine a constitutional question, that is, whether certain resolutions of the Security Council and General Assembly

[26] *Ibid.*, p. 210.

[27] In support of this notion, see several resolutions adopted by the Institute of International Law at its session in Amsterdam, September 18-27, 1957, *A.J.I.L.*, 52, nº 1, January 1958, 103-107.

relating to O.N.U.C. and U.N.E.F. were or were not within the scope of the Charter. The Court decided to offer a maximum solution by answering in the affirmative to both parts of the question. It is obvious that this radical view in fact has not forced the « defaulters » to pay their assessed dues.

The present dilemna can be summed up in this manner : On the one side the good faith, prestige and the future of the United Nations is involved; the interest of the third parties must be protected and the future peace-keeping operations must be anticipated and financially supported. On the other side, the General Assembly resolution based upon, and supported by the Advisory Opinion, and the insistence of the Court that Article 17, paragraph 2 and consequently Article 19 were applicable, have failed to persuade the « defaulters » to pay. The deficit remains.

LEGAL COMPETENCE OF THE SECURITY COUNCIL IN THE AREA OF PEACE-KEEPING ACTIVITIES

Articles 24, 25 and 26 describe the functions of the Security Council under the Charter of the United Nations. Specifically, the authority of the Council to discharge these functions satisfactorily is granted in Chapters VI, VII, VIII and XII. The Charter, under Article 24 (1) holds the Security Council primarily responsible for the maintenance of international peace and security. Under Article 26 it gives the Council further responsibility of working out plans, with the help of a Military Staff Committee, to control and regulate military arrangements to be submitted to the member states for approval.

Chapter VI of the Charter authorizes the Council to work out pacific settlements of disputes, which, if not settled, may cause a breach in international peace and security. Certain United Nations observer groups such as U.N.O.G.I.L. and the group in Yemen (U.N.Y.O.M.) may be regarded as having been established in accordance with the provisions of Chapter VI rather than Chapter VII of the Charter.

It is submitted that whether these types of groups are considered as organs for purposes of investigation under Article 34, or for broader purposes of aiding in Security Council action under Chapter VI, is not of much relevance to the authority of the Council to establish such groups. The Security Council does have extremely broad powers under Chapter VI, specifically under Article 34, which it can utilize by establishing a subsidiary organ under Article 29. However, in either case the Council's vote to *operationalize* these groups may not be procedural, even though the vote to *establish* the subsidiary organ under Article 29 should be considered as procedural. Perhaps the distinction between Chapter VI and Chapter VII, in relation to the Council's actions, would be

that under Chapter VI it would take recommendatory steps, whereas under Chapter VII its action would be mandatory [28].

Chapter VII of the United Nations Charter is the most crucial chapter for purposes of our discussion here. It deals with actions with respect to threats to the peace, breaches of the peace and acts of aggression. In other words, it provides the means to fulfill those functions of the Council which are not covered in Chapter VI relative to pacific settlement of disputes.

Article 39 states that the Security Council « shall determine the existence of any threats to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security ». Article 41 provides that the Security Council « may decide what measures not involving the use of armed force are to be employed to give effect to its decisions... These may include complete or partial interruption of economic relations and of... communications, and the severance of diplomatic relations ». Article 42 goes further than Article 41 in stating :

> « Should the Security Council consider the measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea, or land forces of Members of United Nations. »

The wording of Article 39 suggests that it is possible for the Council to recommend that a United Nations force be set up, without necessarily having to decide upon such measures for which provision is made in Articles 41 and 42. A number of scholars have argued that in the case of the Korean operation, the determination of the existence of a breach of peace was implicitly made under Article 39, and consequently the use of force was recommended. For the same reason, it is further argued, that this caused the Korean operation to be undertaken by States on a voluntary basis and not by the United Nations itself [29].

[28] For an excellent discussion of the authority of the Security Council on this point see : KERLEY, « The Powers of Investigation of the U.N. Security Council », *A.J.I.L.*, 55, 1961, 892. Also, see the Report of the Sub-Committee of the Security Council established under Resolution S/4216 of September 7, 1959, *S/4236*, paras. 13-19 : a group was set up under Article 29 to proceed to Laos to check on a Laotian complaint of September 4, 1959, Doc. *S/4212* refers.

[29] For further details on this point see the position of GOODRICH, L., « Korea : Collective Measures against Agression », *International Conciliation*, n° 494, 1953. The fact that the Unified Command of the operation was delegated to the United States also confuses this view. As regards the importance of Article 39 to this operation, consider, for instance, the position of the delegate from the United Kingdom who was among those who argued that by itself Article 39 is a sufficient basis for the establishment of an international military force to restore international peace and security, *Off. Rec.*, S.C., 5th yr., 476th mtg., pp. 3-4.

The importance of Article 39 as having inherent power to establish a U.N. military force, becomes more significant when one considers the fact that the organization has been unable to take any action under Article 42, because attemps under Article 43 to get the member states to agree on a procedure of making national armed forces available to the Security Council have, so far, largely failed [30]. Here the Soviet Union and the communist states point out that the result of the non-implementation of Article 43 is the inability on the part of the Council to establish an international military force, for the reason that Articles 42 and 43 are essentially related. They also deny the ability of the Council to establish a force under Article 39.

Several other members do not accept this limitation which the Soviets place upon Article 39, but agree on the interrelationship of Articles 42 and 43 [31]. It is interesting to note, however, that the Soviet Union has not been consistent in its position. For example, in 1956 it appealed to all members, insisting that « in accordance with Article 42... all States members of the United Nations... should give military aid and other assistance to the Republic of Egypt » [32]. Also, as Seyersted points out, the Soviet Union did not object to the Security Council resolution under which O.N.U.C. was established [33]. While it is correct to state that O.N.U.C. was not set up under the terms of Article 42, it nevertheless was established outside the framework of Article 43 [34]. Bowett, for instance, points out :

> « While the wording of Article 39 does not seem to necessitate that recommendations thereunder refer to Article 41 or 42, it equally seems untenable to argue that Article 42 can only be applied on the basis of agreements concluded under Article 43. The wording of Article 42 is broad, leaving open both the method of recruiting the Forces and the precise nature of their command. The absence of agreements under Article 43 merely ensures that States cannot be compelled to contribute to United Nations action under Article 42; but action under Article 42 may be recommended by the Security Council, pursuant to a finding under Article 39. Some evidence to the contrary is perhaps presented by Article 106 of the Charter, which stipulates that " pending the coming into

[30] A further elaboration of this point can be found in BOWETT, D., *United Nations Forces : A Legal Study*, New York (F.A. Praeger), 1964, pp. 12-18; GOODRICH and SIMONS, *The United Nations and the Maintenance of International Peace and Security*, 1955, pp. 398-405; and BLAISDELL, « Arms for the United Nations », *Department of State Documents and State Papers*, 1, 1948, pp. 141-158.

[31] For a comprehensive discussion of the Soviet position on this point, see *The Conference of Eighteen Nations, Committee on Disarmament 1962* (F.N.D.C./P.V. 55), pp. 55-66. For an understanding of the positions taken by other member states in support of the Soviet position, see *Off. Rec.*, 5th yr., 476th Meeting.

[32] See *Repertory of Practice of the Security Council*, Suppl. 1956-58, p. 172.

[33] SEYERSTED, F., « United Nations Forces : Some Legal Problems », *B.Y.B.I.L.*, 37, 1961, 439.

[34] U.N. Doc. *S/4387* and *Certain Expenses of the United Nations, I.C.J.* Pleadings (1962), p. 270.

> force " of the special arrangements in Article 43, the parties to the Four-Power Declaration of 1943 and France shall consult together " with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security ". It is, however, generally accepted that Article 106 was intended to be of a temporary nature, and that the failure to implement Article 43 cannot be said to have extended indefinitely its implementation [35]. »

It is interesting to note that Sohn agrees with Bowett on the breadth of the wording of Article 43 as regard the method of recruitment and the precise nature of the command of the force, and suggests that only the use of national contingents depends on the conclusion of special agreements which must be made under Article 43 prior to the establishment of the force [36]. Seyersted also follows the same line of argument, and points out that all that one can infer from Article 43 is that contingents of the national armed forces cannot be compelled to fight on behalf of the United Nations without prior understanding and agreements with the nation-state. However, in Seyersted's view, their services under Article 42 could be accepted by the organization if the same were offered by member states as a result of a recommendation under Article 39 [37]. As regard the temporary nature of Article 106 as pointed out by Bowett, there seems to be a general agreement in the literature [38].

Turning to the main point made by Bowett in the preceding quotation, it can be *concluded* with some assurance that a United Nations military force can be established if recommended simply under Article 39, or if recommended under Article 39 with reference to Article 42. Halderman points out that the authority « to recommend » has two distinct aspects in the language of international law : one is substantive and the other is procedural. The Council may « recommend », under Article 39, that certain measures be carried out, e.g., Korea; or once it has been decided as to what collective measures are going to be taken, the procedure may be adopted of using recommendations to carry them out [39].

Also, it can further be argued that legally a *decision* could be made under Article 39 to establish a force under Article 42 by means of recruitment on an individual and voluntary basis, without necessarily violating Article 43. However, the political response from Member States to a direct recruitment of individuals is bound to be negative. If a force were established under Article 42,

[35] BOWETT, D., *op. cit.*, p. 277.

[36] SOHN, L.B., « The Authority of the United Nations to Establish and Maintain a Permanent Force », *A.J.I.L.*, 52, 1958, 230.

[37] SEYERSTED, F., *op. cit.*, 439-440.

[38] See HALDERMAN, J.W., « Legal Basis for United Nations Armed Forces », *A.J.I.L.*, 56, n° 4, 1962, 985.

[39] *Ibid.*, 987.

subsequent to a finding under Article 39, it would definitely be a force of a military nature.

However, it should be noted that there is nothing in Article 42 which makes it necessary for the force established within its meaning to apply military sanctions against a state; it merely points to the fact that military means may be used to see that international peace and security is maintained or restored. In short, if an international military force were established under Article 42, this does not automatically imply that a state or a number of states have been branded as aggressors and a combat involving United Nations forces is to follow. The broad wording of Article 42 has induced scholars such as Seyersted and Jennings to believe that the O.N.U.C., for considerable periods of time, was operating under the authority of Article 42 [40]. It is submitted that the Congo Operation of United Nations Forces was perhaps the most complicated operation ever undertaken by the international organization. It raises a number of legal questions which have caused a great deal of controversy.

It is also possible to find some constitutional basis for the establishment of United Nations forces within the meaning of Article 41 of the Charter. Article 41 provides : « The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions... These may include... the severance of diplomatic relations. » On the basis of these provisions it is submitted that the Security Council can legally decide that a threat to the peace, breach of the peace or an act of aggression has occurred under the provisions of Article 39, and establish a force with largely *interposition functions* in order to stabilize the situation, without resorting to enforcement measures. Bowett and a number of other scholars feel that the right of such an interposition of « barrier » force to use arms in self-defense would not legally violate its basic posture of a non-combat force [41].

It is interesting to note that at one time or another, Article 41 has presumably been conceded actually to provide a constitutional basis even for enforcement action. On the other hand, a number of scholars and possibly the Secretary-General as well, have relied on its broad wording to include some other operations not involving the use of military forces or any military sanctions. It has been suggested by Schachter, for instance, that the technical aid given to the Congo by the United Nations was regarded « as a means to strengthen the government of the country and to improve internal conditions and... these, in

[40] SEYERSTED, F., *op. cit.*, 446. However, the author admits that it is rather difficult to use Article 42 as the basis for the establishment of O.N.U.C. In an article entitled « The United Nations Force and the Congo », *The Listener*, October 19, 1961, JENNINGS also seems to agree with Seyersted.

[41] BOWETT, D., *op. cit.*, p. 279. Also see, SCHWARZENBERGER, G., *Report on Problems of a U.N. Force*, International Law Association (Hamburg Conference), 1960, p. 7.

turn, would directly reduce the risk of external intervention. One might conceivably regard such measures as within the broad language of Article 41... »[42].

Though the Secretary-General never regarded Article 41 as the main source of his constitutional powers with regard to the Congo operation, there is sufficient evidence to suggest that on a number of occasions he has referred to this Article in connection with the Congo operation[43]. In *conclusion,* it can be pointed out that Article 41 does provide some constitutional basis for a United Nations military force with functions of interposition or at least an observer group. However, Sohn, while agreeing with the preceding statement, cautions that too much emphasis upon this Article will divert attention from Articles 39, 40 or 42 which provide much better constitutional bases for Security Council action[44].

Turning to Article 40 of the Charter, it seems that there exists some constitutional basis for the establishment of an international military force. Article 40 says : « In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable... » Stone argues that the wording of this Article can be implied to mean some sort of « provisional » measures which may well mean either supervision or enforcement of truces, cease-fire orders or interim injunctions on the supply and introduction of more weapons and fresh troops by international military forces[45].

Sohn agrees with Stone and further suggests that once it has been established by the United Nations, under Article 39, expressly or implicitly, that a threat to peace, a breach of peace or an act of aggression has taken place, then there is no reason why an international military force cannot be established under Article 40, should it become clear that some provisional measures are necessary to restore international peace and security[46]. In view of the above comments, it can fairly be *concluded* that a majority of United Nations Observer Groups so far established by the organization may owe their legal existence to the provisions of Article 40. It is further *concluded* that the interposition forces

[42] SCHACHTER, O., « Legal Aspects of United Nations Action in the Congo », *A.J.I.L.*, 55, nº 1, 1961, 6.

[43] *Off. Rec.*, S.C., 15th yr., 884th Meeting, para. 26. The Secretary-General to whom reference is here made is Dag Hammarskjold.

[44] SOHN, L.B., *op. cit.*, 230.

[45] STONE, J., *Legal Controls of International Conflict,* New York (Rinehart), 1954; with supplement : London (Stevens & Sons), 1959, pp. 643-647.

[46] SOHN, L.B., *op. cit.*, 230.

may also be regarded as provisional measures, and thus may find a legal case for their establishment in the authority of Article 40.

Article 40 raises a number of difficulties in interpretation. For example, it authorizes the Council to « call upon » the parties concerned to comply with provisional measures, and does not make it clear as to how far the « call » imposes legal obligations on the parties concerned to comply with that call. It is conceivable that this Article will probably be used in situations in which a threat to the peace or a breach of peace exists, but it is hard to agree that it will be an appropriate or an effective measure in situations in which an aggression has been committed and a call upon the aggressor to cease fire goes unheeded. In a situation such as this, it seems more reasonable to argue that a call from the Security Council for « provisional action » would almost certainly have to mean « preventive action » within the meaning of Article 2 (5), and that means all Member States would be required to « refrain from giving assistance to any state against which the United Nations is taking preventive... action. »

The question raised in the preceding paragraph, regarding the legally binding obligation of « call upon » the members by the Security Council is an interesting one. For instance, Kelsen contends that the Security Council always had the legal option of using the « call » under Article 40 either as a simple recommendation or a legally binding decision, for, as far as the language is concerned, it falls between « recommendations » in Chapter VI, and « deciding on measures » in Chapter VII [47]. Along the same lines, Stone also argues that Article 41 is a part of Chapter VII, and that if the Security Council wishes, it may treat action taken under this Article as binding [48].

Schachter seems to agree with Kelsen and Stone in suggesting that the stipulation in the last sentence of the Article, « The Security Council shall duly take account of failure to comply with such provisional measures », confirms the view held by these two scholars [49]. It is interesting to note that during the Congo operation, both the Secretary-General and the Security Council insisted that the « calls » made under Article 40 were legally binding, and as a result invoked the application of Articles 25 and 40 of the Charter [50].

In view of the above, it may fairly be *concluded* that Article 40 in fact does provide a constitutional basis for the establishment of a United Nations military force, preferably, as a subsidiary organ of the Council, largely for

[47] KELSEN, H., *The Law of the United Nations*, London (Stevens & Sons), 1950, p. 740.

[48] STONE, J., *op. cit.*, p. 220.

[49] SCHACHTER, O., « Legal Aspects of the United Nations Action in the Congo », *op. cit.*, 60.

[50] U.N. Doc. *S/4417/Add. 6*, August 12, 1960.

the purposes of supervision of provisional measures applied by the Security Council under Article 40. It may further be *concluded* that when the Security Council wishes to make these measures mandatory, these « calls » could be regarded as decisions of the Council to which Articles 2(5), 25 and 49 will be applicable, and thus all countries will be required to promote the purposes of the United Nations Forces. After having said this, it should, however, be admitted that given the political climate of the present day, it is unlikely that there will be too many occasions in which the United Nations would choose to rely on Article 40.

It has been suggested previously that perhaps the most controversial operation ever carried out by the U.N. forces was the Congo operation. It may be stated here that the Advisory Opinion of the International Court of Justice on *Certain Expenses of the United Nations* made no attempt to support the view that the constitutional basis for the establishment of the O.N.U.C. were to be found in Article 40. Rather, it took the position that it was not necessary, to reach the Opinion of the Court, that there be reference to a specific Article in the case of U.N.E.F. or O.N.U.C. The Court did offer the broad view that various Resolutions passed on O.N.U.C. were within the constitutional framework of Chapter VII of the Charter, though this should not be taken to mean that the Resolutions constituted measures [51]. The position taken by dissenting Judge Quintana highlights the controversy. The Judge says :

> « Any use of armed force intended for whatever purpose implies by definition enforcement action [and that] when there have been dead and wounded, bombardments on both sides, when civilian populations have paid the price, when a cease-fire and other military agreements have been negotiated between two belligerent groups, it is not easy to evade the conclusion that this constitutes enforcement action [52]. »

In its Advisory Opinion, the Court did *not* clearly go so far as to say that O.N.U.C. fell within the scope of Article 40 but left the point open.

Another dissenting judge, Koretsky, also took the position that Article 40 cannot be applicable in the case of O.N.U.C., and insisted that it is very « closely connected to Articles 41 and 42 through Article 39 », and therefore subject to agreement under Article 43 [53].

Turning to paragraph 1 of Article 48 of the Charter, it has been suggested by at least a few scholars that it might contain some independent constitutional basis for the establishment of an international military force of sorts. Paragraph 1 of this Article reads : « The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the members of the United Nations or by some of them,

[51] *I.C.J. Reports,* 1962, p. 166.

[52] *Ibid.,* p. 246.

[53] *Ibid.,* p. 275.

as the Security Council may determine. » An analysis of this provision does not seem to make a very convincing case for the establishment of a force simply under the authority of this paragraph. It seems more logical to argue that Article 48, paragraph 1, is merely regulating the nature and the intent of participation of various countries in an action which has already been taken by the Council under some other article or articles.

Article 48(1) could regulate the implementation of a decision for a United Nations Force, but not provide the actual basis for its establishment. It is interesting to note that the same view has been taken by the Soviet Union in connection with its position of non-payment of its share of O.N.U.C. expenses. The Soviet Union accepts the fact that the Resolution of July 13, 1960, which authorized the establishment of O.N.U.C. was legally valid, but, because the Secretary-General and not the Security Council [as it should have under Article 48(1)] provided the list of states participating in O.N.U.C., the implementation of the Resolution was thus rendered illegal [54]. However, it is submitted that while on the basis of the Court's observation the particular Soviet interpretation of Article 48(1) can be rejected, the main premise upon which this interpretation (that this particular provision does not provide legal basis for the establishment of a force) was based must be regarded as valid.

At least one scholar has argued that Article 29 itself provides a satisfactory legal basis to establish a force as a subsidiary organ to the Security Council [55]. Article 29 of the Charter provides that « the Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions ». It is conceivable that a U.N. force may certainly be considered a subsidiary organ of the Council, but it is unthinkable that it could be created by a simple procedural vote, which is all that would be required if this Article were to be applied. This point can also be supported by the Court's Opinion. It may be noted that the Court in its Advisory Opinion in the « Expenses Case » did not rely on this Article, but leaned on more substantive Articles of the Charter.

LEGAL COMPETENCE OF THE GENERAL ASSEMBLY IN THE AREA OF PEACE-KEEPING ACTIVITIES

It has been contended that an analysis of the United Nations Charter would reveal the fact that there are a number of provisions in the Charter authorizing the General Assembly to establish an international military force under certain situations. A brief analysis of these provisions is proposed here to determine the validity *vel non* of this contention.

[54] *Certain Expenses of the United Nations, I.C.J.*, Pleadings, 1962, pp. 272 and 400.

[55] DRAPER, « The Legal Limitation upon Employment of Weapons by the United Nations Force in the Congo », *I.C.L.Q.*, 12, 1963, 392. Draper's contention in this article has been that the constitutional basis of U.N.E.F. may be found in Article 29 .

Article 10 of the Charter states :

> « The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for it in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters. »

The provisions of Article 12 to which reference is made above provide :

> « While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendations with regard to that dispute or situation unless the Security Council so suggests. »

It is submitted that despite the fact that this provision of Article 12 tends to curtail the powers of the General Assembly, Article 10 can still be interpreted as giving broad powers to the General Assembly in the sense that under this article the General Assembly can recommend, provided the Security Council is not exercising its functions in respect to the same dispute, to the U.N. membership to support the formation of a peace-keeping force. However, in such a situation Member States will be under no compulsion to provide their national contingents in the service of such a force.

Article 11(1) also seems somewhat relevant, to the extent that it provides a legal basis for the Assembly to work out an *a priori* set of principles which could be applied to an international military force established at a later date. This article provides :

> « The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommandations with regard to such principles to the Members or to the Security Council or to both. »

There is nothing, however, in this provision which would imply that a recommendation is being made to the members that they provide a specified military force to the United Nations [56]. Article 11(2) seems more relevant to this concept. It states :

> « The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraphe 2, and, except as provided in Article 12, may make recommandations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question for which action is necessary shall be referred to the Security Council or the General Assembly either before or after discussion. »

It gives a clear mandate to the Assembly to discuss any question which it feels related to the maintenance of international peace and security, and make

[56] In support of this statement, see SOHN, L.B., *op. cit.*, 231.

recommendations, with, of course, the exception contained in Article 12. But it raises some problems also. For instance, the last sentence of Article 11(2) states that any question relating to the maintenance of peace which requires « action » must be referred to the Security Council. If one interprets the « recommendations » permitted under Article 11(2) as the formation of a U.N. force, is this to be considered as « action » and thus not allowed without reference to the Security Council ? The Soviet Union has answered this question in affirmative. But the Court in the *Certain Expenses* case rejected the Soviet contention by suggesting that the kind of action referred to in Article 11(2) in coercive or enforcement action and thus the word « action » must mean such action as it solely within the competence of the Security Council. No coercive and non-enforcement forces then supposedly are to be recommended by the General Assembly to the Member State without bringing in the Security Council under Article 11(2). While the position of the Court on this point is not crystal clear, one can, however, conclude that the Court seems to be rejecting the popular view that the essential power of the General Assembly, with certain exceptions, is that it may only recommend.

Article 14 may be regarded as providing legal basis for the establishment of a force of interposition. Its broad wording, subject to the limitations of Article 12, does permit the General Assembly :

> « ... recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations. »

It is interesting to note that in the *Certain Expenses* case the International Court of Justice did prefer the view that U.N.E.F. was based on Article 14. The preference for this Article (which was stated only obliquely) is rather surprising, for that Article refers to the « peaceful adjustment of any situation... which it deems likely to impair the general welfare or friendly relations among nations. » Application of this Article in the U.N.E.F. case clearly understates the description of the situation following the British, French and Israeli invasion of Egypt in 1956. The reasoning of the Court with regard to article 14 as the basis for U.N.E.F. is certainly not very clearly presented.

The principles and the purposes of the Charter are of course laid down in Articles 1 and 2. The most pertinent part of these Articles in relation to the present discussion is Article 2(4) which spells out the most fundamental prohibition of the threat or actual use of force. Article 2(4) reads : « All Members shall refrain in their international relations from the threat or use of force against the territoial integrity or political independance of any State, or in any other manner inconsistent with the purposes of the United Nations ».

Sohn contents that a dynamic interpretation of Article 22 may also be taken, legally, to sustain at least an interposition force. That Article states : « The

General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions. » Sohn goes on to point out :

> « Once... it has been accepted that mediators or commissions, appointed by the Assembly to supervise a truce agreement or the observance of the Resolutions of the Assembly, might need additional personnel for the exercice of their functions, there seems to be no logical limit to the number of persons needed. Similarly, if military personnel are added to United Nations missions and guards are send to defend the personnel and the property of such missions, it is difficult to draw the line between permitted and prohibited types of personnel... [57] »

It can, however, be suggested that Article 12 was perhaps originally intended to cover non-military bodies such as commissions of committees which would probably assist the Assembly in carrying out its investigative, deliberative and quasi-legislative functions adequately. In fact, it is further suggested that there is sufficient evidence in the literature to contend that Article 22 cannot *per se* support establishment of an international force without first making a convincing case that the functions of the force will in fact fall within the legally authorized powers of the General Assembly through Articles 10, 11 or 14. The finding of the International Court of Justice with regard to the establishment of the Administrative Tribunal of the United Nations under Article 22 can be quoted in support of this statement. The International Court found that the General Assembly had the authority to create this Tribunal for the effective implementation of the provisions of Article 107 of the Charter with regard to regulations of the United Nations staff [58]. For further support of this view with regard to Article 22, scholars such as Andrassy and Kelsen can also be quoted [59].

GENERAL ASSEMBLY AND THE UNITING-FOR-PEACE RESOLUTION

After the outbreak of hostilities in Korea, the General Assembly passed a resolution pointing out that the members of the Security Council had largely failed to uphold its responsibilities to the members of the United Nations by excessive use of the veto provisions, and by not being able to implement Article 43. Section A of the Resolution is pertinent to the present discussion, for it resolves, as Bowett quotes it, that

> « ... if the Security Council, because of lack of unanimity among the Permanent Members, fails to exercise its primary responsibility for the maintenance of

[57] *Ibid.*, 234.

[58] *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J.*, Reports, 1954, p. 71.

[59] See ANDRASSY, J., in *Report on Problems of a U.N. Force,* International Law Association (Hamburg Conference, 1960), p. 8, nº 206; also see KELSEN, H., *op. cit.*, pp. 391-392.

> international peace and security in any case where there " appears to be threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. " Section A also provides for the calling of an emergency meeting of the Assembly, should it not be in session at that time [60]. »

It is submitted that the main force of the argument as contained in the wording of Section A of the Uniting-for-Peace Resolution, amounts to saying that the General Assembly may do by recommendation almost anything it wishes that the Security Council was authorized to do under the constitutional provisions of Chapter VII of the Charter. The Soviet Union and a number of other countries have consistently denied this, and refer to Articles 11(2), 24, 43 and 47 in support of their contention that those matters which concern use of force are under the exclusive jurisdiction of the Security Council.

In support of the Uniting-for-Peace Resolution, a number of points can be made. First of all, reference can be made to the Advisory Opinion of the International Court on the *Certain Expenses of the United Nations Case.* The Court, during the course of its Opinion, chose to interpret the term « action » as embodied in Article 11(2) to mean « enforcement action ». This view, according to Bowett, indicates :

> « ... that the Assembly is free to undertake many other types of action without referring to the Security Council, it also implies that it may never, even by recommendation, undertake enforcement action. It is possible that the Court did not intend to convey this impression, and the point is not directly germane to its conclusions on the matter of expenses. It does, nevertheless, only mention the authority of the Assembly to take " action " under Article 11(2) when this involves the Organization of " peace-keeping" operations, at the request, or with the consent, of the states concerned [61]. »

It is interesting to note that throughout its Opinion, the Court made no reference to the right of the General Assembly to recommend enforcement measures either under the Charter or under the Resolution, and consequently, does not uphold any such right of the Assembly, which might presumably have been drawn from the Uniting-for-Peace Resolution. On the other hand, it emphasizes repeatedly that the right to order coercive measures is restricted only to the Security Council. As a matter of fact, the Court consciously avoids any reference to the Uniting-for-Peace Resolution.

In support of the Uniting-for-Peace Resolution, it has also been suggested that while Article 24 gives the Council *primary* responsibility for maintaining

[60] Cited by BOWETT, D., *op. cit.*, pp. 290-291. For a substantive examination of the Uniting-for-Peace Resolution, and its compatibility with the functions and procedures of the General Assembly, see ANDRASSY, J., « Uniting for Peace », *A.J.I.L.*, 50, 1956, 574-578.

[61] BOWETT, D., *op. cit.*, p. 291.

international peace and security, but not the *exclusive* responsibility. Consequently, it can be argued that the Assembly does have secondary or residual responsibility in this area as indicated by Articles 10, 11 and 14. This view of secondary responsibility of this Resolution under Article 24(1) is acceptable to a substantial number of scholars in the body of the relevant literature. It is also acceptable to the International Court of Justice provided no reference is made to the provisions of the Uniting-for-Peace Resolution in this connection [62].

After recognizing the fact that the General Assembly has a secondary responsibility in the maintenance of peace and security, it seems logical to pursue this line of thought further, and to refer to Article 12, which provides guidelines to the conduct of the General Assembly with the Security Council, in relation particularly to resolutions such as the Uniting-for-Peace Resolution. Under the directives of this Article, it becomes apparent that the Assembly may make no recommendations whatsoever on a question with regard to which the Security Council is exercising its functions. An exception to this rule would be a request by the Council itself for a recommendation. However, there is nothing in this Article which would suggest that the Assembly must refrain from even *discussing* a subject while it is being dealt with by the Council, or that a unanimous vote of all the permanent members of the Council is required before the Council could make a request to the Assembly for a recommendation on the subject.

With the above explanation it can be *concluded* that this particular provision of the Uniting-for-Peace Resolution which states that the General Assembly can convene in an emergency session on the vote of any seven members when the Council « fails to exercise its primary responsibility for the maintenance of international peace and security », seems therefore to be compatible with the terms of the Charter of the United Nations.

Another provision of the Resolution which states that the General Assembly may call an emergency session of its body by the approval of a simple majority of the members of the United Nations, cannot also be considered against the terms of the Charter. This is because it would simply not occur until the Security Council had failed to discharge its primary responsibility toward the maintenance of international peace and order, and the secondary responsibility of the General Assembly as implied by Article 24(1) has come into effect.

It has also been argued by a number of Member States that until the Secretary-General formally informs the General Assembly that the Security Council is deadlocked and is unable to act on a particular subject, the Assembly may make no recommendations on this subject. The support for this argument is largely drawn from the provisions of Article 12(1) which stipulates that the Secretary-General keep the General Assembly informed constantly on the progress being

[62] *I.C.J.*, Reports, 1962, p. 163.

made by the Council on all matters relating to peace and security. According to Bowett, a more logical view of this point would be :

> « Paragraph 2 of Article 12 is concerned with procedure, and not substance. It provides the appropriate procedure for keeping the Assembly informed of the work of the Council, but the test for whether the Council has actually ceased to deal with a matter is by interpretation of Article 12(1), and not by notification by the Secretary-General. Whether the Council is " exercising its function " cannot depend upon mere formality [63]. »

It is therefore *concluded* that the Uniting-for-Peace Resolution does not violate the limits or authority which is granted to the General Assembly by the United Nations Charter in the area of recommending military operations, if these operations are only « peace-keeping », and not « enforcement » operations directed against an aggressor state involving active combat. It is interesting to note that the Resolution does reserve the use of military force for breaches of peace and acts of aggression, although it will be recalled that Article 39 clearly states that it is the Security Council which shall determine a « threat to the peace, breach of peace, or act of aggression », and Article 42 states that the Council may recommend military measures if such a situation is found to have arisen.

Kelsen and a number of other scholars argue that the U.N. Charter gives only to the Security Council the express authority to make such a finding, and that the General Assembly can not even claim to possess such powers by inference [64]. Bowett, however, disagrees with Kelsen's and Goodrich's views and contends :

> « The right of the Council was only specifically enunciated in order to make clear the conditions for the operation of Article 42, and there was no need for such enunciation in the case of the Assembly, as it possesses no binding authority equivalent to that of Article 42. The opinion that in any event the Assembly has no need to make such a finding before recommending the use of force is also to be doubted — it can hardly be allowed more freedom in the field of military measures than the Security Council. Under part A of the Uniting for Peace Resolution is to be assumed therefore that the General Assembly will determine the existence of a breach of the peace or act of aggression before recommending collective measures [65]. »

[63] BOWETT, D., *op. cit.*, p. 292. In support of Bowett's view see also ANDRASSY, J., « Uniting for Peace », *op. cit.*, 568-569. Andrassy argues that just because a subject is not being considered by the Security Council at a given time is not conclusive for the General Assembly, when the subject has been found deliberately to require a delay, e.g., in order to explore the possibilities of achieving an accord between the disagreeing parties. That such a delay would be appropriate in cases covered by Article 39 is unlikely.

[64] For a detailed explanation of Kelsen's position, see KELSEN, H., *Recent Trends in the Law of the United Nations*, New York (Praeger), 1963, pp. 978-980. Goodrich also supports Kelsen's position. See GOODRICH, L., « Development of the General Assembly », *International Conciliation*, nº 471, 1951, 266-275.

[65] BOWETT, D., *op. cit.*, p. 293. ANDRASSY, J., too, seems to disagree with Bowett's position, *op. cit.*, 578.

Provision was also made, in the Uniting-for-Peace Resolution, to give the military and technical details for collective enforcement measures, in order to insure that the United Nations should be capable of establishing and operating an international military force without delay. Parts C and D of the Resolution provide details and guidelines for the enforcement measures envisaged under part A of the Resolution. Part C makes an appeal to all members of the United Nations to declare the nature and scope of assistance which they will be willing to make available in response to a recommendation by the General Assembly. It also encourages them to train and earmark some of their troops for duty with the international military forces.

Further, a request is made to the Secretary-General to appoint a panel of military advisors. In view of these provisions, it seems reasonable to conclude that some constitutional basis, under certain circumstances, may exist for the establishment of a U.N. force under the provisions of part A of the Uniting-for-Peace Resolution, which can be implemented under the provisions of part C. In fact, one can go so far as to argue that part C of the Resolution in fact falls within the scope of Artice 11(1), further re-enforced by Article 2(5) and the Preamble of the Charter itself.

The Resolution also establishes a Collective Measures Committee of fourteen members under the provisions of its part D. The main task of the committee at the time was to consult with the Member States and the Secretary-General, and to report on methods (including those in part C) « which might be used to maintain and strengthen international peace and security in accordance with the purposes and principles of the Charter, taking account of collective self-defense and regional arrangements (Articles 51 and 52 of the Charter) » [66].

In the final analysis, it is important to remember that these provisions of the Resolution, in fact the entire Resolution itself, is to be put into operation *only* if the Security Council has failed to function. Is is submitted that the passage of the Resolution in no way relieves the Security Council of its primary responsibility to maintain international peace and security. Besides, the permanent members of the Council always have the option to implement Article 43. It is pointed out that there is nothing in the Charter which would forbid the United Nations members from training and earmarking contingents of their armed forces for possible future service with the United Nations.

It is further to be noted that the Resolution adds nothing significantly new to the provisions of Article 11(1). A number of scholars have suggested at one time or another, that in fact both the Assembly and the Council, under the provisions of paragraph 8 of the Uniting-for-Peace Resolution, can make separate recommendations to the United Nations as a whole for the establishment of an

[66] For details see Report of the Collective Measures Committee (1951), U.N. Doc. *A/1891.*

international military force, using any method of recommendation which they prefer [67].

Generally speaking, it seems unnecessary to place too much reliance upon the Resolution with regard to a matter on which the Council finds itself unable to act. If the Council wishes to relieve itself completely of the responsibility in a certain matter, it need merely drop that matter from its agenda altogether. If it feels it has pressing reasons to retain the matter on its agenda (as in the case of the Congo), it can do so by using Article 20. Obviously, there is no use for implementing the Resolution in situations in which the Security Council prefers to send the matter to the Assembly voluntarily.

It can be further said that, by and large, in actual practice, those provisions of the Resolution which allow for the estabishment of an international military force have been avoided. In fact, it can be argued that to date the Resolution has not provided the authority for the establishment of any force. The principle of « consent » and reliance on Articles 11, 14 and 40 has been preferred. In view of this, it can be concluded that the only major use of the Resolution so far has been to call emergency sessions of the Assembly under its provisions.

LEGAL AUTHORITY OF THE SECRETARY-GENERAL AND THE SECRETARIAT IN THE AREA OF PEACE-KEEPING OPERATIONS

Article 97 of the Charter states :

> « The Secretariat shall comprise a Secretary-General and staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization. »

It has been suggested that some constitutional basis for the establishment of an international military force exists under the authority of the Secretariat in relation to the above Article of the Charter. The reading of this Article transmits two notions : First, it is the Secretary-General, as the chief administrative officer of the Organization who decides upon the size of the Secretariat appropriate for the smooth and efficient functioning of the United Nations. Second, the Article can be interpreted to mean that some sort of U.N. force can be set up *within* the Secretariat, should the Secretary-General wish to do so.

[67] In support of the above statement, see SCHWARZENBERGER, G., « Problems of a United Nations Force », *Current Legal Problems*, 11, 1959, 247; MCDOUGAL and GARDNER, « The Veto and the Charter : An Interpretation for Survival », *Yale Law Journal*, 60, 1951, 258; ANDRASSY, J., « Uniting for Peace », *op. cit.*, 563-582; GOODRICH and ROSNER, « The United Nations Emergency Force », *Int. Org.*, 11, 1957, 413; « United Nations Armed Forces, Military Staff Committee and Collective Measures Committee », *Commonwealth Survey*, November 27, 1956, 1019.

However, it will be a mistake to read « too much » into this Article. An analysis of other parts of the Charter establishes the fact beyond doubt that if a force, established under this Article, was intended to perform anything more than the protection of United Nations personnel and property, a lot more authorization either from the Security Council or the General Assembly would be required. The functions performed by the United Nations guards at the U.N. headquarters are the kind envisaged to be authorized under the provisions of this Article.

The first « Guard Force » was proposed by the first Secretary-General under the provisions of Articles 97 and 98 and it was made clear to the Members at the time that this Force could not possibly be used for enforcement purposes under the provisions of Article 42 [68]. The General Assembly subsequently approved the establishment of such a Guard Force which is normally unarmed and performs field services, transport and communication services, protection of U.N. property and so on. In conclusion, it can be said that the Secretariat by and large remains incapable of establishing a United Nations military force within the terms of Article 97. In fact, the past Secretary-General, Trygve Lie, had himself stated on a number of occasions that his freedom to choose an appropriate staff for the efficient administration of the United Nations should never be interpreted to mean that he is free to engage his staff in carrying out enforcement measures [69]. Bowett agrees with the past Secretary-General's position and further contends :

> « ... Should the General Assembly recommend that the Secretariat should establish military units, then Article 97, taken together with General Assembly Resolution 13(1), would seem broad enogh to sustain such action. [By Resolution 13(1) of February 13, 1946 the Assembly had asked the Secretary-General to establish an administrative organization in order to discharge his responsibilities under the Charter efficiently and effectively]... The authority of the Secretary-General to establish an interposition or fighting force is thus seen to be exclusively a delegated authority [70]. »

It should also be noted that regardless of what kind of a force the Secretary-General may decide to set up (a force for the protection of U.N. property and personnel or a force capable of maintaining and enforcing international peace and security)budgetary approval will still have to come from the General Assembly. In other words, as Sohn puts it :

> « If the General Assembly were willing to make the necessary financial appropriations, the Secretary-General could recruit as many individuals as the Assembly should authorize, provide for their training as military units of the Secretariat, and send them on such mission as the Assembly might direct [71]. »

[68] See U.N. Doc. *A/656* : *GAOR*, 3rd Sess., Part 2 (1949), Plenary Meetings.

[69] For a detailed statement of the Secretary-General on this point see « Report of Secretary-General on a United Nations Guard », U.N. Doc. *A/656*, para. 7.

[70] BOWETT, D., *op. cit.*, pp. 299-300.

[71] SOHN, L.B., *op. cit.*, p. 235.

Article 98 is also interpreted to provide authority to the Secretariat in the planing, administration and operation of all United Nations forces established either by the Security Council or the General Assembly. It makes provisions such as the Secretary-General « shall perform such... functions as are entrusted to him by the organs ». Examples of both U.N.E.F. and O.N.U.C. point out that day to day and certain other responsibilities were delegated to the Secretary-General by the Assembly.

In conclusion, it should be noted that despite the fact certain limited constitutonal authority exists for the U.N. Secretariat to establish a United Nations force, no force has ever been established by this organ. Reviewing the past activities of the Secretariat in this area Bowett points out :

> « The first Secretary-General's proposal for a Guard Force proved abortive and the United Nations Field Service cannot properly be described as a military force. The Field Service was established by the Secretary-General under his own authority, and the General Assembly passed a Resolution noting his intentions [72]. »

It is interesting to note that the General Assembly, while nothing the establishment of the Field Service (300 men recruited as Secretariat Staff and rarely armed), made no reference to the specific Charter provisions but merely observed the need of such a service and that the Secretary-General possessed the necessary authority to establish such a service, presumably under Articles 97 and 98 [73].

LEGAL AUTHORITY PROVIDED BY ARTICLE 51 OF THE CHARTER AND COLLECTIVE DEFENCE ARRANGEMENTS IN THE AREA OF PEACE-KEEPING OPERATIONS

Aticle 51 is largely concerned with the rights of the Member States to take whatever collective action they deem necessary in self-defense in the face of an aggression. They can legally continue to take such an action until the Security Council has taken steps to restore and maintain international peace and security and if for some reason, after the appraisal of the situation the Council finds itself unable to take any action, the Member States can continue to act in self-defense. Article 51 of the Charter states :

> « Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by the Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. »

[72] BOWETT, D., *op. cit.*, p. 301.
[73] General Assembly Resolution 297 (IV).

It has been argued by a number of scholars that if a substantial majority of United Nations Members act in a coordinated effort of self-defense then such an effort may be regarded as a United Nations action. The formation of a U.N. command for the purpose of directing a coordinated action taken by a majority of nations in self-defense, subsequent to a declaration by the Security Council that an aggression has been committed against a Member or Members, would, in the opinion of Stone, come very close to having the constitutional authority for a United Nations military force or the Members' right to collective self-defense under the provisions of Article 51. In other words, the thrust of Stone's argument is that the provisions of Article 51 which were primarily designed to maintain the individual liberties of the nation-states (in the area of right of self-defense) possibly could also be used to justify a United Nations action under a different title even when no decision has been made by the Council under Article 42. Stone goes on to say that the authority of the states to use violence, finding expression in the recommendation that they do so by the Assembly is based on two premises : The first is the traditional inherent right of States to an individual or a collective self-defence, and the second, in the words of Stone, « the liberty of each State to resort to war under customary International Law, which still exists even for United Nations members, except where prohibited by the Charter » [74]. Bowett disagrees that this second basis exists and contends that the United Nations Charter has limited the use of violence to legitimate self-defense and legal enforcement measures. Bowett goes on to point out :

> « To rely [as does Stone] upon the wording of Article 2(4) (" ... against the territorial integrity and political independence of any state ") to uphold a license to resort to war for the purpose of " maintaining international peace and security " when the Security Council is unable to take a decision under Chapter VII is to ignore the very intention of the Charter. This view [Stone's view] also involves a curious interpretation of Articles 1 and 2. Moreover, the existence under international law of a duty to maintain international peace and redress violations thereof is very doubtful [75]. »

However, it is suggested that the U.N. forces in Korea may provide some evidence in support of Stone's position. If the right of collective self-defense is taken broadly to mean that any state may come to the aid of another state trying to defend itself from aggression, then one can conclude all that United Nations action in Korea did was to coordinate such measures taken in self-defense. It is interesting to note, however, that the provisions of Article 51 are applicable only to an armed aggression committed against a *Member* State and South Korea was not a member of the Organization. It is correct that

[74] STONE, J., *Legal Controls of International Conflict*, 1959, *op. cit.*, p. 234.

[75] BOWETT, D., *op. cit.*, p. 302, f.n. Bowett draws much of the support for his position from STOWELL, *Intervention in International Law*, Washington, D.C. (J. Bryne & C°), 1921, p. 48.

Article 2(6) states that the United Nations shall ensure that non-Members also abide by the principles of the U.N. Charter to the extent that may be necessary for the maintenance of peace and security, but this, in the view of Bowett,

> « ... seems to refer to enforcement measures rather than a right of collective self-defense under Article 51; to interpret Article 2(6) otherwhise is to strain its natural meaning. Any right of collective self-defense with a non-Member — and against a non-Member — exists not under Articles 51 and 2(6), but under customary international law [76]. »

Stone contends that while the Korean operation was a collective self-defense, it cannot be designated as a « United Nations operations » [77]. Leo Gross argues that if there is evidence of an armed aggression, followed by recommendations by the Organization that Members collectively resist such aggression, then Article 2(5), by which Members are to offer every assistance to the Organization in any action it chooses to take, comes into effect and as such the response must be regarded as « United Nations Action » [78]. Stone rejects this line of thinking for, in his belief, it confuses a Security Council or General Assembly recommendation with collective decisions imposing the obligations of the Charter upon all the Members. Stone's belief obviously presupposes that the « action » pointed out in Article 2(5) is only enforcement action carried out through a binding decision of the Council; and the International Court of Justice in recent years made it very clear that many types of « actions » can be and are carried out by the General Assembly [79]. Perhaps it can be concluded that while a simple recommendation in the area of military measures taken under the provision of Article 2 (5) cannot bind the Members to take action, it may be regarded as pointing toward a general obligation of the Members to act in good faith in helping the United Nations restore international peace and security.

Some scholars have argued that if the Uniting-for-Peace Resolution is to mean anything at all it must base its justification for establishing forces upon the right of collective security for self-defense. Also, if one agrees with the view of Stone that Resolution 377(V) is *ultra vires* to the extend it purports to recommend enforcement action [80], then it is still possible to justify it under Article 51; besides there are paragraphs such as 8 and 11 in the Uniting-for-Peace Resolution which tend to imply that there may be other legal basis, for paragraph 8 recommends that Member States should maintain national contingents for the service with United Nations under the provisions of Article 51, while paragraph 11 states that any planning of collective measures shall duly

[76] *Ibid.*, p. 303.

[77] Stone, J., *op. cit.*, p. 234.

[78] Gross, L., « Voting in the Security Council », *op. cit.*, 254-255.

[79] Certain Expenses of the United Nations, *I.C.J. Reports*, 1962, p. 163.

[80] Stone, J., *op. cit.*, pp. 268-272.

take into account all regional and collective self-defense treaties which may exist at any given time in history. Moreover, a recommendation by the General Assembly under part A of the Resolution to use coercive measures may or may not refer to what is correctly self-defense, depending upon the circumstances. Bowett contends :

> « Not every breach of the peace or act of aggression anywhere in the world gives rise to a right of self-defense by all United Nations Members. Nor in the opinion of the present writer, does the fact that " each Member remains legally free to act or not to act on such recommendation " lead logically to the immediately ensuing conclusion of professor Stone that " If it acts it does so in accordance with its right of self-defense under Article 51. " It only acts under such right if its legal " self " has been subjected to armed attack. The essential nature of self-defense does not lie in the fact that it Is in response to a recommendation rather than a binding obligation [81]. »

Since Article 53 implies that the United Nations may rely upon regional treaty arrangements for enforcement purposes, it seems reasonable to suggest that it will be possible for the Organization to recommend that such an enforcement action may be taken within the purpose and extend of a multilateral defense treaty. In other words, the U.N. may use non-universal defense arrangements under the label of « United Nations Action ». If individual Members can agree *ad hoc* to hand over certain contingents of their armed forces to the United Nations should the need arise for U.N. action and if in fact they can train and earmark these contingents for this specific purpose withhout the U.N. Charter then it is difficult to see why a certain group of Member States already prepared and organized for collective self-defense through a defense treaty, cannot offer their joint forces for the service in the U.N. forces. However, it should be noted that in such a case the constitutional basis of the United Nations forces would be Article 1(1) and either Articles 11(2) or 14 or Chapter VI (depending on whether the force has been established by the Assembly or the Council) rather than Article 51. Here the action would no longer be a collective U.N. action, which is essentially dependent upon authorization by a competent U.N. organ, whereas the collective self-defense action need not be authorized in advance. To put it differently, the fact that *authorization* has been granted, either by the Security Council or is based upon a recommendation by the General Assembly under the Uniting-for-Peace Resolution that certain collective measures are to be taken in the interest of international peace and security alter radically both the nature of the action and its consequences. In this manner the legal requirement that there must be a community of interest among the Members proposing to take a collective action in self-defense is bypassed. A community of interest, required for a collective self-defense, would normally entail a political or economic interdependence or a certain geographical closeness. In other words, each participating country must clearly feel threatened and its

[81] BOWETT, D., *op. cit.*, p. 305.

right of individual self-defense clearly determined in a situation before it can act in a collective self-defense measure. This of course creates immediate difficulties in actual practice when an attempt is made to distinguish collective self-defence arrangements under the provision of Article 51 from regional arrangements and Article 53 of the Charter.

PROVISIONS OF ARTICLES 52 AND 53 OF THE CHARTER FOR REGIONAL ARRANGEMENTS

Authors of the United Nations Charter were particular about not infringing upon the rights of Member States to either individual or collective self-defense. For instance Article 52(1) states :

> « Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations. »

Article 53 of the Charter in fact goes a step further. It authorizes the Security Council to « utilize such regional arrangements or agencies for enforcement action under its authority ». However, it is made clear that these regional agencies will have to have the clear authorization of the Security Council before taking any enforcement action of their own, and they are required, under the provisions of Article 54, to keep the Council fully informed of any activity they undertake or contemplate to undertake in the interest of maintaining international peace and security. In the view of Bowett :

> « Quite clearly, Article 53 provides constitutional authority for the use of certain Forces by the United Nations; however, the scope of this authority merits further examination. Freedom of military action under Article 53 being limited, the reason for the establishment of many collective arrangements of regional character under Article 51 is apparent. Given that collective self-defense arrangements are frequently concerned with the protection of a particular area, what is the essential difference between such grouping and these under Article 53 ? On one view the hallmark of regional arrangement is that it is directed against aggression between its members inter *se* [82]. »

To put it somewhat differently, what Bowett is suggesting here has also been pointed out by Stone, that is, the main theme is that of combined action for peace and security *within* and not simply of the particular region [83]. Besides, the notion, as embodied in Article 52(3) that the Council is to encourage the pacific settlement of *local* disputes, makes it quite clear that enforcement actions

[82] *Ibid.*, p. 306. In support of Bowett's view above, see BECKETT, *The North Atlantic Treaty, The Brussels Treaty and the Charter*, 1950, p. 20. A further elaboration of Bowett's position can also be found in BOWETT, D., *Self-Defence in International Law*, Manchester (Manch. U. P.), 1958, pp . 220-223.

[83] STONE, J., *op. cit.*, p. 247.

taken by regional members refer to the same region. In support of this interpretation of regional arrangements, Stone points out : « If an alliance for defence against a Permanent Member from *outside* the region were a « regional arrangement », even military staff plans would have to be disclosed in advance to the potential aggressor and the potential aggressor's own contest obtained before he could be resisted » [84]. Alliances of this nature, perhaps, more properly, should be considered as measures taken in preparation for collective self-defense and reported after the fact. In view of this position it can be concluded that defense arrangements such as the Brussels Treaty or the North Atlantic Treaty should be considered as merely regional arrangements and *not* subject to use as United Nations forces under the provisions of Article 53.

In conclusion, it can be further said that in all probability, the provisions of the Charter permit the Organization to use regional defense arrangements for enforcement purposes *whitin* the region and as such some constitutional basis for such United Nations action is recognized as present under Chapter VIII of the Charter. But more importantly, the participants of a regional defense arrangement are still free to offer to the International Organization their national contingents either individually or collectively under some other constitutional provisions such as in Article 42. The difference would be that the subsequently established U.N. military force will find its constitutional basis in the provisions of Chapter VIII and not of Chapter VII or Article 51 for that matter. It is interesting to note that the International Organization has so far clearly avoided the establishment of a force under Article 53.

A CONCLUDING REMARK

It is admitted that the legal problems associated with the United Nations interventions in an international crisis may be regarded as secondary to the problems of political consensus among the conflicting Member States with regard to the desirability of a United Nations intervention and the extent of intervention. One can go a step further and state even most legal problems, in the final analysis, have political foundations. But it would be folly to ignore the fact that once such a consensus has withered after the initial establishment of a peace-keeping operation, or if it never existed (as has been the case in most instances), the disillusioned states never fail to raise constitutional objections to the authority of the Secretary-General, the mandate of the Force under consideration, and most importantly, the legal competence of the U.N. organ responsible for initiating the establishment of the Force in the first place.

[84] *Ibid.*, pp. 249-250. An excellent discussion of this point is presented by KELSEN, H., « Is the North Atlantic Treaty a Regional Arrangement ? », *A.J.I.L.*, 45, 1951, 162; BECKETT, *op. cit.*, pp. 220-222; VAN KLEFFENS, « Regionalism and Political Pacts », *A.J.I.L.*, 44, 1949, 666.