The Law and Practice of the United Nations

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TABLE OF CONTENTS

Section II
Modifications in Membership Status

CHAPTER TWO
THE ORGANS

Section I
The Security Council

Section II
The General Assembly

Section III
The Secretariat

Section IV
The Economic and Social Council and the Trusteeship Council

Section V
The International Court of Justice

CHAPTER THREE
THE FUNCTIONS

Section I
General limits to United Nations Functions

Section II
Maintenance of the Peace: Functions of the Security Council

Section VII
The Protection of Human Rights

Section VIII
De-colonization and Self-Determination of Peoples

Section IX
Registration of Treaties

Section X
The Judicial Functions

Section XI
Financing the Organization

CHAPTER FOUR
THE ACTS

INTRODUCTION

1. Origins of the United Nations Charter.

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A) *From the Atlantic Charter to the San Francisco Conference.*

The term United Nations was adopted during the Second World War by the States who were fighting against the Axis Powers. In a solemn declaration signed in Washington D.C. on January 11, 1942, these nations, besides undertaking to direct every effort toward the enemy's defeat and agreeing not to sign a separate peace or armistice, accepted the principles laid down by President Roosevelt and Prime Minister Churchill in the 1942 Atlantic Charter. The Charter did not envisage the establishment of an organization or association of States which could replace the League of Nations; however, it did indicate the necessity of creating a collective security system after the war capable of discouraging aggression (para. 8) and of establishing strong co-operation between the States in economic and social matters (para. 5). Collective security and co-operation in economic and social matters are today

the fundamental aims of the United Nations Organization (or, in official terminology, the United Nations).

Para. 8 of the Atlantic Charter reads as follows: "They [the United States and Great Britain] believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential". Para. 5 states that the United States and Great Britain "desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security".

The United Nations Declaration was signed by twenty-six governments, some of them in exile. Another twenty-one governments subsequently adhered to it.

It was only at the Moscow Conference, in October 1943, that the establishment of an international organization similar to the League of Nations was officially envisaged. The Declaration of the Four Nations who participated in the Conference (the United States, the Soviet Union, Great Britain and China) recognised: "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States and open to membership by all such States, large and small, for the maintenance of international peace and security".

Between the end of August and the beginning of October 1944 the same four governments that had taken part in the Moscow Conference met in Dumbarton Oaks, near Washington D.C., to lay down the foundations of the future world organization. In the meantime the United States Department of State had undertaken a series of studies, investigations and even public opinion polls in the preparation of its draft. The other three governments also presented drafts of their own, although with less ambitious procedures.

The Dumbarton Oaks "proposals", published at the close of the meetings, already contained all of what are the essential aspects of the U.N. today.

The proposals confirmed that the purposes of the Organization were to maintain international peace and security, to develop friendly relations among nations, to promote co-operation in economic and social matters. The structure of the new body was to be based on the model of the Covenant of the League of Nations. It was stated that the basic organs would be the same four organs of the League: the Assembly (consisting of all the Member States), the Council (made up of a limited number of States, with permanent seats given to the Great Powers), the Secretariat, headed by a Secretary-General, and the Court of Justice. The Dumbarton Oaks proposals presented, by contrast, quite noteworthy differences with the League of Nations Covenant as far as the functions and powers of the organs were concerned. First of all, the Assembly

(to become the General Assembly) remained the only organ with general competence, while the Council (to become the Security Council), which in the Covenant had had the same power as the Assembly, was given the exclusive task of maintaining international peace and security. Further, the powers of the Council were considerably widened. The proposals laid down in detail the measures to be adopted in the case of aggression or threat of aggression that can be found in Articles 39 and following of the UN Charter. Next to the General Assembly, but in a secondary position ("under the authority") with respect to it, the proposals placed an organ specifically devoted to the development of co-operation in social matters: the Economic and Social Council. Another important difference with the League of Nations Covenant concerned the voting system, as it was proposed that the Assembly and the Economic and Social Council decide by majority rather than by unanimity.

The Dumbarton Oaks proposals can be found in U.N.C.I.O., vol. 3, p. 1 ff. (English text) and vol. 4, p. 1 ff. (French text). Together with the acts of the following San Francisco Conference, they form, for purposes of interpretation, the "preparatory works" of the UN Charter.

The Dumbarton Oaks proposals established that the Security Council would be made up of 11 members: five of them, at that time the so-called Great Powers (the United States, Great Britain, the USSR, China and France), would be permanent members; the other six would be elected by the General Assembly for a two-year period. On the contrary, nothing regarding the voting system in the Council was agreed upon at Dumbarton Oaks. The problem was then discussed by Churchill, Roosevelt and Stalin at the Yalta Conference in February 1945. It was here that the rule, eventually to become Article 27 of the UN Charter, took shape; by it each of the five permanent members were provided with the famous veto power, that is, the possibility to block, with a negative vote, the adoption of any decision by the Council that was not of a merely procedural nature. The rule, in fact, is called the "Yalta formula".

The three powers participating in the Yalta meeting decided to hold a United Nations Conference in San Francisco on April 25, 1945 with the task of drawing up the Charter of the new world Organization "along the lines proposed... at Dumbarton Oaks". France and China were invited to be considered "Sponsoring Governments" at the Conference. France, while agreeing to participate, refused to accept this title; China accepted it.

B) *The San Francisco Conference, the entry into force of the Charter, and present United Nations membership.*

Fifty States took part in the San Francisco Conference. In addition to those countries which had already signed the United Nations Declaration, Argentina and Denmark and two of the Republics belonging to the Soviet Union, the Ukraine and Byelorussia, were invited. Although Poland had signed the declaration, it did not participate in the preparatory works since at the time it had two rival governments (one pro-West and one pro-USSR) and the Great Powers were not able to agree on which government to invite. When the Communist regime had prevailed after the Conference was over, Poland was treated as a participating State and thus considered one of the original members of the Organization.

Byelorussia and the Ukraine, which figure as original members of the United Nations, certainly could not have been considered, at the time of the San Francisco Conference, as real States under international law, as they were not independent. Their participation in the San Francisco preparatory works and their membership in the United Nations had been decided at Yalta for political reasons: to increase the weight of the Soviet Union, both in the Conference (the only other participating Communist State was Yugoslavia) and in the future Organization. In short, the USSR was thus attributed three votes instead of one in the Conference and then in the General Assembly (where, under Article 18, para. 1, of the Charter, every member has one vote). Today, following the break up of the Soviet Union at the end of 1991, Byelorussia (now called Belarus) and the Ukraine are independent and sovereign, as are the other States created by the dissolution.

Another two of the countries participating in the Conference were not exactly States under international law. India was then a British dominion and the Philippines was a protectorate of the United States. However, in these two cases the countries were nearing independence (obtained by India in 1947 and by the Philippines in July of 1946).

The following States participated in the San Francisco Conference: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussia, Canada, Chile, China, Columbia, Costa Rica, Cuba, Czechoslovakia, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Great Britain, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippines, Saudi Arabia, Syria, Turkey, the Ukraine, the Union of South Africa, the United States, Uruguay, the USSR, Venezuela and Yugoslavia.

The proceedings of the Conference are published in United Nations Conference on International Organization (U.N.C.I.O.), London-New York, 1945, 19 volumes and indexes.

The San Francisco Conference took place between April 25 and June 26, 1945. Even a cursory glance at the preparatory works can reveal how dominant was the role played by the Great Powers in the Conference. One might say that the Charter was born in a certain sense as a constitution granted (*octroyée*). The basic outline sketched at Dumbarton Oaks was presented as unchangeable. Although the Conference could decide by majority (two-thirds) on the wording of the individual articles, the participants knew that any

substantial change in the Dumbarton Oaks proposals would have resulted in the rejection by the Great Powers, or by some of them, of the new Organization, and that it would have then been useless to proceed with its founding. However, many other matters were discussed and numerous provisions were added at San Francisco, including some important ones. These were often adopted at the initiative of middle-sized or small States. Some examples are the provisions concerning colonies (the declaration regarding non-self-governing territories contained in Article 73 of the Charter, the provisions establishing the Trusteeship Council, placed, as was the Economic and Social Council, under the authority of the Assembly), Article 51 of the Charter on the right of self-defence, the rules, drawn from the Covenant of the League of Nations, concerning the registration of treaties, the prevalence of the Charter over any other international agreement, the privileges and immunities of Secretariat officials within the domestic legal systems of the Member States, and so on. By contrast, the few attempts made to even partially modify the "lines" laid down at Dumbarton Oaks, the few attempts aimed at avoiding that the efficacy of the new Organization, would rest largely on the will and agreement of the Great Powers and, in the final analysis, would depend on their unfettered free choice, ended in failure. It is enough to mention the opposition to the drafts that tended to invest the International Court of Justice with some kind of review power over the legality of the acts of the Organization, thus giving it the binding power to interpret the Charter (see U.N.C.I.O., vol. 13, p. 633, p. 645) or at least the provisions of Article 2, para. 7, of the Charter regarding domestic jurisdiction (*ivi*., vol. 6, p. 113, p. 509); or the vain attempts to obtain from the Great Powers, if not changes, at least an authentic interpretation of the Yalta formula (see § 1 A), so as to dissipate the doubts which the application of this formula would certainly have given rise to and which it has indeed given rise to.

At the request of the other States, the four Sponsoring Powers issued a Statement, later also subscribed to by France, in order to "clarify" the Yalta formula (Article 27, paras. 2 and 3 of the Charter), and especially to clarify when a Security Council decision should be considered to be of a procedural nature, and therefore, under the formula, not subject to the veto and when it should be considered substantial. Actually, the Statement (published in U.N.C.I.O., vol. 11, p. 711 ff.), being the result of a compromise, is almost more obscure than the formula. On this point, see § 23. The Soviet Union stood out in defending the prerogatives of the Great Powers and in its distrust of the Organization. At the Yalta meeting, only with great difficulty had it been convinced to exclude the possibility of the veto on procedural questions. For a long time after the UN. had been set up, the USSR's conduct within the Organization reflected the same recalcitrant attitude. It hardly needs to be pointed out that the Soviet attitude at San Francisco (and also afterwards) is to be explained in view of its ideological isolation at the time.

At the end of the Conference, the Charter as a whole was unanimously approved and signed by all the participating States. Under Article 110, para. 3, it was to enter into force when it had been ratified by the five permanent members of the Security Council and by a majority of the other signatory States. This occurred on October 24, 1945. At the end of December of the same year all the fifty States that had taken part in the Conference (as well as Poland which, without having taken part, was allowed to sign) had ratified the Charter. These States constitute the original members of the Organization, in accordance with Article 3. Article 4 governs the admission procedure for new members. Between original members and admitted members, the United Nations numbers today — after the admission of the successor States of the former Soviet Union and the former Yugoslavia, as well as the admission of some territories which still were under a colonial-type domination — more than 190 members. With very few exceptions, all States of the world are members of the UN: Taiwan (Republic of China), which is still independent from the People's Republic of China, was thrown out the Organization when it was replaced by the latter in the United Nations in 1971 (see § 19); the Turkish Republic of Cyprus, has never been admitted as it has never been recognised by the overwhelming majority of the member States. Switzerland, which for many decades remained out, finally decided to become member, and was admitted to the United Nations in September 2002, after a popular referendum. Other entities which are not States, like the Holy See and, with different standards, many inter-governmental or non-governmental organizations, such as the International Red Cross, have the status of "observer".

C) *Relationships between the League of Nations and the United Nations.*

The League of Nations, which formally survived up until the Second World War, was dissolved in April 1946, when the UN was already fully active. The Assembly of the League met for the last time from 8 to 18 April and, with a unanimous vote, solemnly decreed its own dissolution.

Parallel resolutions of the Assemblies of the two Organizations provided for the transfer of a whole series of functions of a *non-political* nature from the League to the UN. In particular, provision was made for the transfer of the functions carried out by the League Secretariat (typical examples were those functions concerning international agreements, such as custody of instruments of ratification, of adhesion, of denunciation, and so on) and by the various *ad hoc* Committees set up by the League to promote economic and social co-operation among the States. The former were assumed by the UN

Secretariat and the latter by the Economic and Social Council. On the basis of a "common plan", also approved by the two Assemblies, most of the real and personal property owned by the League was acquired by the United Nations.

With regard to the UN, cf. Assembly resolutions of February 12, 1946, part I, A (transfer of Secretariat functions regarding international agreements) and part III ("common plan"), of November 19, 1946 and December 14, 1946 (both covering the transfer of non-political functions of the Secretariat and of various *ad hoc* Committees of the League). As for the League of Nations, the Assembly permitted the transfer of all non-political functions and approved the "common plan" in various resolutions, all of April 18, 1946 (see *A.J.*, 1948, p. 326 ff.; *Int. Org.*, 1947, p. 246 ff.). For other more detailed information on the transfer of functions and property from one Organization to the other, cf. Yearbook of the United Nations 1946-47, p. 110 ff. and p. 261 ff.

The transfer of functions and property did not give rise to any disputes. It would therefore be futile to try to establish whether the transfer was the subject of a real agreement between the two Organizations, or between their Member States, or, yet again, whether there existed unilateral or parallel acts.

Aside from the functions that were expressly "transferred", can it be said that the UN succeeded to the League of Nations? In particular, may one speak of some sort of succession... *mortis causa* (that is, succession governed by customary international law) in the functions of a political nature? This issue came up over the legal situation of Namibia (formerly South West Africa) before its independence in 1990, with regard to the functions that the League exercised over mandated territories (see § 81).

2. *The purposes of the United Nations.*

A detailed analysis of the aims of the United Nations is hardly possible, considering their very general nature. As we shall see when we deal with the functions of the organs, the scope of activity of the United Nations can be better identified in negative rather than in positive terms. It is easier to single out the matters with which the Organization cannot be concerned than those which are within its competence. Of fundamental importance in this regard is the provision of Article 2, para. 7, of the Charter, according to which the United Nations may not intervene in matters "which are essentially within the domestic jurisdiction of any State."

The vagueness of its purposes, which gives the UN the nature of a *political entity*, can be seen from the listing in Article 1 of the Charter. This listing includes: maintenance of international peace and security; development of friendly relations among Nations, based on respect for the principle of

equal rights and the self-determination of peoples; the achievement of international co-operation regarding economic, social, cultural and humanitarian issues; promoting respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion. It is obvious how all-inclusive, especially the next to the last of these categories, is.

Even if up to now UN activity has been carried out in all of the above areas, the following can be noted: in the years immediately following the birth of the Organization problems concerning maintenance of peace were considered the most important; between 1950 and 1960 the greatest results were achieved regarding de-colonisation, within the framework of the principle of self-determination of peoples; in the seventies efforts began to be concentrated on co-operation in economic, social, cultural and humanitarian fields, in the hope (which unfortunately today is still only a hope) of eliminating or at least of weakening the serious inequalities existing among the States and therefore of assuring all people equal human dignity and a better future; and, today, after the fall of the Berlin Wall, action is once again being taken with regard to the maintenance of international peace and security, mostly where international peace is threatened or violated by crises arising inside the States themselves.

3. *The organs.*

Article 7 of the Charter establishes as principal organs the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat. Among them, the Security Council and the General Assembly have a fundamental role. The Council consists of 15 members (11 until 1965 when membership was increased, as the result of an amendment to the Charter, in order to take into account the increase in the over-all membership in the Organization), of whom 5 are permanent members, enjoying the so-called veto power, and 10 are elected for a two-year period by the General Assembly. The Security Council is the organ in the Organization with the greatest powers. It has the exclusive power to decide the measures to be taken against States responsible for aggression or for threats to the peace. The General Assembly, in which all States are represented and have equal weight in the voting, can be concerned with any matter that is within the scope of the Charter, but its powers are very limited and come down, with rare exceptions, to the power to adopt "recommendations", that is, non-binding acts, and to promote co-operation among the States by means of treaties, that is, acts that require the ratification of each State before entering into force. The Secretariat, or, rather, the

Secretary-General who heads it and is appointed by the General Assembly upon the recommendation of the Security Council, is an organ with administrative functions.

Even if they are called principal organs in Article 7, the Economic and Social Council and the Trusteeship Council in effect have a subordinate position with respect to the General Assembly, in so far as they are "under the authority" of the Assembly (Article 60 and Article 87 of the Charter). This means that in carrying out their functions they are compelled to follow the directives of the Assembly. Sometimes their task is limited to the preparation of measures that are then to be formally adopted by the Assembly (see, for example, Article 62, para. 2, Article 85). In any case, they do not have decision-making powers. The Economic and Social Council, whose field of activity is clear from its name, consists of 54 members elected by the Assembly for three years. The Trusteeship Council (trusteeship is an extinct institution, similar to the former system of League of Nations mandates) has a membership which varies, in that the number of its members depends on the number of States administering trust territories (Article 86).

The International Court of Justice, consisting of 15 judges, is defined by Article 92 as the "principal judicial organ" of the United Nations. Its activity is governed both by the Charter and by the annexed Statute. In the settling of disputes between States, the Court presents the traditional characteristics of international tribunals: its jurisdiction rests on agreement between the parties. Perhaps more important than its function in settling disputes is its advisory function. Under Article 96 of the Charter, the General Assembly, the Security Council or other organs so authorised by the Assembly may request the Court to give an advisory opinion on any legal question. These opinions are neither obligatory nor binding: the organ is neither obligated to request them nor required to conform to them.

The structure, functioning and powers of the organs will be analysed in the next chapters. Other organs (subsidiary organs, the Administrative Tribunal, and so on) whose establishment has raised problems in practice or which carry out important functions, will also be taken into consideration.

The Security Council, the General Assembly, the Economic and Social Council, and the Trusteeship Council are organs made up of States. This means that the individuals who, with their vote, concur in making a collective decision are organs of their own State and express the will of their State. The Secretary-General and the International Court of Justice, on the contrary, are organs made up of individuals, meaning that the Secretary and the judges take office as individuals, without expressing the will of any State

and without receiving or, rather, with the obligation not to receive, instructions from any State.

4. *The Charter as a treaty.*

BIBLIOGRAPHY: KOPELMANAS, *L'Organisation des Nations Unies*, I, Paris, 1947, p. 165 ff.; KAECKENBEECK, *La Charte de San Francisco dans ses rapports avec le droit international*, in *RC*, 1947, I, p. 113 ff.; DE VISSCHER, *Problèmes d'interpretation judiciaire en droit international public*, Paris, 1963, p. 141; ERLER, *International Legislation*, in *CYIL*, 1964, p. 15 ff.; QUADRI, *Diritto internazionale pubblico*, 5th ed., Naples, 1968, p. 351 ff.; RIDEAU, *Juridictions internationales et contrôle du respect des traités constitutifs des organisations internationales*, Paris, 1969, p. 4 ff.; MACDONALD, *The United Nations Charter: Constitution or Contract?*, in *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague, 1983, p. 889 ff.; SLOAN, *The UN Charter as a Constitution*, in *Pace Yearbook of International Law*, 1989, p. 61 ff.; DUPUY (P. M.), *The Constitutional Dimension of the Charter of the UN Revisited*, in *MP YUNL*, 1997, p. 1 ff.; FASSBENDER, *UN Security Reform and the Right of Veto: A Constitutional Perspective*, The Hague, 1998, Chapters 1-6 ; MACDONALD, *The Charter of UN in Constitutional Perspective*, in *Austr Y*, 1999 (20), p. 205 ss.

The Charter, of which the Statute of the International Court of Justice is an integral part, is an international treaty. In so far as it gives rise to a set of organs that are designed to carry out basic functions within the international community, such as maintenance of peace, it is usually considered also as a kind of Constitution. For some scholars it should even be considered as the constitution of the international community as a whole. Contributing to this is the fact that some of its provisions foresee the possibility of the Organization taking measures with regard to non-Member States, something considered to be in contradiction with the principle that treaties have no effect on third parties (*pacta tertiis neque nocent neque prosunt)*. When its constitutional nature is accepted, it is usually said that a whole series of unwritten rules, created by means of the practice of the organs and the conduct of the Member States, can be superimposed on the Charter norms. It then becomes a "living" Constitution, as opposed to a merely formal one.

The constitutional aspect of the UN should not be exaggerated. The Charter is and remains a treaty. It is subject to the principles that govern international agreements, and that therefore a State is not bound by it if such State does not express a willingness to adhere to it and to become a member of the Organization. In other words, the UN remains a voluntary community, not a obligatory one, even if today nearly all States are members. As far as the practice is concerned, even if the Charter is considered as an agreement, it is possible to say that unwritten rules have arisen along with, or in derogation of, the provisions laid down in San Francisco. Among the sources of international

law, there is customary law. We shall see through the course of this book that customary rules have changed and continue to change the written rules of the Charter. Given the fact that the provisions of the Charter have remained unchanged for fifty years, the customary rules can give a certain flexibility to the action of the organs. However, a great deal of caution is necessary in ascertaining customary law of this kind. It is not enough that a certain principle or a certain rule has been observed over a period of time, even a lengthy period, by the organs, that is, that it has been expressed and upheld by majorities within the organs. It is necessary also to pay attention to the conduct, to the reactions of the individual States, to the capacity of the individual States to effectively oppose majority tendencies. Anyone who undertakes an examination of the practice with this rigorous method will conclude that the number of true customary rules that have been superimposed on the Charter norms is not very high.

The fact that the UN practice has not given rise to many new norms of a customary nature makes the kind of study that we shall undertake in the following chapters more profitable. This will consist in examining the problems of interpretation of the Charter which have arisen since the UN was established. It would not be very useful to undertake such a study, which in each case must involve a judgement as to the legality or illegality of the conduct of the organs and of the States, if new norms to a great extent had come into existence largely through this very conduct, thereby giving them legitimacy.

The provisions of the Charter prevalently govern the functions and the acts of the organs. There are, however, also norms concerned with relations between the Member States. One may mention, first of all, the provisions of Article 2, paras. 3 and 4 (under which the members "shall settle their international disputes by peaceful means" and "shall refrain in their international relations from the threat or use of force"), or of Article 51 which recognises the right of every Member State to act in self-defence against an armed attack and until the Security Council has intervened to maintain international peace and security. Also these norms are closely connected with the functions and the acts of the organs in so far as the possibility of their being applied in practice depends on the actual functioning of the Organization. For example, the prohibition of the use of force does not have much sense unless it is considered within the framework of the Organization normally exercising its powers regarding the maintenance of peace. A treatment of the reciprocal rights and duties of States which is cut off from the treatment of the functions and the acts of the organs would therefore be fruitless, and will not be included here. It is better dealt with in a textbook on public international law.

5. *Interpretation of the Charter.*

BIBLIOGRAPHY: ROSENNE, *United Nations Treaty-Pratice*, in *RC*, 1954, II, p. 295 ff.; ZEMANEK, *Internationale Organisationen als Handlungseinheiten in der Völkerrechtsgemeinschaft*, in *ZöR*, 1956, p. 352; SCHWARZENBERGER, *International Law*, I, London, 1957, p. 517 ff.; BENTIVOGLIO, *La funzione interpretativa nell'ordinamento internazionale*, Milan, 1958, p. 128; DE VISSCHER, *Problèmes d'interpretation judiciaire en droit international public*, Paris, 1963, p. 140 ff.; WENGLER, *Völkerrecht*, Band II, Berlin, 1964, p. 1212; SCHACHTER, *Interpretation of the Charter in the Political Organs of the United Nations*, *ibid.*, p. 269 ff.; RIDEAU, *Juridictions internationales et contrôle du respect des traites constitutifs des organisations internationales*, Paris, 1969, p. 237 ff.; CAPOTORTI, *Il diritto dei trattati secondo la Convenzione di Vienna*, in *Convenzione di Vienna sul diritto dei trattati (Pubbl. della Soc. Ital. per l'Organizz. Internaz.)*, Padua, 1969, p. 35 ff.; RAMA-MONTALDO, *International Legal Personality and Implied Powers of International Organizations*, in *BYB*, 1970, p. 111 ff.; SKUBISZEWSKI, *Remarks on the Interpretation of the United Nations Charter*, in *Festschrift für Hermann Mosler*, Berlin, Heidelberg, New York, 1983, p. 891 ff.; ID., *Implied Powers of International Organizations*, in *Essays in Honor of S. Rosenne*, Dordrecht, 1989.; GIULIANO, SCOVAZZI and TREVES, *Diritto internazionale*, Parte generale, Milan, 1991, p. 427 ff.

Since it is an international agreement, the Charter must be read according to commonly accepted rules on the interpretation of treaties. While this is uncontested in principle, many attempts have been made to refer to special rules that should be applied both to the Charter and, more generally, to the constitutive agreements of international Organizations. These attempts reflect the commonly held view that the Charter should not be considered only as an agreement but as a Constitution, and they are based on the similarities between the UN organs and the administrative or legislative organs of a State. The International Court of Justice took this direction when it made use of the so-called theory of implied powers in several opinions dealing with problems of interpretation of the Charter. According to the theory of implied powers, which has been developed particularly by the United States Supreme Court in order to extend the powers of the federal government to the detriment of the States, every organ has available not only the powers *expressly* attributed to it by the constitutional provisions but also all the powers necessary for exercising its express powers. In applying the theory of implied powers to the UN organs, the International Court of Justice has considerably extended their reach, even inferring that certain powers of the organs stem directly and exclusively from the objectives of the Organization, objectives which, as we have seen, are extremely vague.

Resort to the theory of implied powers clearly clashes with the once dominant view that international agreements should be interpreted *restrictively* in so far as they would involve in any case limitation of the sovereignty and freedom of the States. Certainly today this view seems completely obsolete and contradicted by the fact that co-operation among the States continues to grow stronger. Indeed, as far as international law is concerned,

only general principles usually applicable to all areas of the law should be taken into consideration. Treaty norms should therefore be interpreted broadly or restrictively according to the wording of the text, and its object and purpose. Nevertheless, extreme caution must be used in transferring onto the plane of United Nations and international law doctrines that belong to domestic constitutional law. That there can be an analogy between State organs and UN organs is very questionable as the UN organs lack the effective capacity to impose their decisions on their subjects, which is characteristic of State organs. With regard to the theory of implied powers specifically, it can be applied if it remains within the limits of a broad interpretation, if it serves to guarantee to an organ the full exercise of the powers assigned to it by the Charter. The tendency of the International Court of Justice to use such theory to infer powers from the provisions concerning the general purposes of the Organization does not, on the contrary, seem to be justified and in most cases has proved ineffective.

The advisory opinion of the Court which contained the most precise and also the widest formulation of the theory of implied powers is the well-known one of April 11, 1949 concerning *Reparation for injuries suffered in the service of the United Nations* (ICJ, *Reports*, 1949, p. 174 ff., especially p. 180: "the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents..." and p. 182: "... the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are... essential to the performance of its duties". Therefore, implied powers... for implied functions!) Cf. also the opinions of July 13, 1954 on *The Effects of awards of compensation made by the United Nations Administrative Tribunal* (ICJ, *Reports*, 1954, p. 57) and of July 7, 1962 on *The question of certain expenses of the United Nations* (Article 17, paragraph 2, of the Charter) (ICJ, *Reports*, 1962, p. 168). We will go back to each of these decisions when we examine the specific issues they deal with.

The Court has been more cautious when dealing with constituent instruments of the UN specialised agencies which are independent international organizations although linked to the United Nations (see § 73). See the opinion of July 8, 1996 (ICJ, *Reports*, 1996) on the legality of the use by a State of nuclear weapons in an armed conflict, which denies that this question pertains, even implicitly, to the scope of the World Health Organization.

While the common rules of interpretation of treaties apply to the Charter, it is not possible to examine them thoroughly here. Suffice to mention that the tendency prevalent today on the issue is toward abandoning the so-called subjective method, a method borrowed from the realm of contracts in municipal law. This method would require in all cases and as far as possible that the *effective* intentions of the parties be sought, as opposed to their *declared* intentions. As a general rule, on the contrary, international treaties must be given the meaning which is clear in their text, which is evident from the logical connections between the various parts of the text, and which is in harmony with the object and purpose of the act as they result from the text. In a conception of this kind, the preparatory works, in which the

effective intentions of the parties should be shown, have a subsidiary function. Recourse may be made to them only when the text presents ambiguities or gaps. In practice the preparatory works serve above all to support and strengthen interpretations that have already been, at least to a certain degree, obtained from the text of the treaty. It is indeed rare, and it is particularly rare with regard to the UN Charter, that the ambiguities of the text do not reflect ambiguities in the preparatory works. This is because behind ambiguous provisions there is nearly always a solution of compromise.

The 1969 Vienna Convention on the Law of Treaties favours the "objective" method of treaty interpretation. Article 31 of the Vienna Convention lays down the general principle: "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"; the only significant exception to the principle is the provision of para. 4, according to which "A special meaning shall be given to a term if it is established that the parties so intended". Art. 32 considers the preparatory work as a supplementary means of interpretation to be used when the examination of the text "leaves the meaning ambiguous or obscure or... leads to a result which is manifestly absurd or unreasonable".

6. *The power to interpret the Charter.*

BIBLIOGRAPHY: KOPELMANAS, *L'Organisation des Nations Unies*, I, Paris, 1947, p. 253 ff.; KELSEN, *The Law of the United Nations*, New York, 1951, p. 738 ff.; SCHWARZ-LIEBERMANN VON WAHLENDORF, *Mehrheitsentscheid und Stimmenwägung*, Tübingen, 1953, p. 136; SERENI, *Diritto Internazionale*, II, Milan, 1960, p. 984 ff.; SEYERSTED, *Settlement of Internal Disputes of Intergovernamental Organizations by Internal and External Courts*, in *Bruns'Z*, 1964, p. 12 ff.; GROSS, *The United Nations and the Rule of Law*, in *Int. Org.*, 1965, p. 538 ff.; CONFORTI, *La funzione dell'accordo nel sistema delle Nazioni Unite*, Padua, 1968, p. 58 ff.; RIDEAU, *Juridictions internationales et contrôle du respect des traités constitutifs des organisations internationales*, Paris, 1969, p. 237 ff.; ARANGIO-RUIZ, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations* , in *RC*, 1972-III, p. 503 ff. ; BEDJAOUI, *Du contrôle de légalité des actes du Conseil de sécurité*, in *Nouveaux itinéraires en droit. Hommage à François Rigaux*, 1993, p. 69 ff.; ID., *The New World Order and the Security Council. Testing the Legality of its Acts*, Dordrecht, 1994.

One problem that has been much debated concerns the power of the UN organs to interpret the Charter provisions.

In the United Nations there is no organ that has special power to interpret the Charter with binding effects for the other organs and for the member States. Under Article 96 of the Charter the International Court of Justice may give opinions on any "legal question" and therefore also opinions on interpretation of the Charter. However, this activity, on the one hand, may be requested only by the organs and, on the other, does not give rise to binding

decisions since neither the organ requesting the opinion nor the States are bound to comply with it. The proposal made at the San Francisco Conference to give the Court a kind of control over the legitimacy of UN acts (a power of control which would have thus implied a kind of monopoly by the Court over the interpretation of the Charter norms) was strongly opposed and then dropped (see U.N.C.I.O., vol. 13, p. 633, p. 645).

On the other hand, the view which would assign the General Assembly a pre-eminent role regarding Charter interpretation with respect to the other organs and the Member States has remained an isolated one. This view finds no basis in the preparatory works of the San Francisco Conference, where it was clearly stated that any conflict between two organs over interpretation of the Charter would have to be settled by an impartial organ, for example, by the International Court of Justice in its advisory function, or by a Committee of jurists especially appointed by the two organs, or even by a joint conference (see U.N.C.I.O., vol. 13, p. 719 f.). Nor does this view find support in the provision of Article 15, para. 2, which requires the organs to submit reports of their activity to the General Assembly, since this provision clearly does not give the Assembly the power to review individual measures taken by the other organs. As for the argument that the Assembly would have the right to a position of pre-eminence in that it incorporates the "legal conscience" of the United Nations, such view is not supported by any objective evidence.

As positions of pre-eminence do not exist, each organ is called upon to interpret the Charter on its own at the time it adopts specific measures. Would such an interpretation be binding for the Member States?

In our view, the answer has to be negative. A positive answer would imply the freedom of the organ to manipulate the Charter, and this would be in conflict with the Charter rules which sanction its "rigidity" (see § 7), or with the rules that lay down special complex procedures for amending the Charter (Articles 108 and 109) and with those requiring that the States co-operate with the Organization but only when it acts "in accordance with the present Charter" (Article 2, para. 5, and Article 25). If the UN organs had the sovereign power to interpret the Charter provisions in a way that was binding on all the Member States, this would be the same as saying that they had the possibility of violating them with impunity, since any decision could be justifiable in the light of a subjective and "special" interpretation of the Charter. On the other hand, the Charter's silence with regard to interpretation (where the attribution of a sovereign power of interpretation by the organs owing to its importance would have required an explicit provision) is an element contributing to proving this negative view. Once again, in confirmation of this, the preparatory works of the San Francisco Charter can be cited, where it was unanimously held that "if any interpretation given by any

organ of the Organization... is not generally acceptable, it will be without binding force" (U.N.C.I.O., vol. 13, p. 832).

During the Conference, in Committee IV, which was responsible for the study of legal issues, the question was asked: "How and by what organ or organs should the Charter be interpreted?" While the Committee felt it would be inappropriate to answer this in provisions that were to be part of the Charter, they unanimously approved a statement expressing the view of the Organization's founders. The statement says that there would be no need to codify the principle because "in the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions." It then examines the possibility of a difference of opinion concerning interpretation arising between two States or between two organs, foreseeing that in the former case the dispute would be brought before the International Court of Justice as an organ of quasi arbitration and in the second case there would be recourse to the Court for an advisory opinion, to an *ad hoc* committee of jurists or to a joint Conference. The Commission concluded with the warning that: "it is to be understood, of course, that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable, it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment". It is clear that the final part of the statement specifically denies the existence of an obligation for the Member States to accept interpretation by the organs. For the history of the Statement, see U.N.C.I.O., vol. 13, p. 631 and p. 633 f.; for the complete text, *ibid*, p. 831 ff.

As a consequence, each Member State may question an interpretation of the Charter made by one of the organs in taking a specific measure. In so doing, the Member State questions whether the measure is in accordance with the Charter and therefore whether it is lawful. What consequences may arise from such questioning and how the differences between the organ and the State may be settled in such cases are issues that have often been raised in practice. They will be examined later in the chapter on UN acts (see § 97).

7. *The "rigidity" of the Charter and amendment and review procedures.*

BIBLIOGRAPHY: BALLADORE PALLIERI, *Gli emendamenti allo Statuto delle Nazioni Unite*, in *CI*, 1946, p. 193 ff.; PERASSI, *L'ordinamento delle Nazioni Unite*, Padua, 1953, p. 51 ff.; GIRAUD, *La révision de la Charte des Nations Unies*, in *RC*, 1956, II, p. 307 ff.; SCHWELB, *Charter Review and Charter Amendment*, in *ICLQ*, 1958, p. 303 ff.; SCHULZ, *Entwicklungsformen internationaler Gesetzgebung*, Göttingen, 1960, p. 90 ff.; UDINA, *L'Organizzazione delle Nazioni Unite*, Padua, 1963, p. 11 ff.; MORELLI, *Nozioni di diritto internazionale*, 7th ed., Padua, 1967, p. 40; ZACKLIN, *The Amendment of the Constitutive Instruments of the UN and Specialized Agencies*, Leiden, 1968, p. 104 ff.; PANELLA, *Gli emendamenti agli atti costitutivi delle organizzazioni internazionali*, Milano 1986; MUETZELBURG, IN SIMMA (ED.), *Charta der Vereinten Nationen,* München, 1991, p. 1108 ff.

Article 108 provides a specific procedure for the adoption of amendments to the Charter. In order for an *amendment* to enter into force, it must be adopted by a two-thirds majority of the Assembly and then ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council (who also have veto power on this matter). The *review* procedure under Article 109 is similar. In the case of review — and this is the only difference between the two procedures — ratification does not occur after an Assembly resolution but after an *ad hoc* Conference (made up of all the Member States) has recommended it. The boundary line between review and amendment is uncertain: recourse should be made to the former to bring about changes that noticeably affect the main characteristics of the Organization.

The two articles (which are also found in other constituent agreements of international organizations) depart from the classic principle of international law that a change in a treaty may occur only with the consent of *all* the contracting States. The procedures which they provide for are to be characterised as procedures which draw their normative force not from general international law but from the UN Charter itself. To point out that the principle of consent has been superseded, Articles 108 and 109 are also cited as examples of provisions creating a kind of "quasi" international legislation. Actually, deviation from the classic principles is lessened by the fact that a State may withdraw from the Organization "if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept". Withdrawal is not specifically envisaged by the Charter (although it was expressly provided for within the League of Nations: Article 1, para. 3, and Article 26, para. 2 of the Covenant), but at the San Francisco Conference it was said that it was not to be excluded in the case of amendments that a State would not accept (see U.N.C.I.O., vol. 7, p. 267, from which the quotation is also taken). For reasons which will be discussed later (see § 17), the view expressed at San Francisco should be corrected in the sense that the right of withdrawal in the event of amendments (or review) that are not accepted is to be allowed only when such amendments have *noteworthy importance.* Even with these limitations, however, the right of withdrawal in the event of amendments weakens the innovative importance of Articles 108 and 109, in that a Member State will tend to escape from a majority decision precisely when, and only when, an important question is involved.

The provision of special procedures for modifying the Charter involves the impossibility for the United Nations organs to derogate from the Charter when they adopt special measures, and it therefore gives the Charter

itself rigidity. This rigidity can be seen not only in Articles 108 and 109 but also in the principle, expressed in Article 25 with regard to the Security Council and in Article 2, para. 5, with regard to all organs, in accordance with which the Member State is obligated to co-operate with the Organization when it adopts measures or takes action "in accordance with the present Charter".

Until now the procedure for revision governed by Article 109 has never been applied. With regard to amendments, the only cases concern issues of secondary importance, specifically, the increase of the number of Security Council members from 11 to 15 (General Assembly res. no. 1991-XVIII of 17 December 1963, entered into force on 30 August 1965) and of the Economic and Social Council, first from 18 to 27 (with the same 1963 resolution), and then to 54 (with res. no. 2846-XXVI of 20 December 1971, entered into force on 24 September 1973).

8. *Present trends to revise the Charter.*

BIBLIOGRAPHY: PERASSI and AGO, *Osservazioni sul problema della revisione dello Statuto delle Nazioni Unite*, in *CI*, 1953, p. 572 ff.; CLARK and SOHN, *World Peace through World Law,* 3rd ed., Cambridge (Mass.), 1966; KÖCK, *Die gegenwartigen Bestrebungen zur Änderung der Satzung der Vereinten Nationen*, in *ZöR*, 1973, p. 25 ff.; BROMS, *The Special Committee on the Charter of the United Nations and the Strengthening of the Role of the Organization*, in *GYIL*, 1977, p. 77 ff.; VIÑAL CASAS, *El Comité especial de la Carta de las Naciones Unidas y del fortalecimiento del papel de la Organizacion*, in *ReD*, 1981, p. 101 ff. and 1983, p. 447 ff.; LEWIN, *La triade contraignante, une nouvelle proposition de ponderaton des votes aux Nations Unies*, in *RGDIP*, 1984, p. 349 ff.; BERTRAND, *Contribution à une réflection sur la réforme des Nations Unies*, Genève, 1985; CHEMILLIER-GENDREAU, *La solution de la crise des Nations Unies: application de la Charte plutôt que revision*, in *RBDI*, 1987, p. 28 ff.; BROMS, *The Present Stage in the Work of the Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization*, in *Essays in Honor of S. Rosenne*, Dordrecht, 1989, p. 73 ff.; WOLFRUM, *Die Reform der Vereinten Nationen. Möglichkeit und Grenzen*, Berlin, 1989; BARNABY, *Building a More Democratic UN*, London, 1991; ORTEGA CARCELEN, *La reforma de la Carta de Naciones Unidas: algunas propuestas institucionales*, in *ReD*, 1991, p. 389 ff.; MULLER, *The Reform of the UN*, New York, 1992; LEE, VON PAGENHARDT, STANLEY, *To Unite Our Strength. Enhancing the United Nations Peace and Security System*, New York-London, 1992; DJIENA WEMBOU, *Observations sur le processus des réformes en cours aux Nations Unies*, in *RGDIP*, 1993, p. 217 ff.; HEINZE, *Die Vereinten Nationen in Politikfeld internationaler Sicherheit: Wirkungsmöglichkeiten, Grenzen, Reorganisationsprämissen*, Frankfurt am Main, 1993; *International Symposium, Prospects for Reform of the United Nations System*, Rome, 15-16 May, 1992, Padua, 1993; REISMAN, *The Constitutional Crisis in the United Nations*, in *AJ*, 1993, p. 83 ff.; SAKSENA, *Reforming the United Nations*, New Delhi, 1993; CHILDERS, ERSKINE and URQUHART, *Renewing the United Nations System*, Uppsala, 1994; CZEMPIEL, *Die Reform der UNO — Möglichkeiten und Mißverständnisse*, München, 1994; SUCHARIPA-BEHRMANN, *The Enlargement of the UN Security*

Council. The Question of Equitable Representation of and Increase in the Membership of the Security Council, in *ZöRV*, 1994, p. 1 ff.; FAWCETT and NEWCOMBE (eds.), *United Nations Reform: Looking Ahead After Fifty Years*, Toronto, 1995; TANZI, *Notes on the "Permanent Conference of Revision" of the United Nations Charter at the 50th Anniversary of the Organization*, in *RDI*, 1995, p. 723 ff.; BERTRAND and WARNER (eds.), *A New Charter for a Worldwide Organisation ?*, The Hague, 1996; WALLENSTEEN, *Representing the World: A Security Council for the 21st Century, in* Diehl, *The Politics of Global Governance,* Boulder, 1997; NOYES (ed.), *The United Nations at 50: Proposals for Improving its Effectiveness*, Washington DC, 1997; FASSBENDER, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, The Hague, 1998, Chapters 7-10; FLEURENCE, *La réforme du Conseil de Sécurité: l'état du débat depuis la fin de la guerre froide*, Brussels, 2000; MÜLLER, *Reforming the UN: The Quiet revolution*, The Hague, 2001.

The necessity of revising the Charter has been the object of discussion for a number of years, although a revision has never taken place. Indeed, the following events would have justified changes to the Charter: the number of Member States has tripled in the period from when the Charter was drawn up to the present; the far-reaching and hardly foreseeable phenomenon of decolonisation has occurred; the original ideological conflict between capitalism and socialism, between East and West, has been substituted by the conflict of interest between industrialised and non-industrialised countries, between rich and poor, between North and South. In 1974, the General Assembly created a special Committee made up of a certain number of Member States, with the task of studying the problem (cf. res. no. 3349-XXIX of 17 December 1974). In 1975 this Committee took the name "Special Committee for the United Nations Charter and for strengthening the role of the Organization". Moreover, with regard to the structure of the Security Council, the General Assembly, with resolution no. 48/267 of December3, 1993, decided to establish an "Open-ended working group on the question of equitable representation and increase in the membership of the Security Council and other matters related to Security Council". Lastly, in November 2003 an "High-level panels" was established by the Secretary-General to recommend the changes necessary to ensure an effective action on the part of the United Nations. All this bodies are still working, and up to now no concrete and formal procedure of amendment or revision of the Charter has took place.

There were also many different proposals for changes which came directly from the States. Some of them concerned the Organization's structure, and they range from reinforcing the role of the Assembly (where the Third World States have an overwhelming majority) to enlarging the Security Council in order to guarantee greater representation of the Third World countries, to the abolition or the limitation of the veto (or to extending the veto in order that countries representing different geo-political areas might enjoy it), and so on. Aside from changes in the structure, there has been insistence that several principles declared by the Assembly over the years (see

§ 94) be introduced in the Charter. These concern both principles regarding maintenance of international peace and security, for example, the rules defining aggression (see § 55 *bis*) and principles relating to the field of economic and social co-operation. In this sector declarations and initiatives by the Assembly and by its specially created organs have continued to multiply after de-colonisation, and they are part of the effort to give the world a fairer economic order. We can mention, among others, the Charter of Economic Rights and Duties and the principles of the new international economic order, such as the principle of economic equity, of collective economic security, of the complete and permanent sovereignty of every people over its own natural resources, of the right to a sustainable development, and so on (see § 71). Especially during the seventies, when enthusiasm for the new international economic order was at its peak, and expectation that it could become reality was widespread, a view was held that all these ideas should no longer be entrusted to Assembly documents that were without binding force but should be solemnly made part of the Charter.

In the sector of the maintenance of international peace and security, worthy of mention are the Report presented by the Secretary-General B. Boutros-Ghali to the Security Council in June 1992, a report called "Agenda for Peace" (see *ILM*, 1992, p. 956 ff.), and the Supplement to the "Agenda for Peace", of January 3, 1995 (see Doc. A/50/60 and S/1995/1). More than at a revision of the Charter, these documents aimed at strengthening the role of the Organization within the framework of existing provisions. Worthy of mention is also General Assembly resolution no. 46/36 of December 9, 1991 which sets up in the United Nations a "conventional arms register" where, beginning from January 1, 1992, there is to be registered information, *supplied by the Member States*, concerning the import and export of conventional arms as well as the national stocks at hand. The above cited "Agenda for Peace" (p. 973, para. 71) also refers to this register. If this were a first step towards an efficient system of control by the United Nations over the production and the sale of arms — a system which, involving *direct* inspections, for now is but a utopia — we would be on the right track in pursuing the aim of preventing threats to the peace. Unfortunately still in 1999, in the Report to the fifty-fourth session of the General Assembly, the Secretary-General Kofi Annan was forced to notice that no progress at all had been made within the United Nations on the issue of disarmament (see Doc. A/54/1, par. 122-123).

Programmes aimed at strengthening the role of the Organization are also contained in the Millennium Declaration adopted by the General Assembly on September 8, 2000 (res. 55/2). These are especially devoted to the eradication of poverty, the protection of the environment, the protection of vulnerable people, the strengthening of the role of the General Assembly as "the chief deliberative, policy-maker and representative organ of the UN", and so on. The implementation of the Millennium Declaration is the object of an annual report of the Secretary-General to the General Assembly (the first one is contained in Doc. A/57/270, of July 31, 2002). Cfr. also the Report presented by Secretary-General to the General Assembly with the title "Strengthening of the UN: An Agenda for Further Change" (Doc. A/57/387 of September 9, 2002), which is strictly linked to the Millennium Declaration. The tragic conditions of poor countries and poor people are situations which these, and many other documents, would like to see eliminated or at least mitigated. Such situations, however, still remain to be seriously tackled.

It seems very unlikely that any radical changes in the structure of the United Nations will be made. The attitude of the permanent members of the Security Council is decisive on this. Permanent members have the veto even with regard to ratification of amendments and revision, and they do not seem very inclined to change the existing rules. On the other hand, a single change in the structure of the Security Council, with a widening of the number of members and with the addition of other permanent members, is not in itself sufficient in order to make the United Nations more functional or, most of all, more *credible*. What would change (or, better, would revolutionise) the structure of the Organization in a positive way would be, on the one hand, the *democratisation* of the General Assembly, that is, its transformation from an assembly of governments (see § 30) to an assembly of representatives of peoples and, on the other, the effective control by the Assembly over what the Security Council does. Today we are very far from all this.

Among the trends concerning revision of the UN structures there is one (antithetical to democratising it) favouring a change in the voting system in the Assembly (a system which today is based on the *one State, one vote* principle sanctioned by Article 18, para. 1, of the Charter) through the introduction of the weighted vote, that is, of a vote that is proportionate to the weight, in terms of population, economic resources, contributions to the UN budget, etc., of each country. The weighted vote, whose supporters belong to the Western world, is obviously opposed by less developed countries who hold the majority in the Assembly.

As far as new general principles and aims are concerned, it is unlikely that the Organization would benefit from their addition as general provisions of the Charter. The activities of the Organization is mainly aimed towards obtaining as much co-operation as possible among the States through the instrument of agreement, and the possibility of negotiating equitable consensual solutions to the enormous problems that humanity is facing can be better assured if fewer and less binding objectives are codified. The objectives that the Charter presently indicates (see § 2), precisely because they are all-encompassing and reflect two very general ideals, those of peace and of economic and social co-operation among States, are more than sufficient.

CHAPTER TWO

THE ORGANS

Section I

THE SECURITY COUNCIL

22. *Composition of the Council. Election of non-permanent Members.*

BIBLIOGRAPHY: KELSEN, *Organization and Procedure of the Security Council of the United Nations*, in *HLR*, 1945-46, p. 1087 ff.; BOWETT, *The Security Council*, in WORTLEY, *The United Nations. The First Ten Years*, Manchester, 1957, p. 19 ff.; SCHWELB, *Amendments to Article 23, 27 and 61 of the Charter of the United Nations*, in *AJ*, 1965, p. 834 ff.; GUARINO, *Le recenti modifiche della Carta delle Nazioni Unite*, in *ADI*, 1965, p. 383 ff.; MARSHIK-NEUHOLD, *Die Sicherbeitsrat*, Wien, 1972; REISMAN, *The Case of the Non-permanent Vacancy*, in *AJ*, 1980, p. 907 ff.; BAILEY, *The Procedure of the UN Security Council*, 2nd ed., Oxford, 1988.

The Security Council is composed of permanent members, the so-called five Great Powers, and non-permanent members, elected periodically by the General Assembly. In this regard, Article 23 provides as follows: "The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics (today, Russia), the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution. The non-permanent members of the Security Council shall be elected for a term of two years... Each member of the Security Council shall have one representative".

Each Member State, permanent or non-permanent, holds in turn the office of President of the Council, on a monthly rotation basis (Article 18, Council rules of procedure).

Until 1965, the year when Article 23 was amended, there were only 11 members of the Council, six of whom were non-permanent members.

During the Cold War period, the formula of "equitable geographical distribution", used by Article 23 with regard to the selection of non-permanent members, gave rise to very sharp clashes, and it was asked whether it referred to physical geography or rather to political geography. The issue arose in reference to a kind of verbal understanding that the Great Powers had made among themselves in 1946 and on the basis of which the six non-permanent seats in the Council were to be distributed as follows: two to Latin America, one to the British Commonwealth, one to the Middle East countries, one to Western Europe and one to Eastern Europe (the understanding is cited in GAOR, 8th sess., Pl. meet., 450th meet., n. 19). In the early years of the United Nations, the East European seat was allocated to a Communist government, for example, to Poland in 1946 and to the Ukraine in 1948. After 1950, the Assembly began to fill the seat with States which, although geographically part of Eastern Europe (or nearly so) had nothing to do with the Communist bloc. In 1952 Greece was elected and, in 1954, Turkey. Strong protests were then made by the Soviet Union which complained both that the 1946 understanding had been breached and that Article 23 had been violated. Apart from the 1946 understanding, whose binding nature is very dubious and which in any case did not bind all the Assembly members but only the five Great Powers, it does not seem that the Article 23 formula can refer to the political situation of the country to be elected. This seems obvious when we consider geographical areas, such as Africa or Asia, which are not characterised by the same kind of political regimes but show the greatest variety.

For a summary of the debates on the allocation of the seat belonging to Eastern Europe, see UN Rep., sub Article 23, nn. 14-22, and, for the most important statements in the General Assembly, GAOR, 4th sess., Pl. meet., 231st meet., n. 10 ff.; 6th sess., Pl. meet., 353rd meet., no. 10 ff.; 8th sess., Pl. meet, 450th meet., n. 22 ff.

The modification of Article 23, which increased the number of Council members to 15, was provided for by the General Assembly with resolution no. 1991-XVIII (lett. A) of December 17, 1963, and entered into force in August 1965 following ratification by two-thirds of the Member States, as prescribed by Article 108.

The 1963 resolution has two parts. In one, the Assembly decides to submit the amendment to ratification by the Member States. In the other it "*further decides* that the ten non-permanent members of the Security Council shall be elected according to the following pattern: (*a*) Five from African and Asian States; (*b*) one from Eastern European States; (*c*) two from Latin American States; (*d*) two from Western European and other States". This second part of the resolution, which is still applied in the allocation of seats, is not, nor is meant to be, an amendment to the Charter. In fact, it has never been subject to ratification under Article 108. What, then, is its formal value? Certainly it is not binding the Member States. Under the Charter, the Assembly may adopt binding decision only in very specific cases, and this is not one of them. Nor is it possible, in view of the circumstances, to interpret the second part of the resolution as a real international agreement existing between the countries which voted for it. If the States had really intended to

bind themselves, they would have adopted the second part of the resolution as an amendment as well. On the other hand, it would be excessive to say that the decision has no legal value, lowering it, for example, to the level of a "gentlemen's agreement". The best solution is to bring the resolution within the power to make recommendations which very broadly and generally belongs to the General Assembly under Article 10 of the Charter, and to attribute it the typical legal effect of the recommendations of UN organs, that is, the effect of legality (see § 89). A State which follows the criteria indicated by the Assembly could not in any case be accused of violating the provisions of Article 23 on the geographical distribution of seats.

With the geographical distribution adopted in the 1963 resolution, and considering that a permanent member, China, may be numbered among the developing countries, these countries (which are thus guaranteed more than six seats in the Council) enjoy a kind of "collective veto". They are able, if they are in agreement, to prevent the formation of the majority of nine members necessary for the adoption of any decision.

If the Assembly does not succeed in electing one or more non-permanent member of the Council, it is possible that the latter will have to discuss and decide with an incomplete membership. This will have no effect on the validity of a decision. In fact, neither the Charter nor the Council's rules of procedure (issued by the Council itself on the basis of Article 30 of the Charter) prescribe a particular quorum for the sessions. Therefore, the minimum number required to be present corresponds to the number of votes required by Article 27 for the adoption of decisions.

The only case of vacancy of a non-permanent seat occurred in early January 1980 because the Assembly, in the previous December, had not been able to fill one of the two seats assigned to Latin America for which both Columbia and Cuba were contending. The Council nevertheless met during those days but did not have the chance to vote before the seat was occupied by Mexico, elected on January 7 after the withdrawal of the candidacies of the two above-mentioned countries. On the case, cf. REISMAN, *art. cit.* Cf. also the legal opinion issued by the UN Secretariat on December 3, 1979 (in *UNJY*, 1979, p. 164 ff.) which holds that the Council is not legally formed if one or more non-permanent members have not been elected but that, notwithstanding this, it... may nonetheless function so that its primary responsibility regarding maintenance of the peace is not affected.

23. *Voting procedure in the Council:* A) *The nature of the four Powers' Statement at the San Francisco Conference.*

BIBLIOGRAPHY: LEE, *The Genesis of the Veto*, in *Int. Org*., 1947, p. 33 ff.; JIMENEZ DE ARECHAGA, *Voting and the Handling of Disputes in the Security Council*, NewYork, 1950, p. 42 ff.; BRUGIÈRE, *La règle de l'unanimitè des membres permanents au Conseil de Sécurité, « Droit de veto »*, Paris, 1952, p. 36 ff.; GROSS, *The Double Veto and the*

Four-Powers Statement on Voting in the Security Council, in *HLR*, 1953-54, p. 251 ff.; BROMS, *Voting in the Security Council*, in *Festskrift till L. Hjerner*, Stockholm, 1990, p. 93 ff.; DELON, *La concertation entre les membres permanents du Conseil de Sécurité*, in *AF*, 1993, p. 53 ff.

The voting procedure in the Security Council is outlined in Article 27, which reproduces the Yalta formula (see § 1 A) and confirms the so-called veto power. Under this article, "1. Each member of the Security Council shall have one vote. 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members. 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine [seven until 1965] members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting".

At the San Francisco Conference, several questions were put to the four sponsoring governments (the United States, the USSR, China and the United Kingdom) in order to clarify certain aspects of the Yalta formula which might have created, and which did indeed create, problems of interpretation. Mainly, it was asked how the Council was to vote if it were asked to decide on whether or not a matter was procedural (on the question of the double veto, see § 26). The answer was given in a Statement issued by the sponsoring governments on June 7, 1945 and adhered to by France in its capacity as a future permanent member of the Council.

The nature of the Statement has often been discussed in the Council. The Soviet Union held, in disagreement with the Western Powers, that it is a true international agreement, and, as such, binding on the permanent members. However, if attention is paid to the circumstances in which the Statement was issued and, especially, the position taken at the time by some of the States which signed it, the idea of a formal agreement appears to be unacceptable. The report presented to the President of the United States by the head of the American delegation to the San Francisco Conference has particular significance in this respect. The report indicated the Statement as an explanatory instrument but expressed specific reservations as to the reliability of an anticipatory interpretation made "without any practical experience as to the operation of the Organization or the Security Council". It is clear that such position assumed an intention not to be formally bound.

In our opinion, the Statement should be considered on the same level as the preparatory works. It is true that it was not adopted (but neither was it rejected) by the San Francisco Conference and remained limited to the five Great Powers. Yet it is also true that among these were the States that had drawn up Article 27 at Yalta and then imposed it on the Conference. Consequently, the Statement represented the viewpoint of the "drafters" of the Charter.

The problem of the nature of the Statement should not be over-estimated. Indeed, its content, being the result of compromises, is very ambiguous. As we shall see, it furnishes little help in answering the question the San Francisco Conference most wanted resolved by the Great Powers, the question of the double veto. The Statement thus betrays the purpose that it was meant to fulfill, namely the facilitation of the interpretation of ambiguous texts, the very function of preparatory works.

For the text of the Statement, see U.N.C.I.O., vol. 11, p. 710 ff. The passage cited from the report by the Head of the American delegation is reproduced in GROSS, *art. cit.*, p. 255.

24. B) *The so-called veto power and the significance of abstention by a permanent Member.*

BIBLIOGRAPHY: WILCOX, *The Rule of Unanimity in the Security Council*, in *Proceedings of the American Society of International Law*, 1946, p. 55 ff.; WORTLEY, *The Veto and the Security Provisions of the Charter*, in *BYB*, 1946, p. 95 ff.; PADELFORD, *The Use of the Veto*, in *Int. Org.*, 1948, p. 227 ff.; DE PREUX, *Droit de veto dans la Charte des Nations Unies*, Paris, 1949; LIANG, *Abstension and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council*, in *AJ*, 1950, p. 696 ff.; MCDOUGAL and GARDNER, *The Veto and the Charter: An Interpretation for Survival*, in *Yale Law Journal*, 1951, p. 2258 ff.; BRUGIÈRE, *La règle de l'unanimité des membres permanents au Conseil de Sécurité, « Droit de veto »*, Paris, 1952; DAY, *Le droit de veto dans l'Organisation des Nations Unies*, Paris, 1952; ENGELHARDT, *Das Vetorecht im Sicherheitsrat der Vereinten Nationen*, in *AV*, 1963, p. 377 ff.; KAHNG, *Law, Politics, and the Security Council*, The Hague, 1964, p. 124 ff.; JENKS, *Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Models of Decision in International Organizations*, in *Cambridge Essays in International Law; Essays in Honour of Lord McNair*, London, 1965, p. 48 ff.; STAVROPOULOS, *The Practice of Voluntary Abstention by Permanent Members of the Security Council under Article 27, paragraph 3, of the Charter of the United Nations*, in *AJ*, 1967, p. 737 ff.; GROSS, *Voting in the Security Council: Abstension in the post-1965 Amendment Phase and its Impact on Article 25 of the Charter*, in *AJ*, 1968, p. 315 ff.; UDECHUKU, *The Problem of the Veto in the Security Council*, in *International Relations*, 1972, p. 187 ff.; BAILEY, *New Light on Abstensions in the UN Security Council*, in *International Affairs*, 1974, p. 554 ff.; DAMBAZAU, *UN and the Veto Power*, in *Nigerian Forum*, 1987, p. 84 ff.

"Veto power" (of the five permanent members of the Council) are the words commonly used with regard to the provision of Article 27, para. 3, which provides that decisions on non-procedural matters shall be made by an affirmative vote of nine members (seven before the Council was enlarged in 1965), which includes all the permanent members. The English text of para. 3 reads as follows: "Decisions of the Security Council... shall be made by an affirmative vote of nine members including the concurring votes of the permanent members...". The French text reads: "Les décisions du Conseil...

sont prises par un vote affermatif de neuf de ses membres dans lequel sont comprises les voix de tous les membres permanents...".

There is no question that, under para. 3 of Article 27, the validity of a non-procedural decision of the Council requires the affirmative votes of all five permanent members. Therefore, even the mere abstention of a permanent member is to be considered a veto (although, in a strict sense, a veto implies the expression of a contrary vote) and is able to paralyze the Council's activity in a particular case. This interpretation is supported, first of all, by the text of para. 3, which expressly requires that the votes of the permanent members "concur" (English text), "are included" (French text) in the "affirmative" vote of the Council majority. The spirit of Article 27 also supports this view, as the Council is responsible under the Charter for the maintenance of international peace and security and that, as the facts have shown, effective action in this area should be supported by the unconditional agreement of the permanent members. Lastly, the San Francisco Statement can be cited in favour of this view: in Article 9 it clearly confirms that Council decisions which do not have a merely procedural nature require the "unanimity of the permanent members plus the concurring votes of at least two [today four] of the non-permanent members".

Attention must be drawn to the fact that to reach the majority of seven votes [today nine] prescribed by Article 27, para. 3, the Statement considers necessary the votes of the permanent members plus *two votes* [today four] of the non-permanent members. This very clearly means that the Statement requires the affirmative vote of the five Great Powers, and excludes the possibility of the Council deciding with the abstention of even one of them. The view (of STAVROPOULOS) that the Statement is not clear on this is therefore not convincing.

Notwithstanding the clear words of Article 27, para. 3, the United Nations practice has, since its early years, tended to acknowledge the validity of decisions made with the abstention of one or more permanent members. After some initial uncertainty, this practice became well established through the agreement of all the States. It can be safely said that it gave rise to one of the unwritten rules in the Organization that derogate from the Charter provisions.

The question of abstention of a permanent member first arose in the Council in 1946 during the examination of the domestic situation in Spain, a situation, according to some Member States, likely to threaten international peace and security. On April 29, 1946, the Council approved, with the abstention of the USSR, a draft resolution proposed by Australia that provided for the creation of a sub-committee to study whether the Franco regime actually constituted a threat to the peace. The Soviet representative, after stating he did not approve the draft resolution in that it was dilatory, declared he would abstain so as not to make its adoption impossible; however, he invited the Council (and the United States adhered to this) not to consider his conduct as "a precedent capable of influencing in any way the question of the abstention of permanent members of the Security Council" (cf. SCOR, 1st year, 39th meet., part. p. 243). Thereafter, the abstentions of the permanent members began to be more frequent,

without any longer raising any exceptions or reservations whatsoever. Important decisions, for example, concerning the admission of new States, the setting up of international peacekeeping forces, and so on, have often been taken with the abstention of permanent members. As we have said, it is now a well-established practice which has given rise to a customary norm (on the possibility that the Charter may be derogated from by customary rules, see § 4).

The customary rule that permits the validity of decisions taken with the abstention of one or more permanent members was in no way influenced by the changes in the number of members of the Council introduced in the Charter in 1965. It has been held that since there are now 15 (instead of 11) members of the Council and that 9 votes (instead of 7) are sufficient for the adoption of a resolution, the customary rule should no longer be in effect. Otherwise, the Council could issue a decision even when *all* the permanent members abstained. To the contrary, such an eventuality is not able by itself alone to nullify a rule shaped over a period of time. In introducing changes to the Charter in 1965, the Member States did not show any intention specifically concerning abstention, thereby letting it be understood that they intended to leave things as they were. Indeed, the practice after 1965 has been consistent with the previous practice.

In the sense that the practice has given rise to a customary rule on abstention, and that such rule has remained unchanged since 1965, the International Court of Justice has also expressed a view. This was in its opinion of June 21, 1971 on the Namibia (South West Africa) question. Cf. ICJ, *Reports*, 1971, p. 22. On the Namibia question, see § 81.

A form of abstention exists in *non-participation* in the vote (in the vote, not in the discussion). Also on this point the practice has become well-established, especially in the years immediately following the entry of Communist China in the Council. By not participating in a vote, a State (if it is a permanent member), while not intending to prevent the adoption of a resolution, wants to more strongly emphasize its dissent (but not with different legal effects) with respect to a case of abstention. Non-participation in a vote implicitly carries with it the intention to contest the measure and to be disassociated from its effects (on this point, see § 97).

For several years after its entry in 1971, Communist China did not participate in voting on resolutions concerning the establishment and the functioning of peacekeeping forces or observation forces. Cf., for example, for the resolutions on peacekeeping operations in the Middle East, SCOR, 28th year, 1973, 1760th meet., 33rd year, 1978, 275th meet. Various Arab countries and Third World countries joined China in non-participation with regard to the Middle East resolutions. Also other permanent members (for example, France, in the case of res. no. 376 of October 17, 1975, on the admission of the Comoros Islands) have resorted to the practice of non-participation in the vote.

By mitigating the rigidity of Article 27, para. 3, the customary rule on abstention has allowed the Security Council to adopt resolutions which otherwise would not have been adopted. Yet it is clear that in the end this rule weakens the capability of the Council to act effectively to protect the peace, since this capability depends to a large degree on the consent of the permanent members.

25. C) *Absence of a permanent Member.*

BIBLIOGRAPHY: KUNZ, *Legality of the Security Council Resolutions of June 25 and June 27, 1950*, in *AJ*, 1951, p. 137 ff.; GROSS, *Voting in the Security Council: Abstension from Voting and Absence from Meeting*, in *Yale Law Journal*, 1951, p. 209 ff.; GENTILE, *Astensione ed assenza volontaria di un membro del Consiglio di Sicurezza*, in *RDI*, 1954, p. 347 ff.; KAHNG, *Law, Politics, and the Security Council*, The Hague, 1964, p. 132 ff.; LABOUZ, *L'Organisation des Nations Unies et la Corée. Recherches sur la fiction en droit international public*, Paris, 1980.

Again with regard to Article 27, para. 3, the question arises as to whether the Security Council can legally decide on non-procedural matters, if one or more of the permanent members is absent during the sessions when they are being discussed.

On this issue practical examples are not abundant. Two cases can be cited, both involving the USSR. In 1946, Iran brought a complaint before the Council, claiming Soviet interference in its internal affairs (Russian troops were stationed in Azerbaijan!), but soon after announced it was withdrawing its complaint as the two countries had come to an agreement. Contrary to the Soviet view (shared by France and supported also in a memorandum from the Secretariat), which was that the agreement had eliminated any dispute or situation that might endanger the peace and had thus made any UN intervention unwarranted, the Council decided, in its 36th session of April 25, 1946, to keep the question on the agenda. The USSR then said that it would not take part in the sessions in which the Iranian question was being discussed, thereby challenging beforehand the validity of eventual decisions of the organ. The Council, in any case, did not adopt a resolution.

The second case, which occurred in 1950, is more interesting. The USSR abandoned the Council for more than six months to protest against the failure to substitute Communist China for Nationalist China in the Council (see § 19). Before withdrawing, the Soviet delegate declared that he would refuse to recognize all resolutions passed in his absence. And, on his return, he confirmed this intention. This time the Council, despite the Soviet Union's withdrawal, took two decisions, no. 83 of June 27, 1950 and no. 84 of July 7, 1950, which were at the basis of the Korean War (see § 60).

In both cases, the majority of the Council members expressed the view that the absence of a permanent member should be the same as abstention from the vote and that therefore the organ could proceed to take decisions on any matter.

On the Iranian question, cf. SCOR, 1st year, 33rd, 36th, 40th and 43rd meet. (the above cited Secretariat's memorandum is reproduced in SCOR, 1st year, 33rd meet., p. 143 ff.). For the Russian statements of 1950, see SCOR, 5th year, 461st meet., p. 9 f. and 480th meet., p. 2 ff. Cf. also the telegram from the USSR deputy foreign minister to the Secretary-General, of June 29, 1950 (doc. S/1517, published in SCOR, 5th year, Suppl. for June, July and August 1950, p. 29 f.).

Considering that the practice is limited, that one of the permanent members, the Soviet Union, had throughout its existence insisted on the illegality of decisions taken in its absence, and that caution must be used in ascertaining customary rules that have developed within the framework of the Charter (see § 4), it is impossible to say that an unwritten rule has been shaped with regard to absence similar to the one which confirms the validity of a resolution when a permanent member abstains. All that can perhaps be said, in the light of the provision of Article 27, para. 3, and together with the customary rule on abstention, is that the consequences of the absence from voting depend on the meaning that the State that is absent gives it. If the State is absent in order to paralyze the activity of the Council (as the Soviet Union was in the above-mentioned cases), its position is equivalent to a negative vote and triggers the provision of Article 27, para. 3. On the contrary, if it intends only to dissociate itself from the vote without preventing adoption; if, in other words, it attributes to absence a meaning which does not differ, even if it is more striking, from non-participation in the vote, it remains within the framework of the customary rule on abstention.

26. D) *The problem of the double veto.*

BIBLIOGRAPHY: LIANG, *Notes on Legal Questions Concerning the United Nations; The so-called « Double Veto »*, in *AJ*, 1949, p. 134 ff.; RUDZINSKI, *The so-called Double Veto*, in *AJ*, 1951, p. 443 ff.; GROSS, *The Double Veto and the Four-Power Statement on Voting in the Security Council*, in *HLR*, 1953-54, p. 262 ff.; ID., *The Question of Laos and the Double Veto in the Security Council*, in *AJ*, 1960, p. 118 ff.; KAHNG, *Law, Politics, and the Security Council*, The Hague, 1964, p. 112 ff.

The veto power provided in Article 27, para. 3, can be exercised when a decision is not merely procedural but concerns a "substantive" issue. With regard to decisions of a procedural nature, Article 27, para. 2, provides that

Section II

THE GENERAL ASSEMBLY

30. *Composition of the Assembly. Subsidiary organs.*

BIBLIOGRAPHY: RAY, *Commentaire du Pacte de la Société des Nations*, Paris, 1930, p. 137 ff.; SCHÜCKING-WEHBERG, *Die Satzung des Völkerbundes*, I, 3rd ed., Berlin, 1931, p. 420 ff.; BALL, *Bloc Voting in the General Assembly*, in *Int. Org.*, 1951, p. 3 ff.; BOWETT, *The Law of International Institutions*, London, 1963, p. 37 ff.; BAILEY, *The General Assembly of the United Nations, A Study of Procedure and Practice*, New York, 1964, p. 21 ff.; GOODWIN, *The General Assembly of the United Nations*, in LUARD, *The Evolution of International Organizations*, New York, 1966, p. 42 ff.; WERNERS, *The Presiding Officers in the UN*, Haarlem, 1967; XYDIS, *The General Assembly*, in BARROS (ed.), *The United Nations, Past, Present and Future*, New York, London, 1972, p. 64 ff.; FINLEY, *The Structure of the UN General Assembly (its Committees, Commissions and Other Organims 1946-77)*, 2 vols., Dobbs Ferry, N.Y., 1990; POULANTZAS, *The Interim Committe or "Little Assembly": A Subsidiary Organ of the General Assembly of the United Nations Organization,* in *Revue de droit international, de sciences diplomatiqus et politiques,* 1993, p. 251 ff. .

All the Member States of the Organization are represented in the Assembly. Every member has the right to have five representatives (Article 9, para. 2) but has only one vote (Article 18, para. 1).

The difference between the number of delegates and the number of votes had already been envisaged by the League of Nations Covenant with regard to the League Assembly. Article 3, para. 4, of the Covenant gave every State three representatives and one vote. The main purpose of the provision, according to the drafters, was to allow the participation in Assembly discussions of several people, representing the same State but expressing different, and perhaps even contrasting, views and interests. The right to vote, it was said, cannot be divided and would be exercised by the organs (the executive power) responsible for the foreign policy of each country. It would be wise, however, that each government ensure that more than one "voice" was heard in the discussion phase, accrediting, for example, a representative of the opposition in Parliament, of a trade association, and so on. As President Wilson solemnly declared during the peace conference (session of February 14, 1919), in this way one would have been able to partially get around the fact that the League Assembly was an assembly of State delegates and not a world Parliament.

It does not seem that, either at the time of the League of Nations or today at the United Nations, the intention of the drafters of the Covenant has been followed in practice. Already in the League Assembly, there were not many "discordant voices" (only a few governments, among them, Belgium and Hungary, accredited members of opposition parties). They have actually

disappeared in the UN Assembly. Although the delegations of many States are not made up exclusively of organs of the executive branch, it is impossible to find any trace of non-conformist political views in the statements of delegates in the General Assembly.

The plurality of delegates has also practical purposes since the Assembly proceedings take place, as do the proceedings of any collegial organ which has broad composition and broad competence, both in plenary session and in various committees and subcommittees. Indeed, considering that the Assembly committees and subcommittees are so numerous, even five delegates assigned to each State by Article 9, para. 2, of the Charter would not be sufficient for these purposes. Articles 25, 26, 100 and 101 of the Assembly rules of procedure are of help. These articles provide that five substitute delegates and an unspecified number of counselors, experts, etc., may be part of the delegation. The head of the delegation may invest the former with the same powers as the representatives. The latter may participate in committees without, however, being eligible for the offices of president, vice president or rapporteur in such committees.

The delegation is accredited (by the Head of State or Government or by the Minister for Foreign Affairs: Article 27, rules of procedure) at the opening of every Assembly session. Under the provisions of Article 20 of the Charter, the sessions are regular annual sessions and special sessions. Every year, usually the Tuesday of the third week in September (Article 1, rules of procedure), the regular session opens. Special sessions are convoked by the Secretary-General at the request of the Security Council or of a majority of the members of the United Nations.

The organization of Assembly activities, which has its basis in the rules of procedure, can be outlined as follows. At every session a President and various vice presidents are elected. The activities are mostly carried out in the Main Committees, where every member is represented and which prepare the resolutions to be submitted to the Assembly plenary. The Main Committees are: the First Committee (disarmament and international security); the Second Committee (economic and financial); the Third Committee (social, humanitarian and cultural); the Fourth Committee (special political and de-colonisation); the Fifth Committee (financial and budgetary); the Sixth Committee (legal). Two committees are concerned with important procedural matters. The General Committee, consisting of the President of the Assembly, the vice-presidents and the Chairmen of the Main Committees, is competent for the drawing up of the agenda to be submitted to the Assembly. The Credentials Committee, consisting of nine members, examines the credentials of the delegates and reports to the Assembly.

Making use of the competence given to it by Article 22 of the Charter, the Assembly has over the years gradually established a whole series of subsidiary organs of a permanent nature for pursuing special purposes. Some of them have been established principally to undertake studies. Others

represent the forum in which the States negotiate agreements and seek to promote international cooperation in specific fields. Others, again, oversee operational tasks, in particular, the management of funds received through the voluntary contributions of Member States. The organs created within the framework of economic cooperation and development are very important.

The following are examples of the most important organs (their structure will be examined later, in the framework of the UN functions in the economic and social field): the United Nations Conference of Trade and Development (UNCTAD), whose task is to promote international trade for the principal purpose of accelerating the development of economically disadvantaged countries; the United Nations Institute for Training and Research (UNITAR), for the training of officials in developing countries on general subjects concerning international co-operation; the United Nations Development Program (UNDP), whose governing council, consisting of 37 countries, oversees, in co-operation with various specialised United Nations agencies (see § 73), an extensive system of multilateral technical assistance to low-income countries; the United Nations Children's Fund (UNICEF), which furnishes aid to governments requesting it for the health, nutrition, social protection, education, and professional training of children and adolescents; the United Nations Environment Program (UNEP), which is concerned with the environment.

Among the permanent organs set up by the Assembly which do not concern the field of economic co-operation, the international law Commission deserves special mention. This commission consists of a certain number of experts (who sit as individuals, not as government representatives) and its purpose is to contribute to the codification and progressive development of international law.

Other important subsidiary organs, whose tasks mainly involve research and study, are the following: the Disarmament Commission, the Special Committee for Peacekeeping Operations, the Committee on the Peaceful Use of Extra-Atmospheric Space, the Special Committee for the United Nations Charter and the strengthening of the role of the Organization, the Special Committee on principles of international law covering friendly relations and co-operation among the States, the Commission on the permanent sovereignty over natural resources.

See also § 72.

The organs created by the Assembly in the field of economic cooperation and development (which in turn have given birth to other organs and to a complex bureaucratic apparatus), together with the organs created by the Economic and Social Council, have very often acted without specific coordination and in the end have resulted in a waste of energy and funds not unlike an over-bureaucratized State administration. On this point, see also § 38.

31. *Voting procedure in the Assembly.* A) *The "present and voting" majority.*

BIBLIOGRAPHY: HOVEY, *Voting Procedure in the General Assembly*, in *Int. Org.*, 1950, p. 420 ff.; COSENTINO, *Astensione*, in *Rassegna Parlamentare*, 1959, p. 89 ff.; BAILEY, *The General Assembly of the United Nations, Study of Procedure and Practice*, New York, 1964, p. 132 ff.; GROSS, *On the Degradation of the Constitutional Environment of the UN*, in

AJ, 1983, p. 582 f; MINDAOUDOU, *La notion de majorité comme preuve de démocratie à l'Assemblée générale des Nations Unies*, in *African Journal of International and Comparative Law*, 1996, p. 447 ff..

Article 18 provides that decisions of the Assembly be made by a majority (simple or qualified) of the members present and voting. This provision gives rise to the question, which is often raised also for collegial bodies in municipal law, of whether abstentions should be taken into account in calculating the majority. Is abstention equivalent to a vote? If so, the majority is to be calculated by summing the votes in favour, the votes against and the abstentions, with the consequence that the number of votes necessary for the adoption of a decision will increase. If not, it will be necessary to count only the negative and favourable votes, and therefore arrive at approval more easily. Article 86 of the Assembly rules of procedure resolves the problem in this second sense, establishing that "... the phrase 'members present and voting' means members casting an affirmative or negative vote". However, the question remains whether the provision in the rules of procedure and the practice, which has always conformed to it, are compatible with Article 18 of the Charter.

Article 86 of the rules of procedure was adopted at the second Assembly session in 1947. At the first regular session, in 1946, and at the first special session, at the beginning of 1947, the problem was raised, in the absence of rules on the point, twice. Both times, after a discussion in which views were put forward in favour of one or the other solution, the view consistent with the present Article 86 prevailed. Cf. GAOR, 1st sess., 2nd part, 1st Comm., 13th meet., p. 43 ff., 1st Comm., 57th meet., p. 346 f.

Domestic law literature has discussed at length the possibility of considering abstention as demonstration of a vote and including it in the calculation of the majority. As always, arguments favouring one view or the other may be, and have been, used. It has been said, by those who want to count abstention, that by abstaining, a member of the body takes a middle course which is neither more nor less significant than a yes or no vote, and that the abstaining member expresses his will and this will is to yield to the opinion of the majority, whether it is favourable or unfavourable to the draft resolution. Excluding those who abstain from the list of voters would mean unjustifiably putting them at the level of absentees. The contrary view points out the literal meaning of the word abstention. It adds that the voter who abstains in a certain sense gives up his right to vote, to effectively take part in the voting procedure. Mainly, however, this view holds that counting abstention for purposes of the majority gives it the same value as a negative vote. There are also views between these two extremes, such as the one that abstention should not be counted only when it is formally announced before the vote. The extent to which this issue is debatable can be shown by those

cases in which, even in the presence of an identical provision on the required majority for the approval of a decision, two collegial bodies behave in opposite ways. This is what happens, for instance, in Italy where Article 64, para. 3, of the Constitution provides that both houses of Parliament decide "by the majority of the members present" and where abstentions are counted in the Senate while they are not counted in the Chamber of Deputies.

It is difficult to establish which solution Article 18 of the Charter actually favours. A deciding element in favour of the view that excludes abstentions in counting the majority, the view underlying Article 86 of the Assembly rules of procedure, is one of the arguments already mentioned: the fact that abstention would not otherwise be different from a negative vote. Yet this argument, instead of interpreting the provision, indicates only the consequence, however serious, of one of its possible interpretations. One should rather consider the aspect of the greater or lesser facility in arriving at the adoption of Assembly resolutions. If abstentions do not count, the number of votes necessary for approval is reduced and the Assembly may more easily decide. Considering that this organ, unlike the Security Council, does not as a rule have real decision-making powers, the less rigid interpretation, which would facilitate its functioning, is perhaps more in conformity with the spirit of the Charter. Under this aspect it is therefore not difficult to acknowledge that Article 86 of the rules of procedure correctly interprets Article 18.

One scholar (GROSS) has held the opinion that Article 86 and the underlying interpretation more favourable to the adoption of a resolution could have been justified when there were few members of the United Nations, while today it would no longer be justified, given the great increase in the number of Assembly members. It is not easy, however, to understand what difference this makes. As for the view (held by the same author) that, if Article 86 of the rules of procedure were eliminated, Article 18 would necessarily have to be interpreted in the sense that abstentions are to be counted in determining the majority, it is difficult to establish on what historical, textual or logical arguments such view is based.

32. B) *Simple majority and qualified majority.*

BIBLIOGRAPHY: KOO, *Voting Procedures in International Political Organizations*, New York, 1947, p. 231 ff.; HOVEY, *Voting Procedure in the General Assembly*, in *Int. Org.*, 1950, p. 412 ff.; VALLAT, *Voting in the General Assembly of the United Nations*, in *BYB*, 1954, p. 237 ff.; KERLEY, *Voting on Important Questions in the United Nations General Assembly*, in *AJ*, 1959, p. 324 ff.; SALERNO, *La procedura di voto della Assemblea Generale delle Nazioni Unite sulle c.d. questioni importanti*, in *ADI*, 1966, p. 312 ff.; WILCOX, *Representation and Voting in the United Nations General Assembly*, in FALK-MENDLOVITZ, *The Strategy of World Order, III, The United Nations*, New York, 1966, p. 272 ff.; WOLFRUM, in SIMMA (ED.), Die Charta der Vereinten Nations, München, 1991, p. 275 ff.

There have been discussions both in legal literature and in practice about the system adopted in Article 18, paras. 2 and 3, for distinguishing Assembly decisions that are to be made by a simple majority of present and voting members from those requiring a qualified two-thirds majority.

After establishing that decisions on "important questions" are to be made by a two-thirds majority, para. 2 of Article 18 lists a number of questions of this kind (including, among others, recommendations with respect to maintenance of the peace and decisions concerning member status in the UN, the Trusteeship Council, budgetary questions, etc.). Para. 3 provides that the Assembly shall decide by simple majority on "other questions" and that by simple majority it may indicate new "categories of questions to be decided by a two-thirds majority", in addition to those listed in para. 2.

Making use of the power given it by Article 18, para. 3, the Assembly has gradually introduced other categories requiring the two-thirds majority, by including them in its rules of procedure or in an annex to these rules. For example, Article 19 of the rules of procedure provides that the request to include an item on the agenda of an Assembly special session may be approved only by a two-thirds majority if it is made after a certain date. Article 81 provides that when a proposal (usually a draft resolution) has been adopted or rejected, it may not be reconsidered during the same Assembly session unless a two-thirds majority of the members present and voting decide otherwise. Annex III, F (no longer of use after Namibia's acquisition of independence) provided that decisions on reports and petitions concerning the South-West African Territory (today Namibia) under South African administration were to be made with the qualified majority. More recently, a proposal was presented, again within the meaning of Article 18, para. 3, that the qualified majority is required also for resolutions which repeal a previous resolution, but it was rejected by the Assembly.

For the discussion on this proposal, carried out during the Assembly session of January 16, 1992, see A/46/PV.74. Actually, even if it was formulated in general terms, the proposal concerned a specific case being examined by the Assembly. Its aim was to make more difficult the adoption of a draft resolution which, owing mainly to the insistence of the United States, revoked res.no. 3379-XXX of November 10, 1975. Under this latter resolution zionism was to be considered as a form of racism. The draft was then approved by a wide majority (111 votes in favour, 25 against and 13 abstentions) and became res. 46/86.

The most important problem concerning the vote procedure is whether the list of questions contained in Article 18, para. 2 is exhaustive or is only a list of examples. If the list is exhaustive, the Assembly may decide by a two-thirds majority only on the questions listed, except, obviously, for the possibility of creating an additional category on the basis of para. 3, i. e. for the possibility of deciding that in future all resolutions of a certain kind and

with a certain purpose, will be voted on by the two-thirds majority. If, on the contrary, it is held that para. 2 contains only a list of examples, the Assembly may decide *in individual cases* (and therefore without resorting to para. 3) whether a question is important and whether it should be voted on with the qualified majority.

The practice has followed this second interpretation. In a number of cases (the last one occurred in 1998, when the Assembly voted on the question of equitable representation and increase in the membership of the Security Council, and related matters) the Assembly has decided that a certain resolution, not included in the list, was to be considered important and to be voted on by the two-thirds majority. Moreover, in making this decision it has a number of times stated that it did not want to be bound for the future by para. 3. This has led the organ to behave differently, and without any substantial justification, in identical cases. For example, in the first session, in 1946, it was decided that the two-thirds rule was to apply to the request for an advisory opinion of the International Court of Justice, because the request was connected to another draft resolution requiring this majority. During the fourth session, in 1949, the simple majority was proposed and accepted although the same connection existed. In another example, simple majority and greater majority were adopted at different times for resolutions concerning non-self-governing territories (Article 73 of the Charter).

The Assembly's tendency to endorse the view that the list in para. 2 is not exhaustive has often led to perplexity and opposition within the organ itself. Therefore, while it is to be excluded that the practice has given rise to an *ad hoc* customary rule, it will be useful to investigate what is the acceptable interpretation from an objective point of view.

For the question of the representation in the Security Council see res no. 53/30 of November 23, 1998, adopted by the General Assembly after two days and a half of heated debate on the reform of the Security Council (GAOR, 53rd sess., 63-66th meets.). The resolution, after a reference to Chapter XVIII of the Charter (which already states that a two-third majority is needed for the approval of amendments to the Charter) says that the Assembly "determine not to adopt any resolution or decision on the question of equitable representation on and increase in the membership of the Security Council and related matters without the affirmative vote of at least two third of the members of the General Assembly". Of course, from the legal point of view we are discussing here, the determination contained in the resolution is important as far as the "equitable representation and related matters" are concerned, since the increase in membership, needing an amendments to the Charter, is already covered by chapter XVIII, Article 108.

For the practice concerning the case of the request for opinions of the International Court of Justice, see GAOR, 1st sess., 2nd part, Pl.meet., p. 1048 ff. and 4th sess., Pl. meet., 270th meet., n. 126 ff. The details of the cases concerning non self-governing territories were the following. Up until the eighth Assembly session, in 1953, draft resolutions concerning information about non-self-governing territories were voted on by the two-thirds majority. On the contrary, in the eighth session, the Assembly decided for the simple majority, as proposed

by Mexico (cf. GAOR, 8th sess., Pl. meet., 459th meet., no. 6 ff. and partic. no. 35 f.). In the 11th, 12th, and 13th sessions, the Assembly again adopted the two-thirds rule, amidst the protests of Mexico and of other States (cf. GAOR, 11th sess., Pl. meet., 657th meet., no. 1 ff., Pl. meet., 722nd meet., no. 14 ff.; 12th sess., Pl. meet., no. 1 ff.). Subsequently, the voting was once again by simple majority: cf., for example, resolutions 35/27 of November 11, 1980, 36/50 of November 24, 1981 and 37/30 of November 23, 1982 on the question of East Timor, adopted respectively by 58 votes to 35, 54 votes to 32, and 50 to 36.

For other cases in which it was discussed and decided each time whether a question was to be voted by the two-thirds majority, cf., again as an example, GAOR, 16th sess., Pl. meet., 1043rd meet., nos. 6-25 (the Assembly decided to vote by two-thirds majority on a draft resolution presented by Czechoslovakia on the effects of atomic radiation. The draft was considered as not approved since it received only a simple majority); GAOR, 20th sess., Pl. meet., 1385th-1390th, 1400th, 1405th, 1407th and 1408th meet. (here it was decided to apply the simple majority rule to a draft resolution, which then became res. no. 2105-XX of December 20, 1975, on the observance of the Declaration concerning the independence of colonial peoples). For other information on the practice, see SALERNO, *art. cit*., p. 312 ff.; see also, further on this paragraph, regarding the question of Chinese representation.

Textual arguments have been used to reach conclusions on this subject. For example, in favour of the view that has had the widest following in practice, i.e. in favour of the opinion that the list of questions in para. 2 is a pure catalogue of examples, the English text of the article has been cited. In introducing the list with the phrase "The questions [the important questions to be decided by the two-thirds majority] shall include:..." the text would let it be understood that the Assembly is free to consider other questions as important. On the contrary, others have made reference to the French text, which introduces the list with the phrase "Sont considerées comme questions importantes:...", a phrase which would seem to support the exhaustive nature. In fact no textual argument can lead to a certain conclusion. The same must be said for those who, once again in favour of the opinion that the list contains only examples, put emphasis on the fact that para. 2 says: "Decisions... on important questions shall be made by a two-thirds majority... These questions shall include...". If the qualified majority were to apply only to the questions listed, they say, para. 2 would speak directly of the questions to be decided by the two-thirds majority, as there would be no practical necessity for qualifying them as important. If, then, para. 2 adopts this terminology, this implies that the Assembly is free to declare the importance of other questions and decide them by the two-thirds rule. To the contrary, it can be said that such a serious problem cannot be resolved by discussions over whether or not a phrase is superfluous.

In our opinion, despite the prevailing tendency in practice (followed also by the United Nations Secretary-General Perez de Cuéllar: cf.: *Memorandum* of November 4, 1985 in *UNJY*, 1985, p. 130 f.) and notwithstanding the respective strengths of the textual arguments, the view to be preferred is the one holding that the list in para. 2 is exhaustive. This is for a reason of

systematic interpretation, that is, a connection which must exist between para. 2 and para. 3 of Article 18. If the list were not exhaustive, and the Assembly could decide on a case-by-case basis whether a question was to be voted by a two-thirds majority, would there still exist the need to have the procedure under para. 3 which entails adding, in the future, other categories of questions to be decided by two-thirds majority? If para. 3 has a purpose, it can only be that of avoiding the Assembly's decision on a case-by-case basis. The view supporting the exhaustive nature of the list is also confirmed in the preparatory works. They reveal that the procedure under para. 3 was considered the *only* acceptable procedure for extending the two-thirds majority to questions not included in the list in para. 2.

During the San Francisco Conference, it was debated whether certain questions should be included in the list in para. 2 as important questions. In some cases (for example, regarding the election of the Secretary-General) it was decided not to do so also because the Assembly would have always been able, on the basis of para. 3, to later add the question to the list. In these discussions, mention was never made of the possibility of the Assembly voting by the two-thirds majority on questions not listed in para. 2 or not added under para. 3. (Cf. UNC.I.O., vol. 8, p. 364 ff., partic. p. 389 f. and p. 510 ff.).

The procedure provided by para. 3 needs to be given a closer look. On the basis of this procedure, as we have said, the Assembly may decide that in the future all questions belonging to the same category shall be decided by two-thirds majority. May the Assembly, after having introduced a certain category, eliminate it later? The question is a very delicate one and is the pivot around which the whole interpretation of Article 18, para. 2 and 3, revolves. In our view, it would be difficult to hold that once a category had been added to the list of questions to be decided by two-thirds majority, it could not be eliminated. If this were so, Article 18, para. 3, would acknowledge that the Assembly had the power to modify the Charter by simple majority, in derogation of the provisions of Articles 108 and 109 on amendments and review; moreover, resort to Articles 108 and 109 would be necessary whenever the necessity was felt to restore the simple majority system for the additional category. Although this view has been held, such a rigid system cannot be attributed, in the absence of an express prevision to para. 3.

One could object that admitting the revocability of a category under para. 3 would come into conflict with our opinion in favour of the exhaustive nature of the list in para. 2. It could be said: If the Assembly has the power to introduce and eliminate categories, does this not mean that it is then free to act on a case-by-case basis? Does it not mean that it is ultimately free, even if only through the creation or elimination of a category, to decide each time whether or not to vote by the two-thirds rule? And is this not the conclusion

reached by those who deny the exhaustive nature of the list? Such an objection has to be rejected for the following reason. In speaking of categories, para. 3 *authorizes the Assembly to make only general and abstract decisions*. According to the purpose of para. 3, a category cannot be *introduced* for contingent reasons and with regard to individual cases, nor can it be *eliminated* for contingent reasons and with regard to individual cases. It may be introduced and eliminated only with a well-pondered and generally motivated measure. For example, the measures with which the Assembly has introduced several additional categories in its own rules of procedure — measures which have been mentioned above and which all-in-all represent the only serious examples of application of para. 3 — respond exactly to these requirements. On the contrary, the rule of the case-by-case basis, even if disguised under the *form* provided by para. 3, does not constitute an application but rather a violation of this paragraph. And such violation involves violation of the rights of the minority. "We should not change the rules in the middle of the game", the United States delegate correctly observed in the 39th General Assembly session in 1984 (A/39/PV.98, sess. of December 12, 1984, p. 1792) in strenuously but unsuccessfully opposing a decision made by the organ that all resolutions, and their relative amendments, on the question of apartheid would require from then on a two-thirds majority vote. In fact, the decision had clearly been proposed and was adopted for the sole purpose of preventing a United States amendment, which had just been introduced, from being voted on by a simple majority.

Another example of resort to para. 3 to disguise a decision on a specific case was the one, above reported, of the proposal regarding resolutions repealing previous resolutions, a proposal put forward for the sole purpose of making the repeal of the declaration on zionism more difficult. In this case, however the proposal was not successful.

The situation is, then, identical to that of rules of procedure of collective bodies, for example the rule of procedure of the General Assembly or of the Security Council (see § 96), of Parliamentary rules of procedure, and so on. There is no doubt that, just as they are issued by the majority, rules of procedure can be modified by the same majority. However, it is necessary that the modification be general and abstract and that it be made only after an examination of the reasons that objectively make it necessary. On the contrary, the view cannot be held that the majority, which has the power to modify a rule of procedure, may also not apply it in individual cases. The individual failure to apply would constitute a violation of the rules of procedure and mean violation of the rights of the minority.

In conclusion, the Assembly practice, which tends to establish case by case whether a certain question not included in the list in para. 2 must nevertheless be voted by a two-thirds majority, is illegal. Under the Charter, the

Assembly may adopt the two-thirds rule for a question not included in the list only through the procedure described in para. 3, deciding in a general and abstract way that all the questions of a certain kind shall in the future be decided by the two-thirds majority. Such decision could then later be revoked but always in a general and abstract way.

Once again to show its illegality, separate mention should be given to the attitude taken by the Assembly regarding the voting procedure on the question of Chinese representation, before the question was resolved in favour of Communist China (see § 19). Until the 15th session (1960), the problem had never arisen as to what majority should be required to vote on the Communist proposal aiming to substitute Mao's delegates for those of Chiang-Kai-Shek in the United Nations. On the other hand, until that time the States favouring Formosa had constituted the great majority in the Assembly. At the 16th session, in 1961, a draft resolution was presented for the first time (by the United States together with other countries) and approved. The draft decided "in conformity with Article 18 of the Charter" that "any proposal to change the representation of China is an important question". At the 20th session, in 1965, the Assembly confirmed the 1961 resolution, expressly deciding that "this resolution is still valid". Similar confirmation occurred in subsequent sessions up until November 20, 1970. On that date, the proposal to substitute the delegates of Communist China for those of Nationalist China received for the first time a simple majority of the votes cast (51 in favour, 49 against, and 25 abstentions) but was not adopted owing to the decision that had made the Chinese question an important question to be decided by the two-thirds majority (cf. GAOR, 25th session, Pl. meet., 1913th meet.).

It is not clear whether with the 1961 resolution the Assembly intended to introduce a category under para. 3 of Article 18, or if, in conformity with the practice that had always been followed and starting from the assumption that the list in para. 2 is a mere catalogue of examples, it had intended to take a decision limited to the session underway. Nor was this uncertainty cleared up in the subsequent practice. The fact that the Assembly felt the need several times in a row to confirm the two-thirds rule testifies for the latter solution, since the procedure in para. 3 has unlimited efficacy in time. Considering, however, that the resolutions after 1961 seemingly had the character of restatements ("the 1961 resolution is still valid"), resort to para. 3 is conceivable. In any case, whether the first or the second interpretation is the right one, Article 18 was not respected. If the Assembly intended to act on the basis of para. 2, its action would be in contempt of the exhaustive nature of the list of important questions. As for para. 3, this authorises the introduction of "additional categories of questions" to be decided by the two-thirds rule. It is clear that the Chinese question could not be considered a category but an individual specific case (exactly as Albania held several times: cf., for one of its last statements, GAOR, 25th sess., Pl. meet., 1913th meet., no. 24), and that the treatment given by the Assembly to the Chinese question shows exactly that para. 3 has no other function than that of guaranteeing the general and abstract nature of Assembly decisions on the voting procedure.

The resolutions which considered the Chinese question important are the following: Res. December 12, 1961 (1668-XVI); November 17, 1965 (2025-XX); November 29, 1966 (2159-XXI); November 28, 1967 (2271-XXII); November 19, 1968 (2389-XXIII); November 11, 1969 (2500-XXIV) and November 20, 1970 (2642-XXV). For the debate in the XVI session in 1961, see GAOR, Pl. meet., 1080th meet.

An altogether different problem (on this, see § 19) is whether the Chinese question, in involving the Charter provisions on admission and expulsion, could be decided by an Assembly resolution, no matter whether it was passed by a simple majority or by a two-thirds majority.

One final point needs to be discussed. Up to now the rules which the Assembly should follow when it is faced with a question *not included in* the enumeration in para. 2 have been examined. It may occur, however, as it has occurred, that the Assembly is faced with question over which there is *some doubt* as to whether it belongs to one of the listed categories: a question that some members believe belongs to the list and others believe does not. The problem has arisen, for example, of whether a draft resolution stating that a certain State "should" be admitted to the UN, or another one recommending that the Security Council re-examine its policy on admission, belonged to the category "admission of new members to the United Nations" (a category which clearly concerns specific admission of a given State, and therefore the resolutions governed by Article 4 of the Charter). It has been also asked whether in the category "suspension of the rights and privileges of membership" there could be included the case of an invitation, made by the Assembly to the Member States, to renounce the right to present opinions to the International Court of Justice in the exercise of its advisory function; whether there belonged to the category "recommendations with respect to the maintenance of international peace and security" decisions relating to the inalienable rights of the Palestinian people or those on the aggressive and peace-threatening policy of Israel; whether there belonged to the category of "budgetary questions" the decision to qualify certain expenses as ordinary expenses under Article 17, if such qualification was made in the abstract, before the expenses were incurred and actually noted in the budget; whether, again concerning "budgetary questions", there were to be included the mere setting of criteria for allocation of the financial burden among the Member States or regarding travel allowances for Secretariat officials, and so on. In these and in similar cases, the Assembly has always held that it could decide (by simple majority) whether a question was included in the enumeration in para. 2. In our opinion this is a classic problem of interpretation of the Charter and the considerations we made about the power of the UN organs to interpret the Charter (see § 6) should be applied: the interpretation given by the General Assembly to para. 2 in a concrete case is not binding for the Member States and may be challenged by any of them.

For the practice cited, cf. GAOR, 6th sess. (1951-52), Pl. meet., 370th meet., no. 77ff (question of the admission of new members); 10th sess. (1955), Pl. meet., 541st meet., no. 126 ff. (renunciation of the right to present opinions to the Court); 25th sess. (1970), Pl. meet., 1921st meet., no. 74 ff. (question of the inalienable rights of the Palestinian people; *ivi*, no. 25, protests of the Israeli delegate that the Assembly had decided to vote by simple majority); 21st sess. (1966), Pl. meet., 1492nd meet., no. 17 ff. (qualification of the expenses of the Capital Development Fund as ordinary expenses); 27th sess., A/PV.2108 of December 13, 1972 (principles on the sharing of expenses); 28th sess., A/PV.2206 of December 26, 1973 (travel allowances for officials); 39th sess., A/PV.101 of December 14, 1984 (aggressive policy of Israel). In this last case, the United States, in maintaining that para. 10 of a draft resolution

against Israel (which then became res. 39/146A) should come under the category of resolutions regarding maintenance of peace, was first opposed to the question of the applicability of the two-thirds rule under Article 18, para. 2, being put to the vote. Resolutions on the maintenance of the peace, the US delegate said, are, under para. 2, to be adopted by a two-thirds majority and the Assembly *cannot* decide otherwise without violating the Charter:. This view was correct. Immediately afterwards, however, the United States accepted "in a spirit of accommodation" that the Assembly decide on the preliminary question, and the organ decided by simple majority (69 in favour, 28 against, with 23 abstentions) that the two-thirds rule should not apply to the cited para. 10. Para. 10 was then adopted with 69 votes in favour, 39 against, and 26 abstentions, in clear violation of para. 2 of Article 18.

33. C) *Approval by "consensus".*

BIBLIOGRAPHY: see § 28.

The practice of consensus has already been dealt with in treating the voting procedure in the Security Council, and there is no need to resume the discussion. Worthy of mention here is the fact that in the General Assembly more often than in the Security Council States, while participating in the adoption of a measure by consensus, expressly reserve their position regarding some parts of it. Even if this can be explained by the large number of States sitting in the Assembly and therefore by the impossibility of reaching really unanimous decisions, it certainly does not lead us to consider the practice of consensus as entirely commendable. It is indicative that some important or even historical Assembly resolutions adopted by consensus, such as resolutions no. 3201 S-VI of May 9, 1974 and 3202 S-VI of May 16, 1974 on the new international economic order, stand out for the number and the quality of the reservations expressed against them (see § 97).

Section II

MAINTENANCE OF THE PEACE: FUNCTIONS OF THE SECURITY COUNCIL

49. *Chapters VI and VII of the Charter.*

BIBLIOGRAPHY: HERNDL, *Reflections on the Role, Function and Procedures of the Security Council of the UN*, in *RC*, 1987-VI, p. 322 ff.; PETROVIC, CONDORELLI, *L'ONU et la crise yougoslave*, in *AF*, 1992, p. 32 ff.; DUPUY (P.M.), *Sécurité collective et organisation de la paix*, in *RGDIP*, 1993, p. 617 ff.; DURCH (ed.), *The Evolution of UN Peacekeaping: Case Studies and Comparative Analysis*, New York, N.Y., 1993; HAHLBOHM, *Peacekeeping im Wandel: die friedenssichernden Einsätze der Vereinten Nationen nach dem Ende des Ost-West-Konflikts*, Frankfurt am Main, 1993; WHITE, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, Manchester, 1993; BROWN, *The role of the United Nations in Peacekeeping and Truce-Monitoring: What Are the Applicable Norms*, in *RBDI*, 1994, p. 559 ff.; FERENCZ, *New Legal Foundations for Global Survival: Security Through the Security Council*, Dobbs Ferry-New York, 1994; DINSTEIN, *The Legal Lessons of the Gulf War*, in *ZöRV*, 1995, p. 1 ff.; ORTEGA CARCELÉN, MARTÍN, *Hacia un Gobierno Mundial. Las nuevas funciones del Consejo de Seguridad de Naciones Unidas*, Salamanca, 1995; RATNER, *The New UN Peacekeeping*, New York, 1995.

Chapters VI (Articles 33 ff.) and VII (Articles 39 ff.) lay down the functions of the Security Council, the organ assigned by the Charter "the primary responsibility for the maintenance of international peace and security" (Article 24). Since the end of the Cold War and the fall of the regimes in Eastern Europe, this organ has once again become active (as it was in the very early years of the life of the United Nations). Chapter VI is dedicated to the peaceful settlement of disputes. Aside from some provisions (Articles 34 and 35) which govern general aspects of Council activities, and therefore within the systematic order of the Charter must be linked not only to the other provisions of Chapter VI but also to the provisions in Chapter VII (see §§ 50-51), Chapter VI regulates the Council's exercise of a merely conciliatory function. Chapter VII concerns "action" for the maintenance of the peace; it assumes that the peace has been breached or threatened and enables the Council to adopt a series of measures to restore peace, which may or may not involve the use of armed force.

The different features of Security Council actions on the basis of either Chapter VI or Chapter VII may be summarised as follows.

First, the peaceful settlement function under Chapter VI deals with matters that only potentially could disturb the peace and is performed with regard to a dispute or situation "the continuance of which is likely to endanger the maintenance of international peace and security" (cf. Articles 33, 36, and 37). By contrast, Chapter VII concerns crises that are underway, specifically

the existence "of a "threat to the peace", a "breach of the peace", or an "act of aggression" (cf. Article 39).

Secondly, the protagonists of the relationships governed by Chapter VI are, more than the Council itself, the parties to the dispute, or the States involved in a situation potentially prejudicial to the peace. Given its role of peacemaker, the Council has only the function of urging the States involved so that the endangering disputes or situations may be settled. However, such settlement remains a matter that is completely dependent on the will, and therefore on the agreement, of the States directly concerned. It is not by chance that Article 33, the opening article of Chapter VI, places in the foreground the obligation on the parties to the dispute to resolve it by peaceful means. Vice versa, in the cases envisaged by Chapter VII, the main role belongs to the Council. Most of its actions, far from requiring the co-operation of the States (or the groups fighting within a country) who are the authors of the crisis, are directed against them. What is important is rather the obligation of the other States to co-operate to make effective the measures decided upon for the maintenance of the peace (the breaking of diplomatic relations, economic blockades, use of force, and so on).

The different degree of gravity of the situation to be dealt with and the different role played by the Council is reflected in the instruments the Council has available on the basis of either chapter. The typical act through which the pacific settlement function under Chapter VI is performed is the recommendation (cf. Articles 36 and 37) which is without binding force. By contrast, Chapter VII, while providing for the possibility of recommendations, is characterised by the Council's power both to issue decisions (cf. Article 41), that is, acts binding the States they address, and to adopt resolutions of an operational nature (Article 42), that is, resolutions with which the Council does not address the States but decides itself to undertake certain actions (on operational decisions, see § 92). Moreover, the conciliation function cannot, owing to its nature, be carried over into resolutions which acquire a sanctioning nature with regard to one or more States. Whereas the imposing of sanctions against States which breach or threaten the peace is the typical measure governed by Chapter VII.

Lastly, the whole conciliatory function of the Council is subject to the exception of domestic jurisdiction set out in Article 2, para. 7, an exception that the framers of the Charter had originally put exactly at the end of the provisions of Chapter VI (see § 47). Vice versa, according to the same Article 2, para 7, the exception is not admissible when the Council takes enforcement measures on the basis of Chapter VII. In fact, in recent times, the Council has mainly acted with regards to domestic affairs and mainly for humanitarian reasons (see § 55). Obviously, the exception of domestic jurisdiction is not admissible even as far as the Chapter VI is concerned, when the Council

intervenes in situations for which, as we saw, the limit of domestic jurisdiction has been superseded in practice.

Ascertaining whether a Council intervention comes under Chapter VI or Chapter VII also has practical consequences from the point of view of Article 27, para 3. According to this paragraph, it is only when confronted with a draft resolution that is within the framework of Chapter VI that a Member State of the Council, which is directly and individually affected by the resolution, is obliged to abstain from participating in the vote (see § 27).

These differences can serve as a starting point. As will be made clear from an analysis of the rules on the peaceful settlement function under Chapter VI and from the rules of Chapter VII, a very sharp dividing line between the two groups of provisions cannot be drawn. There are cases where Council interventions under Chapter VI may be mixed with interventions governed by Chapter VII (for example, Chapter VII also contains, in Article 39, conciliatory action: see § 56). In cases of this kind, the exact classification of a Council resolution in one chapter or the other can only be the result of careful interpretation aimed at establishing which of the distinguishing features outlined above are mainly present.

Often in the past Council resolutions did not indicate the articles in the Charter, or even the chapters, on the basis of which they have been adopted. In recent times this cases have considerably diminished, although not disappeared, since the Council often declares that it is acting under .Chapter VII. It still may happen, for instance**,** that the grounds for the decisions are connected to one chapter, while the operative part is within the framework of another. It may happen, for example, that the Council decides upon measures not involving the use of armed force of the kind governed by Article 41, but in the preamble to the resolution it avoids stating the existence of a threat to the peace or a breach of the peace and qualifies the situation in which it is intervening with terms that bring it within the situations covered by Chapter VI. It would be out of place, given the highly political nature of the Council functions, to treat the contradiction between the grounds and the operative part in the light of formal criteria... borrowed from administrative law, and conclude, or only raise doubt, that it is the cause of the illegality of the resolution! The only problem foreseeable is that of the exact classification of the act under Chapter VI or Chapter VII. In classifying an act, the operative part is more important, since it is the part of the act that will have practical effects. One could in fact adopt, as a valid criterion for any resolution, the rule that the act is characterised by its operative part and that examination of the grounds may help only if the operative part leaves open doubt as to whether it belongs under Chapter VI or Chapter VII.

It is also of utmost importance to note that in recent times the Council has adopted a series of resolutions, (such as the authorisation of the use of

force by States, institution of criminal tribunals, administrations of territories, etc.) which can hardly fit into one or other Article. A legal examination of such cases will ascertain whether sufficient practice has been established in order to justify the conclusion that customary rules have arisen within the UN system. The issue will be treated in the framework of Chapter VII.

50. *The power to seize the Council.*

BIBLIOGRAPHY: KELSEN, *The Law of the United Nations*, London, 1950, p. 372 ff.; JIMENEZ DE ARECHAGA, *Voting and the Handling of Disputes in the Security Council*, New York, 1950, p. 47 ff.; CAVARÉ, *Les sanctions dans la cadre de l'ONU*, in *RC*, 1952, I, p. 263 ff.

Article 35 (a general provision that can refer to any function of the Security Council) grants all States the power to seize the Council. Under para. 1, the Member States may come before the Council, bringing to its attention any dispute or any situation which might lead to international friction. Under para. 2, non-Member States may also seize the Council although with certain limitations, and specifically they can only bring to its attention a dispute to which such State is a party and provided that it states its intention to settle the dispute peacefully.

Although it is included among the provisions on the Security Council functions, Article 35 is also concerned with the power to bring a matter before the Assembly. This is further evidence that it has the nature of a quite general rule.

Worth mentioning also is Article 37, which does not merely provide an option but creates a true obligation to seize the Council. This obligation is incumbent on the parties to a dispute who have failed to settle the dispute between themselves through peaceful means. Since, however, it is an obligation pertaining only to the conciliation function of the Council, it would be better to discuss it with regard to such function (see § 52.). The same can be said about Article 38, which provides for the possibility that all parties to a dispute agree to bring it before the Council, in which case certain limits, which should be inherent to the conciliation function of the organ, do not apply.

Matters may also be brought before the Council by the General Assembly and by the Secretary-General.

The Assembly "may call the attention of the Security Council to situations which are likely to endanger international peace and security" (Article 11, para. 3). The Secretary-General may bring to its attention, under Article 99, "any matter which in his opinion may threaten [in the French text: "mettre en danger"] the maintenance of international peace and security". The two provisions, taking into account the reference to situations that may endanger, as well as threaten the peace, are rules of general applicability: the

Assembly and the Secretary may turn to the Council both when they believe that a matter requires action under Chapter VII and to request the conciliation function under Chapter VI.

At the request of the Secretary-General the Council has several times undertaken the examination of very important cases, for example, the Congolese crisis in 1960 (see § 59), the Cypriot crisis in 1947 (see Doc. S/11339), and the crisis resulting from the capture and detention of hostages in the United States Embassy in Tehran in 1979 (see Doc. S/13646).

The power of the General Assembly to seize the Council is also provided for by Article 11, para. 2 (first part). According to this provision, the Assembly, after having discussed a question regarding maintenance of the peace, may make recommendations to the Council concerning such questions. The other rule in Article 11, para. 2 (last part), which requires that the Assembly refer to the Council any question "on which action is necessary", more than being concerned with procedure, confirms the Assembly's lack of competence to perform functions of the kind envisaged in Chapter VII (see § 63).

When the States, the Assembly or the Secretary-General act on the basis of the above-cited provisions, the Security Council *must meet*. This can be understood from the letter and spirit of the norms themselves. Article 3 of the Council's rules of procedure strictly conforms to these norms. It requires the President to call a meeting of the organ whenever it is requested under Articles 35, 11 and 99.

Obviously, this concerns only the convocation of the organ. Once it has met, the Council must ascertain whether the conditions necessary for the exercise of its functions exist. If the conditions do not exist, it will not include the matter referred to on its agenda. It may be said that the Council President is authorised to carry out a *prima facie* investigation to exclude cases that are of manifest inadmissibility, for example, cases that have already been rejected by the Council and presented again within a very short time without any change of circumstances. This is all the more true since it is customary in the Council for the President to consult all the members before calling a meeting.

Article 2 of the rules of procedure considers separately the case where a meeting of the Council is requested by a Member State of the organ, and also requires that the President call the meeting. This provision is independent from Article 3 which, referring to all the UN Member States, already includes the requests of members of the Council. In the first place, Article 2 is relevant mainly when the Council is already considering a question, included on the agenda, and it is only a matter of moving forward or postponing meetings that have already been decided upon or of urging the President in the event that the Council has entrusted him with convening at his discretion for subsequent meetings. Moreover, according to the interpretation given to Article 2 in practice, the request of a Council member takes away from the President the

above mentioned power of *prima facie* investigation: he is in any case obligated to convoke the Council.

For the practice concerning convocation, cf. SC Rep. (and subsequent supplements) *sub* Chapter I, part. I. An exemplary case regarding Articles 2 and 3 of the rules of procedure can be found in SCOR, 20th year (1965), 1220th meet, p. 3 ff. In this meeting, the President stated that he had convoked the Council to examine the situation in the Dominican Republic (a situation that had for some time already been placed on the Council agenda by the Socialist States who maintained that it was a situation likely, owing to the presence of United States troops in the territory, to endanger the peace), despite the fact that the preliminary consultations he had held with the majority of the Council members were *prima facie* in the sense that the meeting was useless. At the insistence of a member of the organ (the USSR), he felt he was obligated to convene the meeting. Cf. also: SCOR, 21st year (1966), 1276-77th meet. (protests of the United States, Great Britain and other countries over the President's delay in calling a Council meeting on the Rhodesian question); Doc. S/14683 of September 10, 1981 and A/15699 of September 18, 1981 (containing, respectively, the formal request for convening a meeting of the Council, on the basis of Article 35 of the Charter and of Article 3 of the rules of procedure, by Guatemala for examining their dispute with the United Kingdom regarding the territory of Belize, and the formal protest by Guatemala that a Council meeting had not been called); Doc. S/PV.2977 (Part I) of February 13, 1991 (protest by Cuba for the failure to call a Council meeting concerning the Gulf War — the Council had not met for 28 days since the outbreak of hostilities — despite the request by several members).

We should emphasise that convocation of the Council is one thing and the Council's performance of its functions is another. The latter includes the ascertainment of the conditions (for example, real danger to the peace) necessary to be able to undertake action, and such ascertainment may have positive or negative results.

The confusion between these two moments gave rise to a strange debate in the very early years of the United Nations, during the examination of the Iranian question. It was asked whether, since Iran had seized the Council under Article 35, para. 1, to protest against the stationing of Russian troops on its territory, but then had stated that it had reached an agreement with the Soviet Union, the Council could, in spite of this, keep the question on the agenda, as the majority wanted. The problem of the legality of the majority decision was approached, both within the organ and in a memorandum of the Secretariat, in the sense that it would have to be established whether the Council... could act *ex officio* or would have had to defer to the decision of the State which had requested the meeting! The fallacy of such an approach is clear, and it is clear that it is useless to pose a problem of *ex officio* action if it is true, as it is true, that the Council may always be activated by a single State and therefore, even more so, by the majority of its members. The only question that in this particular case should have been asked was whether, an agreement between the parties having been reached, international peace and security were still in danger. It concerned the *objective* conditions for carrying out the functions of the Council.

For references to the documents, see § 25. Cf. also SC Rep. *sub* Chap. II, part. IV, case no. 56.

a State which closes its frontiers to an investigation must at least furnish an adequate reason for doing so.

In the light of the Charter, therefore, the refusal of Albania, Bulgaria and Yugoslavia in the above-cited case cannot be condemned. The same is to be said, again in the light of the Charter, of Israel's refusal in 1968 to allow entry in the occupied Arab territories to a representative of the Secretary-General, who had been entrusted, by res. no. 259 of September 27, 1968, with the task of investigating the living conditions and the security of inhabitants (on this case, see *UNMC*, 1968, Oct., p. 3).

Quite a different question is whether the refusal of a State to open its territory to, and to fully co-operate with, the investigating organs can be considered by the Council as a threat or a violation of international peace according to Article 39 and engendering enforcement measures within the framework of Chapter VII.

Various resolutions recently adopted against Iraq, which demand the opening of the territory to, and full co-operation with, UN inspectors in order to investigate its programme of development of weapons of mass destruction, can be cited in this respect. The last and most important one is res. 8.11.2002 n. 1441 which warned Iraq that it would face "serious consequences" if co-operation with the inspectors was refused or incomplete.

52. *The peaceful settlement function under Chapter VI.* A) *Factual Conditions*.

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402 ff.; MURPHY, *The Conciliatory Responsibilities of the United Nations Security Council*, in *GYIL*, 1992, p. 190 ff.

According to Articles 33, 36 and 37, the peaceful settlement function applies to "disputes or situations the continuation of which is likely to endanger the maintenance of international peace and security".

It is difficult to say where exactly the difference lies between dispute and situation. The preparatory works do not shed any light on the matter. As far as the definition of "situation" is concerned, the starting point is the fact that even a situation must be such as to endanger the peace. Consequently, a situation must have *as a minimum* the following characteristic: on the one hand, the claim of one or more States that others act in a certain way (either at the international level or, for cases where the limit of domestic jurisdiction does not exist, at the domestic level), and, on the other, the refusal to act in this way. The questions that have been brought before the Council up until now have all had this characteristic. However, demand and refusal (or resistance) are the classic elements of an international dispute, and one could therefore be tempted to say that, for purposes of the peaceful settlement function, a distinction between dispute and situation does not exist. In favour of this conclusion, one could note: firstly, that the States, in seizing the Council, usually speak of a situation even when they are clearly bringing their own very special disputes; secondly, that the Council has hardly ever been concerned with the difference; thirdly, that even the legal doctrine which has sought to examine the topic is abundant with theoretical observations but miserly with practical examples; and, lastly, that the classic notion of international dispute is so broad as to be able to take in any matter brought before the Council (see, on this point, § 27). Perhaps all that can be concluded, in simply adopting a quantitative criteria, is that in a dispute a claim to the effect that others act in a certain way comes from one or from few States, whereas in a situation (especially in the case of a domestic situation in a country) there are more or many States or even the entire international Community involved. The necessity that in any case there are opposing parties is found in the spirit of Chapter VI and, more simply, in the very fact that the function of the Council is limited to settling disputes.

It would be mistaken to identify *situations* with the attitude taken by a State in the sphere of domestic jurisdiction. In the first place, a dispute between two given States may also touch upon matters of domestic jurisdiction, for example, the treatment of a minority in the light of the treaties in force between the two States. Secondly, when a domestic situation, for example, a situation arising from the failure to respect human rights, is not brought to the attention of the Council by a State or by a group of States but by the General Assembly or by the Secretary-General, there can still be identified a group, perhaps a very large group, of States, or even a group composed of all the States, who are pressing to have the situation settled.

When we speak of domestic situations, we speak of situations for which the limit of domestic jurisdiction does not exist, or does not exist any more (see § 45 III). Of course, other domestic situations cannot be dealt with by the Council under the provisions of Chapter without infringing Article 2, para. 7, of the Charter.

Besides being fleeting, the difference between dispute and situation is also of no practical use. It is true that some articles of the Charter seem to assume such differences, in that their provisions are limited to disputes. This is the case of Article 27, para. 3, last part, according to which "in decisions under Chapter VI,... [a member of the Council] a party to a dispute [under consideration by the Security Council] shall abstain from voting". Similarly, Article 32 which gives the right to participate in Council sessions to any State which "is party to a dispute under consideration by the Security Council...", and to Article 37 which, in addressing the most important competence of the Council under the peaceful settlement function, the power to enter in the merits of a question (see § 54), refers solely to disputes. However, as far as the first two articles are concerned, we have already noted in ascertaining their exact rational, that their sphere of application is ultimately completely independent from the notion of dispute (see § 27 and § 29). As for Article 37, we shall see in a moment that practice has considerably widened its scope, so as to make it useless to strive for a precise determination of the factual circumstances set out by it.

The difference between disputes and situations, for the purposes of Article 37, has occasionally been discussed in the Council, although without any practical result being reached, with the aim of establishing whether or not... the organ had to keep to the qualification of dispute or situation given to a certain case by the State bringing the issue. Cf. the cases of nationalisation of the Suez Canal and of the Indo-Pakistani dispute (which India insisted on calling a situation) at the earl stage of their dispute for the possession of the territories of Jammu and Kashmir: cf. SC Rep, Suppl. 1956-1958, sub. Chap. X, part. IV, case nos. 7 and 9.

The peaceful settlement function is limited to disputes and situations "the continuance of which is like to endanger the maintenance of international peace and security". With this redundant language, Articles 33 ff. requires that matters brought before the Council have certain gravity. The gravity may depend either on the matter being disputed, or on the means and intensity with which the States directly concerned claim to have their respective interests or points of view prevail. In any case, as can be seen in an even superficial reading of Article 33, para. 2 ("The Security Council shall...") and Article 37, para. 2 ("If the Security Council deems..."), the Council enjoys broad discretionary power in deciding whether a question actually may endanger the peace and therefore deserves to be dealt with. The only limit to the discretion of the organ is the fact that... some kind of difference, whatever it may be,

exists between the States. If there are no differences between States, the peace cannot be endangered.

Under this aspect, the behaviour of the Council in examining the already mentioned Iranian question was to be considered unlawful (see § 50). In this case, the majority decided to keep the question on the agenda although Iran and the USSR had together announced that they had resolved it by agreement, and that new elements had not appeared.

Given the discretion enjoyed by the organ in deciding whether or not a question may endanger the peace, Article 38 in the end borders on irrelevance. Under this article, the Council "may, if all the parties to a dispute so request, make recommendations... with a view to a pacific settlement of the dispute". This means that the peaceful settlement function may also have as its subject disputes that do not endanger the peace, when, and only when, all the parties (and therefore not only one of them or even a third State or the Secretary-General or the Assembly, as in the other cases: see § 50) agree in bringing the matter before the Council. It is a useless norm since the provisions regarding the peaceful settlement of endangering disputes defer to the Council the judgement as to their dangerous nature. It would be a different matter if it were held that in the case of Article 38 the Council *was obligated* to be concerned with a question or at least to place it on the agenda. However, such a view would be contrary to the letter of Article 38 ("The Council may..."). Moreover, it would be unfounded from a general point of view, since it is inconceivable that UN organs could enter positive obligations to engage in a given course of conduct (see § 13).

There is no trace of Article 38 in practice.

53. B) *Indications to the States of "procedures or methods" for settling differences that may endanger the peace.*

BIBLIOGRAPHY: see § 52.

Article 33, para. 1, which opens Chapter VI, obliges the parties to a dispute to seek a solution by peaceful means (cf. Article 2, para. 3). It indicates, by way of example, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.

Article 33, para. 2, and Article 36 give the Council the power to urge the parties to a dispute and, more generally, the States whose differences are likely to endanger the peace, to have recourse to procedures of this kind. The difference between Article 33, para. 2, and Article 36 is that the former refers to a *general* request by the Council while the latter provides that the organ

indicate which *specific* means ("procedure or method") among the ones in Article 33, para. 1, or among others of a similar nature, is appropriate for a given question. In both cases, as in the whole peaceful settlement function, the Council may issue only recommendations. Those do not bind the States to follow the recommended course of conduct.

The subjects regulated by Article 33, para. 2, and Article 36 are also dealt with in Chapter VII at Article 39. According to Article 39, the Council, faced with a threat to the peace, a breach of the peace, or an act of aggression not only may adopt enforcement measures but may also make recommendations to the States concerned, of the kind provided for in Chapter VI (see § 56). Actually, it may be difficult to establish whether a certain Council resolution comes within the framework of Article 33, para. 2, or Article 36, in that it refers to a mere dispute or situation likely to endanger the peace, or can be traced back to Article 39. It is mainly difficult to distinguish between a situation "likely to endanger the peace" and a situation that is a "threat to the peace". What criterion should be adopted in practice? In accordance with what we have said previously regarding the delimitation between Chapter VI and Chapter VII (see § 49), Article 39 covers those resolutions which indicate not only procedures or methods for settling a dispute or a situation, but also adopt one of the measures for protecting the peace set out in Chapter VII, or expressly state they are confronted with conduct of States that can be considered a threat to the peace, a breach of the peace or an act of aggression, or, again, intervene in a situation characterised by the use of military force and therefore objectively definable as a breach of the peace.

Of the two articles, Article 36 is the more important. It authorises the Council to intervene "at any stage" of a dispute or situation endangering the peace and it authorises interventions of various kinds. The most simple intervention is the indication of the procedure or method to follow to reach a settlement. It operates as an invitation to the interested States, depending on the case, to negotiate, seek a solution by mediation, submit the dispute to arbitration, and so on. In addressing the States, the Council must take into account the procedures that have already been adopted by the parties (Article 36, para. 2) and the necessity that when the disputes have a legal nature, recourse should be had to the International Court of Justice (Article 36, para. 3).

Cf., for example, the following resolutions: res. no. 2 of January 30, 1946, regarding the already mentioned Iranian question in which, once it had been ascertained that the USSR and Iran had begun negotiations, the parties were invited to continue and to inform the Council on their progress; res. no. 22 of April 9, 1947, which invited Great Britain and Albania to submit to the International Court of Justice their dispute regarding the Corfu Channel (Great Britain held Albania responsible for damage suffered by several of its ships which were passing through the waters of the Channel in October 1946, waters which had been mined by Albania; in turn, Albania claimed the violation of its sovereignty since British authorities had, in the following days, begun an operation of mine-removal; the decision was handed down by the Court on April 9, 1949, in ICJ, *Reports*, 1949, p. 4 ff.); res. no. 93 of May 18, 1951, including an invitation to Israel and to Syria to bring questions regarding the implementation of the armistice agreement of July 20, 1949 before a mixed armistice Commission, created after the 1948 war between Arabs and Israelis and consisting of representatives of the two parties; res. no. 144 of August 19, 1960, adopted in relation to the tension created between Cuba and the

United States following the coming to power of the Castro regime and recommending that the members of the Organization of American States act as a mediator between the two countries; res. no. 385 of August 25, 1976, which invited Greece and Turkey to negotiate an agreement for settling the dispute over the delimitation of their respective portions of the continental shelf, keeping in mind the competence of the International Court of Justice in legal matters; res. no. 530 of March 19, 1983, which, having expressed concern about the danger of a military clash between Nicaragua and Honduras, recommended that they resolve their disputes through the mediation of the Contadora group (Columbia, Mexico, Panama and Venezuela); res. no. 616 of July 20, 1988, which acknowledged the establishment of an ICAO Commission of investigation regarding the shooting down of an Iranian civilian aircraft by the United States naval forces in the Straits of Hormuz in 1988; res. no. 658 of June 27, 1990, no. 690 of April 19, 1991, and no. 809 of March 2, 1993, inviting Morocco and the Polisario Front to co-operate with the Secretary-General to resolve the question of Western Sahara; res. no. 1073 of September 28, 1996, calling, *inter alia*, for the immediate resumption of negotiations within the Middle East peace process (see para. 3 of the resolution).

A second kind of intervention that can come within the framework of Article 36 is when the Council does not only invite the States to have recourse to a certain procedure or method, but itself provides for such procedure or method. This is the reason for the Council's creation of subsidiary organs, which are composed in different way (by members of the organ, by Secretariat officials, by UN Member States) and which may assist the parties in settling disputes or situations. Examples of Commissions of good offices, of mediation, of conciliation, and so forth, are numerous in practice. However also in these cases, as in general in the exercise of the peaceful settlement function (see § 49), the protagonists remain the States concerned, with the Council's task that of stimulating agreement among them. The role and the powers of the Commissions created by the Council do not differ in any way from those of similar organs set up outside of the United Nations and used by the States in accordance with Article 33, para. 1.

Cf., for example, the various resolutions adopted regarding the Indo-Pakistani and Middle East questions, in periods of truce: res. no. 39 of January 20, 1948 (creation of a Commission of three members of the United Nations with the tasks of investigating and exercising "mediatory influence to smooth away difficulties" between India and Pakistan); res. no. 47 of April 21, 1948 (Commission of five UN members with functions of good offices between the parties); res. no. 107 of March 30, 1955 (invitation to Egypt and Israel to co-operate with the Chief of Staff of the UN Commission encharged with supervising the truce in the Middle East, and to discuss the situation existing along the armistice line between the two countries); res. no. 242 of November 22, 1967, adopted several months after the Israeli Six-Day War and including a request addressed to the Secretary-General to send his own special representative to the Middle East (this was the beginning of the Jarring Mission which was to last several years) to favour the pacific settlement of the question. Cf. also, and again as examples, res. no. 367, para. 6, of March 12, 1975, inviting the Secretary-General to exercise his good offices in order to reach a solution to the Cyprus question; res. no. 457, para. 4, of December 4, 1979, containing the same invitation with regard to the taking and the detention of American Embassy staff in Tehran; res. no. 765 of July 16, 1992 and no. 772 of August 17, 1992 (sending of a representative of the Secretary-General and of observers in South Africa);

res. no. 1398 of March 25, 2002, no. 1430 of August 14, 2002 and no. 1466 of March 14, 2003 (boundary dispute between Ethiopia and Eritrea).

See also the examples listed at § 51, concerning the groups of observers with functions both of mediation or conciliation and investigation.

Aside from the above mentioned cases, any recommendation, whose purpose is to facilitate agreement among the States directly concerned, can come within the scope of Article 36. The only thing that the Council cannot or, rather, should not do on the basis of Article 36 is *to enter into the merits* of questions, that is, to recommend how to resolve a given difference, to say who is wrong and who is right, or to express condemnation for certain conduct of a State and to request, as a consequence, that it cease. The power to recommend solutions on the merits (the so-called terms of settlement, as opposed to procedures and methods under Article 36) is provided by the following Article 37 and must, or, rather, should be exercised in the presence of special and more rigid conditions. We use the conditional tense because these pre-requisites have been abandoned in practice and therefore can be considered eliminated by custom (see § 54). Today the Council is completely free, when faced with a dispute or situation which threatens to endanger the peace, both to indicate procedures and methods of settlement and to recommend solutions on the merits, during any stage of the dispute or situation.

The procedures and methods of settlement under Article 36 are those, and only those, aimed at facilitating agreement among the States. It is absurd, considering the spirit of Chapter VI, to consider measures applying sanctions or involving the use of force, even as an exception and for very limited purposes, as procedures of "settlement", and to bring them within the framework of Article 36. No merit has the view, held in legal doctrine as well as in the Security Council itself, that certain resolutions, such as recommendations addressed to the Member States to adopt economic measures against given States, or resolutions to set up UN armed forces, should come within the framework of Chapter VI and in particular of Article 36. This view holds that such resolutions would not come completely within the cases governed by Article 41, regarding economic sanctions, and Article 42, on measures involving the use of force. It is often said that the Council acts in these cases in between Chapters VI and VII. As we shall see, this view has been upheld in the Council for political reasons but is legally untenable (see §§ 58 and 59).

54. C) *The indication of "terms of settlement".*

BIBLIOGRAPHY: see § 52.

Recommending "terms of settlement", that is, suggesting to the States how to settle, *in the merits*, a given dispute, certainly comes within the framework of the peaceful settlement function. The powers of the Council on the subject are provided by Article 37.

As in the case of Article 33, para. 2, and Article 36, there is a problem of co-ordination of Article 37 with Article 39, which also authorises the Council to recommend solutions on the merits. The criterion for distinguishing the recommendations that come within Article 37, on the one hand, and Article 39 on the other, is the same criterion which should be used in order to distinguish between Article 39 and Article 33, para. 2 and Article 36. On this point, see § 56.

Article 37 contains, first of all, at para. 1, a provision of a procedural nature. This provision substitutes for the generic term *may* (which refers to the *right* of every State, on the basis of Article 35, to bring a matter before the Council: see § 50), a precise *obligation* of the parties to a dispute likely to endanger the peace to refer it to the Council. This obligation arises only when the States are not able to settle the dispute by the means indicated by Article 33, para. 1 (and in spite of possible recommendations made by the Council on the basis of Article 33, para. 2, and Article 36). In other words, it arises only when the possibility of an agreement between the parties proves to be unrealistic.

In disputes brought before the Council in this way, the Council may intervene, under para. 2 of Article 37, by recommending terms of settlement (in the French text, "termes de règlement"), and thus make proposals on the merits, deciding who is wrong and who is right, indicating the reciprocal concessions that the parties must make in the interests of peace, expressing condemnation of a given State conduct, such as, for instance, the gross and systematic violation of human rights, and then requesting that it ends.

Article 37, para. 2, also says that the Council may, instead of entering in the merits, decide to take action... under Article 36. The indication of this second possibility is redundant, since it is already stated, in very broad terms, by Article 36 itself.

In the Dumbarton Oaks proposals, no mention was made of the Council's power to recommend terms of settlement (cf. para. 4 of Chapter VIII, sec. B, corresponding to the present Article 37). However, the Sponsoring Powers themselves proposed it at the San Francisco Conference (see U.N.C.I.O., vol. 12, p. 181).

Article 37 subjects the power to enter in to the merits of questions to the following conditions: the existence of a dispute; recourse to the Council by the parties to the dispute (or at least by one of them); the proven

impossibility of reaching agreement between the parties through the means available under Article 33, para. 1.

Literally, para. 1 of Article 37 seems to require that *all* the parties to the dispute have recourse to the Council. However, during the proceedings of the San Francisco Conference, the possibility of a unilateral recourse was explicitly and unanimously allowed: see U.N.C.I.O., vol. 12, p. 47.

The phrase "should the parties to a dispute... fail to settle it by the means indicated" in Article 33 does not mean that all these means (negotiation, mediation, conciliation, arbitration, etc.) must be attempted before the Council intervenes! It is enough that, given the circumstances, an agreement between the parties is not foreseeable.

Cf., in this sense, the intervention of the Egyptian delegate during the examination by the Council, in 1947, of the dispute between Egypt and Great Britain regarding the presence of British troops in Egyptian territory. In protesting against a draft resolution (then not adopted) which stated (clearly for purposes of delay) that "the means of settlement provided by Article 33 of the Charter have not been exhausted", the Egyptian representative pointed out the impossibility that the Charter could require prior resort to these means *cumulatively* considered (see SCOR, 2nd year, 193rd meet., p. 2165 f.).

It is useless to dwell on the conditions required by Article 37 for the Council to recommend terms of settlement. As all commentators usually point out, the Council practice, except for very rare cases, has clearly tended, since the early years of the United Nations, to give the organ a great amount of freedom on this matter. The Council has entered into the merits of questions, without encountering significant opposition of a procedural nature by the States involved, whenever it has wished to do so. It has done so in questions submitted to it as "situations" rather than as "disputes", with regard to cases that were not brought before it by one of the parties to the action, and, finally, without being concerned with investigating if resort to the means under Article 33 was effectively impossible, but even intervening in the initial stage of a dispute. Consequently, it is possible to say that, owing to a custom, the power to indicate terms of settlement under Article 37 exists within the same broad limits with which Article 33, para. 2, and Article 36 grant the power to recommend and to indicate procedures or methods of settlement. Such custom has given the peaceful settlement function, a function which by nature does not adapt very well to procedural limits, a remarkable degree of effectiveness. Indeed, the provisions of Chapter VI on the peaceful settlement function are uselessly and inexplicably long-winded. Would it not have been sufficient to lay down in general terms the Council's power to recommend how States should act in the case of situations likely to endanger the peace? That is exactly what the customary rule which has developed from the practice does!

Examples of resolutions indicating terms of settlement (sometimes together with procedures or methods of settlement) can be found, first, in the practice on the Middle East question, in periods of truce. Cf. res. no. 42 of March 5, 1948 (regarding implementation of the partition plan for Palestine prepared by the General Assembly with res. no. 181-III of November 29, 1947); res. no. 89 of November 17, 1950 (on the regulation of passage of Beduins through the demilitarised zone); res. no. 95 of September 1, 1951 (recommendation to Egypt that the restriction on traffic through the Suez Canal be eliminated); res. no. 242 of November 1967 (indicating some general points for the solution of the Middle East question, such as the withdrawal of Israel from the Arab territories occupied during the Six-Day War in the summer of 1967, the reciprocal obligation to respect territorial integrity, the freedom to navigate in international waterways in the region, etc.); and, more recently, no. 607 of January 5, 1988, no. 608 of November 14, 1988, no. 636 of July 7, 1989, no. 672 of October 12, 1990, no. 681 of December 20, 1990, no. 694 of May 24, 1991, and no. 699 of June 17, 1991 (obligation of Israel to respect, in the Arab territories, the rules on belligerent occupation and to end the deportation of Palestinian civilians). Various times, then, terms of settlement, and, in particular, the necessity of plebiscites under the aegis of the United Nations, have been proposed to India and Pakistan in order to settle their territorial disputes (cf., for example, res. no. 47 of April 21, 1948, no. 80 of March 14, 1950, no. 91 of March 30, 1951, no. 122 of January 24, 1957). With regard to other questions, cf. for example, res. no. 3 of April 4, 1946 (withdrawal of Russian troops from Iranian territory); res. no. 138 of June 23, 1960 (invitation to Israel to "make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law" to Argentina for the abduction of the Nazi criminal Eichmann by Israeli agents in Argentine territory); res. no. 226 of October 14, 1966 and res. no. 241 of November 15, 1967 (request that Portugal take appropriate measures so that its territory would not become a base of operations for mercenaries on their way to the Congo); res. no. 264 of March 20, 1969 (invitation to South Africa to withdraw from the territory of Namibia); res. no. 278 of May 11, 1970, incorporating a report of the Secretary-General, favourable to granting full independence to the Bahrain Islands, and the consequent rejection of the claims of Great Britain and Iran to exercising form of "protection" over such islands; res. no. 348 of May 28, 1974 (invitation to Iran and Iraq to... carry out the agreement concluded by the two States to resolve their border disputes); no. 457, para. 1, of December 4, 1979 (request to the Iranian government to immediately free staff of the American Embassy in Tehran); no. 573 of October 4, 1985 (request for compensation for damage caused by Israel in an attack on Tunisian territory); no. 637 of July 27, 1989 (approval of the agreement of Guatemala City of August 7, 1987 for peace, democratisation, reconciliation, development and justice in Central America); no. 649 of March 12, 1990 and no. 774 of August 26, 1992 (settlement of the Cypriot problem through a bi-municipal and bi-zonal federation between the Greek and Turkish communities); no. 731 of January 23, 1992, asking the Libyan government to agree to the request of the governments of the United States, Great Britain and France for co-operation in ascertaining responsibility for the terrorist attacks on the PAN AM 103 and UTA 772 flights, and, in particular, to deliver to these governments two Libyan citizens considered responsible for the attacks; no. 825 of May 11, 1993 (invitation to the People's Republic of Korea to respect the Treaty on the Non-proliferation of Nuclear Weapons); no. 1044 of January 31, 1996 (calling upon the government of Sudan to extradite to Ethiopia three suspects wanted in connection with the assassination attempt on the life of the President of Egypt occurred in Addis-Abeba); no. 1117 of June 27, 1997 (again on the settlement of the Cypriot problem trough a single bi-municipal State).

Many of the above listed resolutions did not fulfil the procedural requirements set forth in Article 37.

55. *Action with respect to maintenance of the peace under Chapter VII. General remarks.*

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Chapter VII covers the most important powers of the Security Council, which should serve the purpose of the maintenance of world order. It constitutes the basis for the adoption of enforcement measures regarding States responsible for breaching the peace and even for the establishment of armed forces in the service of the United Nations. The collective security system, as the powers given by Chapter VII to the Council are called,

functioned poorly and rarely up until the fall of the Berlin Wall, owing to the Cold War and the reciprocal veto's of the Soviet Union and the permanent Western members. Starting with the Gulf War, however, this system has had a second life and has once again become important. At the present time the Council actions taken on the basis of Chapter VII are the most relevant and important UN activities, in accordance, moreover, with what had been the idea of the framers of the Charter. Although the period of veto is not definitively over, particularly as far as large and important crises are concerned, the number of resolutions providing for very limited interventions of the Security Council under Chapter VII is, however, still impressive.

One of the main features of the current action of the Security Council on the basis of Chapter VII is the intervention in a State's domestic affairs. This could be where a civil war is going on or a massive violation of fundamental human rights has occurred or where a post-conflict situation arises which needs the assistance to the local authorities.

Another important feature is the increasing number of measures which are taken by the Council without any justification in the light of the provisions of the Charter. Often, in taking such measures, the Council expressly states that it is acting in the framework of Chapter VII since a threat or a breach of the peace has occurred. In examining this practice from a legal point of view, it is necessary to ascertain whether the practice can be somehow fitted into one of the provisions of the chapter, even broadly interpreted, and, if not, whether it has brought about a customary rule or it must simply be considered as illegal even if politically understandable. In the following pages we will firstly examine the provisions of Chapter VII and the related practice and then consider the practice which has no basis in such provisions.

55 *bis*. *The determination of a threat to the peace, a breach of the peace, or an act of aggression.*

BIBLIOGRAPHY: See § 55. *Adde*: DELBRÜCIK,, *The Fight Against Global Terrorism : Self-Defense or Collective Security as .international Policy Action ?*, in *GYI*L, 2001, p. 9 ff; ZAMBELLI, *La constatation des situation de l'article 39 del Chartedes Nations Unies, ecc*., Bâle, 2002;CHAN, *La notion de pouvoir discrétionnaire appliqué aux organizations internationals*, in *RGDIP*, 2003, p. 535 ff.

Under Article 39, the first article in Chapter VII, the exercise of the powers set out under the article presumes the existence of a threat to the peace, a breach of the peace or an act of aggression.

In determining whether or not, in a specific case, there exists a threat to the peace, a breach of the peace, or an act of aggression, the Security

Council enjoys broad discretionary power ("The Council", Article 39 simply states, "shall determine the existence...", etc.). This discretionary power may be exercised especially with regard to the hypothesis of "threat to the peace". This is actually a very vague and elastic hypothesis which, unlike aggression or breach of the peace, is not necessarily characterised by military operations or operations involving the use of armed violence. It therefore covers the widest range of behaviour by a State. As a threat to, or a breach of, the peace, domestic situations become important, both with regard to conduct of the State itself (for example, the Council may hold, as it did in the case of South Africa and of Southern Rhodesia, that a generalized policy of racial discrimination constitutes a threat to the peace: see § 58) and with regard to a civil war situation in which a State, that is, a legitimate government, is no longer identifiable, but there are only factions fighting among themselves (as was the case of the intervention in the Congo in 1960 and is the case of the intervention in Somalia in 1992: see 59). Indeed, as we have already seen, one of the salient features of the present stage of interventions by the Council on the basis of Chapter VII is the humanitarian nature of the intervention and the lack of a distinction between international war and civil war. Of course, for this whole subject, the exception of domestic jurisdiction is not admissible. First of all, this exception is expressly excluded by Article 2, para. 7, last part, with regard to decisions concerning enforcement measures. Secondly, also for the other decisions that come within Chapter VII, decisions which, as we shall see, consist mainly of recommendations governed by Article 39 (see § 56), the limit of domestic jurisdiction has been eliminated in the practice with regard to situations in which human rights are at stake (on this point, see § 45 III).

The Council enjoys, then, a very wide discretionary power. At the San Francisco Conference, various proposals were made that the Charter be more detailed with regard to the conditions for the applicability of Chapter VII and, in particular, that it define aggression or at least list a certain number of typical cases which would justify an intervention by the Council. There was also clear concern that wide discretion of the organ could be detrimental to small or middle-sized States, possibly targeted by the Council, whereas the major powers, shielded by their right of veto, would have nothing to fear even in the event of their being in the position of the accused. However, it was easy to object that the opening of such issues would have brought the Conference to a standstill, especially if one took into account the precedent of the heated and fruitless debates that had characterised the attempts at defining aggression in the League of Nations in the period between the two world wars (on these debates, see STONE, *op. cit.*, p. 27 ff.) So, in the end, the present wording of Article 39 was preferred, with the stated purpose of allowing the Council to decide how to act on a case by case basis (cf. U.N.C.I.O., vol. 12, p. 505).

The discretionary power of the Council, as laid down by Article 39, has remained integral even after the adoption by the General Assembly, with res. no. 3314-XXIX of December 14, 1974, of a Declaration of principles (on the characteristics of this kind of act, see § 94) on the definition of aggression. The Declaration, issued after several years of work by a special Committee, lists a series of cases of aggression. They range from military invasion or occupation, even if temporary, to bombardment by land, sea or air forces, to the blockade of ports or coasts, to the sending of bands of mercenaries or to a State allowing its territory to be used for attacks against another State's territory (so-called indirect armed aggression), and so on. This is a list that does not affect Article 39 and the powers of the Security Council. Indeed, the Declaration recognises that the Council may, taking into account the circumstances of each specific case, conclude that the commission of one of the acts listed does not justify its intervention (Article 2); that the Council may consider other acts not listed as aggression (Article 4); and that, more in general, the definition of aggression contained in the resolution shall not prejudice the functions of UN organs as they are provided for by the Charter. This being the situation, it is useless to raise the problem (which in any case would have to have a negative answer) of whether the Assembly has the power to bind the Council on this matter.

A committee of 15 Member States for the study of aggression had been appointed by the General Assembly already in 1950 with res. no. 688-VII and was enlarged in 1954 to 19 members. However, its activity came to an end in 1957 because it proved impossible to reach an agreement. Only in 1967, with res. no. 2330-XXII which created a new Committee composed of 35 members ("Special Committee for the Definition of Aggression") was work resumed. The work's successful conclusion in 1974 was due also to the fact that many controversial points were eliminated rather than resolved and that, ultimately, the Declaration defines and specifies only the most simple, although the most serious, form of aggression, i.e., armed aggression. The final report of the Special Committee appears in GAOR, 29th sess., Suppl. no. 19.

Is the Council's broad discretion unlimited? Perhaps some limits may be deduced from the overall system. Let us distinguish between a situation characterised by military operations and, more in general, by the use of military force — whether this occurs abroad (international war) or within a country (civil war) does not matter — and a situation characterised by conduct which, although serious, does not involve armed violence (for example, the violation of human rights).

In the first case, since the use of military force is in itself at least a threat to the peace, the only limit that the Council may meet can be drawn *implicitly* from the principle of individual or collective self-defence provided for by Article 51. The Council may not consider as a threat to the peace, a breach of the peace, or an act of aggression the use of armed force in

individual or collective self-defence, and intervene against a State which is defending itself or against States which are helping it to defend itself. This, however, is a rather theoretical limit if self-defence is restricted, as Article 51 restricts it, to the hypothesis of a reaction to an "armed attack" ["aggression armée" in the French text]. It is unthinkable, and it has never happened, that the Council has taken action against States... which had been attacked and had defended themselves. It would be a different matter if we were to accept the view favourable to preventive self-defence, or the view that every State could resort to the use of force against grave violations of international law such as gross violations of human rights (humanitarian interventions) or complicity in terrorist activities or in drug traffic. Similar views, usually upheld by the stronger States, in particular by the United States and their closest allies, but never accepted by the weaker ones, are unfounded in the light of Article 51.

Article 51 restricts, without possibility of misunderstanding, the use of force in self-defence to the very specific case of the reaction to an armed attack; that is, of an attack that has already been launched by one State (with regular forces, or, under the above-cited 1974 Declaration on the definition of aggression, with irregulars or mercenaries of equivalence strength) against another State. Only in this case could an act of self-defence not be considered as a threat to the peace or breach of the peace for purposes of the application of enforcement measures.

Article 51 speaks of both individual and *collective* self defence. The latter refers to cases in which the reaction to an armed attack comes not only from the State that has been attacked but also from third States. Collective self defence was introduced at San Francisco to give room to the reciprocal assistance agreements that at the time were being drawn up on the American continent (cf., the Act of Chapultepec of March 3, 1945, in AJ 1945, Suppl. p. 108 ff.) and that later were to proliferate with the establishment of regional organizations such as NATO, OAS, and so on. (The organized collective self-defence action under Article 51 must not be confused, however, with the collective measures that a regional organization may take under the direction of the Security Council in accordance with Article 53, para. 1; see, on this point, § 67).

The views that self-defence would justify preventive attacks, or attacks aimed at saving human lives (attacks with humanitarian purposes) or at counter-acting States encouraging terrorism (for example, the bombing of Libya by the United States in 1986, the air war of NATO against the Republic of Yugoslavia during the Kosovo crisis in 1999, which lasted about three months, the war against Afghanistan in October/November 2002, the war against Iraq in 2003) or illegal drug traffic (the invasion of Panama by the United States in 1989 and the resulting removal of General Noriega), have no basis in the Charter. The prohibition of the use of force, in fact, is expressed by Article 2, para. 4, in a way such as not to tolerate exceptions beyond the ones in Article 51. Moreover, at San Francisco, the absolute character of the prohibition of the use of force was clearly confirmed, apart from the exceptions provided by other rules of the Charter (see U.N.C.I.O., vol. 6, p.

334 and 400). Also the practice is against such theories. For example, in 1951 the Security Council, pointing out the absence of an armed attack, rejected Egypt's view that its measures restricting the passage of ships directed toward Israel through the Suez Canal were justified as self-defence (see SCOR, 6th year, 550th meet., ff.). Likewise, it has always rejected Israel's and South Africa's attempts to justify attacks against neighbouring States with the view that such attacks were reactions to *threats* to their territorial integrity. UN practice, in short, has never endorsed a notion of self-defence other than the one in Article 51 (cf., on this point, COMBACAU, *op. cit*., p. 22 ff. and see, especially, res. no. 487 of 19 June 1981, condemning Israel for the bombing of nuclear plants in Iraq)), and recourse to this notion in the other above-mentioned cases has always been used by States which, for however powerful, remain a minority group.

For the full discussion in the Council on the possibility of interpreting the American bombing of Libya in 1986 as self defence, cf. the documents S/PV.2674 of April 15, 1986 and S/PV.2674, 2680 and 2682. A draft resolution condemning the bombing obtained the majority of nine votes necessary for the adoption of a resolution, but it was blocked by the veto of the U.S., Great Britain and France (cf. S/PV.2682). On the Kosovo, Afghanistan and Iraq wars, see §§ 60 and 67.

The doctrine of preventive self-defence is now contained in the document entitled "The National Security Strategy of the United States of America" (the so-called Bush Doctrine) officially presented by the President of the United States to the Congress in September 2002 and conceived as a reaction to the brutal terrorist attack on the Twin Towers on September 11, 2001. According to this document, preventive self-defence will be exercised by the United States whenever it is deemed necessary in order to prevent an imminent threat of attack with weapons of mass destruction or terrorist acts. The Bush doctrine has been condemned or criticised by many States and also by the Secretary General of UN before the General Assembly (see GAOR, 58th sess., Pl. Meet., September 23, 2003). It is not law but a rough and arrogant expression of force.

The reaction against terrorism should not consist of the use of armed force *against a State*, involving the death of innocent people but rather in the adoption of preventive and repressive measures against the individuals committing or organizing such crimes. Worth noting is the fact that, even after September 11, the Security Council, acting in the framework of Chapter VII, only requested the States to take a series of measures, including financial measures, against individuals and groups of individuals, like Al Qaida. The Council never authorised the war conducted by the Unites States and their allies in Afghanistan (see § 60). It is true that in some resolutions which adopted such measures (particularly in res. no. 1368 of September 12, 2001

and no. 1373 of September 28, 2001) it is stated, among the "whereas", that the Council "reaffirms the inherent right of individual or collective self-defence as recognised by the Charter of the UN..."; however, this statement must be read in the context of the measures against terrorists as listed in the resolutions; it cannot be interpreted as authorising a war, since any time the Council has wanted to authorise the use of armed force by States it has done so expressly.

Regarding the "imminent" threat of the use of weapons of mass destruction, it is known that this *casus belli* was relied upon by the United States and United Kingdom at the time of the war to Iraq in 2003. However, it is also well known that the war was condemned by the overwhelming majority of the other States, even when it had not yet been ascertained that the weapons of mass destruction...did not exist.

Those who tend to extend the lawfulness of the use of force beyond the case of self defence against armed attack usually emphasise the deficiencies in the collective security system provided for by Chapter VII. In particular, they emphasise the possibility that the Security Council can be paralysed by the exercise of the veto. They say that if the Charter guarantees such paralysis by allowing the right of veto, it cannot be interpreted in the sense of prohibiting a State from using any other possibility of defending itself beyond the provision of Article 51. In fact such an observation is not decisive for purposes of increasing the cases of self defence but rather gives us the opportunity to ask whether there can be drawn from Article 2, para. 4, on the prohibition of the use of armed force, and from Article 51 itself, real obligations and rights that can be invoked by the States between themselves, outside of the institutional framework of the United Nations. In other words, it seems to us that in such a vital subject, as is maintenance of the peace, the Charter must be seen *only* as a set of rules regulating certain powers of the organs. In this perspective, Article 51 should not come into play as a norm sanctioning a right of the States, but rather as a norm which places a limit on the power of the Security Council to adopt enforcement measures against a State on the basis of Chapter VII. If, then, the Council is paralysed, this means that the Charter, including Article 51, has exhausted its function.

More interesting, from a legal viewpoint, is the other hypothesis, that is, the one in which the situation brought to the attention of the Council is not characterised by military operations, whether international or internal. Considering the vague and elastic nature of the notion of threat to the peace, and taking into account the fact that the enforcement measures of Chapter VII fall outside the exception of domestic jurisdiction, the Council could consider, as a threat to the peace and therefore subject to enforcement measures, any conduct whatsoever, either within or outside a State, such as the adoption of a certain political regime, a treatment of the economic interests of aliens that is not in conformity with international standards, the closing of ports to foreign ships, the refusal to extradite criminals, and the like. All this does not make much sense. Then, what is the criterion for establishing the limit beyond which the Council cannot go? In our view the conduct of a State cannot be

condemned by the Council, and cannot therefore be subject to enforcement measures, *when the condemnation is not shared by the opinion of most of the States and their peoples*. A limit of this kind can be implicitly found in Article 24, para. 1, which provides that the Security Council acts "in the name" of all UN members. Even if this provision does not place any limit on the mandate given to the Council, it cannot be thought that the UN members wanted to give the Council carte blanche. Mainly, however, such limit can be found in those principles in the preamble to the Charter and in Article 1 which bind the United Nations to pursue justice and co-operation among people. Justice alone, as an absolute value, does not say much when it is referred to an organ such as the Council which is a political and not a judicial organ. It acquires, by contrast, an unquestionable relevance if it is anchored in something real such as the opinion of the majority of States.

The possibility that the Security Council can consider certain situations as a threat to the peace which are not so considered by the majority of States can more easily occur today owing to the present hyper-activity of the Council. During the Cold War things were different. Indeed, at that time, only twice did the Council take action, with enforcement measures under Chapter VII, in situations not characterised by military operations. We are referring to res. no. 232 of December 16, 1966 and no. 253 of May 5, 1968 against Southern Rhodesia and no. 418 of November 4, 1977 against South Africa. These resolutions were adopted to penalise the apartheid policy of these two States (see § 58). In both cases it certainly cannot be said that the decisions of the Council did not correspond to the common opinion of the majority of the States especially if we consider the numerous resolutions adopted by the General Assembly specifically to induce the Council to take decisive action.

As for the new phase which opened with the end of the Cold War and which began with the resolutions against Iraq, some doubt may already arise regarding the legality of some of the decisions or parts of the decisions taken by the Council. This is the case of res. no. 687 of April 3, 1991, which put an end to the Gulf War, establishing a series of conditions for the cease-fire between Iraq on one side and Kuwait and its allies on the other. Resolution no. 687 was based expressly, as nearly all the other resolutions against Iraq, on Chapter VII. Since it was passed when the Iraqi armed aggression had been driven back, all the decisions contained in it postulate that a threat to the peace is implicit in the subsequent conduct of Saddam Hussein's government. For some parts of the resolution, it is doubtful whether this ascertainment corresponds to the general opinion of the States. In particular, Part E of the resolution which requires Iraq to pay compensation for the damage caused by the invasion and the unlawful occupation of Kuwait, and to accept that this damage be evaluated by a special Commission encharged with managing a compensation fund (cf. also subsequent res. no. 692 of May 20, 1991, which set up the Fund and the Commission and res. no. 705 of August 15, 1991, which set the minimum amount due from Iraq at 30% of the annual value of its oil exports). Part F, para. 22, of the resolution concerns the obligation to pay the compensation. Under this part, Iraq's failure to accept this would result in maintenance of the embargo (under Article 41 of the Charter) on Iraqi exports ordered by previous res. no. 661 of August 6, 1990 (see § 58). The only possible interpretation of Part E and Part F, para. 22, of the resolution is that refusal to pay compensation for war damages — compensation which, incidentally, finds little precedent in practice — constitutes a threat to the peace. Exactly such an interpretation does not seem to correspond to what is generally thought in the international community.

Another action of the Council over which there may arise some doubt as to the legality of the Council's own ascertainment of the existence of a threat to the peace, is contained in res. no. 748 of March 31, 1992. This imposed on the States the blocking of air communication with Libya and an embargo on the supplying of aircraft and weapons to that country. The resolution, expressly based on Chapter VII (and coming within the framework of Article 41: see § 58), justified these enforcement measures both by the fact that Libya had not agreed to the request of the United States, Great Britain and France to hand over two of its citizens accused of having taken part in acts of terrorism which led to the destruction in flight of two planes belonging to PAN AM (flight 103) and UTA (flight 772) and by the fact that Libya had not yet completely ended its participation in terrorist acts or in giving assistance to groups of terrorists. The resolution also provided (at para. 3) that sanctions were to be applied until the Council had ascertained that Libya had put an end to its refusal to hand over the two suspected terrorists and to its involvement in terrorist activities. It is evident that the resolution (subsequently reaffirmed and enlarged by res. no 883 of November 11, 1993) started (as it would have to start, under Article 39) from the assumption that participation in terrorist acts and the refusal to hand over presumed terrorists constitutes a threat to the peace. The first point meets no objection: a State which encourages international terrorism may well be considered, according to international *communis opinio* (various times also expressed by the General Assembly), as threatening the peace among nations, and may well be subject to sanctions until it has shown that it has changed its mind. By contrast, serious doubts may arise over the part of the resolution which considered the failure to extradite Libyan citizens as a threat to the peace, and made the ending of sanctions contingent upon the ending of this behaviour of the Libyan government. It is questionable whether the failure to extradite two criminals may actually, according to general opinion, be considered a threat to the peace. This is all the more so in that, under the Montreal Convention of September 23, 1971 on the suppression of unlawful acts against the safety of civil aviation, which was applicable to the case and under international customary law, a State which detains a person presumed responsible for acts of terrorism is free to choose between extradition to other States for punishment or to prosecution and trial before its own judicial authorities (the *aut dedere aut judicare* principle). The sanctions were suspended in 1999, after the transfer of the accused to Netherlands to appear before a Scottish court setting there (see res. of the Security Council no. 1192 of August 27, 1998 and the Statement by the President of the Security Council on Lockerbie suspects of April 8, 1999, in ILM, 1999, p. 949) and were abolished in 2003 (res. no. 1506 of September 12, 2003) after the settlement of the dispute between Libya, the United States and the United Kingdom.

The same must be said of res. no. 1054 of April 26, 1996 which decides that all States must significantly reduce the Sudanese diplomatic and consular staff in their territories and restrict the entry to, or the transit through, their territories of Sudanese officials, due to the refusal of Sudan to extradite to Ethiopia three suspects wanted in connection with the assassination attempt against the President of Egypt (see § 58). See also res. no. 1070 of August 16, 1996 which, for the same reasons, imposes to all States an air traffic blockade against the Sudanese airlines. All these measures have been terminated once the Sudan decided to comply with the said resolutions (see res. no. 1372 of September 28, 2001).

The discretionary power of the Security Council has no other limitations. The opinion has been expressed in legal literature that the Council must abide by general international law, in particular by the rules of *jus cogens*. In our opinion no such limit exists as far as the determination of a threat to the peace, a breach of the peace or an act of aggression is concerned. The framer of the Charter did not express such a view; on the contrary, Article 1, par. 1 of the Charter limits the respect of international law to the UN

function of settlement of disputes. A different question is whether the application of enforcement measures under Articles 41 and 42 of the Charter must comply with general international law (on this question see §§ 58 and 59). The same question arises with regard the measures of governance of territories (see § 60 *bis*). .

56. *The measures provided for by the Charter. A) Recommendations under Article 39.*

BIBLIOGRAPHY: see § 55. *Adde*: STARITA, *Processi di riconciliazione nazionale e diritto internazionale*, Napoli, 2003.

Article 39 provides that, when faced with a threat to the peace, a breach of the peace or an act of aggression, the Council may either decide what enforcement measures to take under Articles 41 and 42 or (alternatively or simultaneously) "make recommendations". As can be very clearly deduced from the preparatory works, these recommendations may be identical to the recommendations under Chapter VI. In other words, the intention in Article 39 is to confirm that, also in situations coming under Chapter VII, the Council may exercise its peaceful settlement function, indicating to the States concerned procedures and methods of settlement (like those regulated by Article 33, para. 2 and Article 36) or terms of settlement (like those regulated by Article 37). The only difference between the peaceful settlement function in Chapter VI and the one under Article 39 is procedural, in that only in the first case does the obligation exist that a directly concerned Council member must abstain from the vote (Article 27, para. 3, last part).

The content and the nature of recommendations under Article 39 were discussed in Committee 3 of Commission III of the San Francisco Conference, which was concerned with Chapter VII, sec. B, of the Dumbarton Oaks proposals (present Chapter VII of the Charter). In the final report of the Committee we read:

"In using the word 'recommendations' in Section B, as already found in paragraph 5, Section A [the latter corresponds to the present Chapter VI], the Committee had intended to show that the action of the Council so far as it relates to the peaceful settlement of a dispute or to situation giving rise to a threat of war, a breach of the peace, or aggression, should be considered as governed by the provisions contained in Section A. Under such an hypothesis, the Council would in reality pursue simultaneously two distinct actions, one having for its object the settlement of the dispute or the difficulty, and the other, the enforcement or provisional measures, each of which is governed by an appropriate section in Chapter VII" (see U.N.C.I.O., vol. 11, p. 19 and vol. 12, p. 507).

Committee 3 did not raise the problem of the voting procedure for the adoption of recommendations under Article 39. This problem was raised by the Netherlands in Committee 1 of Commission III, to which questions regarding procedure had been referred, including the so-called Yalta formula, that is, the present Article 27. The Netherlands proposed, with an

amendment to the whole of Chapter VIII, sections A and B (the amendment is reproduced in U.N.C.I.O., vol. 3, p. 325 f.), that the provision corresponding to the present Article 39 be inserted in Sec. A (today, Chapter VI) instead of in Sec. B (today Chapter VII), specifically in order to guarantee that both in deciding the existence of a threat to the peace, a breach of the peace or an act of aggression and in making recommendations, the Council would be bound by the rule, set out only with regard to Sec. A, that an interested Member State must abstain from the vote. However, the Dutch amendment was not even put to the vote, because the provision of the present Article 27, the provision agreed upon at Yalta by the Great Powers (see § 1 A), was considered unchangeable. Cf. U.N.C.I.O., vol. 11, p. 327 ff., p. 455 and p. 517. Considering the preparatory works and considering the very clear text of Article 27, para. 3, last part, which limits the obligation to abstain of the interested member to decisions under Chapter VI, it is to be excluded that the same obligation exists with regard to Article 39.

In order to establish whether a resolution which recommends procedures or terms of settlement comes under Article 39 rather than Chapter VI, the following criteria must be evaluated. First, the principle that acts of the Council must be identified mainly on the basis of their operative part (see § 49), should be applied. This means that Article 39 comprises of those resolutions which, in indicating procedures or terms of settlement, simultaneously adopt one of the other measures governed by Chapter VII (provisional measures under Article 40, measures involving or not involving the use of armed force under Articles 41 and 42). If the operative part does not allow an unambiguous identification, one must look at the reasoning and refer to Article 39 those resolutions which expressly declare that they concern a threat to the peace, a breach of the peace or an act of aggression. Lastly, one can look at the objective situation and consider Article 39 as applicable if the resolution refers to a crisis provoked by the use of military force (it does not matter whether it is in a situation of international war or of civil war) and thus objectively qualifying as a breach of the peace.

For recommendations under Article 39, as for the recommendations governed by Chapter VI, the domestic jurisdiction clause, which is excluded by Article 2, para. 7, last part, only with regard to the enforcement measures, is applicable. Obviously, the erosion that this limit has undergone in practice (see § 45 III), an erosion that has been shown specifically in civil war situations, has to be taken into account. As far as civil wars are concerned, the peaceful settlement of disputes on the basis of Article 39 particularly covers cases where some form of national conciliation is going on. The Security Council intervenes in these procedures, through the Secretary-General, in order to promote, and monitor the execution of, agreements among the different factions which have participated in the war. Normally such agreements contain provisions on the future constitutional regime of the country, the assistance of the United Nations in the democratic orientation of local institutions, in the monitoring and organizing of political elections, in the economic reconstruction of the country, and so on.

In so far as they refer to a situation that can be qualified objectively as a threat to the peace or a breach of the peace, Article 39 covers, first of all, the resolutions (on "terms of settlement") with which the Council has condemned acts of armed reprisal or actual invasions, inviting the States (or the factions) responsible not to repeat them and threatening (but then not implementing) enforcement measures in case of repeated offences. There have been a great many resolutions of this kind adopted against Israel: cf., for example, res. no. 171 of April 9, 1962, no. 228 of November 25, 1966, no. 248 of March 24, 1968, no. 256 of August 16, 1968, no. 262 of December 31, 1968 (in this case the Council also invited Israel, which had attacked the Beirut airport and destroyed several civilian aircraft, to pay appropriate compensation to Lebanon), no. 265 of April 1, 1969, no. 270 of August 26, 1969, no. 280 of May 19, 1970, no. 316 of June 26, 1972, no. 337 of August 15, 1973, no. 347 of April 24, 1974, no. 509 of June 6, 1982. Cf. also the following resolutions: no. 178 of April 24, 1963 and no. 204 of May 19, 1965, relating to armed actions of Portugal in Senegalese territory; no. 290 of December 8, 1970, which condemned Portugal for having "invaded" Guinea, and requested it to pay compensation for damage caused to the lives and to the property of the local inhabitants; no. 384 of December 22, 1975 and no. 389 of April 22, 1976, containing the invitation to Indonesia to withdraw its armed forces which had invaded East Timor; no. 387 of March 31, 1976, no. 393 of July 30, 1976, no. 428 of May 6, 1978, no. 447 of March 28, 1979, no. 454 of November 2, 1979, on South Africa's invasion of the territories of neighbouring States (Angola, Zambia, etc.); no. 1177 of June 26, 1998, urging Ethiopia and Eritrea to cease hostilities and to achieve a peaceful settlement of their dispute; no. 1339 of January 31, 2001 (on a comprehensive settlement of the conflict in Abkhazia, Georgia).

As examples of recommendations under Article 39 combined with one of the other measures governed by Chapter VII, cf., among many, res. no. 50 of May 29, 1948 and no. 338 of October 22, 1973, which, concerned with the armed conflicts between Israel and the Arab States, invited the parties to a cease-fire (a measure under Article 40) and to have recourse to mediation; res. no. 186 of March 4, 1964 which, considering the situation in Cyprus a threat to the peace, authorised the Secretary-General to establish a UN force for the purposes of preventing fighting on Cyprus territory and invited him to appoint a mediator in agreement with the Cypriot, British, Greek and Turkish governments; res. no. 425 of March 19, 1978 which, besides deciding to send a United Nations force in Southern Lebanon, requested Israel to end its military action against Lebanon; res. no. 450 of June 14, 1979, again on the Lebanese situation, containing the same request to Israel as well as an invitation to the parties to negotiate within the Armistice Commission; res. no. 502 of April 3, 1982 relating to the Falklands/Malvinas war, which "demanded" an end to hostilities and "asked" Argentina and the United Kingdom to seek a diplomatic solution to their dispute; res. no. 514 of July 12, 1982 and no. 522 of October 4, 1982 on the ending of hostilities, on the sending of observers and on recourse to the mediation of the Secretary-General, with regard to the war between Iran and Iraq; res. no. 660 of August 2, 1990 which, expressly referring to Article 39 and Article 40 of the Charter, condemned the invasion of Kuwait by Iraq, and, for the part that can be referred to Article 39, "obliged" the two countries to settle their disputes by negotiation; res. no. 674 of October 29, 1990, on the treatment of foreign citizens by Iraq; res. no. 687 of April 3, 1991 which, besides maintaining the embargo (under Article 41) against Iraq after the Gulf War, contains (in para. 3 of part A) an invitation to the Secretary-General to co-operate in the delimitation of the frontier between Iraq and Kuwait; res. no. 713 of September 25, 1991, which, besides decreeing the embargo on arms export to Yugoslavia, requested the Secretary-General to offer his assistance in reaching a definitive end to hostilities in that country; res. no. 773 of August 26, 1992, which contains an invitation to Iraq and Kuwait to co-operate fully with the Commission for the delimitation of the boundary, appointed by the Secretary-General in May 1992; res. no 1160 of March 31, 1998 (reiterated by res. no. 1199 of September 23,

1998, no. 1203 of October 24, 1998 and some others) on the achievement of a political solution of the Kosovo crisis; res. no. 1337 of March 12, 2002 and no. 1435 of September 24, 2002 (cessation of acts of violence and acts of terrorism in Palestine and in Israel; withdrawal of Israel forces from Palestinian cities occupied after September 2000); res. no. 1515 of .November 19, 2003 (endorsement of the roadmap to a Two-States solution to the conflict between Israel and Palestine).

For examples of indications of "terms of settlement" to factions in post- civil war situations, see the pertinent parts of res. no. 788 of November 19, 1992, on the situation in Liberia; of res. no. 797 of December 10, 1992, and no. 863 of September 13, 1993, on the situation in Mozambique; of res. no. 804 of January 29, 1993, no. 811 of Mars 12, 1993, no. 823 of April 30, 1993, no. 834 of June 1, 1993, no. 851 of July 15, 1993, no 922 of May 31, 1994, no. 932 of June 30, 1994, no. 945 of September 29, 1994, and no. 966 of December 8, 1994, on the situation in Angola; of res. no. 861 of August 27, 1993, on the situation in Haiti; of res. no. 1234 of April 9, 1999, no.1273 of November 5, 1999, no. 1279 of November 30, 1999, no. 1291 of February 24, 2000, and no. 1304 of June 16, 2000, on the situation in the Democratic Republic of Congo; of res. no. 1245 of June 11, 1999, no. 1270 of October 22, 1999, on the situation in Sierra Leone; of res. no. 1491, of July 7, 2003 (situation in Bosnia Herzegovina).

For the consideration of these, and other similar cases concerning the function of settlement of disputes, see STARITA, *op. cit*., p.200 ff.

It has been maintained in legal doctrine and in practice that Article 39 authorises the Council also to recommend measures like those regulated by Articles 41 and 42 (measures involving and not involving the use of armed force). Indeed, some observers hold that the power of recommendation set forth in Article 39 would exactly and exclusively serve this purpose. Aside from this last view, which must be immediately rejected in that it is clearly belied by the above cited preparatory works, the examination of the problem can be postponed to when Articles 41 and 42 will be discussed, as the interpretation of these two articles is indispensable for reaching a correct solution.

57. B) *Provisional measures (Article 40).*

BIBLIOGRAPHY: see § 55. *Adde*: FABBRI, *Le misure provvisorie nel sistema di sicurezza delle Nazioni Unite*, in *RDI*, 1964, p. 186 ff.; BAILEY, *Cease-Fires, Truces and Armistices in the Practice of the UN Security Council*, in *AJ*, 1977, p. 463 ff.; FROWEIN, in SIMMA (ED.), *Charta der Vereinten Nations*, München, 1991, p. 571 ss.

The provisional measures in Article 40 constitute the *typical* measures of Chapter VII, together with measures not involving (Article 41) or involving (Article 42) the use of armed force. Their provisional nature is related both to the aim pursued, which is only that of preventing a worsening of a situation, and to the limits placed on their content, since they must not prejudge “the rights, claims or positions of the parties concerned”.

Given these characteristics, the provisional measures were meant to be emergency measures preliminary to any other resolution adopted on the basis of Chapter VII. This is why Article 40 provides that the Council resort to them "before making the recommendations or deciding upon the measures provided for in Article 39". However, it would be out of place to say that the Council is rigidly bound from a chronological point of view. Indeed, a crisis *which is considered* as a threat to the peace, breach of the peace or act of aggression can develop over long periods of time, and with alternating turns of events, so that interventions of different intensity may be necessary at different times. The Council thus could be compelled both to adopt several measures at the same time and to again take up provisional measures also after having adopted other resolutions on the basis of Chapter VII, for example, after having recommended settlement procedures on the basis of Article 39 or after having decided upon measures not involving, or even involving, the use of armed force. Taking into account the spirit and purposes of the collective security system under Chapter VII, it does not seem that such conduct of the Council (recurrent in the practice) should be considered illegal.

Likewise, the opinion must be rejected that provisional measures are an *indispensable stage* before passing to the measures in Articles 41 and 42. The San Francisco Conference which drew up Article 40 (which does not appear in the Dumbarton Oaks proposals) unanimously agreed that neither provisional measures nor recommendations under Article 39 were to be considered as a necessary prerequisite to enforcement measures (see the already cited report of Committee 3 of Commission III, in U.N.C.I.O., vol. 11, p. 19).

The provisional measures form the object of recommendations by the Council ("The Council", Article 40 states, may "*call upon* the parties concerned to comply with such provisional measures... etc."). Once again, then, we are in the presence of acts that do not bind the parties to keep to the prescribed conduct. In legal doctrine and in practice, an attempt has been made to give a binding nature to the "invitation". Such view is linked, first of all, to a more general tendency to maintain the obligatory nature of any resolution of the Council, and especially those envisaged by Chapter VII. This is a tendency, however, that, as we shall see when we examine the acts of the United Nations in general, is not acceptable (see § 90). The same view is also based on a specific argument that would be offered by Article 40, specifically in the last part of the article, which states, "The Security Council shall duly take account of failure to comply with such provisional measures". In other words, the last part of Article 40, referring to the possibility of sanctions (under Articles 41 and 42) would make the requested conduct obligatory. Also this reasoning is not acceptable as it casts too wide a net: in fact the Security Council may duly take account of *any* conduct of a State. Neither does it seem that the terminology that the Council uses in adopting resolutions regarding

provisional measures affects their non-binding nature. Especially in recent times, this terminology denotes the intention of the organ to give its invitations an urgent nature: "The Council... urgently requests...", "... the Council... urges...", "The Council... demands..." are the formulas which occur in many resolutions coming under Article 40. It would be risky to try to take from these formulas, which certainly can be connected to the *threat of sanctions* contained in the last part of the article, an unwritten rule on their obligatory nature.

A typical provisional measure under Article 40 is the *cease-fire,* or, more generally, the cessation of acts of violence requested by the Council during international or civil wars. Considering the objective circumstances and the nature of the measure, the invitation to cease fire falls *in any case* in the realm of Article 40. If, occasionally, some of the Member States of the Council have said they were acting in the framework of Chapter VI, such intention has been necessitated by political reasons, that is, by the desire to alienate their partners involved in the crisis as little as possible. It would be absurd to maintain this from the viewpoint of a correct interpretation of the Charter.

Examples of resolutions containing a cease-fire, or the cessation of acts of violence, in international or civil wars: res. no. 27 of August 1, 1947 (Indonesian war of independence); no. 50 of May 29, 1948 and no. 54 of July 15, 1948 (Arab-Israeli conflict); no. 63 of December 24, 1948 (Indonesia); no. 92 of May 8, 1951 (Middle East); no. 104 of June 20, 1954 (Guatemala); no. 164 of July 22, 1961 (Franco-Tunisian conflict); no. 205 of May 22, 1965 (Dominican Republic); no. 210 of September 6, 1965 (Indo-Pakistani conflict); nos. 233, 234, and 235 of June 6, 7 and 9, 1967 (Israeli Six-Day War); no. 307 of December 21, 1971 (India-Pakistan); no. 338 of October 22, 1973 (Middle East); no. 353 of July 20, 1974 and no. 357 of August 14, 1974 (Cyprus); no. 502 of April 3, 1982 (Falklands-Malvinas war); no. 508 of June 5, 1982 (Lebanon); no. 514 of July 12, 1982 (war between Iran and Iraq); no. 517 of August 4, 1982 (Lebanon); no. 582 of February 24, 1986 (war between Iran and Iraq); no. 812 of March 12, 1993 (Ruanda); no 1052 of April 18, 1996 (Lebanon); no. 1097 of February 18, 1997 (Eastern Zaire and Great Lakes region); no. 1397 of March 12, 2002 and no. 1435 of September 24, 2002 (cessation of acts of violence between Israel and Palestine).

After the end of the Cold War, a cease-fire has been requested several times, together with the adoption of measures within the framework of Articles 41 and 42. Cf., for example, res. no. 713, para. 2, of September 25, 1991, no. 724, para. 7, of December 15, 1991, no. 743, para. 8, of February 21, 1992, and no. 762, para. 2, or June 30, 1992 (all on the war in the former Yugoslavia); no. 733, para. 4, of January 1, 1992, no. 746, para. 2, of March 17, 1992, and no. 767, para. 9 of July 27, 1992 (all on the civil war in Somalia); no. 788, para. 6 of November 19, 1992 (civil war in Liberia); no. 1076 of October 22, 1996, 1193 of August 27, 1998 and 1214 of December 8, 1998 (civil war in Afghanistan); no 1199 of September 23, 1998 (civil war in Kosovo); no. 1227 of February 10, 1999 (war between Ethiopia and Eritrea).

It is not always easy to distinguish between an invitation to apply a provisional measure and a recommendation on "terms of settlement" (within the meaning of Article 39 or Article 37), as the former may consist in a partial

settlement of the question which set off the crisis. A framing within Article 40 should be preferred when the predominant purpose of the resolution is not to aggravate the situation.

Aside from resolutions on cease-fires, the following resolutions can be considered as indicating provisional measures: those which, in the case of civil wars or wars of independence, urge the liberation of political prisoners (for example, res. no. 63 of December 24, 1948 on the war in Indonesia); or those which invite States not involved in an international or domestic conflict not to support the parties in conflict and not to furnish them with armed troops or war materials (for example, res. no. 50 of May 29, 1948 on the Middle East, no. 104 of June 20, 1954 on the domestic situation in Guatemala, no. 61 of February 21, 1961 and no. 169 of November 24, 1961 on the domestic situation in the Congo and inviting the States not to send mercenaries and not to introduce weapons in Congolese territory); or those which request the withdrawal of foreign troops from territories in a state of civil war (for example, res. no. 143 of July 14, 1960 with a request to the Belgian government to withdraw its troops from the Congo); or, lastly, those which request one of the States involved in a war to withdraw its own troops to certain positions (for example, res. no. 660 of August 2, 1990, expressly based on Articles 39 and 40, which "demanded" that Iraq withdraw its forces to the positions occupied on August 1, 1990).

Sometimes the Council has made only a general appeal, addressed to all the States, which also can be referred to Article 40, to... not aggravate a situation. It did so, for example, in 1971 in relation to the Indo-Pakistani conflict (res. no. 307, para. 2, of December 21, 1971).

As a provisional measure can also be considered the one contained in res. no. 250 of April 27, 1968, which requested Israel, in order not to aggravate tension with Jordan, not to hold a military parade set for the following May 2 in Jerusalem. The reason Israel relied upon in order to justify, in this specific case, non-performance, is unacceptable. According to its view the resolution involved a matter of Israeli domestic jurisdiction (cf. SCOR, 23rd year, 1417th meet.). As we have already seen, measures under Article 40 in any case fall outside the exception of domestic jurisdiction (see § 47).

58. C) *Measures not involving the use of armed force (Article 41).*

BIBLIOGRAPHY: see § 55. *Adde*: RUZIÉ, *Les sanctions économiques contre la Rhodésie*, in *Journal du droit international*, 1970, p. 20 ff.; DOXEY, *Economic Sanctions and International Enforcement*, London, 1971; SKUBISZEWSKI, *Recommandations of the UN and Municipal Courts*, in *BYB*, 1972-73, p. 353 ff.; BROWN-JOHN, *Multilateral Sanctions in International Law. A Comparative Analysis*, New York, 1975.; ZICCARDI CAPALDO, *Le situazioni territoriali illegittime nel diritto internazionale*, Naples, 1977, p. 99 ff.; DAVID, *Les sanctions économiques prises contre l'Argentine dans l'affaire des Malouines*, in *RBDI*, 1984/85, p. 150 ff.; WILLAERT, *Les sanctions économiques contre la Rhodésie (1965-1979)*, *ivi*, p. 216 ff.; JOYNER, *Sanctions, Compliance and International Law: Reflections on the UN Experience Against Iraq*, in *Vanderbilt Journal of International Law*, 1991, p. 1 ff.; CONFORTI, *Non-Coercive Sanctions in the UN Charter: Some Lessons from the Gulf War*, in *EJIL*, 1991, p. 110 ff.; BURCI, *L'azione del Consiglio di Sicurezza delle N.U. nella crisi del Golfo*, in *CI*, 1991, p. 278 ff.; MARTIN-BIDOU, *Les mesures d'embargo prises à l'encontre de la Yougoslavie*, in *AF*, 1993, p. 262 ff.; LOPEZ MARTIN, *Embargo y bloqueo aéreo en la práctica del Consejo de Seguridad: del conflicto del Golfo al caso de Libia*, in *ReD*, 1994, p. 39 ff.; DAHMANE *Les measures prise par le Conseil de Sécurité contre les entités non-étatiques*, in *Afr J*, 1999 p. 55 ff; ALABRUNE, *La pratique des comites des sanctions du Conseil de Sécurité depuis 1990*, in

AF, 1999, p. 226 ff; STARCK, *Die Rechtsmässigkeit von UNO-Wirtschafssanktionen, ecc,* Berlin, 2000; De HOOG, *Attribution or Delegation of (Legislative) Power by the Security Council ? The case of the UNTAET*, in *International Peacekeeping*, 2001, p. 7 ss.; CRAVEN, *Humanitarianism and the Quest for Smarter Sanctions*, in *EJIL*, 2002, p. 43 ff.; ELLEN O'CONNELL, *Debating the Law of Sanctions, ibid*., p. 63 ff.; BENNOUNA, *Les sanctions économiques des Nations Unies*, in *RC,* 2002, vol. 300, p. 13 ff.

These measures definitely have the nature of sanctions and therefore are imposed *against* a State which, in the judgement of the Security Council, has broken or threatened the peace or is to be considered an aggressor. They are adopted by the Member States of the United Nations (all the members or even only some of them: see Article 48, para. 1), at the request of the Council. Article 41 speaks of complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic and other means of communication, as well as the severance of diplomatic relations. However, this list is not exhaustive, as the Council may order any other measure whose purpose is to provide a sanction and which does not involve the use of armed force. It is obvious that the *cumulative* application of all the measures listed will result in the total isolation of the State they are issued against.

Also conduct occurring only within a State may lead the Council to have recourse to the measures under Article 41, since such measures are not subject to the exception of domestic jurisdiction (see § 47). Indeed, it is especially in internal conflicts, and for the purpose of protecting the civilian population, that the Council usually intervenes. Sometimes the sanctions are even imposed by the Council against *armed* political groups. In recent times, measures not involving the use of force have been imposed on all States with regard to the fight against groups committing acts of terrorism. International terrorism is an offence against the international community as a whole, being widespread around the world. This is why the action of the Security Council is to be considered as justifiable.

Economic sanctions were also set out by the Covenant of the League of Nations, at art, 16, para. 1. However, they were, first of all, restricted to a very specific possibility, the possibility that a Member State had resorted to *war* in contempt of the Covenant provisions. Secondly, they were to be *applied automatically* by the Member States, without any decision (and therefore without exercising any discretion) by the League organs. As is well known, such sanctions were adopted against Italy during the Ethiopian war in 1936.

By definition, measures not involving the use of armed force are the object of a Council *decision*, that is, of an act which binds the Member States to adopt them (although the possibility exists that a State may inform the Council, under Article 50, if it has "special" economic difficulties). This can be drawn from Article 39 which provides that decisions under Article 41 are binding and which contrasts them to recommendations ("The Council... shall

make recommendations, or decide what measures *shall* be taken in accordance with Articles 41 and 42”). It can also unambiguously be found in the preparatory works, if we consider that Article 41, together with Article 42, were conceived of at Dumbarton Oaks and were accepted by the San Francisco Conference as the most important innovation in the Charter as compared to the Covenant of the League of Nations. This innovation was characteristic of the broad decision-making powers attributed to the Council (cf. U.N.C.I.O., vol. 12, p. 278). Given these elements, no weight should be given to an apparent contradiction in the wording of Article 41 which, on one hand, 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....”, and, on the other hand, adds that the Council may *call upon* the Member States to apply such measures.

Art. 41 deals with sanctions and with sanctions only. The Council may take measures not listed, since the list is not exhaustive, provided that they are sanctions not involving the use of armed force. The opinion has been held (by Hoogh) according to which Article 41 gives the Council a double power, one implied, the other express: on the one hand, the (implied) power to make "decisions" for maintaining or restoring peace and, on the other hand, the power to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions". Using the first power, the Council could take no matter what decision provided that it is aimed at maintaining or restoring the peace; using the second one, the Council could impose the sanctions listed, or sanctions not listed, in Article 41. This opinion, which has been upheld in order to justify the institution of international criminal courts, like the International Criminal Tribunals for the former Yugoslavia and Rwanda, has no basis in the preparatory works of the Charter and in the Article 41 read in conjunction with Article 39. Art. 39 is clear in the sense that, after the determination of a threat to, or a breach of, the peace, the measures that shall be taken "to maintain or restore international peace and security", are either recommendations or decisions taken in accordance with Article 41 and 42. It would be very strange if Chapter VII empowered the Council to take decisions of such importance as to be assisted by sanctions without saying a word about their content and limits: for instance, are these decisions subject to the domestic jurisdiction exception, an exception which indeed is excluded by Article 2, n. 7, with regard the "enforcement measures under Chapter VII " only ? As we have seen, the doctrine of implied powers must be used with caution (see § 5), and this is especially true in a sensible matter as the one we are dealing with now. Having said that, the formulation of Article 41 ("The Security Council may decide what measures ...are to be employed to give effect to its decisions..."), is certainly redundant, but not more redundant than the last part of the first sentence of Art. 41 ("...call upon the members...to apply such measures") and many other articles of the Charter. Regarding the institution of criminal tribunals, it must be simply recognized that it is a measure not considered by the Charter (see § 60 *bis*).

During the Cold War period, there were not a great many binding decisions made by the Council under Article 41. More generally, there were not many measures of an enforcement nature, truly able to discourage breaches of the peace. In fact, there were only two cases that came within the framework

of Article 41 as binding decisions! This is the case of resolutions no. 232 of December 16, 1966 and no. 253 of May 29, 1968 (confirmed by subsequent decisions; cf. res. no. 277 of March 18, 1970, no. 314 of February 28, 1972, no. 320 of September 29, 1972, no. 333 of May 22, 1973, no. 388 of April 6, 1976, no. 409 of March 27, 1977) against Southern Rhodesia and res. no. 418 of November 4, 1977 (also confirmed, and extensively interpreted, in subsequent decisions: cf., particularly, res. no. 591 of November 28, 1986) against South Africa because of the two countries' apartheid policies. The resolutions against Southern Rhodesia, repealed with res. no. 460 of December 21, 1979, following the forming of a government representing the majority of the people, imposed a series of measures (prevention of import and export, interruption of air services, closing of borders to Rhodesian citizens or to residents in Rhodesia, and so on) and aimed at the *total isolation* of the Rhodesian government at the time. In the case of South Africa, the 1977 resolution was restricted to imposing an embargo on any supplying of weapons to the South African government.

After the end of the Cold War, Council resolutions coming under Article 41 have proliferated. The Council has intervened with measures not involving the use of armed force (in addition to those involving such use) in many important international and domestic crises that have occurred in recent times. In so far as these crises were characterised by violence and by gross violations of human rights, they have interested the international community as a whole. This is the case of the Gulf crisis, the crisis in Yugoslavia, the one in Somalia and many others. The same can be said of the measures adopted against groups committing acts of terrorism.

Beginning with the Gulf crisis (a crisis which, as we shall see, mainly provoked the adoption of measures involving the use of force), the fundamental resolution was no. 661 of August 6, 1990, which was adopted against Iraq immediately after its invasion of Kuwait. Res. no. 661 obliged all States to break off all economic relations with Iraq, and, in particular, placed an embargo on imports and exports from and toward this country and prohibited all financial operations with the Iraqi government (excluding operations necessary for payment of medicines) and with firms under its control. Worth mentioning are also, among the many resolutions that are linked to res. no. 661: res. no. 670 of September 25, 1990, binding the States to the so-called air blockade, that is, to prohibiting in their territory (and therefore in the exercise of normal policy activity under territorial sovereignty) the taking off, landing and flying over of aircraft suspected of breaking the embargo; and res. no. 687 of April 2, 1991, which established, at sec. F, that the measures provided by res. 661 shall be maintained until Iraq has carried out what has been required by the resolutions, such as payment of compensation, elimination of military arsenals, and so on. All prohibitions related to trade with Iraq, with the exception of prohibitions related to the sale or supply of arms and related material, and all economic and financial measures against Iraq, have been abolished by res. no. 1483 of May 22, 2003, adopted after the fall of Saddam Hussein's regime.

With regard to the Yugoslav crisis, the first resolution, no. 713 of September 25, 1991, adopted when the civil war still seemed to be a war of secession, was restricted to providing an embargo on weapons intended for (all of) Yugoslavia. Later, an important

decision among those which come under Article 41, was res. no. 757 of May 30, 1992 which, after having reiterated condemnation of the intervention of the Yugoslav Republic (Serbia-Montenegro) in Bosnia-Herzegovina, already expressed in a previous resolution (res. no. 752 of May 15, 1992), bound all States to adopt a series of economic sanctions against this Republic, from the embargo on imports and exports, to the blocking of financial operations, to the suspension of all co-operation in scientific and technical fields, as well as to prohibit aircrafts coming from or directed towards Serbia-Montenegrin territory from taking off, landing and flying over their territory. In turn, res. no. 820 (part B) of April 17, 1993 extended the embargo to the territories of Croatia and to those of Bosnia-Herzegovina controlled by the Serbs, and also provided for the prohibition of commercial traffic with the Republic of Yugoslavia along the Danube; the interruption of land traffic and the obligation of the States where there were ships in port which had broken the embargo to confiscate the ships and their loads.

The economic sanctions against the Republic of Yugoslavia (Serbia-Montenegro) were terminated by res. no. 1074 of October 1, 1996. During the Kosovo crisis, in 1998-1999, the Security Council was unable to take any decisions against this country with the exception of an embargo on arms and related material (res. no. 1160 of March 31, 1998, reiterated by res. no. 1199 of September 23, 1998 and no. 1203 of October 24, 1998).

In the case of the crisis in Somalia — another crisis which saw the Council take measures mainly involving the use of armed force — res. no. 733 of January 23, 1992, prohibited the export of arms to Somalia.

Among those resolutions by which the Security Council has decided a number of measures in order to prevent and repress acts of terrorism, see especially res. no. 1373 of September 28, 2001. See also res. no 1377 of November 12, 2001, no. 1455 of January 17, 2003, no. 1456 of January 20, 2003.

For other recent examples of decisions containing measures under Article 41, cf. the already cited resolutions no. 748 of March 31, 1992 and no. 883 of November 11, 1993 against Libya which, in so far as the Libyan government had refused to hand over two Libyan citizens accused of grave acts of terrorism (a handing over requested with prior resolution no. 731 of January 23, 1992, within the framework of Chapter VI: see § 55 *bis*), ordered the interruption of air traffic and of the supplying of aircraft or parts of aircraft as well as of weapons to that country and a series of other economic restrictions (the sanctions were suspended in April 1999 an abolished in September 2003: see § 55 *bis*). Cf. also res.: no. 788 of November 19, 1992 (confirmed by subsequent res. no. 813 of March 25, 1993) on the embargo on the sale of arms to Liberia, because of the civil war underway there; no. 841 of June 16, 1993, no. 873 of October 13, 1993, no. 875 of October 16, 1993, and no. 917 of May 6, 1994, against the military regime in Haiti, no. 864 of September 15, 1993 on the embargo on the sale of arms and oil products to UNITA, the Angolan armed political party; no. 1054 of April 26, 1996, ordering the reduction of the Sudanese diplomatic and consular staff and the restriction of the entry into, or the transit through, the territory of all States of Sudanese officials, due to the refusal of the Sudan to extradite to Ethiopia the suspects wanted in connection with the assassination attempt on the life of the President of Egypt occurred in Addis Abeba; all these measures have been abolished in September 2001 (see § 55 *bis*); no. 1127 of August 28, 1997, sect. B (closure of the territory of States to officials, adults members of their families, air-crafts, vessels, etc., of the Angolan UNITA); no. 1132 of October 8, 1997 (sanctions against the military junta in Sierra Leone: the sanctions were terminated by res. No. 1156 of March 16, 1998, due to the restoration of a democratic government in this country); no. 1171 of June 5, 1998 (*embargo* on arms to be sent to non-governmental forces in Sierra Leone); no. 1173 of June 12, 1998 (again against UNITA); no. 1306 of July 5, 2000, no. 1385 of December 19, 2001 and 1446 of December 4, 2002 (on illicit traffic in rough diamonds in Sierra Leone); no. 1333 of December 19, 2000 (against the Taliban faction in Afghanistan); no. 1343 of March 7,

2001 (against Liberia); no. 1390 of January 16, 2002 (against the Taliban faction and Al Qaida); no. 1478 of May 6, 2003 (again against Liberia); no. 1556 of July 30, 2004 (embargo on the sale and supply of arms to non-governmental entities and individuals in Sudan).

A weak point in the measures governed by Article 41 lies in the fact that, once the Council has imposed an obligation on the States to adopt such measures, this obligation must be fulfilled in practice. In other words, if it is true that the States are obligated by the United Nations Charter to carry out the decisions regarding measures not involving the use of armed force, it is also true that often various States, for political or economic reasons, tend to disregard this legal obligation. Usually when the Council orders sanctions under art, 41, it appoints a Committee to see that the sanctions are carried out (cf., merely as examples, para. 6 of the cited res. no. 661 of August 6, 1990 against Iraq and paragraphs 12 and 13 of the cited resolution no. 757 of May 30, 1992 against the Yugoslav Republic). However it is not difficult to get around this supervision, since it is mainly carried out through reports sent by the States themselves. We see reflected in this matter the perpetual problem of international law, that is, law within whose sphere rules are created, but are often not applied.

With reference to the past, the vicissitudes regarding the implementation of sanctions against Southern Rhodesia within the legal systems of Member States, particularly the Western Powers, were not exemplary. The most striking — and openly carried out — case of the non-application of economic sanctions concerned the United States. Between 1971 and the end of 1976 a special law in the United States authorised the import of Rhodesian chromium (the law was justified by the U.S. delegate in the Council with the claim... that it was identical to the practice of some other States! Cf., for example, SCOR, 27th year, 1645th meet., no. 29 ff.). Only at the beginning of 1977, under pressure from the Carter Administration was this law abrogated (the relevant acts appear in *ILM*, 1972, p. 178 ff., and 1977, p. 425 ff.). Aside from those of the United States, there were many violations by the States of the economic blockade which, if not authorised, were at least tolerated. In one of the various reports to the special Committee appointed by the Council to investigate them, about 135 were mentioned (cf. the 5th Report of the Committee, in SCOR, 27th year, *Special Suppl.* no. 2, p. 27 ff.). Still in 1998 the Security Council, in a resolution couched in very general terms, was forced to urge all States and other organizations to report on possible violations of arms embargoes established by the Council (see res. no. 1196 of September 16, 1998).

Also regarding the embargo on arms intended for South Africa, violations were often denounced, even in General Assembly resolutions. For an interesting list of the loopholes devised by various States to elude the spirit, if not the letter, of cited res. no. 418 of November 4, 1977, cf. the Report of the Committee for Sanctions against South Africa (doc. S/14179 of September 19, 1980), examined by the Security Council in its sessions of September 20 and 23, 1982.

For more recent violations of Article 41, see, for instance, res. no. 1407 of May 3, 2002, no. 1425 of July 22, 2002, no. 1474 of April 8, 2003 and no. 1519 of December 16, 2003 (denouncing the continued flow of weapons and ammunition supplies to Somalia).

The violation of Council resolutions is facilitated by the view that such acts, like, moreover, all binding acts of an international organization, would become operational only after the issuance of specific domestic implementing acts. This view is quite widespread in the

legal doctrine and the case law of various countries, and was confirmed, for example, precisely with regard to Security Council resolutions under Article 41, in a judgement of the Australian Supreme Court of September 10, 1973 (in *UNJY* 1974, p. 208 f.), as well in a decision of the District Court for the District of Columbia, United States, of May 13, 1975 in *Diggs* v. *Dent* (in *ILM*, 1975, p. 803 ff.). In our opinion, a firm stand must be taken against this view. If a State has undertaken to respect the UN Charter (a commitment usually made with the agreement of the legislative organs) and if Article 41 of the Charter requires the observation of Security Council decisions, we cannot see why the administrative and judicial organs of the country should not be considered authorised to demand similar compliance by its citizens. Obviously a different situation exists when a domestic law expressly states the intention not to apply Council decisions (see the American law on the import of Rhodesian chromium, cited above). In that case, and only in that case, nothing can be done at the level of the administrative and judicial bodies.

The monitoring of the applications of sanctions is also necessary to ensure that no useless suffering is inflicted by economic measures to the population of the target State, a necessity which has become increasingly evident especially in recent years and particularly in the framework of the action against Iraq during and after the Gulf war. In various resolutions the Security Council has authorised derogation on the duty of States to apply economic or others sanctions. Derogations had been already authorised at the time of Cold War, in the case of sanctions against Rhodesia (for the practice, see CRAVEN, *art .cit*., p. 49). For the more recent practice, see, for instance,: res. no. 666 of September 13, 1990 which provided the possibility that, through the United Nations, in agreement with the International Red Cross or other entities with humanitarian purposes, foodstuffs could be delivered to Iraq; res. no. 986 of April 14, 1995, which authorised the States to derogate in some circumstances to the *embargo* on petroleum and petroleum products originating in Iraq, for humanitarian reasons; res. no. 1111 of July 4, 1997 (*idem*); res. no. 1127 of August 28, 1997, para. 5 of sect. B (derogation to the air-traffic embargo against UNITA in Angola); res. no. 1143 of December 4, 1997 and no. 1153 of February 20, 1988 (again on derogation to the petroleum embargo against Iraq).

The practice quoted above shows a clear trend towards the duty of the Security Council to comply with general international law, at least with international humanitarian law, when deciding on *economic* sanctions.

A third State whose economy is linked to the economy of the target State may also be damaged by economic sanctions. According to Article 50 of the Charter, it has the right to consult the Security Council for taking appropriate measures. In 1995 attention has been drawn to this matter by the General Assembly (see res. no. 50/51 of December 11, 1995).

On the monitoring of the humanitarian aspects of the sanctions attention was also called by the UN Secretary-General B. Boutros Ghali in his *Supplement to an Agenda for Peace* (Doc. A/50/60 and S/1995/1, of January 3. 1995, para. 69 ff.). The Secretary-General

suggests setting up a mechanism in order *inter alia:* to measure the effects of the sanctions in order to enable the Security Council to take decisions with a view to maximising their political impact and minimising collateral damages; to ensure the delivery of humanitarian assistance to vulnerable groups within the target State; and to explore ways of assisting third States that are suffering collateral damages.

May the Council restrict itself to *recommending* measures not involving the use of armed force, and thereby leave the States free to adopt them or not? Even if the measures were conceived at Dumbarton Oaks and at San Francisco as the expression of a true decision-making power of the Council with regard to the Member States, it seems to us that the possibility of adopting recommendations must be recognised according to the spirit of Article 41. In fact, the power to recommend is included within the larger power to decide. Since Article 41 lists measures of various kinds and intensity (from the very bland sanction of severing diplomatic relations to the strong measures of economic blockade), it implicitly allows the Council to soften the intensity of one of its decisions by giving it the mere nature of a recommendation.

In our opinion, recommendations on measures not involving the use of armed force may be considered lawful only if they are covered by Article 41. This is so even if achieved through a broad interpretation of the article. On the contrary, in legal doctrine and in practice there is a widespread tendency to seek a different basis for the recommendations on the assumption that Article 41 (just like the following Article 42) is concerned *only* with binding decisions, as only binding decisions are adequate for the effective collective security system that is the core of Chapter VII. Reference is sometimes made to Article 39, but more often to Chapter VI as the chapter characterised by the Council's power to recommend, or Article 24 which confers on the Council "primary responsibility for the maintenance of the peace". Aside from the fact that Article 39 was conceived solely with regard to the peaceful settlement function, that neither the letter nor the spirit of Chapter VI justify any resolution intending to impose sanctions, and that Article 24 cannot be the basis for specific powers (see § 60 *bis*), the tendency of the doctrine clearly contradicts itself. If Article 41 were to picture the system of sanctions not involving the use of armed force as inextricably tied to the full decision-making power of the Council; if, in other words, Article 41 were to recognise as indispensable for purposes of collective security the fact that the power to decide sanctions is centralised in the Council so as to guarantee both the objectivity of a decision and the general applicability of measures involving sanctions, then it seems there would be no alternative. The act with which the organ makes only a recommendation, deferring the final decision to the individual State, should logically be considered unlawful. Actually, for the reasons we have given before, Article 41 does not demand as much and it is

this article which furnishes the legal basis for sanctions which are recommended as well as for those which are imposed as mandatory.

In order to determine whether a measure under Article 41 is a recommendation or a decision, the Council's intention is decisive. The intention is made evident, first, by the rest of the resolution, and, secondly, from the discussions and the vote which came before and after the resolution was adopted.

The view held by the International Court of Justice in this matter is unacceptable. According to this view the reference, in the preamble to a resolution, to Article 25 of the Charter ("The members of the United Nations agree to accept and to carry out the decisions of the Security Council in accordance with the present Charter"), would constitute positive proof of the Council's intention to issue a binding decision. This view, contained in the opinion of June 21, 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276 (1970),* in ICJ, *Reports*, 1971, p. 53, no. 115, will be discussed later on (see § 90), since it was put forward by the Court with reference not to Article 41 but to the problem of the meaning of Article 25 with regard to Council acts in general.

Examples of *simple recommendations* within the framework of Article 41 are seen mainly, but not exclusively, in the practice relating to the Cold War era. At that time the Council was not able to take *decisions*.

Cf. resolutions no. 180 of July 31, 1963 and no. 218 of November 23, 1965 against Portugal for its colonialist policy and no. 181 of August 7, 1963 against South Africa for its apartheid policy, all inviting the States to prohibit the sale of weapons, or of certain types of weapons to the two countries. Cf. also resolutions no. 276 of January 30, 1970, no. 283 of July 29, 1970 and no. 301 of October 20, 1971 on Namibia, confirmed by subsequent resolutions, in the parts in which they invited the States to sever diplomatic and commercial relations with South Africa "as far as they extend to Namibia", a territory held by South Africa since the time of the League of Nations and now independent (see § 81).

No serious doubts can be raised about the nature of a mere recommendation of all these acts. This nature can been seen from the formulation of the text, as compared to the text of binding decisions, and also from statements made at the time of the vote by some Western permanent members, members who would have been able to prevent the adoption of decisions with their veto. The statements meant to emphasise the non-binding effect of the acts. All the above recommendations avoided speaking, in their statement of reasons, of a threat or breach of the peace, or acts of aggression and used terms that were somewhat more toned down, such as "disturbance of the peace", "very grave situation", and so on. This does not affect their coming within the framework of Article 41 since, as we have often repeated, it is not the reasoning but rather the operative part which characterises a decision (see § 49).

Lastly, it should be recalled that some permanent (and non-permanent) members of the Council, the Western powers, used to declare that they held these resolutions to be extraneous to Article 41 and to Chapter VII. We have already discussed the fallacy of this point of view and need not return to it here. Actually, the statements of the Western States essentially had the purpose of confirming the non-binding nature of the resolution and their intention to vote for them (or, at least, not to prevent their adoption with a veto) on the condition that they were not considered binding. In short, all that can be obtained from these statements is the certainty that they were mere recommendations. For references, cf., for example, the statements

of the US and British delegates regarding res. no. 181 of August 7, 1963 against South Africa, in SCOR, 18th year, 1056th meet., p. 6 f. and p. 8 f.; of the British delegate in reference to res. no. 191 of June 18, 1964, again against South Africa, in SCOR, 19th year, 1135th meet., p. 10; of the Belgian delegate in reference to res. no. 218 of November 23, 1965 against Portugal, in SCOR, 29th year, 1268th meet, p. 5, no. 23; again of the British delegate after the adoption of resolution no. 282 of July 23, 1970 against South Africa, in SCOR, 25th year, 1549th meet.; of the French, British and Belgian delegates regarding res. no. 301 of October 20th, l971 on Namibia, in SCOR, 26th year, 1588th, 1589th and 1994th meets.

As examples of recommendations in more recent practice see: res. no. 1076 of October 22, 1996, para. 4, where the Security Council calls upon all States to end the supply of arms to all parties to the conflict in Afghanistan; res. no. 1227 of February 10, 1999, urging all States to end immediately all sales of arms and munitions to Ethiopia and Eritrea.

As we have noted, the list of measures which do not involve the use of armed force, is not exhaustive in Article 41. Therefore, any decision or recommendation of the Security Council which calls upon the States, explicitly or implicitly, to take actions which have the outward character of sanctions with regard to a certain State, or to an armed political group within a State, come within the framework of this article. Such an atypical measure can be found in those resolutions often used by the Council in order to declare certain domestic acts "invalid". This is the case, for example of: res. no. 252 of May 21, 1968, adopted against Israel and confirmed in subsequent decisions (cf., for example, res. no. 478 of August 20, 1980) which stated that the Council "considers that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the status of Jerusalem, are invalid..."; res. no. 276 of January 30, 1970, concerning Namibia, also reiterated in the following years but now obsolete owing to the independence acquired by the country, which "declared" the entire presence of South African authorities in Namibian territory "invalid and illegal"; res. no. 446 of March 22, 1979, which considered the Israeli practice of establishing colonies in occupied Arab territories to be without any "legal validity"; res. no. 554 of August 17, 1984, which declared invalid the South African constitution enacted in November 1983; res. no. 662, now obsolete, of August 9, 1990, which declared Iraq's proclaimed annexation of Kuwait "null and void". Such statements could appear *ultra vires*, since invalidity inflicted by the Council has no possibility of being effective within the legal orders of the target States. In fact, they can be given only the implicit value of a request made to the Member States to *refuse to recognise* the "invalid" measures, and therefore not to apply them if in any way they acquire relevance before their State organs, for example, legal actions before their Courts involving expropriated property, and so on. In this sense, they are acts coming within the framework of Article 41.

Also for atypical measures, it will be necessary to establish case by case, with the usual methods of interpretation, whether the Council has in-

tended to make them the object of binding decisions or of recommendations. With regard to the resolutions we have just cited, it seems that, with the exception of res. no. 662 of 1990 against Iraq, the hypothesis of a recommendation is the correct one. To be persuaded of this, it is sufficient to examine the discussions that preceded the resolutions and to bear in mind the atmosphere of compromise in which they were carried out.

Even if it is now a closed matter, worthy of mention is the already cited advisory opinion of June 21, 1971 of the International Court of Justice, which was concerned with res. no. 276 of January 30, 1970 on Namibia. The opinion does not frame the Council resolution within Article 41, but considers it (cf. ICJ, *Reports* 1971, p. 51 f., partic. no. 110) as the expression of a presumed residual power of the Council, supported by Article 24 of the Charter, on the maintenance of the peace (for a critique of this opinion, see § 60 *bis*). When it goes on to establish the legal consequences of the declaration of "invalidity" and "illegality" of South Africa's presence in Namibia, however, the opinion ultimately identifies such consequences in the *non-recognition* of the situation by the other States (CIJ, *Reports*, cit, p. 54 ff.), that is, in sanctioning measures that are clearly based, in our view, on Article 41.

59. D) *Measures involving the use of armed force (Articles 42 ff.). Peacekeeping Operations.*

BIBLIOGRAPHY: see § 55. *Adde*: MILLER, *Legal Aspects of the UN Action in the Congo*, in *AJ*, 1961, p. 1 ff.; RAID, *The UN Action in the Congo and its Legal Basis*, in *REgDI*, 1961, p. 1 ff.; BOWETT, *UN Forces*, London, 1964, p. 153 ff. and p. 552 ff.; SEYERSTED, *UN Forces in the Law of Peace and War*, Leiden, 1966.; BOYD, *UN Peace-Keeping Operations: A Military and Political Appraisal*, New York, 1972; THEODORIDES, *The United Nations Peace-Keeping Force in Cyprus (UNFICYP)*, in *ICLQ*, 1982, p. 765 ff.; RZYMANEK, *Some Legal Problems of UN Peacekeeping: UNEF-2 and UNDOF Experiences*, in *Polish Yearbook of International Law*, 1987, p. 85 ff.; LE PELLET, *Les bérets bleus de l' ONU: à travers 40 ans de conflit israelo-arabe*, Paris, 1988; SUY, *Legal Aspects of UN Peace-keeping Operations*, *ivi*, p. 318 ff..;SIEKMANN, *National Contingents in UN Paecekeeping Forces*, Dordrecht, 1991; HAGELSOM, GERT-JAN, *The Law of Armed Conflict and UN Peace-Keeping and Peace-Enforcing Operations*, in *Hague Yearb. of International Law*, 1993, p. 45 ff.; MAIJER, *UN Peace-Keeping Forces: The Conditions of Change, in LJIL*, 1994, p. 63 ff.; WARNER (ed.), *New Dimensions of Peacekeeping*, Dordrecht, 1995; PICONE, *Il peacekeeping nel mondo attuale etc.,* in *RDI*, 1996, p. 5 ss.; PINRSCHI, *Le operazioni di peacekeeping delle Nazioni Unie per il mantenimento della pace*, Padova, 1998, Part. 1, Chapt. 1 and 2; CELLAMARE, *Le operazioni di peeace-keeping multifunzionali*, Torino, 1999; SAROOSHI, *The UN and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, 1999; RONZITTI, *Comamdo e controllo nella Carta delle Nazioni Unite*, in RONZITTI, *Comando e controllo nelle forze di pace e nelle coalizioni militari*, Milan, 1999, p. 31 ff.; BENVENUTI, *Forze multinazionali e diritto internazionale umanitario, ibid*., p. 222 ff.; GARGIULO, *Il controverso rapporto tra Corte penale internazionale e Consiglio di Sicurezza per la repressione dei crimini di diritto internazionale*, in *CI* 1999, p. 428 ff.; *Wundeh Eno*, UN *Peacekeeping Operations and Respect for Human Rights*, in *SAYB*, 1999, p. 76 ff: FRULLI, *Le operazioni di peacekeeping delle Nazioni Unite e l'uso della forza*, in *RDI*, 2001, p. 347 ff.; SAROOSHI, *Aspects of the relationship between the International Criminal Cour and the UN*, in *NYIL*, 2001, p. 27 ff.; ARCARI*, Quelques remarques à propos de l'action du Conseil de Sécurité*

dans le domaine de la Justice pénale internazionale, in *ADe*, 2002, p. 207 ff.; HESELHOUS, *Resolution 1422 (2002) des Sichereitsrates zur Begrenzung der Tätigkeit des Internationalen Strafgerichtshofs*, in *ZöRV*, 2002, 907 ff; KATAYANAGI, *Human Rights Functions of UN Peacekeeping Operations*, New York, 2002; ORAKHELASHVILI, *The Legal Basis of the UN Operations*, in *Virg JIL*, 2003, p. 485 ff:

Articles 42 and those following concern the possibility that the Security Council may decide to use force *against* a State responsible for aggression, or responsible for a threat to the peace or for a breach of the peace. Or it may decide to use force *within* a State by intervening in a civil war, where it deems that the domestic situation constitutes a threat to the peace (as often occurs in the case of civil war with its tragic consequences for the local population). The domestic nature of a situation does not constitute an obstacle to Council action, since the enforcement measures under Chapter VII do not come under the limit of domestic jurisdiction (Article 2, para. 7, last part). Indeed, as we have often said, it is exactly in domestic crises, and mainly for humanitarian purposes, that the Council today has the most opportunity to intervene.

Resort to military measures by the Security Council is clearly seen by Article 42 as an international police action. ("The Council... *may take such action* by air, sea or land forces as may be necessary to maintain or restore... peace"). The decision of the Council thus belongs to the kind of operational measure through which the Organisation does not order or recommend something to the States, but acts directly (see § 92). As specified by Articles 43 and following and in line with what was decided at the San Francisco Conference as the principal characteristic of the United Nations collective security system (cf. U.N.C.I.O., vol. 12, p. 279), direct action consists of the use of national armed contingents which are under an international command depending on the Security Council.

It is easy to understand the purpose pursued by Articles 42 and those following when they concentrate not only the power to decide that force is to be used but also the supervision of the military operations in the hands of the Security Council. This is, on the one hand, to guarantee the objectivity and impartiality of the operation as well as to see that such action remains within the limits strictly necessary for maintenance of the peace, and, on the other hand, to remove any military initiative from the individual States which is not justifiable, under Article 51, for reasons of individual or collective self-defence (on this, see § 55 *bis*).

As for the ways in which, under the Charter, the Security Council may take action, Articles 43, 44 and 45 lay down the *obligation* on the Member States to enter into agreements with the Council in order to establish the number, the degree of readiness, the deployment, and so on, of the armed forces to be utilised, totally or partially, by the organ (cf. also Article 48, para.

1) as the necessity arises. Under Articles 46 and 47, the actual use of the various national contingents is to be decided by a Military Staff Committee, composed of the Chiefs of Staff of the five permanent members and under the authority of the Council. The special agreements to be concluded between the UN Member States and the Council are considered by the Charter as the pre-conditions and the cornerstone of the system. These agreements are, moreover, the subject of a true *de contrahendo* obligation on the States. Indeed, it was clearly and expressly said at San Francisco that the Council would never be able to demand any assistance from the States, with weapons and with soldiers, which was not provided for by the special agreements (see U.N.C.I.O., vol. 12, p. 508).

Articles 43 ff. have never, from 1945 until today, been applied. The agreements for making national military contingents available to the Council, under Article 43, which were to be concluded "as soon as possible" (the Charter dates from 1945!), have never seen the light, nor has the Military Staff Committee of the Council ever functioned. In previous editions of this book we consequently held the view that Articles 43 ff. and the *de contrahendo* obligation on the Member States had been abrogated by custom. Now, the revitalisation of the Council after the end of the Cold War entails a reappraisal of this view in the sense that a "revival" (which has not yet taken place) of these articles cannot be excluded. It is indicative that the "Agenda for Peace" Report presented by the Secretary-General B. Boutros-Ghali to the Security Council in June 1992 (in *ILM*, 1992, p. 956 ff.), a Report dealing with the strengthening of the UN role in the area of maintenance of the peace (see § 8), provides that the agreements under Article 43 of the Charter may be concluded in the future (cf., para. 43 of the Report).

Up until today, and especially after the end of the Cold War, the Council has usually intervened in international or domestic crises with measures of a military nature in two different ways, sometimes combining them. It either has created United Nations Forces who are engaged, although with very limited tasks, in peacekeeping operations or it has authorised the use of force by the Member States, either individually or within regional organizations. The use of force by regional organizations will be discussed later, in Section V (see § 65). Here, we will deal firstly with peacekeeping operations and then with the authorisation of the use of force by Member States. In our opinion, peacekeeping actions can be traced back to Article 42 although broadly interpreted. The authorisation of the use of force by States - a matter dealt with in the next paragraph as an enforcement measure not provided for in the Charter - largely departs from Article 42.

As far as peacekeeping forces are concerned, there were very few between 1945 and 1987 and many more in the years after 1988. The principal ones are, or have been, the following: ONUC, which was active in the Congo

in the sixties to help the Congo out of its state of civil war and anarchy; UNEF II (United Nations Emergency Force), established in 1973, as a buffer between Egypt and Israel, and dissolved in 1979 (not to be confused with UNEF I, set up by the General Assembly in 1956: see § 64); UNFICYP, created in 1964 and still operating as a buffer force between the tow Cypriot States; UNDOF (United Nations Disengagement Observation Force), stationed since 1974 in the Golan Heights between Israel and Syria; UNIFIL (United Nations Interim Force in Lebanon), established in 1978 and operating in Southern Lebanon; UNAVEM II and III, operating since 1991 in Angola; UNPROFOR, established in 1992 in the former Yugoslavia and operating particularly in Bosnia-Herzegovina until December 1995; UNOSOM, which has been operating, between 1992 and 1995, in Somalia; UNOMOZ, set up with res. no. 797 of December 16, 1992 and stationed in Mozambique; UNOMSIL, operating in Sierra Leone between 1998 and 1999; MINURCA, operating in the Central Africa Republic since 1998; UNAMSIL, created in 1999 and operating in Sierra Leone, MONUC, created in 1999 and operating in the Democratic Republic of Congo since 2000; UNMEE, operating in Ethiopia and Eritrea since 2000; UNMISET, created in 2002 and operating in East Timor; UNMIL, operating in Liberia since 2003; MINUSTAN, operating in Haiti since June 2004; ONUB, operating in Burundi since June 2004.

Aside from the case of the Congo, the practice followed by the Security Council in the other cases has been to limit the duration of the mandate of the Forces it has established, and then to gradually extend it, always for limited periods (usually six, nine or twelve months). This practice has its roots in the disagreements which occurred in the Council at the time of the Congo action when, since the Council had not set any limit and could not decide for a certain period of time, the Secretary-General (who is appointed by the Council to head the Forces) in the end had to decide what to do (see § 65.). With the system of extension and therefore of automatic expiration of the mandate of the Force in the event of the Council's inactivity, the intention is to strengthen the principle (strenuously defended by the Socialist States of East Europe in the Cold War period) that the Forces' operations, even if they are carried out under the direction of the Secretary-General, remain entirely under the "authority" of the Council. The observation of the principle is also assured by continual close contact between the Secretary and the Council, contact maintained through periodic reports, request for approval of the appointment of high-level officers, and so on.

The principal characteristic of the peacekeeping operations is the Security Council's delegation to the Secretary General of both provision and command of the UN Forces, through agreements with the Member States. According to common opinion, another characteristic is that the UN Forces, which normally intervene in internal crises, operate with the consent of the State, or States, on whose territory they are stationed. Actually, this is a pure legal fiction since often either no local government has existed since the beginning of the operations or it has ceased to exist during the operations. This could be the case in civil wars or in a situation of anarchy, for example

the Congo in 1960-61 and Somalia in 1992. Yet, according to common opinion, the peacekeeping forces are not meant to use force. They are simply buffer forces, meant only to divide adversaries and to help them in re-establishing and in maintaining conditions of peace and security without being allowed to use arms, except for self-defence, even though they are fully equipped. In other words, they should be considered, to use current terminology, as peacekeeping and not peace-enforcing forces. Moreover, they are often combined with UN civil personnel in order to provide humanitarian assistance, to monitor the execution of agreements concluded by different factions within the framework of procedures of national conciliation (see § 56), and to assist the local authorities in acts of civil administration, in post-conflict situations (so called multidimensional or multifunctional peacekeeping).

No doubt the task of these forces is always very limited, and was particularly limited in the Cold War period. However, this is not enough to conclude that the UN Forces have nothing to do with the use of armed force, even if it is limited. Moreover some of them have been established with the task of peace-enforcing or have transformed from peacekeeping forces to peace-enforcing forces. The case of the Congo, as well as the cases of the former Yugoslavia and Somalia, are indicative in this sense.

In the case of the Congo, the Security Council, in res. no. 143 of July 14, 1960, "authorised" the Secretary-General to provide military assistance to the Congolese government until the Congo was able to maintain domestic order by itself. Subsequently, the United Nations Force (ONUC) was set up with contingents offered voluntarily by the Member States and was placed under the authority of the Secretary-General. In the meantime, a series of very serious events had occurred, such as the establishment of various centres of power in the country, the killing of the leader Lumumba, the secession of the Katanga province, and the death of the then Secretary-General Hammarskjold. The Council then adopted other resolutions confirming the purposes of the Force and authorising the use of weapons to prevent civil war (res. no. 161 of February 21, 1961) and to eliminate the presence of foreign mercenaries in the country, particularly in the Katanga province (res. no. 169 of November 24, 1961). As a result, ONUC carried out what was a real, although brief, war of liberation in the Katanga province.

In the case of Yugoslavia, the first resolution concerning UNPROFOR (United Nations Protection Force) was res. no. 743 of February 21, 1992, which decided to establish the Force "under the authority" of the Council in order to "create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis" (para. 5) and invited the Secretary to take the necessary measures. A long series of subsequent resolutions then specified, in relation to developments in the crisis, the various tasks of the Force. The main ones were: res. no. 761 of June 29, 1992 and no. 764 of July 13, 1992 which (respectively, para. 1 and para. 2) authorised the Force to "ensure the security and functioning of Sarajevo airport and the delivery of humanitarian assistance"; no. 779 of October 6, 1992, which authorised it to monitor the complete withdrawal of the Yugoslav army from Croatia and the demilitarisation of the Prevlaka peninsula; res. no. 807 of February 19, 1993 which called upon the Secretary-General to equip the Force with suitable weapons for its defence; res. no.836 of June 4, 1993 which entrusted the force with the task of defending several Bosnian cities, and their surrounding areas, which had been declared "safe areas" in previous

resolutions; no. 913 of April 22, 1994, which invited the Secretary-General to take all the necessary measures in order to enable the UNPROFOR to control the situation and the respect of the cease-fire in Gorazde. These resolutions provide evidence that even if UNPROFOR was not engaged in true military actions, it cannot be considered a mere instrument of peaceful measures. By res. no. 1031 of December 15, 1995 the Security Council put an end to the mandate of UNPROFOR, following the Dayton Agreement.

With regard to Somalia, ONUSOM was initially established with res. no. 751 (paras. 2 and 7) of April 24, 1992, with the task of "supporting" the Secretary-General's efforts to facilitate the cease-fire between the factions at war in the country and to furnish humanitarian assistance to the population. However, subsequently, with res. no. 814 (part B, paras. 5 and 14) of March 26, 1993, it took on the functions that had formerly been exercised by a groups of States under United States unified command. In particular, it took on the function of consolidating, extending and maintaining the security of the whole country. Res. no. 837 of June 6, 1993, adopted after a Somali attack on a group of Pakistani blue helmets, entrusted the Force (now called ONUSOM II) with the task of taking "any measure against all those responsible for the armed attacks". Unfortunately, this resolution constituted the legal grounds for a brutal attack against the districts controlled by the Somali General Aidid, an attack which, in the name of the United Nations, provoked the killing of innocent victims and was thus deplored by the civilised world. Nobody can deny that this action constitutes use of force. In March 1995 ONUSOM was withdrawn from the territory of Somalia, as demanded by res. no. 954 of November 4, 1994.

By res. no. 1327 of November 13, 2000 with Annex, the Security Council has laid down some general "decisions and recommendations" on the establishment and behaviour of the peacekeeping forces. This was with the aim of strengthening the peacekeeping operations and giving them "clear, credible and achievable mandates" as well as "a credible deterrent capability". Worth noting is the recommendation contained in Part IV of the Annex, according to which the peacekeeping operations should be deployed within 30 days, and in case of complex operations, within 90 days of the Security Council resolution establishing its mandate.

In Part I of the Annex, the Council urges the parties to a "prospective peace agreement" where a peacekeeping operation is envisaged, to bear in mind the need for any provision regarding such operation "for the...compliance with the rules and principles of international law, in particular international, humanitarian, human rights and refugee law". Needless to say that the peacekeeping forces have to comply with these rules even more closely. The above cited case of the attack of the ONUSOM II in 1993 is a clear case of non compliance with humanitarian law and should never be repeated.

The above resolutions show a clear trend towards the duty of the Security Council to comply with international law when a peacekeeping operation is set up. This duty is parallel to the Council's duty with regard to those measures not involving the use of force (see § 58).

One question needs to be treated here since it is mainly linked to the status of the UN Forces. It concerns the relation between the Security Council and the International Criminal Court whose Statute, approved by the Rome UN Conference of Plenipotentiaries, entered into force on 1 July 2002. By res. no. 1422 of July 12, 2002 (and then by the identical res. no. 1487 of June 12, 2003), the Security Council, referring to Article 16 of the Rome Statute and acting under Chapter VII, has requested the Court not to commence or proceed with investigation or prosecution against current or former officials or personnel involved in UN operations for acts relating to such operations, unless the Security Council decides otherwise. The immunity is requested for a period of twelve months starting from 1 July 2003, but the Council "expresses the intention" to renew the request for further 12-month periods, if necessary. According to Article 16 of the Rome Statute "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council has requested the Court to that effect; that request may be renewed by the Council under the same conditions". In fact, the request has not been reiterated on June 2004, due to the events in Iraq and the gross violation of humanitarian rules by US soldiers. A draft resolution drawn up by United States has not been presented since it would not have the required majority within the Council.

In legal doctrine the question of whether res. no. 1422 and 1487 are compatible with the powers of the Security Council under the Charter is the object of sharp debate. Doubts about the legality of the resolutions have been raised, as Chapter VII does not deal with the relations between the Security Council and international tribunals. Doubts have also been raised about the possibility of considering the activity of the Court as a threat to the peace, the previous determination of such threat being indispensable for any decision of the Security Council under Chapter VII. In particular, the general immunity requested for all members of peacekeeping forces coming from non-Member States of the Statute of the Court, instead of a request made on a case by case basis, has been considered *ultra vires*. In our opinion, leaving aside the sad impression created by resolutions imposed by only one Member State of the Council, the United States, and the setback thus suffered by International justice, the decision of the Security Council cannot be considered contrary to the Charter. It is not a question of finding a special provision of the Charter which deals with this specific case. It is not a question of the lack of determination about a specific threat to the peace in order to justify the request of immunity. The Security Council has not only the power to create military forces but also the power to enact all regulations governing them and their status: the immunity granted to the members of these forces is exactly the expression of the latter .

Having said that, the resolutions on immunity have to be evaluated from another point of view. No doubt the Council is bound by humanitarian and human rights law, as well as some other international rules of *jus cogens*. Moreover, in the already quoted res. no 1327 of November 13, 2000 with Annex,, as we have seen, the Council has recognised the importance of humanitarian and human rights rules by committing the UN Forces to their observance. We can consequently wonder whether the general request for immunity, contained within res. no. 1422 and 1487, does comply with such rules. Indeed, the power granted to the Security Council by Article 16 of the Statute of the Court has been considered as contrary to humanitarian law by some Non Governmental Organizations, during the preparatory works of the Statute (see AMNESTY INTERNATIONAL, *The International Criminal Court Making the Right Choise - Part I*, London, 1997, p. 95 ff.; HUMAN RIGHTS WATCH, *Commentary for the August 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court*, 1997, p. 9 f.). However, even if this is the way of dealing with the question of the legality of the resolutions on immunity, the answer to the question is still positive. In fact, the resolutions do not grant an absolute immunity, since it notes that "States not party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes". What is at stake, therefore, is not immunity but simply *international* immunity.

In light of the above, in what framework can peacekeeping operations be put? We have always held, and we continue to hold that the peacekeeping Forces carry out the international police action spoken of in Article 42. This is in spite of their usually limited tasks, and in spite of the fact that their provision and their command are ensured *case by case* by the Secretary-General (but under the authority and continuous supervision of the Security Council) and not, as Articles 43 ff. prescribe, directly by the Council and with contingents *permanently* available to the Council. When Article 42 says that the Council "... may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security...", we do not see why by action only war or action involving the spilling of blood is meant. On the other hand, the nature of international police action under Article 42 is not diminished because the blue helmets are usually forbidden to fire (except in self-defence), just as the action of national police forbidden to fire on demonstrators is no less considered police action. Nor the absence of the Military Staff Committee under the direct authority of the Security Council, provided for by Articles 46 and 47, has a decisive weight. The command being entrusted to the Secretary-General, it is sufficient to remind that, according to Article 98, this organ may perform all the functions the Council deems advisable to delegate to him.

The delegation with which Article 98 deals ("The Secretary-General...shall perform such functions as are entrusted to him by [the Security Council]...") is not a true delegation as this is intended in domestic law, i.e. as a mandate given by a person to another person. Since the Secretary-General is the chief administrative officer of the Organization, one of his institutional task is exactly to execute the decisions of the Security Council. The relationship with the Security Council is always an inter-organic relationship within the framework of the Charter (see § 65). Quite different is the relationship between the Council and a Member State when the latter is called by the former to act on its behalf (see § 60).

We must recognise that our view is not shared in legal literature. Most commentators hold the opinion that only peace-enforcing forces (i.e. forces enabled to make war) were taken into consideration by the Founders of the United Nations when drafting Article 42 ff.; they either tend to bring peacekeeping operations under Charter provisions other than Chapter VII, especially under the norms on peaceful settlement in Chapter VI, or speak of the formation of unwritten rules which have now taken root with the agreement of all the Member States. Some scholars even say that peacekeeping operations…come between Chapters VI and VII.

The first of these views is absurd, as the peaceful settlement function also belongs to the General Assembly and no one any longer today dares to

hold that the Assembly (which only in one remote case created a Force for maintenance of the peace: see § 64) is competent in this matter. The second view seems more convincing and seems to be shared by the above cited *Agenda for Peace* of the Secretary-General B. Boutros-Ghali (cf. *ILM*, 1992, p. 967, para. 46, where peacekeeping operations are defined as an "invention" of the United Nations; see also the Secretary-General' s *Supplement to an Agenda for Peace, Doc.* A/50/60 and S/1995/ 1, January 3, 1995, para. 33 ff.*)*. One could say, at this point, that whether one holds our view or holds that an *ad hoc* customary rule has been formed, the substance does not change. Actually, there is a difference, and it is not a negligible one, when we consider that peacekeeping operations are very costly, that all the Member States are called upon to participate, according to Article 17, in the expenses for carrying them out, and that, for reasons which will be discussed later (see § 86), it would be difficult to say that there exists an obligation to contribute to expenses that cannot be brought within a specific Charter provision.

Even if their functions are limited, the UN Forces, in so far as they are actual military forces operating in permanent crisis situations, must be distinguished from UN observer corps, which come under the function of investigation (see § 51). However, the two forces sometimes tend to overlap. In fact, the difference lies more in quantity than in quality, the military presence being normally assured by *single* armed persons in the case of observer corps.

60. *Measures not provided for by the Charter. A) The authorization of the use of force by States.*

BIBLIOGRAPHY: See § 55. *Adde*: GAJA, *Il Consiglio di Sicurezza di fronte all'occupazione del Kuwait: il significato di un'autorizzazione*, in *RDI*, 1990, p. 380 ff.; VERHOEVEN, *Etats alliés ou Nations Unies? L' ONU face au conflit entre l'Irak et le Kuweit*, in *AF*, 1990, p. 145 ff.; BURCI, *L'azione del Consiglio di Sicurezza delle N.U. nella crisi del Golfo*, in *CI*, 1991, p. 278 ff.; AA.VV., *Agora: the Gulf Crisis in International and Foreign Relations Law*, in *AJ*, 1991, p. 63 ff. and p. 506 ff.; PYRICH, *UN: Authorisations of Use of Force — Security Council Resolution 665 and Security Council Resolution 678*, in *HILJ*, 1991, p. 265 ff.; DOMINICÉ, *La sécurité collective et la crise du Golfe*, in *EJIL*, 1991, p. 85 ff.; SCHACHTER, *UN Law in the Gulf Conflict*, in *AJ*, 1991, p. 452 ff.; VILLANI, *Lezioni su l'ONU e la crisi del Golfo*, Bari, 1991; MAJID, *Is the Security Council Working? "Desert Storm" Critically Examined*, in ., 1992, p. 984 ff.; LOBEL and RATNER, *Bypassing the Security Council: Ambiguous Authorisations to Use Force, Ceasefires and the Iraqui Inspection Regime*, in *AJ*, 1999, p. 124 ff. ; BENVENUTI, *Forze multinazionali e diritto internazionale umanitario, in* RONZITTI, *Comando e controllo nelle forze di pace e nelle coalizioni militari*, Milan, 1999, p. 222 ff. SAROOSHI, *The UN and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, 1999; BLOKKER, *Is the Authorization Authorized ? Powers and Pracice of the UN Security Council to Authorize the Use of force by Coalitions of the Able and Willing,* in *EJIL*, 2000, p.541 ff.; SICILIANOS, *L'autorisation par le*

Conseil de Sécurité de recourir à la force: une tentative d'évaluation, in *RGDIP*, 2002, p. 5 ff.; PICONE, *La guerra contro l'Iraq e le degenerazioni dell'unilateralismo*, in RDI, 2003, p. 39 ff..

Notwithstanding frequent resort to the use of UN Forces after the end of the cold war, things have now changed. The deployment of UN Forces has proved almost unfeasible for many reasons (political, military, logistic, etc.). The experience of ONUSOM in Somalia and UNPROFOR in the former Yugoslavia testify to this.

The failure of the action of the Council is very well illustrated by the part of the above cited res. no. 954 of 1994 on the withdrawal of UNOSOM from Somalia, where the Council recognises that "the lack of progress in the Somali peace process and in national reconciliation, in particular the lack of sufficient co-operation from the Somali parties over security issues, has fundamentally undermined the United Nations objectives in Somalia..." and that "the people of Somalia bear the ultimate responsibility for achieving national reconciliation and bringing peace in Somalia".

It is understandable, then, that the Council is now oriented to confer the task of conducting military operations for the maintenance of peace and security to the Member States, acting individually or through regional organizations (on regional actions see § 67).

Twice during the Cold War and several times since the beginning of the nineties, instead of acting directly, as prescribed in Article 42, or through the Secretary-General in peacekeeping operations, the Council has authorised or recommended or delegated (the three terms are used interchangeably here) Member States to use force *against* a State or *within* a State and placed the command and the supervision of military operations in their hands.

We are speaking here of actions of States authorised, or recommended, or delegated, etc., by the Council, therefore, of actions in which the individual States are free to participate or not to participate. The problem of Council decisions which *obliges* Member States to use force has never arisen. In the absence of practice and in the light of the Charter text, this type of decision would certainly be illegal.

In two cases authorisation was given to conduct a full-fledged war to counteract outside aggression. The first was the Korean War, which took place in 1950 when the Member States were "invited" to help South Korea defend itself from an attack by North Korea. The second case was the Gulf War, carried out in 1991 by a coalition of Member States "authorised" by the Council to help the Kuwait government take back its territory occupied by Iraq.

In the case of Korea, in a first resolution, no. 83 of June 27, 1950, the Council recommended that the Member States furnish assistance to South Korea. In a subsequent resolution,

no. 84 of July 7, 1950, it expressed satisfaction with the support given by a certain number of States to the recommendation of June 27, and accepted that the command of the forces operating against North Korea be undertaken by the United States, authorising use of the UN flag. The two resolutions were contested by the Soviet Union but only regarding their procedural aspect, as they had been adopted in its absence (see § 25).

In the case of the Gulf crisis, after having taken several decisions under Article 41, the Council passed res. no. 678 of November 29, 1990 in an effort to induce Iraq to leave Kuwait. This resolution authorised the Member States, if Iraq were not to have retreated within January 15, 1991, to use "all necessary means" to reach this aim and to restore peace and security in the Gulf area. Among the necessary means — according to the terminology which thereafter became standard in order to indicate also the use of armed force — military action was included and it punctually began on the date set.

In other cases Member States have been authorised to use military force in internal crises. One important example is INTERFET (International Force for East Timor), a multinational force led by Australia and entrusted by the Security Council (res. no. 1264 of September 15, 1999) with the task of restoring peace and security in East Timor. The action of the Force, which faced serious troubles following the result of the referendum in favour of the independence of this country from Indonesia, was very successful and lasted until the replacement of the Force by the military personnel of the UNTAET, the UN Transitional Administration in East Timor, created by res. no. 1272 of October 25, 1999 (see § 60 *bis*).

Recently, the use of military forces by Member States has been authorised as far as the (tragic) situation in Iraq is concerned, after the unauthorised International war conducted by the coalition led by the United States. By res. no. 1511, of October 16, 2003, the Security Council, at para. 13 "authorises a multinational force under unified command [the forces of occupying Powers were already on the spot!] to take all necessary measures to contribute to the maintenance of security and stability in Iraq" and at para. 14 "urges Member States to contribute assistance under this mandate, including military forces, to the multinational force referred to in para. 13 above". The authorisation has been reiterated by res. no. 1546 of June 8, 2004. This time, the mandate of the multinational force will be reviewed after twelve months from the date of resolution and will terminate earlier at the request of the Interim Government of Iraq (par. 12 of the res.) a Government installed on June 2004 - and whose true independence from the multinational force could be called into question!.

There are numerous other examples of authorisation of the use of force in internal crises. As far as the war in Bosnia Herzegovina, see, for instance: res. no. 816 of March 31, 1993, which authorised the Member States to use their air forces individually or within the framework of a regional organizations; res. no. 1031 of December 15, 1995, which acknowledged the transfer of functions from UNPROFOR (see § 59) to the Multinational Implementation Force (IFOR) created by the Dayton Agreement; res. no. 1087 of December

11, 1996, para. 18, which authorises the Member States to establish a Multinational Stabilisation Force (SFOR) as a successor of IFOR. With regard to the Somali crisis, the res. no. 794 of December 3, 1992 can be cited. By it the Council authorised the Member States to co-operate in carrying out the "offer" of a UN member (read: the United States) to use the necessary means (read: use of force) in order to establish "a secure environment for humanitarian relief operations" by providing their military forces. As we have already had occasion to note, the functions thus entrusted to the Member States were subsequently transferred to the United Nations Force operating in Somalia, which absorbed the national military contingents (see § 59).

For other examples see: res. no. 929 of June 22, 1994, authorising a French force to intervene in Rwanda; res. no. 940 of July 31, 1994, authorising the USA to intervene in Haiti and lead the Multinational Force in Haiti (MFH); res. no. 998 of June 6, 1995, authorising the constitution of a "Rapid Reaction Force" (RRF) in the former Yugoslavia with contingents from France, the Netherlands and the United Kingdom; res. no. 1080 of November 15, 1996, authorising the creation of a temporary multinational force to intervene for humanitarian reasons in the Eastern Zaire; res. no. 1101 of March 28, 1998 (Multinational Protection Force for Albania, leaded by Italy; res. no. 1264 of September 15, 1999 (Multinational Force in East Timor); res. no. 1386 of November 20, 2001 and no. 1444 of November 27, 2002 (International Security Assistance Force in Afghanistan; res. no. 1464 of February 4, 2003 (French forces, together with ECOWAS forces, in Ivory Coast); res. no. 1484 of May 30, 2003 (Interim Emergency Multinational Force in Bunia, Democratic Republic of Congo); res. no. 1497 of August 1st, 2003 (Multinational Force in Liberia); res. no. 1529 of February 29, 2004 (Multinational Interim Force in Haiti)..

Measures short of war, but still definable as measures involving the use of armed force, have been authorised or recommended to Member States. Among them are those authorising the establishment of naval blockades, which, also through the use of force, are designed to prevent trade by ships of any nationality (and in derogation of the principle that on the high seas a ship is subject only to the flag State) with certain ports. A precedent of a naval blockade, at the time of the Cold War, can be found in res. no. 221 of April 9, 1966, which, to strengthen the prohibition on the sale of oil to Southern Rhodesia (see § 58), "called upon" Great Britain to prevent "by the use of force if necessary" the arrival of oil in the port of Beira (Mozambique) which was intended to continue by land for Rhodesia. Much larger naval blockades have been set up more recently, and precisely during the Gulf crisis, before the outbreak of hostilities against Iraq, and during the Yugoslav crisis.

In the first case, res. no. 665 of August 25, 1990 "called upon" the Member States to prevent any ship coming from or directed towards the coasts of Iraq and occupied Kuwait from violating the embargo established by previous res. no. 661 of August 6, 1990. In the case of the Yugoslav crisis similar measures were ordered against the Yugoslav Republic (Serbia-Montenegro) with res. no. 787, para. 12, of November 16, 1992.

Is the delegation of the use of force by the Council to the States lawful?

The question of the legality of the delegation of the use of force to States has been considered in legal doctrine, in the light of general principles of domestic law regarding the mandate. The opinion has been held that Article 24 of the Charter ("...Members *confer* on the Security Council primary responsibility for the maintenance of international peace and security...") embodies a delegation of power from Member States to the Security Council. The consequence - we say - should be the impossibility for the Council itself to delegate, since a well established general principle of law states that delegatus *non potest delegare*.

We do not believe that Article 24 can be interpreted as containing a true delegation in the meaning this term has in domestic law. The terminology used in the article cannot be read in a literal sense. It is rather a way of stating that the Security Council has the monopoly of the use of military force, with the exception of self-defence. If Article 24 were interpreted in the sense of the delegation theory, then the Member States, at least collectively, could decide to use force whenever they wanted, since the *delegans* can always resume the power conferred to the *delegatus*. Such a consequence is manifestly absurd. Worthy of note is also that Article 24 has not only been interpreted as containing a delegation of power, with the consequence of the applicability of the principle *delegatus non potest delegare*, but also in the quite opposite sense, i.e. as a rule which, being couched in very general terms, could justify all actions of the Security Council not expressly set forth by the Charter provided that they are necessary in order to maintain international peace and security!

The attempt has been made (by SAROOSHI, *op. cit.*, pp.22-46) to reconcile the principle "*delegatus non potest delegare*", with the delegation of the use of force by the Security Council to States. This author also starts from the assumption that Article 24 of the Charter embodies a true delegation to the Council. However, he holds that the principle does not prevent the (sub)delegation to States, but only implies that the (sub)delegation is subject to certain conditions, namely that it does not include: the determination of the threat to the peace, the breach of the peace or an act of aggression; an unrestricted power of command; broad powers of discretion; the exercise of powers in a way other than that specified by the Charter. Moreover, the terms of the (sub)delegation should be construed narrowly. The attempt is not convincing, since the principle "*delegatus non potest delegare*" as a general principle of law suffers no other exception than the express authorization on the part of the *delegans* to proceed with a sub-delegation.

In our opinion, it is correct to say that the Charter does not permit the delegation of military force by the Council to the States. However, the reason for that is simply because the founders of the United Nations wanted to concentrate the international police power in the hands of the Organisation with the consequent guarantee of objectivity and impartiality of military actions. As time went by, as the original idea of the framers of the Charter

was revealed as Utopian, the practice of delegation begun. Now the Council tends more and more to follow this practice, while maintaining its control over operations. This being the case, and due to the lack of a serious opposition to such practice among the great majority of Member States, delegation has to be considered as permissible under an unwritten rule which has taken root in recent times. On the basis of this rule, the Council is assuming more and more functions that are *directive* rather then *operative*.

In previous editions of this book, and specifically with regard to the Gulf War, we held the opinion that the intervention of States "authorised" by the Council could come within the framework of Article 51 when, as in this case, it was an intervention aimed at repelling an armed attack in the exercise of collective self-defence (see § 55 *bis*). However, especially in the light of more recent practice, this framing seems unsatisfactory and not much in keeping with reality, since delegation to States also concerns interventions in civil war situations which it is impossible to define as collective self-defence., not being a reaction to an armed aggression.

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The delegation to States must be couched in express terms. No resolution of the Council can be interpreted as implicitly authorising the use of force by States if it does not contain a clear authorisation. The events which preceded the second war in Iraq by a coalition led by the United States in 2003 are very meaningful in this sense. Res. no. 1441 of November 8, 2002, authorised UN inspectors to be sent to Iraq to investigate possible weapons of mass destruction. It deplored the continuous violations by Iraq of its obligations vis-à-vis the United Nations, and warned Iraq once again "that it will face serious consequences" as a result of these violations. In the opinion of the Member States of the coalition, such a warning was sufficient to justify the subsequent war. However, it is well known that the opposite view was upheld by the overwhelming majority of the UN members.

The resolutions adopted by the Security Council at the time of the war in Afghanistan also cannot be interpreted as authorising this war. Some of these resolutions (particularly res. no. 1368 of September 12, 2001 and no. 1373 of September 28, 2001) after having requested the States to take a series of measures, including financial measures, against terrorists and terrorist organizations, like Al Qaida, embodied a "whereas" reaffirming "the inherent right of individual and collective self-defence" . References to self-defence, made in resolutions whose operative parts were clearly applying measures not involving the use of military force, do not seem sufficient to justify military actions by States.

According to the rule on authorisation which has emerged from practice, the control on the way operations are carried out by States must remain in the hands of the Security Council. This is clearly a *minimum* which is necessary in order to say that military action is still carried out in the framework of the United Nations. In fact, the Council is constantly kept informed, directly or through the reports of the Secretary-General, about the

conduct of operations, so that it is able to give those directives it deems appropriate.

Since the military action of States has to be carried out under the supervision and control of the Security Council, the illegality of a war conducted without authorisation by the Council cannot be removed by a subsequent (implied) ratification, for instance by providing a post-war administration of the territory wherein the war took place. The case of the Kosovo crisis can be cited in this regard. After three months of the unauthorised air war by Nato forces in 1999 (see § 67), by res. no. 1244 of June 10, 1999 the Council established UNMIK, the UN Interim Administration in Kosovo (see § 60 *bis*) still in charge, with some of the NATO forces (the KFOR) ensuring the external security of the territory. The resolution clearly governs the post-war situation and has been welcome within the Security Council as a way of restoring the authority of the Council (See Doc. S/PV. 4011 of June 10, 1999). However, it does not embody any express ratification of the air war; nor it could be interpreted as entailing an implied ratification precisely because the Security Council had no control of operations during the war. The same must be said of resolutions (for instance res. no. 1483 of May 22, 2003, no. 1511 of October 16, 2003) concerning the post-war situation in Iraq and recognising the "authority" of the occupying coalition forces led by the United States.

What we say about unauthorised military actions is strictly linked to the United Nations system including customary rules which have emerged within the system. In our opinion, the question can be put differently from the point of view of general (customary) international law. When the UN system does not work, then general international law is by itself unable to govern the *jus ad bellum*, showing a "lacuna" which opens the way to discussion of the problem of war in the context of natural law as a problem of "just" or "unjust" war. See on this point, CONFORTI, *The Doctrine of "Just War" and Contemporary International Law*, in IYIL, 2002, vol. XII, p. 3 ff.

According to another view (Picone), when the UN system of collective security does not work or works imperfectly, unauthorised military action by Member States can be permitted on the basis of customary international law, provided that countries react against violations of obligations *erga omnes*, in particular International crimes. The Member States are then acting *uti universi*, i. e. in the name of International community as a whole. In some cases, namely when it is evident that the intervention of the Security Council has no other aim but to legitimize an action already decided by single States, the UN Organization is in these States' service and becomes itself an organ of the International community. This view is not convincing since the equation International crimes with the right of every State to react with the use of force is not persuasive.

Lastly, the forces of Member States whose creation is authorised by the Security Council must comply with general International law, especially Humanitarian law. Such compliance is imposed by the Council on the peacekeeping forces (see § 59) and it is even more understandable that it is

incumbent on forces set up by States. Moreover, all Sates must abide by international law, and it would be strange if they were exempted when using force for the maintenance of peace and security.

In fact, the boundary between action of the States, under the supervision and authority of the Council, and action of the Secretary-General, under the supervision and authority of the Council, tends to vanish. Besides, even if the first kind of action is legal, its superiority, in terms of impartiality and objectivity, with respect to the other kind should not be exaggerated. The violent operations carried out by ONUSOM in Somalia (see § 59) show that the use of military force, even on the part of the United Nations, should always be discouraged. In other words, use of force always has odious consequences, no matter who is behind it. How, then, can the fundamental problem of maintaining peace be resolved? In our view, the only solution would be to provide the United Nations with effective instruments to *prevent* crises from breaking out, and this could be done only by giving the United Nations the means to carry out serious, continuous and effective arms control. This is obviously a utopian solution in light of the actual behaviour of States, but it is one worth striving for.

As we have already noted in discussing revision of the Charter (see § 8), General Assembly res. no. 46/36 of December 12, 1991 established at the United Nations a "Register of conventional weapons" in which, beginning from January 1, 1992, there were to be registered data, *provided by the Member States*, relating to the import and export of conventional arms as well as the size of national stocks. A system of control by the United Nations over the production and sale of arms, instead of being based only on data provided by the States, should involve *direct* means of information and inspection, as well as enforcement measures of the kind governed by Article 41 to compel if necessary the States to tolerate them. The need for preventive disarmament in order to reduce the sale and the number of small arms and light weapons in conflict-prone regions is stressed in the Report of the Secretary-General to the 54 th sess. of the General Assembly in 1999 (see Doc. A/54/1 of August 31, 1999, para. 37 ff.). However, up to now nothing very serious has occurred regarding this matter.

60. *bis*. B) *Measures on governing territories*.

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internationale au Timor oriental, *ibid*., 2000, p. 139 ff.; De HOOG, *Attribution or Delegation of (Legislative) Power by the Security Council ? The case of the UNTAET*, in *Int.PK*, 2001, p. 7 ff.; IRMISCHER, *The Legal Framework for the Activities of the UN Interim Administration Mission in Kosovo: Te Charter*, *Human Rights and the Law of Occupation*, in *GYIL*, 2001, p. 353 ff.; MATHESON, *United Nations Governance of Postconflict Societies,* in HJIL, 2001, p. 76 ff.; SHUSTOV, *Transitional Civil Administration within the Framework of UN Peacekeeping Operations: A Strong Mechanism ?,* in Int PK, 2001, p. 417 ff.; STROHMEYER, *Collapse and Reconstruction of a Judicial System*, in *Ath and J*, 2001, p. 46 ff.; ABLINE, *De l'indépendence du Timor-Oriental*, in *RGDIP*, 2003, p. 349 ff.; KORHONEN, *International Governance in Post-Conflict Situations*, in *LJIL*, 2001, p. 495 ff.; Von Carlowitz, *UNMIK Lawmaking between Effective Peace-Support and Internal Self-determination*, in *AV*, 2003, p. 336 ff.

Sometimes the Security Council, acting in the framework of Chapter VII and invoking the necessity to maintain or restore peace and security, has organized the governance of territories. Such territories might have been the object of contrasting claims by neighbour States or have been the battlefield of a civil war. Single acts of governance have also been decided and executed.

The establishment of administrations of territories has also been decided in some cases by the General Assembly, for a transitional period, in the framework of de-colonisation. See § 80 *bis*.

Very often the Security Council has participated, through the Secretary-General and his staff, in constitutional procedures of national conciliation. We have considered this function as a kind of peaceful settlement of disputes according to Article 39 (see § 56).

Already at the beginning of the United Nations' life the Security Council was called on to participate in the government of disputed territories. This was the case of the Free Territory of Trieste established by the peace treaty of 1947 between the Allied Powers and Italy. According to Annex VI, the Free territory was conceived as a small State ruled by a Governor appointed by the Security Council together with independent local legislative, judicial and executive authorities. The example of Trieste is not very meaningful, since the Free Territory was never instituted and the territory of Trieste was successively divided up between Italy and Yugoslavia.

More recently two examples of administration set up by the Council, with express reference to Chapter VII, and entrusted to the Secretary-General with full legislative and executive authority deserve a particular mention. One is the case of UNMIK (UN Interim Administration in Kosovo), the other is UNTAET (UN Transitional Administration in East Timor).

UNMIK, established by res. no. 1244 of June 10, 1999 immediately after the end of NATO's air war, is still operative. Its function is to organize and oversee the development of provisional institutions for democratic and autonomous self-government pending a political settlement, and, at a final stage, to oversee the transfer of authority from provisional institutions to institutions established under the said political settlement. UNMIK is headed

by a Special Representative of the Secretary-General, who is assisted by the OSCE (see § 68) in matters of democratisation and institution building, by the European Union in matters of reconstruction and economic development and by NATO forces (KFOR) as far as the external defence is concerned. A "Constitutional Framework for Provisional Self-government in Kosovo" has been adopted by UNMIK regulation n.° 9/2201 of May 15, 2001, according to which a Parliamentary Assembly, a President of Kosovo and other representative institutions have been created and are now in function. Although the UN administration is considered to be provisional, its end is not easily foreseeable due to the difficulties of combining the Kosovar Albanians' claim for independence, the protection of the Serb minority and the claim for territorial integrity of Serbia and Montenegro.

UNTAET was created by res. no. 1272 of October 25, 1999 to provide security and maintain order throughout the territory of East Timor, to support capacity-building for self-government, to ensure the co-ordination and delivery of humanitarian assistance to the population which had been the target of massacres on the part of the guerrilla sustained by Indonesia following the referendum of August 1999 in favour of the independence of the territory. The UN administration lasted until May 20, 2002 when the territory became independent and was admitted to the United Nations as Timor-Leste. The new State is now assisted by UNMISET (UN Mission of Support in East Timor), a multifunctional peacekeeping force (see § 59), which is composed of civil and military personnel headed by a Special Representative of the Secretary-General, and whose mandate is to assist the local authority in promoting stability, democracy, justice, public security, law enforcement, external security and border control for a period of two years.

Although anomalous, the case of the post-conflict administration of Iraq by the United States' led coalition deserves mention here. By res. no. 1483 of May 2003, after having recognised "the specific authorities, responsibilities, and obligations under applicable International law, of these States as occupying powers under unified command (the Authority)", the Security Council at para 9 "supports the formation...of...a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibilities of the Authority ". In fact, at the moment we are writing, the transitional administration is mainly run under the control of the coalition led by the United States. The case is anomalous since the coalition administration has not been created but only recognised by the Security Council and - as in the case of the use of military force dealt with above (see § 60) - the action is carried out by Member States instead of the Secretary-General.

The case of UNTAC (UN Transitional Authority in Cambodia) created by res. no. 745 of February 28, 1992 on the basis of an agreement between the interested States promoted by the five permanent Members of the Security Council, can also be cited. For a period of more than one year UNTAC was entrusted with the task of assisting the civil administration, preparing political elections and protecting human rights in Cambodia. Worth noting is the fact that in this case - a case which does not differ in substance from the subsequent cases of UNMIK and UNTAET, indeed - the Security Council did not mention Chapter VII..

The institution of tribunals dealing with crimes committed by individuals can be considered as single acts of governance. The first two well known examples are the International Criminal Tribunal for the former Yugoslavia (ICTY), established by res. no. 827 of May 25, 1993, and the International Criminal Tribunal for Rwanda (ICTR), established by res. no. 955 of November 8, 1994. The first was created for the prosecution of serious violations of International Humanitarian law committed in the former Yugoslavia after January 1992; the second for the prosecution of violations of International Humanitarian law and genocide committed by Rwandan citizens between January 1 and December 31, 1994. Although the two Tribunals do not sit in the territory where their jurisdiction is exercised (the seat of the first is in The Hague, of the second in Arusha) they may be considered assisting in the governance of such territories.

The Security Council has also played a role in the establishment of the Special Court for Sierra Leone. The creation of the Court was envisaged by res. no. 1315 of August 14, 2000 and set up by an agreement signed by the Secretary-General and the Government of Sierra Leone on February 27, 2002. It has one Trial Chamber and one Appeals Chamber. The first consists of three judges, two appointed by the Secretary-General and one appointed by the Government; the Appeals Chamber consists of five judges, three appointed by the Secretary-General and two appointed by the Government. The Court has jurisdiction to hear crimes of war, crimes against humanity and other serous violations of humanitarian law committed in Sierra Leone since November 30, 1996.

The measures of governance we are dealing with do not find an express ground in the Charter. Many attempts have been made in legal doctrine and in practice to bring these measures within the "enforcement measures" set forth by Articles 41 and 42. The creation of criminal tribunals in particular has been the object of speculation. The most wide spread opinion in this regard is that Article 41 applies. The fact that Article 41 deals with behaviours which the Security Council can impose on States has not be considered as decisive. What States can be requested to do - it has been said - the Council can also do. Such opinion has been held by the International Criminal Tribunal for the former Yugoslavia (see the decision of the Trial Chamber, of August 10, 1995, *case no IT-94-I.T/ Defendant: Dusko Tadic*, para. 27-32, and the decision of the Appeals Chamber of October 2, 1995, in the same case). According to a more sophisticated opinion (De HOOG),

Article 41 should be split in two parts, one allowing the Security Council to take whatever decision it deems necessary to maintain or restore peace and security (in this case, the decision to create a tribunal), the other allowing the Council to call upon the States to co-operate with the tribunal. We have already criticised the last opinion (see § 58) and there is no need to deal with this again here. The first opinion is also unconvincing, since the jurisdiction of the Tribunals - and the same can be said of the administration of territories - is exercised upon individuals, while the enforcement measures set forth by Article 41 are clearly conceived as measures against States or armed factions within a State.

Another view which cannot be accepted, although it is upheld by some principal organs of the United Nations, is that measures not set forth by one or the other article of Chapter VII can be grounded on Article 24, para. 1. According to this view, paragraph 1 of Article 24, by stating that the Security Council has the primary responsibility for the maintenance of international peace and security, allows the Council to take whatever measure, provided that it is necessary for maintaining or restoring peace. In other terms, the Council could exercise a kind of general, residual power. This view is contradicted by the second paragraph of Article 24, wherein the "specific powers" granted to the Council with reference to Chapters VI, VII, VIII, and XII are enumerated. And, indeed, why should Chapter VII specify, in Articles 40, 41, and 42 ff., the measures the Council could adopt, if the Council can take any other action in order to maintain peace and security? In fact, the theory of residual powers, although apparently progressive, was used, during the Cold war, to provide a legal basis for those Council resolutions characterised by compromise, basic disagreement among the members of the organ, and near total incapacity to deal effectively with the substantive issues of a dangerous situation. Article 24, in other words, was invoked for resolutions which clearly betrayed its spirit in as much as they involved the circumvention of the Council's responsibilities rather than the earnest undertaking of them.

This can be said, for instance and with respect, with regard to the advisory opinion of June 21, 1971 of the International Court of Justice, which applied the theory of residual powers under Article 24 (cf. ICJ, *Reports*, 1971, p. 51, no. 110) to Council resolution no. 276 of January 30, 1970 on the Namibia question. This resolution had been limited to declaring South Africa's presence in Namibia (today independent) as "invalid", and it had been adopted after ascertaining that it was impossible for the Council to proceed against South Africa with effective and decisive sanctions, as the majority of the Member States and civilised peoples wished to do.

The opinion of the Secretary-General B. Boutros Ghali, an opinion expressed in a Report concerning the International Criminal Tribunal for the former Yugoslavia (cf. Doc. S/25704 of May 3, 1993, paras. 18-30) is close to the theory of residual power. In the Report, this kind of organ was considered a subsidiary organ of the Council under Article 29 of the

Charter ("The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions"). In the same Report, the functions of the Tribunal were deemed to be covered by Chapter VII without further specification.

In our opinion it must be recognised that the practice of the Security Council has largely deviated from the letter and the spirit of the Articles in Chapter VII. As for all other acts of the United Nations which cannot be grounded in the Charter the question must be asked whether a customary rule has emerged from practice. The answer is yes, even adopting the rigorous method we pleaded for in the introduction to this book (see § 4). The lack of opposition to the participation of the Council to the government of post-conflict areas, together with the *communis opinio* among the generality of the Member States that the intervention of the Council is necessary in order to restore peace and security in these areas, testify in favour of the existence of such a custom.

Accordingly, we revise the opinion expressed in preceding editions of this book, according to which the administration of territories and the creation of International criminal tribunals were to be included among the measures set forth in Article 42 as a kind of belligerent measure. Indeed, it must be recognised that such an opinion was unable to explain cases wherein no previous armed actions had been carried out by UN Forces or with the authorisation of the Security Council, such as the administration of Kosovo or the creation of the Tribunal for Rwanda.

It has been asked whether the administrators of territories under the control and the directives of the Security Council must abide by rules of international law. As we have seen, a trend going in such a direction is developing in practice regarding all measures involving and not involving the use of forces (see §§ 58 and 59). By analogy, the same must be said of UN administrations of territories, particularly as regard respect for human rights and humanitarian law as well as the compliance with the principle of self-determination of governed people.

Section III

MAINTENANCE OF THE PEACE: THE FUNCTIONS OF THE GENERAL ASSEMBLY

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61. *Discussions and recommendations on general questions.*

In the field of maintaining peace, as in nearly all other fields (economic, social and cultural co-operation, etc.) in which the General Assembly is called upon to intervene, this body may issue only recommendations, that is, acts without binding force.

Since it is the organ in which all States are represented, the Assembly's power to discuss any question of a general nature regarding maintenance of the peace, and to possibly issue recommendations on such issue, has noteworthy importance. This power, which appears first in Article 10, is specifically provided by Article 11, para. 1 ("The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security... and may make recommendations with regard to such principles to the members or to the Security Council or to both"). In looking through the proceedings of the various sessions of the organ it is noticeable how much space is dedicated to "general discussions" which touch upon all the most important political and international topics of the period in which the session is held. It is with reference to such discussions that the United Nation's nature of an "international forum", of a "center of open diplomacy", or of a "mirror of world public opinion" stands out. The number of recommendations — in truth, often wordy and repetitious — of the Assembly on general questions is very impressive.

62. *The peaceful settlement function.*

With regard to specific disputes and questions concerning given States, the Assembly exercises the same identical peaceful settlement function as does the Council on the basis of Chapter VI of the Charter. The peaceful settlement function of the Assembly has a broader scope of application than that of the Council. It covers, under Article 14, any question that touches upon the general welfare or friendly relations among nations ("... the Assembly", Article 14 says, "may recommend measures for the *peaceful adjustment* of any situation... 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..."). The provision in Article 14 absorbs the more specific one in Article 11, para. 2, according to which "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, paragraph 2 and... may make recommendations

with regard to any such question to the State or States concerned...". Actually, Article 10 would be enough to provide a basis for the peaceful settlement function of the Assembly. This article gives the organ a general power to discuss "any questions... within the scope of the present Charter" and to "make recommendations... on any such questions...".

With regard to the procedure by which the Assembly is entrusted with a dispute or question, see Articles 12 ff. of the organ's rules of procedure. These articles provide that the proposal to place a given question on the agenda of a session may be made by the other principal organs of the United Nations (those indicated by Article 7 of the Charter) as well as by any Member State or by a non-Member State. However, this is only if it is made under Article 35, para. 2, that is, if the State brings to the attention to the Assembly a dispute to which it is a party that is likely to threaten the peace. The rules of procedure thus confirm, with regard to any kind of dispute or question, the rules that Article 35, paras. 1 and 2, and Article 11, para. 2, formulate only in relation to the field of maintenance of the peace.

As we saw regarding the Security Council (see § 43), the limitation concerning non-Member States has no practical relevance.

The very general terms of Article 14 ("... recommend *measures for the peaceful adjustment*...") allow the peaceful settlement function of the Assembly to cover all the measures which could be adopted by the Security Council under Articles 33, para. 2, 36, 37 and 38 of the Charter. The Assembly may therefore use any instrument, as long as it is non-binding, that may bring about agreement between the parties involved in an international dispute or crisis or directly concerned in a situation. It may recommend recourse to one of the procedures under Article 33, or indicate terms of settlement (that is, solutions on the merits) or provide for the establishment or directly establish (making use of Article 22 on subsidiary organs) organs of good offices, mediation, conciliation, and so on. On the other hand, the absence of detailed provisions such as those provided for the Security Council by Chapter VII, an absence to be appreciated, eliminates any problem of interpretation.

For some few examples of resolutions, see *UN Rep. and Supplements, sub* Article 14, (however, many resolutions coming under the peaceful settlement function appear in the lists under Articles 10 and 11) and: res. no. 1947-XV of October 31, 1960 (recommendation to Italy and Austria to negotiate a settlement of the Upper Adige question); no. 1599-XV of April 15, 1961, relating to the presence of foreign troops in the Congo; no. 1616-XV of April 21, 1961 (the Cuba-United States conflict); no. 1855-XVII of December 19, 1962 (on the re-unification of Korea); no. 1964-XVIII of December 13, 1963 (*idem)*; no. 2077-XX of December 18, 1965 (observance of the territorial sovereignity of Cyprus); no. 2453-XXIII (*A*) of December 19, 1968 (Middle East question); no. 2504-XXIV of November 19, 1969 (on the agreement between Indonesia and the Netherlands for Western Irian); no. 2516-XXIV of November 25, 1969 (on the re-unification of Korea); no. 2535-XXIV,B, of December 10, 1969 (on the Middle East question); no. 3160-XXVIII of December 14, 1973 (on the dispute between Great Britain and Argentina over the Falklands/Malvinas Islands); no. 3333-XXIX of December 17, 1974

and no. 3390 A-XXX of November 18, 1975 (again on the re-unification of Korea); no. 3395-XXX of November 20, 1975 (negotiations for Cyprus); no. 34/412 of November 21, 1979 (negotiations between the United Kingdom and Guatemala for Belize); no. 34/412 of November 21, 1979 (negotiations for Gibraltar); no. 37/9 of November 4, 1982 (Falklands/Malvinas); no. 38/12 of November 16, 1983 (*idem*); no. 38/10 of November 11, 1983 (support for the Contadora group's mediation activities in Central America); no. 38/77 of December 15, 1983 (Antarctic regime); no. 39/6 of November 1, 1984 (Falklands/Malvinas); no. 40/188 of December 17, 1985 (invitation to revoke the unilateral embargo ordered by several countries against Nicaragua); no. 41/31 of November 3, 1986 (invitation to apply the decision of the International Court of Justice of June 27, 1986 on the United States intervention in Nicaragua); no. 41/31 of November 3, 1986 (bombing of Libya by the United States); no. 42/124 of December 7, 1987 (torture and cruel treatment of children in South Africa); no. 43/177 of December 15, 1988 (Arab-Israeli conflict); no. 44/2 of October 6, 1989 (*idem*); no. 44/10 of October 23, 1989 (peace process in Central America); no. 44/124 B of December 14, 1989 (Antarctic regime); no. 44/240 of December 28, 1989 (armed intervention of the United States in Panama); no. 45/68 of December 6, 1990 (Arab-Israeli conflict); no. 46/7 of October 10, 1991 and no. 46/138 of December 6, 1991 (human rights situation in Haiti); no. 46/18 of November 29, 1991 (situation in Cambodia); no. 46/75 of December 11, 1991 (Arab-Israeli conflict); no. 47/19 of November 24, 1992 and various others up until res. no. 58/7 of November 4, 2003 (request to the United States to lift the embargo against Cuba); no. 47/20 of November 24, 1992 (human rights situation in Haiti); no. 47/21 of November 25, 1992 (withdrawal of foreign military forces from the Balkans); no. 47/57 of December 9, 1992 (Antarctic regime); no. 47/63 of December 11, 1992 (Middle East); no. 47/118 of December 18, 1992 (peace process in Central America); no. 47/139 of December 18, 1992 (human rights situation in Cuba); no. 47/140 of December 18, 1992 (human rights situation in El Salvador); no. 47/141 of December 18, 1992 (human rights situation in Afghanistan); no. 53/94 of February 11, 1999 (peace in Central America); no. 53/164 of February 25, 1999 (human rights in Kosovo); no. 54/42 (peaceful settlement of the question of Palestine); no. 57/113 A of December 6, 2002, with reference to previous resolutions (situation in Afghanistan); no. 57/228 of December 18, 2002 (Khmer Rouge trials in Cambodia); no. 57/234 of December 18, 2002 (human rights in Afghanistan).

Aside from the substantial limit of domestic jurisdiction, the peaceful settlement function of the Assembly meets only the procedural limit under Article 12: "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 recommendation with regard to that dispute or situation unless the Security Council so requests". The limit of domestic jurisdiction has been lost in practice with regard to human rights and other matters (see § 45 III). The provision of Article 12 is a corollary of the principle affirmed by Article 24 under which the Council has *primary* responsibility for maintenance of the peace. The phrase "while the Security Council is exercising the functions assigned to it by the present Charter..." is to be understood restrictively, so as not to compromise the aim of the peaceful settlement of the dispute or situation. The exception founded on the fact that the case is pending before the Security Council may therefore be legitimately raised before the Assembly, independently of circumstances of mere form such as the registration of the dispute or situation on the agenda of the

Council, only if the Council or its subsidiary organs are discussing or are actively concerned with the question, or if there is a reasonable probability that they will be so in a short time.

According to the International Court of Justice (Advisory Opinion of July 9, 2004, on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories,* para. 27-28), the practice has evolved, showing "an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security" . Moreover, the Court holds the opinion that such a practice "is consistent with Article 12, para. 1, of the Charter (sic!)" and this is sufficient for concluding, in the specific case, that the General Assembly could deal with the construction of the wall by Israel. With due respect, this opinion of the Court seems to be excessive from a general point of view and unnecessary in order to solve the problem of "*lis alibi pendens*" in the specific case, since the Security Council neither discussed, nor adopted any resolution on the construction of the wall.

The Assembly practice initially seemed to favour a formalistic interpretation of Article 12, and therefore the necessity that a question be cancelled from the Security Council agenda so that the Assembly could make it the subject of recommendations (cf. UN Rep., *sub* Article 12, nos. 23-54). Then, there was a tendency to take an excessively restrictive view, by interpreting the phrase in Article 12 "while the Council is exercising..." in the sense of "while the Council is contemporaneously exercising..." (cf. *UNJY*, 1964, p. 229 ff. and, especially, 1968, p. 185). The reservations that were occasionally presented in the Assembly (for example: by Belgium, Holland and Norway in 1970 concerning the discussion of the question of apartheid in South Africa, with which the Council was seized, in GAOR, 25th sess., Spec. Pol. Comm., 69th meet., nos. 7 and 43, and Pl. meet., 1864th meet., no. 84 ff.; by Holland in 1971 regarding the Middle East question, also before the Council, in GAOR, 26th sess., Pl. meet., 2009th meet., no. 83 and 2016th meet., no. 221; by Iraq in 1990 in relation to the Gulf crisis, in A/45/PV.3 of September 25, 1992) usually fall on deaf ears. See also UN Rep., Suppl. No. 6, par. 16 ff.

Since there are no other limits to the peaceful settlement function of the Assembly, besides those of domestic jurisdiction, under Article 2, para. 7, and of "*lis alibi pendens*", under Article 12, the view held by the United States in the session of November 6, 1986 (doc. A/41/PV.53) after the adoption of the above-cited resolution no. 41/31 of November 3, 1986, which invited the U.S. to give effect to the judgment handed down on June 27 of the same year by the International Court of Justice in the Nicaragua-United States case, cannot be shared. According to this view, Article 94, para. 2 (which provides that the Security Council may make recommendations or decide upon measures to give effect to a judgment of the Court if one of the parties fails to do so voluntarily) would prevent the General Assembly from making recommendations on the matter.

Does the Assembly have a power of investigation more or less similar to the one granted to the Security Council in Article 34? The answer must be yes. It is a power that is implicit in the peaceful settlement function, indispensable to the organ in establishing what measures of peaceful

adjustment are to be recommended for a specific case, and it unquestionably can be deduced from the broad formulation of Article 14. It is obvious that, thus defined, the investigation must be preparatory to the peaceful settlement function. It becomes illegitimate if it is connected to the exercise of functions that the Assembly does not have, for example, functions which belong exclusively to the Security Council, such as those governed by Articles 41 and 42.

63. *The problem of General Assembly powers regarding "action".* A) *The solutions given by the Charter.*

There was much discussion and, and much quibbling, in the past over the General Assembly's power to take action for the protection of the peace and, more specifically, to decide measures of the kind set out by Chapter VII of the Charter. This power has been affirmed by some observers in light of the Charter and by many on the basis of rules taking shape by custom. The topic was the subject of heated discussions in the doctrine between 1950 and 1960, a period when the Assembly, under pressure from the United States, expressed the wish to replace the Security Council in maintaining the peace, once it was clear that the Council was paralysed by the use of the veto power. Later, the subject became less important owing to the Assembly's incapacity to continue this course as a result of the enormous increase in the number of members and of the Great Powers' reluctance to allow effective action by an enlarged organ that they were increasingly less able to control. With the Security Council's recent hyper-activism, the topic has lost importance even more.

From the point of view of the Charter, the meaning of Article 11, para. 2, is the crucial point. After having recognised the Assembly's power to discuss and to make recommendations on any question concerning maintenance of the peace, this provision adds "any such question *on which action is necessary* shall be referred to the Security Council...". Can it be said that this confirms the Assembly's lack of competence with regard to *all* measures provided under Chapter VII, a chapter entitled "*action* with respect to threats to the peace, etc." and which speaks only of the Security Council? Or is it possible to adopt a view that is more favourable to the Assembly?

In our opinion, there cannot be any doubt about the Assembly's absolute and complete lack of competence to resort to measures involving the use of armed force. First of all, it is to be excluded that the Assembly may impose or even only recommend to the States resort to the use of armed force.. Secondly, it is to be excluded that the Assembly may undertake actions such as those governed by Article 42, that is, establish and direct armed forces for international police operations (even for "buffer zone" operations or

operations to be carried within a State) or authorise their establishment and direction by the Secretary-General. If the reservation in Article 11, para. 2, in favour of the Security Council, has a meaning, it must be referred to actions of this kind.

In the light of the Charter, therefore, the Assembly resolutions adopted during the 1956 Suez crisis, and which were at the basis of the first *United Nations Emergency Force* (UNEF I), were illegal. This has been the only important operation carried out by the General Assembly regarding maintenance of the peace.

The Force (not to be confused with UNEF II which was to be established by the Security Council in 1973: see § 59) was set up by the Secretary-General with contingents offered by the Member States. It had the task of "ensuring and monitoring" the cessation of hostilities between Egypt, on one side, and Israel, Great Britain and France on the other (cf. res. no. 998-ES I of November 4, 1956, res. no. 1000-ES I of November 5, 1956, and res. no. 1001-ES I of November 7, 1956). The Socialist countries expressed their view that the Suez action was unlawful, given the Assembly's lack of competence on the matter. They stated (cf., for example, GAOR, 1st Em. Spec. Sess., Pl. meet., 567th meet., no. 292-297; cf. also GAOR, 11th sess., Pl. meet., 591st meet., no. 40, 592nd meet., no. 53, 595th meet., no. 170) that they approved the UNEF resolutions from a political viewpoint but abstained from voting for them specifically to stress their reservations of a legal nature. These reservations led in the following years to their refusal to contribute to the UN's expenses for maintaining the Force: see § 86).

Those who affirmed the legality of the Suez action used arguments that were very similar to the ones adopted with regard to the subsequent actions of the Security Council in the Congo, in Cyprus and in the Middle East (see § 59). It was said that the UNEF action differed from the action under Article 42 of the Charter, since it had been organized with the consent of the territorial government, with forces not exactly directed against a State and with the intent not to use arms except in self-defence. In this way, an attempt was made to overcome the obstacle of the Assembly's lack of competence. The International Court of Justice (advisory opinion in the case *Certain Expenses of the United Nations* of July 20, 1962) chose this route when it was called to give an opinion on the refusal of some States to contribute to the expenses for the maintenance of the Force, a refusal which was also justified by the illegality of the relevant Assembly decisions (on the financial aspects of the case, see § 86). According to the Court, the measures taken in respect of Suez by the Assembly would not constitute one of the enforcement actions under Article 42 and reserved for the Security Council, but would come within Article 14, specifically among the measures that the Assembly may "recommend" for the "peaceful adjustment of situations..." (cf. ICJ, *Reports*, 1962, p. 171 f.).

The above views are unfounded and the Assembly's lack of competence remains if, as we have previously sought to demonstrate (see § 59), it is held that Article 42 is not to be restricted to actions undertaken *against* one specific State but covers any UN operation of a military nature. As for the opinion of the International Court of Justice, with all due respect, it seems to us that reference to Article 14 is absurd. Article 14 gives the Assembly the power to make recommendations to the States, whereas the UNEF resolutions belong to the category of operational decisions, that is, decisions through which the Organization itself undertakes action (see § 92). Moreover, since Article 14 is concerned with measures for the "peaceful adjustment" of situations, it seems quite far-fetched to bring under it the establishment of a military force, even if it is a buffer force such as UNEF. In fact, the opinion of the Court was not complied with by many States (*ibid.*).

Once the Assembly's power to carry out military operations is excluded, may the organ at least order measures of the kind governed by Article 41? It is on the basis of this article that the Security Council may impose or also only recommend that the Member States adopt the so-called measures not involving the use of force, such as the severance of diplomatic relations, economic sanctions, and so on, against a given State. In so far as the Assembly certainly does not have binding powers regarding the maintenance of the peace, the only problem that can arise is whether it may recommend measures not involving the use of force.

Examples of Assembly resolutions recommending sanctions: no. 39-I of December 12, 1946, which called upon the States to recall their heads of diplomatic missions accredited with the Fascist government in Spain (a measure then revoked with res. no. 386-V of November 4, 1950); no. 500-V of May 18, 1951, relative to the embargo on certain goods intended for North Korea and the People's Republic of China; no. 1761-XVII of December 6, 1962, reconfirmed, specified and broadened several times in the following years (cf., for example, res. 37/69 A of December 9, 1982 and 39/72 A of December 13, 1984) on the severing of economic relations with (and on the total isolation of) South Africa because of its policy of apartheid; res. no. 2949-XXVII of December 8, 1972, no. 2203-XXVIII of December 17, 1973, no. 3336-XXIX of December 17, 1974, no. 35/122 B of December 11, 1980, no. 37/88 C and E of December 10, 1982, no. 37/123 A of December 20, 1982 and various others, up until res. no. 54/37 of December 1, 1999, on the non-recognition of Israeli acts of government in the Arab territories; res. no. 42/23 F of November 20, 1987, no. 43/50 J of December 5, 1988 and various others, up until res. no. 47/116 D of December 18, 1992, recommending an oil embargo against South Africa.

Are these resolutions lawful under the Charter?

An objective interpretation of the Charter leads to the conclusion that the Assembly also lacks competence in this case. Consequently, its relevant resolutions are not in conformity with the Charter. An exception to this conclusion is that of resolutions limited to confirming the sanctions already decided or recommended by the Security Council. This has occurred, for example, regarding the non-recognition of Israeli acts of government in the occupied Arab territories.

The view here expressed is supported by the following reasons: first, the provision which explicitly concerns sanctions, Article 41, envisages only the competence of the Security Council; second, the sanctions, even if only recommended, are strictly part of the collective security system culminating in operations of a military nature; third, as a result, the reservation under Article 11, para. 2, relating to Security Council "action", could not be referred to measures under Article 42 unless it is held that it concerns also measures under Article 41; and, lastly, the provisions on the functions of the Assembly, particularly in Articles 10, 11 and 14, seem to concern decisions inviting co-operation among the States and the peaceful adjustment of disputes rather than resolutions having the nature of sanctions.

The view has been expressed that the measures under Article 41, or at least some of them (for example, the severance of diplomatic relations), could always be recommended by the Assembly as lawful measures under customary international law and therefore that a State could also adopt them on its own initiative. This opinion was expressed, for example, by some delegates in the Assembly with regard to the cited resolution on the recall of heads of mission from Franco's Spain (cf. GAOR, 1st sess., Pl. meet., 58th meet., pp. 1193 and 1220). This view cannot be accepted. Any form of unfriendly, or even hateful, conduct of one State towards another, even if in itself lawful under international law, acquires the clear nature of a sanction if it is ordered by an international organ in the exercise of its functions, and must therefore be sustained by the competence of the organ that orders it. A different problem — which is fashionable today but which, as it does not concern the United Nations lies outside our treatment — is whether sanctions against States responsible for serious violations of international law may be adopted also by States not directly injured by such violations. It is certain, however, that the Assembly could not itself endorse or authorise such sanctions (even if they are lawful under customary international law) since the Assembly is bound by the powers attributed to it by the Charter.

With regard to the third type of measures under Chapter VII, the provisional measures governed by Article 40 (see § 57), it is possible to recognise the Assembly's competence to adopt them. It is certainly true that the provisional measures are linked to the collective security system culminating in the military operations under Article 42 and that they in fact constitute the first, even if not indispensable, stage for Security Council "action" in the case of a threat to the peace or a violation of the peace. However, it is also true that, exactly because they constitute the first stage, these measures do not have, neither by definition must they have, the nature of sanctions. Thus, they tend to blur with the measures for the peaceful adjustment of situations, which certainly do come under the (peaceful settlement) function of the Assembly. The Assembly may therefore recommend a cease-fire or the liberation of prisoners or call upon the States not to introduce arms into areas where hostilities are underway, and so forth.

Cf., for example, res. no.107-S I of May 15, 1947 (invitation to the Middle East governments and to the Arabs and Jews of Palestine to abstain from using weapons or from any other action "which might create an atmosphere prejudicial to an early settlement of the question of Palestine"); res. no. 193-III of November 27, 1948 (invitation to bordering States not to support the guerrilla forces in Greece); res. no. 997-ES I of November 2, 1956 (cease-fire between France, Great Britain, and Israel on one side and Egypt on the other, during the Suez crisis, and recommendation to all the Member States not to send war material into the hostilities zone); res. no. 37/3 of October 22, 1982 (cease-fire between Iran and Iraq); res. no. 53/200 of February 12, 1999 (cease-fire in Afghanistan).

Lastly, on the basis of Article 39 (see § 56), both the General Assembly, as well as the Security Council may intervene in procedures of national conciliation.

The Assembly has very rarely acted in this way. For an example, see res. no. 48/267 of September 19, 1994, on the situation in Guatemala.

64. B) *The alleged formation of customary rules on the subject.*

If military action (Article 42) and sanctions not involving the use of armed force (Article 41) are prohibited to the Assembly by the Charter, the question has been asked whether a customary rule has emerged on this subject. One part of legal doctrine holds that practice supports a positive answer. The first example used is usually the well-known Assembly resolution no. 377/V of November 3, 1950 "Uniting for Peace". This resolution, adopted during the Korean crisis at the most acute stage of the Cold War, explicitly established that, in the case of the Security Council's inability to act when confronted with a breach of the peace or an act of aggression, the General Assembly could order appropriate measures, including the establishment of UN armed forces (cf. Part. A of the resolution, partic. nos. 1 and 8). It provided, from a procedural point of view, that the Assembly could be convoked for this purpose in a special emergency session upon the request of the Security Council (voting without the right of veto) or of a majority of the members of the Organization. As a proof of a customary rule on the full power of the Assembly to recommend and to undertake measures for the maintenance of the peace, the "Uniting for Peace" resolution and other resolutions we have already reported in the previous section are indicated.

Serious doubts can be raised over the customary basis of the Assembly's power. Two facts are decisive on this. The first is that the opposition by a group of States, the Socialist States, against the Assembly's having this power was persistent and effective during the Cold War period. This opposition was shown in vehement form against the Uniting for Peace resolution, against the embargo measures ordered by the Assembly with regard to North Korea and Communist China, against the Assembly's appointment of certain subsidiary organs, such as the Committee for Collective Measures, which were in some way related to measures for maintenance of the peace, and, lastly, against entering expenditures relating to these organs in the UN budget.

The second fact is that even those countries, and particularly the Western powers, which had advocated the adoption of the Uniting for Peace resolution changed their position when they lost control of the General Assembly.

With regard to Communist opposition, cf.: against Uniting for Peace, GAOR, 5th sess., 1st Comm., 357th meet., no. 39 ff.; against res. no. 500-V of May 18, 1951 on the embargo on goods intended for China and North Korea, GAOR, 5th sess., Pl. meet., 330th meet., no. 37 ff., 64 ff., 69 ff., 85 ff., 101 ff.; against the creation of subsidiary organs, UN

Rep., *sub* Article 22, no. 51 ff. and Suppl. no. 1, no. 9, note 5; against expenditures for subsidiary organs, GAOR, 7th sess., Pl. meet., 410th meet., no. 23 ff., 10th sess., Pl. meet., 559th meet., n. 148 ff., 11th sess., 5th Comm., 551st meet., no. 1 ff., 12 th sess. , PL. meet., 731st meet., no. 71. The Socialist States also expressed their view of the illegality of the Uniting for peace resolution in the case of the Soviet invasion of Afghanistan, with regard to the Security Council's convening of the Assembly in a special emergency session at the beginning of the 1980's.Cf., for the protests made in the Council in the sessions between January 5 and 9, 1980, doc. S/PV.2185-S/PV.2190. For the protests in the Assembly, see the statements by Afghanistan, Mongolia and Czechoslovakia, in GAOR, 6th Em. Sp. Sess. (January 1O-14, 1980), 1st meet., no. 26 and no. 39, 6th mett., no. 92.

For the position of the United States and of the other States which in 1950 had strongly supported the Uniting for peace resolution, the reservations expressed during the adoption of res. No. 2107-XX of December 21, 1965, recommending economic sanctions against Portugal for its colonialist policies, are significant. These reservations were based on the Assembly's lack of competence to order sanctions. Cf. GAOR, 20th sess., 4th Comm., 1591st meet., no. 1 (Canada), 1592nd meet., no. 10 (United States), no. 44 f. (Bolivia).

Cf. also the reservations expressed by Australia, in 1976 regarding one of the many resolutions on the embargo against South Africa, in GAOR, 31st. sess., Pl. meet., 58th meet., no. 64 and the ones of various Western States, again based on the Assembly's lack of competence to order sanctions and again concerning the resolutions adopted against South Africa, in GAOR, 35th sess. (1980), Pl. meet., 98th meet., no. 10 (EEC countries) and no. 26 (New Zealand), 37th sess. (1982), Pl. meet., A/37/PV.98, p. 2 (Japan), 38th sess. (1983), Pl. meet., A/38/PV.83, p. 20 (EEC countries); 43th sess (1988), Pl. meet., A/43/PV.68; 44th sess. (1989), A/44/PV.63 (Belgium).

The case of West Irian has also been considered as an example of peacekeeping operations grounded in practice,. This was a (single) case of temporary administration by the United Nations organized by the General Assembly in 1963 and concerning a former colony of the Netherlands. In our opinion, the Assembly was rather acting at the time in the framework of de-colonizaton (see § 78).

~~*Section IV*~~

~~MAINTENANCE OF THE PEACE. THE FUNCTIONS OF THE SECRETARY-GENERAL~~

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be brought to the attention of the Council (cf. SCOR, 1st year, 70th meet., p. 404). However, his statement did not have any specific consequences.

The problem was again proposed in 1970 when the Secretary-General, at the invitation of Great Britain and Iran, conducted an investigation aimed at ascertaining the wishes of the inhabitants of the Bahrein Islands regarding a possible relationship of protection or of union with either State, or the acquisition of full independence. The results of the investigation, favourable to independence, were communicated by the Secretary to the Security Council (see doc. S/9772 in SCOR, 25th year, Suppl. for April-May-June 1970, p. 166), and the Council adopted them with res. no. 278 of May 11, 1970. During the debate, however, both the Soviet Union (see doc. S/9737, in SCOR, 25th year, Suppl. cit,, p. 143, and 1536th meet., no. 73) and France (ivi, 1536th meet., no. 156) protested over the procedure adopted and over the "independent" action of the Secretary. France in particular said that such a procedure should not be meant to constitute a precedent. The position of France and the USSR, opposed in an opinion of the Secretariat (in *UNJY*, 1973, p. 162 ff.) which resorted to the theory of implied powers (on this, see § 5), is, for the reasons we have given, correct.

Section V

MAINTENANCE OF THE PEACE AND REGIONAL ORGANIZATIONS

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67. *Regional actions "authorized" by the Security Council.*

As the opening article in Chapter VIII on regional arrangements, Article 52 recognizes international organizations that are created at a regional level and emphasizes their task in the settlement of local disputes between the countries who are member of them. This is an almost superfluous provision, since resort to regional agencies is already mentioned in Article 33 as one of the means for the peaceful settlement of disputes.

The importance of regional organizations in preventing conflicts among their members is more and more referred to by the Security Council in recent practice. As a model see, for instance, res. no. 1170 of May 28, 1998 on the role of the Organization of the African Unity.

Article 53 is much more important. It concerns regional agencies organized for its members' defense and mutual assistance in the event of war

or crises short of war. It provides that the Security Council may utilize "regional agreements or agencies for enforcement action under its authority", and adds that "no enforcement action shall be taken under regional arrangements... without the authorization of the Security Council...". This provision is linked with Article 51 which permits *collective* self-defense in the event of armed attack and which was formulated with regional organizations in mind (see § 55 *bis*). Such organizations thus may act with the use of force on the authorization of the Security Council, or without the authorization of the Council but only to counteract an armed attack.

Article 53 envisaged another possibility of action by regional agencies that could be carried out without the authorization of the Council. That is the case of war against a country which, during the Second World War, had been an "enemy" of one of the signatories of the Charter. This part of the article has been now abrogated as a consequence of a fundamental change of circumstances (*rebus sic stantibus*).

Since enforcement action against a State, or within a State, requires the authorization of the Security Council, the regional agencies appear, under this respect, and as has been correctly noted (QUADRI) as "decentralized United Nations organs".

We must stress that, according to the UN Charter, the authorization of the Security Council is always needed when force is used by a regional organization. In fact, the cases of regional organizations acing without authorization have increased in recent times, but cannot be considered as supported by a customary rule due to the reactions they still meet.

With regard to unauthorized actions, the 1962 Cuban crisis should be mentioned first of all. At that time the United States set up a naval blockade of the Cuban coasts in order to prevent the installation on the island of missile-launching ramps coming from the Soviet Union. The blockade, which nearly set off a war between the two superpowers, was preceded by a decision of the OAS (Organization of American States), adopted on the basis of Article 8 of the Treaty of Reciprocal Assistance (Rio de Janeiro, 1947). The resolution, requested by the United States, recommended that the Member States use any measure, including the use of force, to avoid Cuba receiving military supplies of any kind from the URSS and to prevent the use of the missile ramps that had already been installed.

The United States' action, in that it was contrary to Article 2, para. 4 (which prohibits the *threat* or the use of force), clearly departed from the Charter principles. It could not be justified as self-defence under Article 51 as it was not directed against an armed attack (see § 55 *bis*); and neither could it come within Article 53, since the OAS resolution lacked the authorization of the Security Council. In defending the United States, it was said that the rule on the authorization in Article 53 had lost its efficacy, owing to the *rebus sic stantibus* clause, given the impotence and paralysis of the Council at that time. Following what we have already concluded concerning self-defence (see § 55 *bis*), it must be said that whoever holds such view must coherently conclude that the whole Charter and not only its individual provisions has lost its function. The truth of the matter is that the United States' action, not supported by any Charter provision, could have been justified under the Charter only if had had the nature of

self-defence under Article 51. On the Cuban crisis, both for a description of the events and for the legal views held, cf. the articles by various authors in *AJ*, 1963, p. 515 ff.

The United States' action in the Dominican Republic in 1965, when troops landed during the civil war, is also to be considered contrary to the Charter. The view, held by the United States delegate in the Security Council (and vehemently challenged by the USSR and Cuba), that the action was lawful in so far as it was authorized by the OAS Council of Ministers and its purpose was solely to protect and evacuate foreign civilians without supporting any of the parties involved in the conflict, cannot be shared. This is because the OAS did not have the authorization of the Security Council under Article 53 and because an action using armed force, for reasons similar to those we spoke of regarding United Nations Forces (see § 60), is always to be considered as an "enforcement action" under this article. For the lengthy debate in the Security Council, see SCOR, 20th year, 1196th-1204th, 1207th-1209th and 1212th-1222nd meets, (for the U.S. thesis, see, especially, 1212th meet., no. 144 f. and 1222nd meet., no. 21).

Neither can the military intervention of the United States, Barbados and Jamaica in Grenada in October 1983 come within the framework of Article 53, although it had been decided by the Organization of Eastern Caribbean States. Also this decision did not have the necessary authorization of the Security Council. For the debate in the Council, see SCOR, October 25-28, 1983 (S/PV.2489). In legal literature, see the articles by various authors in *AJ*, 1984, p. 131 ff.

The same must be said of the intervention of ECOMOG, the peacekeeping force of the Economic Community of West African States (ECOWAS) in Liberia in 1990. The intervention was not authorized by the Security Council which only later commended the efforts of ECOWAS in restoring order to the country (see resolution no. 866 of September 22, 1993. The resolution cannot be interpreted as an *ex post* ratification, for the reasons we have explained when dealing with unauthorized actions of single States (see § 60). For other cases of unauthorized actions of ECOMOG, see DEEN- RACSMÁNY, *art. cit.*, p. 316 ff.

Last but not least, the three months' air war by NATO forces against the Republic of Yugoslavia in 1999 during the Kosovo crisis must also be considered as a clear violation of the Charter. Quite different is the problem whether this kind of actions, and of any other armed actions for humanitarian reasons, can be justified from a moral point of view.

As we have already noted (see § 60) when the United Nations fail in controlling a crisis, then general international law is by itself unable to govern the *jus ad bellum*. This reveals a "lacuna" which opens the way to discussion of the problem of war in the context of natural law as a problem of "just" or "unjust" war.

The re-vitalization of the Security Council after the end of the Cold War had repercussions on the relationships between the Security Council and regional agencies. In various resolutions adopted on the basis of Chapter VII, the Council, in recommending or authorizing the adoption of enforcement measures by the Member States, addressed the resolutions both to the Member States individually and the Member States as members of regional agencies or arrangements (expressly referring to Chapter VIII), or directly to one regional organization or another.

As far as the first formula is concerned, many resolutions adopted during the Yugoslav crisis can be quoted, and in particular: resolutions no. 770 of August 13, 1992, on the adoption of the measures necessary to ensure that humanitarian assistance reached Sarajevo and other places in the former Yugoslavia; no. 781 of October 9, 1992 and no. 816 of March 31, 1993 on the adoption of the measures necessary to ensure a ban on military flights over Bosnia and Herzegovina; no. 787 of November 16, 1992, on the naval blockade against the Republic of Yugoslavia (Serbia and Montenegro). The appeals by the Council in this case were received and acted upon by the Western European Union and by the North Atlantic Treaty Organization.

Regarding authorization directly addressed to a regional organization, see, for instance, res. no. 504 of April 30, 1982, which endorsed the setting up of a pan-African Force by the OAU (Organization for African Unity) for maintenance of the peace in Chad. The case of KFOR, the NATO forces entrusted with the external defence of Kosovo in the framework of UNMIK (see § 60 *bis*), is also a case of application of Article 53.

68. *Existing regional Organizations.*

The following are the most important regional agencies for the purposes of Chapter VIII.

The *North Atlantic Treaty Organization* (NATO) was established in 1949 to bind Western Europe and the United States together in a common defense alliance. After the end of the Cold War many countries from Eastern Europe have joined the alliance. Its members are now: Belgium, Bulgaria, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, and United States. Under Article 5 of the treaty, in the event of armed attack against one of the members, the others agree to assist them and to take such action that *each of them* deems necessary to restore peace (they are therefore not obliged to intervene automatically with military force). In time of peace, the Organization has the purpose of developing military co-operation among the member countries (through military organs, the so-called *Commands*). Its main organs are the *Council*, which brings together the representatives, usually Foreign Ministers but also the Heads of State and Government, of all the members and the *Defence Committee*, composed of the chiefs of general staff, again of all the members. By the Alliance's Strategic Concept of 1991, and especially by the Alliance's New Strategic Concept approved by the Heads of State and Government in 1999, NATO has decided to pursue not only the defense of its members but also to participate in military actions for the maintenance of peace and security. By that, it fully satisfies the requirements of Chapter VIII of the UN Charter. The question of whether the decisions of 1991 and 1999 comply with the North

Atlantic Treaty - a question which has been raised in legal literature – does not have any interest in a discussion on the law of the United Nations.

The *Western European Union* (WEU), established by the Treaty of Brussels of March 17, 1948. Besides developing economic, social and cultural co-operation among the members, the Organization has the purpose of assuring mutual assistance in the case of aggression. Its principal organ is the Council, where the parties may consult one another on any situation that may constitute a threat to the peace (Article 8, para. 3). In a sense it is the defense alliance of the European Union: according to Article 17 (former Article J.7) of the Treaty on European Union as amended by the Treaty of Amsterdam of 1997, the WEU "is an integral part of the development of the Union providing the Union with access to an operational capability", particularly in performing humanitarian tasks, peacekeeping tasks and tasks of combat forces in crisis management. The Union may also avail itself of the WEU to elaborate and implement decisions and actions of the Union which have defense implications.

The *Organization of American States* (OAS), which joins together the United States and the countries of Latin America, and which was established in 1948 by the Treaty of Bogotà. Among the purposes of the Organization, besides co-operation in the economic, social, legal and cultural fields, there is "strengthening the peace and security of the American continent", "pacific settlement of disputes among the members", and a collective security system through "common action on the part of the Member States in the event of aggression". The OAS has many organs, and among them the most important are: the *General Assembly*, consisting of the representatives of all the Member States, the *Meeting of Consultation*, where the Foreign Ministers of the members meet; the *Permanent Council of the Organization*, composed of a representative of each member.

The *League of Arab States*, formed in 1945. This Organization does not only have the purpose of military alliance but also aims at the development of co-operation in various sectors, from politics to economics, communications to health and social security, and so on. The principal organ is the *Council*, consisting of representatives of all the members. Its decisions are binding only on the States which agree by their affirmative vote to adopt them. Article 6 of the constitutive treaty provides that, in the event of aggression against a member, the Council must decide (by unanimity) what measures to take to repel it.

The *Organization for African Unity* (OAU), created in 1963, has as its principal purpose "to promote the unity and security of the African States", eradicating from the continent all forms of colonialism and of foreign economic and political interference. The OAU Charter does not contain any specific provision on reciprocal defense, and only indicates, among the pur-

poses of the Organization, "defending the sovereignty, territorial integrity and independence of the Member States". The main organs are: the Assembly of Heads of State and Government, the Council of Ministers, the Secretary-General, and the Commission of Mediation, Conciliation and Arbitration, which, under Article XIX of the Charter and in accordance with a procedure to be defined by a separate Protocol, is to settle disputes among the Member States.

The *Commonwealth of Independent States* (CIS) was created in 1991 from among the former Republics of the URSS after the dissolution of this State. The main organs of the CIS are the Council of Heads of State, the Council of Heads of Government, the Council of Foreign Ministers, the Council of Defense Ministers, the Council of Board Troops Commanders. The goals of the Organization, as they are stated in the Commonwealth Charter of January 22, 1993, are, *inter alia*, the strengthening of relations of friendship, good neighborhood and cooperation between States, particularly when the sovereignty and territorial integrity of a Member State is threatened. The participation of peacekeeping forces within the territory of the CIS has been envisaged by the Kiev Agreement of 1992, the Charter and various subsequent agreements.

The Warsaw Pact Organization, established in 1955 by the countries of Eastern Europe to counterbalance NATO, was also a regional organization, dissolved when the Socialist regimes in those countries fell. The Warsaw Pact, as the Atlantic Pact, provided that the contracting States would consult one another and assist one another in the event of armed attack against one of them and also provided for military co-operation in time of peace. The basic organs of the Pact were the *Political Committee*, where consultation and consideration of matters of interest to the alliance took place and the *United Command*, to which a part of the armed forces of the Member States were assigned.

The *Economic Community of West African States* (ECOWAS) is a further example. Although this organization is mainly devoted to economic cooperation among its members, in its framework a non-standing military force (ECOMOG) also operates as a peacekeeping force in the region.

The *Organization of Eastern Caribbean States* (OECS) was established in 1981 by several States in the area and its constitutive treaty includes reciprocal defense among the purposes of the union (Article 3, para. 2).

The *Organization for Security and Co-operation in Europe* (OSCE) is one of the largest regional organizations in Europe with Member States from Europe, Central Asia and North America. The Organization succeeded the Conference on Security and Co-operation in Europe (CSCE) issued from the historical Helsinki Agreements of 1975 concluded by Western and Eastern European countries during the Cold War. The OSCE's tasks have been fixed

by various Declarations of the Head of States and Governments of Member States since it is not based on a true treaty. The last and most important one is the Charter for European Security issued by the Conference of Istanbul of November 19, 1999. The Charter reaffirms the OSCE as a regional arrangement under Chapter VIII of the UN Charter and, *inter alia*, commits the Organization, in co-operation with other organizations and institutions, to develop its role in peacekeeping operations, in particular providing support for the supremacy of law and democratic institutions and for the maintenance and restoration of law and order, assisting in the organization and monitoring of elections, verifying and assisting in fulfilling agreements on the peaceful settlement of conflicts, and providing support in the rehabilitation and reconstruction of various aspects of society. The participation of OSCE in peacekeeping operations, mainly with the function of helping local authorities in civil and political matters, is widespread. To mention only one example, the OSCE is assisting UNMIK in matters of democratisation and institution building (see § 60 *bis*). The fact that the Organization is not based on a true international agreement in the legal sense, and that, consequently, its resolutions do not have a strictly legal character, is not an obstacle to the Security Council making use of the Organisation whenever the occasion arises.

For the text of the Istanbul Declaration of 1999, cf. *ILM*, 1999, p. 255 ff. A previous and also most important Declaration was the Helsinki Declaration of July 10, 1992 (ibid., 1992, p. 1385 ff) wherein the Organization already defined itself as a regional agreement under Chapter VIII of UN Charter. It should be noted, with regard to the conflicts in the former Yugoslavia, that, even before the Declaration of 1992, the Security Council called upon the parties to make use of the CSCE's contribution or in any case to act in accordance with its principles. Cf., for example, resolutions no. 713, para. 1, of September 25, 1991, no. 740, para. 7, of February 7, 1992, no. 743, para. 10, of February 21, 1992, no. 762, para. 11, of June 30, 1992.

Section X

THE JUDICIAL FUNCTIONS

84. *The judicial settlement of disputes between States.*

BIBLIOGRAPHY: STARACE, *La competenza della Corte Internazionale di Giustizia in materia contenziosa*, Naples, 1970; LACHS, *La Cour Internationale de Justice dans le monde d'aujourd'hui*, in *RBDI*, 1975, p. 548 ff..; GROSS (ed.), *The Future of the International Court of Justice* (2 vols.), Dobbs Ferry, 1976.; FRANK, *Judging the World Court*, New York, 1986; DAMROSCH (ed.), *The International Court of Justice at a Crossroad*, Dobbs Ferry, 1987; BLOED and VAN DIJK (eds.), *Forty Years of International Court of Justice Jurisdiction, Equity and Equality*, Utrecht, 1988; MCWHINNEY, *Judicial Settlement of Disputes. Jurisdiction and Justiciability*, in *RC*, vol. 221, 1990, p. 9 ff.; ABI-SAAB, *De l'évolution de la Cour internationale — Réflexions sur quelques tendences récentes*, in *RGDIP*, 1992, p. 273 ff.; SZAFARZ, *The Compulsory Jurisdiction of the International Court of Justice,* Boston, 1993; ROSENNE, *The World Court. What it is and how it Works*, 5th ed., Dordrecht, 1995; BODIE, *Politics and the Emergence of an Activist International Court of Justice*, Westport, 1995; JENNINGS, *The International Court of Justice after Fifty Years*, in *AJ*, 1995, p. 493 ff.; MULLER (ed.), *The International Court of Justice: Its Future role after Fifty Years,* The Hague, 1997; MEYER, *The World Court in Action*, New York, 2002.

The judicial functions belong to the International Court of Justice whose Statute is annexed to the Charter and forms an integral part of it (Article 92). The Court performs the same functions that had been performed by the former Permanent Court of International Justice created at the time of the League of Nations. Its Statute closely follows the one of the old Court.

Article 92 defines the Court as the "principal" judicial organ of the United Nations. The only other judicial organ is the Administrative Tribunal which was created by the Assembly to settle employment disputes between the Organization and its staff. On this, see p. 103 ff.

The Court has, first of all, the function of settling disputes among States, by applying international law (Article 38, para. 1, of the Statute) and handing down decisions with which the parties have undertaken to comply (Article 94, para. 1, of the Charter). This activity (so-called contentious jurisdiction), however, is firmly anchored in a principle that is considered characteristic of international law and which hardly offers a constructive role for purposes of achieving justice in the relations between peoples. It is the principle that, for however it may be formed, an international court may never adjudicate if its jurisdiction has not been previously accepted by all the

States parties to a dispute. Article 36 of the Statute of the Court is inspired by this principle both at para. 1 ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for... in treaties and conventions in force") and at para. 2 ("The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court...").

The problems relating to the Court's jurisdiction in contentious matters, coming within the subject matter of international process, lie outside our topic.

85. *The advisory function of the International Court of Justice.*

BIBLIOGRAPHY: DUBISSON, *La Cour Internationale de Justice*, Paris, 1964, p. 277 ff.; GREIG, *The Advisory Jurisdiction of the International Court and the Settlement of Disputes Between States*, in *ICLQ*, 1966, p. 325 ff.; KEITH, *The Extent of the Advisory Jurisdiction of the International Court of Justice*, Leiden, 1971; PUENTE, *Consideraciones sobre la Naturaleza y Efectos de las Opiniones Consultivas*, in *Bruns'Z*, 1971, p. 730 ff.; PRATAP, *The Advisory Jurisdiction of the International Court*, Oxford, 1972; POMERANCE, *The Advisory Function of the International Court in the League and UN Eras*, Baltimore-London, 1973; SUGIHARA, *The Advisory Function of the International Court of Justice*, in *Japanese Annual of Int. Law*, 1974, p. 25 ff.; LUZZATTO, *La competenza della Corte Internazionale di giustizia nella soluzione delle controversie internazionali*, in *CS*, vol. XIV, 1975, p. 479 ff.; RADICATI DI BRÒZOLO, *Sulle questioni preliminari nella procedura consultiva davanti alla Corte Internazionale di Giustizia*, in *RDI*, 1976, p. 677 ff.; ZICCARDI CAPALDO, *Il parere consultivo della Corte Internazionale di Giustizia sul Sahara Occidentale: un'occasione per un riesame della natura e degli effetti della funzione consultiva*, in *CS*, XV, 1978, p. 557 ff.; SOHN, *Broadening the Advisory Jurisdiction of the International Court of Justice*, in *AJ*, 1983, p. 124 ff.; SCHWEBEL, *Authorizing the Secretary-General of the UN to Request Advisory Opinions of the International Court of Justice*, in *AJ*, 1984, p. 869 ff.; BENVENUTI, *L'accertamento del diritto mediante i pareri consultivi della Corte Internazionale di Giustizia*, Milan, 1984; AGO, *I pareri consultivi « vincolanti » della Corte internazionale di giustizia. Problemi di ieri e di oggi*, in *RDI*, 1990, p. 5 ff.; ESPOSITO, *La juridicciòn consultativa de la Corte Internaiconal de Justicia*, Madrid, 1996; FRANCK, *Fairness and the General Assembly Advisory Opinion*, in BOISSON DE CHAZOURNES and SAND (eds.), *International Law. The International Court of Justice and Nuclear Weapons*, Cambridge, 1999, p. 511 ff.; TCHIVOUNDA, *La fonction consultative de la Cour Internazionale de Justice dans le cadre de l'application des traités internationaux*, in *RHDI*, 1999, p. 1 ff.; GAJA, *Diseguaglianza tra le parti nella soluzione di controversie per mezzo di un parere della Corte internazionale di giustizia*, in *RDI*, 1999, p. 138 ff.

The advisory function of the International Court of Justice under Article 96 of the Charter and Articles 65 ff. of the Statute of the Court can be considered a judicial function in a broad sense since it is aimed at *stating* the law.

The advisory function has up until today been carried out in a series of important opinions, many of which had been discussed along this book.

Under Article 96, advisory opinions may be requested by the General Assembly and the Security Council as well as, upon the authorization of the General Assembly, by other UN organs and the Specialized Agencies (for example, with res. no. 89-I of December 11, 1946, the Assembly once and for all authorized the Economic and Social Council to address the Court).

The opinions are optional and non-binding, in so far as the organs have not an obligation to request them nor, once the request has been made, are they obligated to comply with them. This lack of binding force, which is characteristic of the opinions, finds confirmation in United Nations practice. Its contrast with the binding force of judgments on disputes among States has also often been confirmed by the Court itself. The fact is significant that various times the opinions, despite the "respect" rendered them in the resolutions of the requesting organ, have remained ineffectual. In view of this, it does not seem possible to say that the advisory function has been put at the same level as the contentious function. This was attempted at the time of the League of Nations with regard to the Permanent Court of International Justice and has been taken up again recently in legal doctrine. Another view (ZICCARDI CAPALDO) which raises perplexity is that the opinions would produce an *effect of lawfulness* similar to what is produced by General Assembly and Security Council recommendations (see § 89). What is true rather is that the Court opinions may contribute, and sometimes have contributed in large, to the formation or to the confirmation of international customary rules. They are then to be seen as demonstration of a kind of *opinio juris ac necessitatis* which, in that it corresponds, and only in that it corresponds, to the real behaviour of the majority of States, gives rise to binding principles for all States. For example, the opinion of May 28, 1951 on the reservations to the Convention for the Punishment of Genocide (in ICJ, *Reports*, 1951, p. 15 ff.) was at the basis of an important change in customary law regarding reservations in international treaties.

Sometimes although advisory opinions are issued under Article 96, they acquire binding force. This is because with treaty norms, or with other appropriate acts, a party beforehand undertakes the obligation to observe them. Cf., for example, Article VIII, sec. 30, of the Convention on the Privileges and Immunities of the United Nations of February 13, 1946 (see § 36) and Article IX, sec. 32, of the analogous Convention on Privileges and Immunities of the Specialised Agencies. Both articles provide that, in the event of a dispute between the UN, or a Specialised Agency, and one or more of the Member States, a request shall be made for an advisory opinion to the Court in accordance with the procedure prescribed by Article 96 of the Charter, with the parties being obligated to accept it. These are, in substance, true arbitration clauses, similar to those that provide the jurisdictional grounds in contentious matters. They refer to the advisory function in that they are stipulated between States and international organizations and thus aim at circumventing Article 34, para. 1, of the

Statute under which only States may be parties in cases before the Court. The same aim was pursued, before 1995 (see § 35), by Article 11 of the Statute of the Administrative Tribunal, established by the General Assembly to settle disputes between the UN and its staff. This article (and a similar provision is still contained in the Statute of the Administrative Tribunal of the International Labor Organization) foresaw the Court's competence to review the Tribunal decisions.

In its opinions of October 23, 1956 and July 12, 1973 (on the review of Administrative Tribunal judgements, respectively of the ILO and of the UN), the Court held that prior acceptance of the binding nature of its advisory function does not constitute an obstacle to the exercise of such function. Cf. ICJ, *Reports*, 1956, p. 84 and 1973, p. 182 f. As an example of advisory opinion given pursuant sect. 30 of the UN Convention on Privileges and Immunities see the opinion already cited (see § 35) of April 29, 1999 in *Cumaraswamy case* (ICJ, Reports, 1999). In this case the Court held that the subject of requested opinion was the one indicated by the requesting organ (the Economic and Social Council) without taking into account the view of the State which had previously agreed on submitting the question to the Court. The finding of the Court seems to be correct, since the jurisdiction of the Court is grounded on Article 96 and only on this article. For a different view, see the dissenting opinion of judge Koroma (ivi, para. 24 of the dissenting opinion) and Gaja, *art. cit*.

Also Article 66, para. 2 (*b*) and (*c*), of the Vienna Convention on the Law of Treaties between States and international organizations and between international organizations (the Convention which codified this matter) provides that the advisory function of the Court, requested through the General Assembly or the Security Council, may be accepted as obligatory in disputes in which the UN or other international organizations are parties.

The opinions requested by the Assembly and by the Security Council may touch upon "any legal question" (Article 96, para. 1). Those requested by the other organs and by the Specialized Agencies may concern "legal questions arising within the scope of their activities" (Article 96, para. 2).

In its opinion of July 8, 1996 on the legality of the use by a State of nuclear weapons in armed conflicts (ICJ, *Reports*, 1996) the Court refused to give an advisory opinion on the request of the Health World Organization, notwithstanding the authorization given once and for all by the General Assembly in the liaison agreement between HWO and UN (see § 73). The refusal was due to the fact that the question of the legality of the use of nuclear weapons was not "a question arising within the scope" of HWO activities.

As can be seen, aside from this last limitation, the object of the advisory function is indicated in such broad terms that it would be arbitrary not to accept any question pertaining to the application of interpretation of legal norms.

Various views expressed both by the States in the General Assembly or before the Court and in legal doctrine, which tend to take away certain legal questions from the advisory jurisdiction of the Court must be rejected.

Only the main views are discussed here. Some minor quibbles, which have been often advanced before, and rejected by, the Court, deserve a mention. Many of them have been recently raised in the case of *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*: see the Advisory opinion of July 9, 2004, par. 29-35

(irregularities of the procedure followed in the course of the deliberation on the request submitted to the Court), par. 38-39 (lack of clarity of the terms of the question), par. 40 (abstract nature of the question). Another, and very important, objection raised in this case – the objection founded on the "*lis alibi pendens*" embodied in Article12, par. 1, of the Charter – has been dealt with in connection with the function of the General Assembly with regard to the maintenance of peace and security (see § 62).

First, it must and it has been rejected the view, which was held only in the early years of the UN, that opinions should not be issued with regard to interpretation of the Charter. As the Court pointed out in its opinion of May 28, 1948 (*Reports*, 1947-48, p. 61) on admission to the United Nations, and as can be found in the preparatory works (cf. UNC.I.O., vol. 13,p. 719), and in the practice, it is exactly on this subject that the advisory function, coming from the "principal judicial organ of the United Nations", is meant to give crucial contributions in keeping with the spirit of Article 96.

Secondly, no merit can be seen in the view that would remove from the advisory function all questions that can be resolved in legal terms but that have political importance due to the circumstances in which they arise.

Cfr. the already cited opinion of May 28, 1948 on admission in ICJ, *Reports*, 1947-1948, p. 61 (in this case the Court was asked to establish whether the "package" admission proposed by the Soviet Union and opposed by the Western powers was in conformity with the Charter: see § 13). Cf. also the opinions of March 3, 1950 (also on admission), *ivi*, 1950, p. 6 ff., of July 20, 1962 (on Expenses of the United Nations in the Middle East and in the Congo), *ibid*., 1962, p. 155, of December 20, 1980 (on the interpretation of the agreement between WHO and Egypt), *ibid*., 1980, p. 87; of July 8, 1996 (on the legality of the threat or use of nuclear weapons) *ibid*., 1996, p. 8 f.; and of July 9,2004 (on the construction of the wall in the occupied Palestinian territories, par. 4

Lastly, nothing prevents that a question submitted to the Court can be the subject of a dispute between States or between a State and the UN For example, the Assembly or the Security Council, faced with a dispute with which they are dealing, may address the Court even against the wishes of the parties or of one of them, in order to know what is the *legal* solution to the dispute. This results not only from Article 96 which speaks of legal questions in general, but also from Articles 14 and 37 of the Charter which authorize, respectively, the Assembly (see § 61) and the Security Council (see § 54) to recommend to the parties to a dispute solutions in the merits without excluding legal solutions. Nor should it be held, to the contrary, that the issuance of the opinion would circumvent the principle that contentious jurisdiction of the Court may not be established without the consent of all parties and the settlement of the dispute may not take place without the full participation of all parties involved in the judicial proceedings. To this objection one can answer that contentious jurisdiction leads to a judgment binding for the disputing parties, whereas the advisory function, which

simply brings about co-operation between the judicial organ and the other United Nations organs, is devoid of any binding effect either for the requesting organ or for the States.

In favour of this view the advisory opinion of March 30, 1950 on the interpretation of peace treaties with Bulgaria, Hungary and Rumania can be cited. Here the Court states "... Another argument that has been invoked against the power of the Court to answer the questions put to it in this case is based on the opposition of the Governments of Bulgaria, Hungary and Romania to the advisory procedure. The Court cannot, it is said, give the Advisory Opinion requested without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent. This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions. The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings *even where the request for an Opinion relates to a legal question actually pending between States*. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of a Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the cause of action it should take. The Court's opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused" (Cf. ICJ *Reports*, 1950, p. 71; our italics).

Also the opinion of December 15, 1989 on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations can be cited. Here the Court was called upon to express an opinion, at the request of the Economic and Social Council, on the applicability of the provisions of this Convention to Mr. *Mazilu*, a Rumanian citizen and member of the United Nations subcommittee on discrimination and the protection of minorities, whom the Rumanian Government had prevented from leaving the country (see § 36). Section 30 Article VIII of the Convention, as we have just seen, provides that, in the event of a dispute between the UN and a Member State, an advisory opinion of the Court may be requested, and the parties are *obligated* to comply with it. However, in this case Rumania had formulated a reservation to the Convention, excluding the *a priori* acceptance of such obligation. It was a matter, then, of establishing whether, notwithstanding the reservation, the Court could all the same issue the opinion, obviously without binding effects but as a function normally performed on the basis of Article 96 and therefore as a mere advisory function aimed at indicating to a United Nations organ (in this case the Economic and Social Council, on the authorization of the General Assembly) the solution to a legal question. The Court correctly answered in the affirmative, referring to its opinion of 1950 (cf. ICJ, *Reports*, 1989, p. 188 ff., paras. 29-32).

If the advisory function can extend, without exceptions, to any other legal question, may the Court refuse to perform it anyhow? In other words, does the Court, when confronted with a legal question, have the power to decide, at its own discretion, whether or not to issue an opinion? The answer which is usually given to this question is affirmative and is based on the text of Article 65 of the Statute, under which "the Court may [in French, "peut"] give an advisory opinion...".

The discretionary power under Article 65 has often been invoked before the Court in order to seek to persuade it not to express an opinion in some of the cases that have just been mentioned here. It has been said that even if it is true that the Charter does not exclude the issuance of opinions when the legal question submitted by a UN organ has considerable political importance or is the subject of a dispute between States (or between States and an international organization), and specifically between States which do not agree in requesting the intervention of the highest judicial organ in the organization, nevertheless the latter would make correct use of its discretionary power if, in the presence of such circumstances, it did not express an opinion.

How has the Court behaved in this regard? Its position, as it results from various opinions, is the following: it has as a principle adopted the view that it had a discretionary power on the subject, asking on various occasions whether there were "urgent reasons" for not answering the legal questions put to it by the General Assembly or by other organs. However, it has then carefully avoided applying such view. More specifically, with regard to highly political legal questions, the Court has always denied that political importance was a sufficient reason for refusing to intervene. By contrast, on questions that were the subject of disputes, it has affirmed in principle the appropriateness of not issuing an opinion when the parties were not all in agreement, but in the end it has issued an opinion all the same, sometimes holding that the question submitted did not affect the main subject of the dispute, sometimes denying that a dispute existed, sometimes resorting (as it did in the cited December 15, 1989 opinion in the *Mazilu* case) to subtle and perhaps rather incomprehensible arguments.

For the view that the discretionary power to express or not to express an opinion comes from Article 65 of the Statute, and for the assertion that this power is not, however, to be used to refuse the issuance of an opinion in the event of legal questions having considerable political importance, cf., for example, ICJ, *Reports*, 1962, p. 155 (opinion on the question of expenses for UN actions in the Middle East and in the Congo), 1971, p. 23, no. 28 f. and p. 27, no. 41 (opinion on Namibia), 1996, p. 8 f. (on the legality of the threat or use of nuclear weapons).

On the problem whether the advisory function can be refused at the Court's discretion when the question is the subject of a dispute between States, the Court expressed its view in the already cited opinion of March 30, 1950 on the peace treaties with Bulgaria, Hungary and Rumania. In this case, the request for an opinion from the Assembly concerned the interpretation of certain arbitration clauses of these treaties. Such interpretation was, without doubt, the subject of dispute between the parties, and, moreover, the three States had repeatedly said they were against the issuance of an opinion by the highest UN judicial organ. As we have just recalled (see § 85), the Court in this opinion claimed that it was fully competent to be concerned in an advisory capacity also with questions that were the subject of disputes, given the separation between advisory functions and contentious jurisdiction. Then, right after having made this claim, the Court went on to ask if, however, in the specific case, it should refuse to express a view (because of the opposition of several parties to the dispute) in

the exercise of its discretionary power under Article 65. It recalled that in similar circumstances the Permanent Court of International Justice had refused to give an opinion. This was the case of the Status of Eastern Carelia (PCIJ, Series B, no. 5). It stated, although implicitly, that it agreed in principle with the former Court in the sense that opinions should not be issued if they touch upon "essential points" of dispute between Governments, in order not to circumvent the principles on contentious jurisdiction. However, it concluded that in this particular case "essential points" were not involved, and therefore in the end it decided to express an opinion (cf. ICJ, *Reports*, 1950, p. 72).

Cf. also the opinion of June 21, 1971 on Namibia (ICJ, *Reports*, 1971, p. 23 f., no. 30 ff. and p. 27, no. 41) in which the Court, recalling here also the opinion of the Permanent Court in the case of the Status of Eastern Carelia, denied that the question submitted by the Security Council on the status of South West Africa (see § 81) was the subject of dispute between South Africa and other States.

Also in the *Western Sahara* case (opinion of October 16, 1975, in *Reports*, 1975, p. 25, no. 33) the Court began by recalling the principle expressed by the old opinion on the Status of Eastern Carelia, and said: "... in certain circumstances, therefore, the lack of consent of an interested state may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement...". In light of this affirmation, one would expect that the Court would have refused to give an opinion, since in this particular case there had been a precise proposal by Morocco to submit the same question which formed the object of the opinion to the contentious procedure before the Court and since Spain had refused this proposal, requesting the Court not to express an advisory opinion. The Court, on the contrary, decided to render an opinion, holding (*ivi*, p. 25, no. 34) that it was not a matter of a pure and simple dispute born "independently in bilateral relations", but of a dispute "that arose during the debates in the Assembly and concerned problems it is involved in". With all due respect, the Court's view was very captious (every question submitted to the Court in its advisory capacity is discussed by the Assembly or by the Security Council, or by other organs authorized to request opinions) and the easier approach to take in this case should have been to finally abandon the old principle in the opinion of the Status of Eastern Carelia.

Similar considerations must be made with regard to the often cited opinion of December 12, 1989 in the *Mazilu* affair, where, as we have just seen, the Court was also faced with a specific dispute between the UN and a Member State, Rumania, as well as with the refusal of the latter to submit the dispute to the judgement of the Court. In this case, the Court overcame the question by holding that the dispute concerned the "application" of the Convention on the Privileges and Immunities of the United Nations, while the request for the opinion concerned the "applicability" of the same Convention (sic!). Cf. ICJ, *Reports*, 1989, p. 190 ff., paras. 37-39, partic. para. 38.

Again, in the opinion of July 9, 2004 on The Construction of a Wall in Palestinian Territories, the Court, quoting the *Western Sahara* opinion, expressed the view that "in certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character". However, again in this case, the Court found that no such circumstances existed. Why? Essentially because, given the powers and responsibilities of the United Nations in questions relating to international peace and security "the subject-matter of the General Assembly's request cannot be regarded as only a bilateral matter between Israel and Palestine" (paras. 48-50).

In our view, the idea of discretionary power, even if it is moderated by the safeguards found in the Court's jurisprudence, is puzzling. The textual

argument on which it is based (the "may" in Article 65 of the Statute) is very weak and should yield to the spirit of the provision on the advisory function which testifies to the *obligatory co-operation of the Court* with the UN organs in the solution of legal questions. It is clear that the most delicate point of the whole matter is that of the connection between the advisory function and contentious or binding jurisdiction. However, it is exactly on this point that the Court should, rather than quibbling as it has done up to now, once and for all, say that the existence of a dispute does not limit *in any way* its competence to render an opinion. Why should the Court be authorized to sacrifice, at its discretion, the advisory function to the contentious function and therefore sacrifice co-operation between the organs to respect for the desire of an individual State to avoid the opinion (even the non-binding opinion!) of the judicial organ? Such a sacrifice could have been justified at the time of the League of Nations and the advisory function of the old Permanent Court, but it seems anachronistic to day. In fact, the case- law of the Court is moving exactly in this direction, particularly if the above mentioned reasoning in the *Construction of a Wall* case is taken into account.

Section XI

FINANCING THE ORGANIZATION

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