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# THE CHARTER OF THE UNITED NATIONS: AN INSTRUMENT TO RE-ESTABLISH INTERNATIONAL PEACE AND SECURITY?

H. KARSTEN SCHMIDT†

Article 16 of the Covenant of the League of Nations obliged the members to immediately sever all trade and financial relations and to prohibit all commercial intercourse between the respective nationals, whether a member of the League or not, if a member-state resorted to war.

This provision, however, did not give any central organ of the League the power to decide the preliminary question as to whether such an act of aggression had been committed, and which of the states engaged in the war was guilty of such an act. It is true that paragraph 2 of article 16 provided that the League Council should in such case *recommend* to the several governments concerned what effective military, naval or air support they should contribute to the armed forces to be used to protect the covenants of the League. Such a recommendation, however, was not binding upon the members of the League, and, furthermore, the Resolution of the League Assembly of October 4, 1921, concerning economic sanctions expressly recognized that it was for the various members of the League to determine whether there had been a breach of the Covenant. The resolution added that "the obligations incumbent on Members by virtue of Article 16 are directly derived from the Covenant and their enforcement is based on respect for treaties."<sup>1</sup>

The Charter of the United Nations, on the other hand, does not leave it to the members to determine the conditions under which sanctions are to be applied, but confers this power on the Security Council. By article 39 of the Charter, only the Security Council is authorized to determine the existence of a threat to the peace, a breach of the peace or an act of aggression.<sup>2</sup> This provision is further strengthened by article 25 by which members of the organization are bound to accept the decisions of the Security Council. Since the determination by the Security Council under article 39 of the Charter is not a mere recommendation, but a decision, there is no doubt that it is binding upon all the members

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1. RAY, COMMENTAIRE DU PACTE DE LA SOCIÉTÉ DES NATIONS 517 (1930).

2. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

of the organization. Nevertheless, the Security Council has very wide discretionary power in this connection, since the Charter contains no definition of the three expressions "threat to the peace," "breach of the peace" and "act of aggression."

This lack of definitions is not accidental. The struggle for the definition of "aggression" has been a long and continuous one.<sup>3</sup> The meaning of this term has been the subject of various writings, drafts and debates by the most highly qualified publicists and scholars because the same provision was contained in article 10 of the Covenant of the League of Nations; yet it is still impossible to say when this question will be definitely decided. There are two possible definitions proposed, the supple one and the rigid one.<sup>4</sup>

On the other hand it is true that the Bolivian and Philippine Delegations to the San Francisco Conference proposed to include a definition of "aggression" in the Charter, but this was rejected by the majority for the reason that a complete and satisfactory definition is rendered too difficult by modern war.<sup>5</sup> This was a compromise between the two previously mentioned theories; otherwise it would be the first unconditional surrender of the science of international law and the newly created organization to the facts of modern warfare. The committee of the General Assembly, entrusted with the task of finding a definition of aggression, arrived at the same result. Therefore the Security Council has to decide, in each case, whether the act of force amounts to aggression or not and this decision is to be reached by a vote taken according to article 27, paragraph 3 of the Charter, because this is not a procedural matter.<sup>6</sup>

The question as to what acts are included in the term "breach of the peace" in article 39 is even more difficult. It is, however, clear that this term is broader than the term "act of aggression," since the latter is covered by the former.

In this way article 1, paragraph 1 of the Charter, after mentioning aggression, speaks of "*other* breaches of the peace." This formulation is therefore more accurate than that contained in article 39. However,

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3. See, e.g., Eagleton, *Bibliographie on Aggression*, 33 AM. J. INT'L L. SUPP. 831-43 (1939); Hertz, *Die Theorie die Notwehr*, 1935 DIE FRIEDENSWARTE 137 (Switzerland).

4. "definitions souple et rigide."

5. Doc. No. 881, III/3/46, 12 U.N. CONF. INT'L ORG. DOCS. (UNCIO) 519-20 (1945).

6. "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members." U.N. CHARTER art. 27, para. 2; "Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members. . . ." U.N. CHARTER art. 27, para. 3.

it is not clear how the peace can be broken by an act which is not an act of aggression—but this leads back to the problem of definition. Thus the power of the Security Council to determine the acts falling within this class is almost unlimited. The application of article 39 is limited, however, by the fact that enforcement measures cannot be applied against any of the permanent members of the Security Council and against states subject to their protection, since the permanent members can prevent this by exercising their right of the veto.<sup>7</sup> This limitation shows that enforcement measures according to article 39 of the Charter<sup>8</sup> are now only possible against states outside the two power combinations and these “neutral” states are either forced to join one of the two blocs or to behave in such a manner that the danger of the application of article 39 against them does not arise.

The above statement shows that the application of enforcement measures under article 39 is a mere theoretical question. Therefore, as will be shown later, the exceptions to the rule of article 39, namely the actions of self-defense under article 51 and actions against ex-enemy states under articles 53 and 107, are the only possible *legal* military actions under the Charter because they do not need the authorization of the Security Council.

If the Security Council has determined the existence of a breach of the peace, act of aggression or any threat to the peace, the members are not yet bound to apply sanctions. By article 39, the power of applying enforcement measures lies solely with the Security Council. Indeed, according to article 39, the Security Council, after having determined the existence of, *e.g.*, a breach of the peace, must make a recommendation or decide what measures shall be taken “to maintain or restore international peace and security.” The Charter, therefore, does not recognize any automatic sanctions derived directly from it, but the members can and must await the decision or recommendation of the Security Council and if they make no use of the right of self-defense, they must not take military action before the decision or recommendation is made regardless of how long it takes. How this provision fits into the modern warfare concept is a question which, in contrast to the problem of the definition of aggression, was not raised at the San Francisco Conference.

This interpretation of article 39 is emphasized by article 53 which provides that no enforcement measures shall be taken by the members of the organization “without the authorization of the Security Council.” This is to be read as “without the *prior* authorization. . . .” No other

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7. *Ibid.*

8. See note 2 *supra*.

interpretation of the Charter is possible in this case because of the corresponding provisions in articles 51, 53 and 54.<sup>9</sup>

It seems that the Security Council has the option of choosing a recommendation *or* a decision after having determined the existence of a breach of the peace, an act of aggression or a threat to the peace.<sup>10</sup> It is, however, difficult to agree with this result in view of the fact that the final report of the San Francisco Conference included an observation by the Belgian Delegation which stated that the word "recommendation" does not refer to threats of coercion but to the pacific settlement of a dispute which has produced a threat of war, a breach of the peace or an act of aggression. According to this interpretation, the Security Council would have the power, even at this stage of the conflict, to propose pacific settlement, but ought nevertheless to adopt the enforcement measures required by the circumstances without delay.<sup>11</sup>

If the above view is the correct one, the Security Council could not recommend the taking of enforcement measures by states, but only could order this to be done. This restrictive interpretation, however, is not supported by the provisions of the Charter itself. Nor can it be denied that if the Security Council can oblige states to take part in collective sanctions, it can, a fortiori, merely recommend such participation.

Such a conclusion is also dictated by reason of article 43 of the Charter which makes the duty of states to take part in collective military

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9. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. CHARTER art. 51.

"The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. . . But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

"The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter." U.N. CHARTER art. 53.

"The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security." U.N. CHARTER art. 54.

10. ". . . shall make recommendations, or decide what measures shall be taken. . . ." U.N. CHARTER art. 39.

11. GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS; *Commentary and Documents* 265 (2d ed. 1949).

action depend upon the conclusion of a special agreement between the Security Council and the respective state. This provision does not, however, prevent states from taking part in military actions on recommendation of the Security Council. It is true that under article 106, pending the coming into force of the special agreements mentioned in article 43, the permanent members of the Security Council shall consult with one another and, as occasion requires, with other members of the organization with a view toward such joint action as may be necessary to maintain international peace and security. Such action does not, however, prevent one of these states bringing the dispute to the attention of the Security Council and requesting the latter to make a recommendation to the permanent members of the organization that they participate in the action.

The provision of article 106 that "the parties to the Four-Nation-Declaration, signed at Moscow, October 30, 1943, and France,"<sup>12</sup> which are the five permanent members of the Security Council, shall consult with one another and "as occasion requires" with other members of the organization, leads to the question: when does an occasion require a consultation with other members of the organization?

As this would not be a consultation of China, Great Britain, USA, USSR and France as permanent members of the Security Council, but as parties to the Four-Nations-Declaration, the decision as to when an occasion requires a consultation with other members does not fall within the competence of the Security Council. But whether in such a case a unanimous decision or a majority decision is required is not yet clear. Up to the present there has been no case which could be developed this far because the exercise of the veto by one of the permanent members of the Security Council has prevented a prior decision on the existence of an act of aggression, breach of the peace or threat to the peace. As the Charter does not contain a special voting procedure for the decision of the five powers under article 106, it is suggested that in such a case a majority decision would not be sufficient. The five powers of this decision are acting outside of the United Nations despite the strong connection contained in article 106, which commands joint consultation "on behalf of the Organization." As there exists no special voting procedure in regard to this matter, the general rules of international law must be taken into account and that means that a state can only be bound with its consent. This construction is merely academic because the previous decisions of these five nations in such a case, acting as permanent mem-

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12. U.N. CHARTER art. 106.

bers of the Security Council, were already subject to the veto of each one.

In his commentary on the Charter of the United Nations, Kelsen raises the question whether the enforcement measures provided for in Chapter VII of the Charter are true sanctions, that is to say, punitive measures taken against a state which is guilty of a breach of international law, or whether they are mere police measures of a remedial nature.<sup>13</sup> He compares the wording of article 39 with that of article 2(4) of the Charter<sup>14</sup> and comes to the conclusion that the words "threat to the peace" and "breach of the peace" do not coincide, nor do the phrases "threat of force" and "use of force." Under these circumstances Kelsen considers two interpretations possible. The one sees enforcement measures provided for in article 39 not as sanctions but as mere measures of police. The other, however, interprets the provisions of article 2(4) and article 39 as independent of one another. A state must, according to this interpretation, refrain from acts forbidden by both the articles so that both types of acts are subject to sanction.

The solution to this question is made easier by the fact that no enforcement measure is possible without the determination of the Security Council. Consequently there is no sanction as regards the acts forbidden by article 2(4) if the conditions of article 39 are not fulfilled. But since the scope of article 2(4) is more limited than that of article 39, the latter includes the obligations laid down in article 2(4).<sup>15</sup>

The only question that remains is whether the Security Council may order ordinary police measures if the conditions of article 2(4) have not been fulfilled. This question must be examined, like all others dealing with the general competence of an organ of the organization, in the light of the general principles in articles 1 and 2 of the Charter. In this connection the Charter clearly distinguishes between the purposes of the UN mentioned in article 1 and the principles contained in article 2 which are binding on the organization and its members.<sup>16</sup> A comparison of the provisions of article 1(1)<sup>17</sup> with those of article 2(4) clearly shows that the obligations to take enforcement measures are much broader than that of applying sanctions against a state which has violated the provisions of article 2(4). This is because article 1(1) authorizes the organization

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13. KELSEN, *THE LAW OF THE UNITED NATIONS* 727 (1951).

14. "All Members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2(4).

15. VERDROSS, *VOELKERRECHT* 514 (3d ed. 1955).

16. The wording of art. 2 is in this respect so clear that there is no doubt of the cogent character of the principles.

17. "To maintain international peace and security, and to that end: to take ef-

not only to take action in respect to a breach of the provisions of article 2(4) (threat or use of force), but also in respect to *any other* breach of the peace. This makes it clear that the enforcement measures provided for by article 39 of the Charter are of a dual character. They may be sanctions in respect to a breach of the provision of article 2(4), but they may also be ordinary police actions.<sup>18</sup>

Since article 39 is not restricted to disputes between members of the United Nations but deals with *any* threat to the peace, breach of the peace or act of aggression, disputes between two or more non-members are also covered. Article 39 therefore authorizes the Security Council to apply sanctions against a non-member who is guilty of an act forbidden by this provision. This interpretation is in accordance with article 2(6) of the Charter, by which the organization is bound to ensure that states which are not members of the United Nations should act in accordance with the principles of the Charter, insofar as it is necessary for the maintenance of international peace and security.<sup>19</sup> For this reason it is unimportant whether the guilty party has or has not been recognized as a state. Article 37 of the Charter even applies to civil war, if the Security Council is of the opinion that it constitutes a threat to peace in general. This clearly follows from the last sentence of article 2(7) which states that the principle that the United Nations cannot intervene in matters of domestic jurisdiction shall not prejudice the application of enforcement measures. Following this interpretation, the Charter authorizes enforcement against either or both parties involved in the struggle.

At first glance this interpretation conflicts with the old rule *pacta tertiis nec nocent nec prosunt*, a rule referred to by the Permanent Court of International Justice.<sup>20</sup> Following this rule, states which are parties to a treaty cannot obligate third states which are not parties to it. An exception seems to be the creation of a new state by a treaty between some existing states.<sup>21</sup> Verdross sees another "natural" exception in the resolutions of an organized community of states,<sup>22</sup> without limiting those

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fective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." U.N. CHARTER art. 1(1).

18. VERDROSS, *op. cit. supra* note 15, at 520.

19. See, *e.g.*, VERDROSS, *op. cit. supra* note 15, at 520.

20. Judgment of May 25, 1926, P.C.I.J., Ser. A, No. 7 p. 29: "Un traité ne fait droit qu'entre les Etats qui y sont parties."

21. See, *e.g.*, the creation of the neutral state of Krakau by art. 6 of the Act of the Congress of Vienna of June 9, 1815, and the creation of the Free City of Danzig by art. 100 of the Peace Treaty of Versailles in 1919.

22. VERDROSS, *op. cit. supra* note 15, at 160.



organizations. This idea returns to the view taken by the United Nations Organization and its claim in the Charter to oblige non-members too. Originally the Charter was created by 51 nations and that means that these 51 nations in supporting the provisions of article 2(7) thought themselves—now being combined—in the position to overrule the principle of *pacta tertiis nec nocent nec prosunt*, a principle which has been in force for generations. The reason for the abrogation of that principle by a world-wide organization of states was that the United Nations thought themselves competent to establish eternal peace—after having suffered a total war. And as the establishment of such a peace would have been impossible without control over non-members, the abrogation of the principle was the only way to fulfill the task. This is the first time that an exception from a general principle of law has been codified in favor of an organization of states. In 1945 it was entirely doubtful whether 51 nations could bind some 40 other nations by this provision, but as there are now only about 10 nations still non-members, it can be said that the abrogation of the principle is acknowledged in favor of this very organization of states.<sup>23</sup> But this abrogation must not be regarded as a precedent for the later termination of this or any other existing principle of law.

As mentioned above the monopoly of the Security Council in the use of armed force has some exceptions. The most important one is contained in article 51 of the Charter which allows states to retain the inherent right of individual and collective self-defense against an armed attack by any state.

This right of self-defense is called an “inherent” right. The question thus arises, why was it necessary to include this right in the positive provisions of the Charter? Originally the American view on this problem was that it was not necessary to expressly include this right in a treaty.<sup>24</sup> But at the San Francisco Conference it became rather doubtful whether the right of self-defense was so inherent and universal that a collective self-defense provision should not be included. The South American

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23. Also, it must be noted that these non-member nations are willing to become members of the U.N. By this expression of willingness they have indicated that they accept the Charter in its entirety, including art. 2(6).

24. See, e.g., Secretary of State Kellogg on March 15, 1928, before the Council of Foreign Affairs, printed as Special Supplement to 6 FOREIGN AFFAIRS 3: “This treaty is so inherent and universal that it was not deemed necessary to insert it expressly in the treaty. . . .” See also the diplomatic note of the USA of June 23, 1928, published in 1928 PUBLICATIONS DU MINISTÈRE DES AFFAIRES ÉTRANGÈRES 37-38: “Ce droit est inherent a la souveraineté de tous les Etats, et il est contenu implicitement dans tous les traités.”

At the Dumbarton Oaks Conference it was considered that this right of self-defense did not need explicit mention in the Charter. U.S. DEPT. OF STATE PUB. NO. 2192 rev. 56.

States especially feared that the provisions of the Act of Chapultepec would not continue in force.<sup>25</sup> The solution of this problem was the creation of article 51 which was based on an Australian proposal that was confined by Senator Vandenberg to the case of an armed attack. Thus it is clear that the reason for the explicit mention of the right of individual *and* collective self-defense was the necessity of preserving regional systems like the Inter-American one.

Because article 51 strictly confines the right of individual and collective self-defense to the case of an armed attack, a mere threat to the peace or other breach of the peace is not sufficient.<sup>26</sup> The right of determining the existence of an armed attack is, however, left to the victim and its allies until the Security Council exercises its power under article 39 of the Charter. The determination by the victim of the armed attack or its allies is a merely provisional one, as it may be corrected by the Security Council. But since this provisional determination enables states to use armed force, a basic definition of "armed attack" is essential. At the San Francisco Conference there was a minority motion to define this term "armed attack" by the enumeration of concrete acts,<sup>27</sup> but the majority were of the opinion that such a definition would abet abuses.<sup>28</sup> It was not the intention of the legislators of San Francisco to avoid defining the term "armed attack"; they merely objected to having it done by an enumeration of acts. They did intend to limit this term to the use of military force. This was done by using the much narrower term of "armed attack" rather than "aggression."<sup>29</sup>

The use of armed force in exercising the right of individual or collective self-defense is, according to the wording of the Charter, terminated the moment the Security Council has taken measures necessary to maintain international peace and security.<sup>30</sup> This, however, supposes a functioning Security Council. This is to say that no veto power is exercised and at least two of the non-permanent members give concurring votes with the five permanent members in the decisions provided for in article 39. How often this has happened in the past is well known, and

25. UNITED NATIONS TEXTBOOK 282 (Telder ed. 1950 Netherlands).

26. Albanell-Mac-Coll, *La Legítima Defensa en el Art. 51 de la carta de las Naciones Unidas*, VI JUSTICIA URUGUAYA 137 (1945) (Uruguay); Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 878 (1947).

27. Doc. No. 881, III/3/46, 12 U.N. CONF. INT'L ORG. DOCS. (UNCIO) 519-20 (1945).

28. Doc. No. 881, III/3/46, 12 U.N. CONF. INT'L ORG. DOCS. (UNCIO) 505 (1945).

29. KELSEN, *op. cit. supra* note 13, at 797; Albanell-Mac-Coll, *op. cit. supra* note 26.  
30. The wording in art. 51 "to maintain" international peace is illogical because this article presupposes the existence of an armed attack by which the peace has already been disturbed.

that it will probably not happen in the future can be predicted.

The situation is quite different in the normal event that the Security Council does not function. In such a case the decision of the victim of an armed attack and its allies, that an "armed attack" exists and to use defensive military force, becomes final because they are expressly permitted "until the Security Council has taken measures necessary to maintain international peace and security." Consequently the measures of self-defense become actions of war.

This exception to the principle of the monopoly of armed force given to the Security Council indicates that the Organization of the United Nations is unable in practice to maintain or restore international peace and security by action of the Security Council.

While article 51 also provides for collective self-defense, no state or member of the United Nations is bound to give assistance to the victim of an armed attack. They merely have the right to do so. So if a state wishes to be certain that it will not stand alone in the event of an armed attack, it must conclude treaties with other states by which the contracting parties avail themselves of the right given by article 51 to assist each other in case of an armed attack against any one of them. This was precisely provided for in the Act of Chapultepec, so that Alberto Lleras Camargo, representing Colombia at San Francisco could say: "It may be deduced that the approval of this article [article 51] implies that Chapultepec is not in contravention of the Charter."<sup>31</sup>

The Act of Chapultepec was followed by the Pact of the League of the Arab States,<sup>32</sup> which provides the possibility of mutual assistance;<sup>33</sup> the treaties of Rio de Janeiro<sup>34</sup> and of Brussels;<sup>35</sup> the North Atlantic Treaty;<sup>36</sup> the three treaties of 1951 in Eastern Asia<sup>37</sup>—the US-Philippines Mutual Defense Treaty, the Pacific Security Pact and the US-Japanese Defense Pact; the Southeast Asia Collective Defense Treaty in 1954;<sup>38</sup> the Balkan Treaty of Bled in 1954<sup>39</sup> and the Treaty of Friendship, Cooperation and Mutual Assistance, signed at Warsaw in 1955.<sup>40</sup>

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31. Doc. 576, III/4/9, 12 U.N. CONF. INT'L ORG. DOCS. (UNCIO) 680 (1945).

32. UNITED NATIONS TEXTBOOK 350.

33. See PACT OF THE LEAGUE OF THE ARAB STATES, art. 6.

34. UNITED NATIONS TEXTBOOK 286.

35. UNITED NATIONS TEXTBOOK 259.

36. UNITED NATIONS TEXTBOOK 263.

37. Text of all three treaties in: U.S. Senate Committee on Foreign Relations, Subcommittee on the United Nations Charter, *Review of the U.N. Charter*, U.S. Sen. Doc. No. 87, Jan. 7, 1954, p. 704.

38. 31 DEP'T OF STATE BULL. 393-96 (1954).

39. N.Y. Times, Aug. 10, 1954, § 1, p. 4, col. 4-7.

40. 49 AM. J. INT'L L. SUPPL. 194-98 (1955); New Times, May 21, 1955, Suppl. 65-70 (Moscow).

With the one exception of the Warsaw Treaty,<sup>41</sup> the Russian Satellite Treaties are not treaties under article 51 of the Charter, but treaties under articles 53 and 107.<sup>42</sup> They depend for their legality on the second exception to the principle of the monopoly of the use of armed force given to the Security Council—actions against ex-enemy states.<sup>43</sup>

These Satellite treaties can be divided into three main groups: (1) the treaties with nations outside the Soviet system; these are the treaties which were concluded with France, Great Britain and Finland; (2) the treaties which were concluded *among* the satellites; and (3) the treaties which were concluded by the USSR with its satellites. The treaties of the first group are all based on the rules of articles 53 and 107, as they provide for action in the case of an attack by Germany or one of its allies.<sup>44</sup> Beginning with the treaty of 1948 between Rumania and Bulgaria,<sup>45</sup> the treaties of the second group refer to an act of aggression committed by Germany *or a third state*. The treaties of the third group, at least as far as the treaty between the USSR and Bulgaria in 1948<sup>46</sup> is concerned, refer to the same *casus foederis* as the first group.<sup>47</sup> The explicit mention of acts of aggression committed by Germany in all these treaties characterizes them as treaties under articles 53 and 107. The right of self-defense is not mentioned.<sup>48</sup>

Since the right of self-defense is an exception to all other provisions of the Charter,<sup>49</sup> including the second sentence of article 53, according to which no enforcement action shall be taken under regional arrangements without the authorization of the Security Council, it might seem that the provisions of article 51 render those of article 53 meaningless. This, however, is not true. Where action is taken against armed attack,

41. *Ibid.*

42. "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action." U.N. CHARTER art. 107.

43. SCHMIDT, DAS SELBSTVERTEIDIGUNGSRECHT NACH DER SATZUNG DER VEREINTEN NATIONEN UND SEINE VERBINDUNG MIT DEN DEFENSIVEN REGIONALPAKTEN 155 (unpublished thesis in Hamburg University, Germany 1956).

44. No distinction is made between West and East Germany.

45. LEONARD, INTERNATIONAL ORGANIZATION 319 (1951).

46. N.Y. Times, March 19, 1948, § 1, p. 5, col. 7.

47. MARTIN, COLLECTIVE SECURITY, a *progress report*, Appendix IV (UNESCO Paris 1952). Martin does not make any distinction in this direction. His list of the satellite treaties may be complete in the statement of the dates of the treaties, but in his survey of their contents he deals too generally with them and does not make the fundamental legal differences clear.

48. Kulski, *The Soviet System of Collective Security Compared With the Western System*, 44 AM. J. INT'L L. 453-76 (1950); SCHWARZENBERGER, POWER POLITICS; a *Study of International Society* 517 (2d ed. London 1951); Fraenkel, *Regionalpakete und Weltfriedensordnung*, 2 VIERTELJAHRSSCHRIFT FUER ZEITGESCHICHTE 48 (1954 Germany).

49. "Nothing in the present Charter. . . ." U.N. CHARTER art. 51.

the members of the United Nations are bound to await the authorization of the Security Council before resorting to enforcement measures under regional arrangements. This case is covered by article 51 and gives exceptionally the right to use armed force as a means of self-defense. But if a regional arrangement obliges the parties to apply enforcement measures, not only against an armed attack, but also against any other breach of the peace or mere threat to the peace, such action would be illegal without prior authorization of the Security Council.

Besides this, the NATO-Treaty was especially criticized because it included states who were not only non-members of the United Nations but were former ex-enemy states. This criticism arose out of the provisions of article 51 of the Charter which state that the right of individual and especially of collective self-defense exists "if an armed attack occurs against a *member* of the United Nations."<sup>50</sup>

This criticism, however, overlooks the fact that article 2(6) of the Charter provides that the Organization shall ensure that non-members shall also act in accordance with the principles of the Charter and that means that these states shall refrain from the use of force, and that the right of self-defense is stated as being "inherent." Consequently these non-member states have the right of individual and collective self-defense.<sup>51</sup>

The second exception to the duty of members of the United Nations not to resort to force without the authorization of the Security Council is found in articles 53 and 107 of the Charter. Under these articles the members have the right, without authorization of the Security Council, to take action against states, which, during World War II, were enemies of any signatory to the Charter, if such action is taken as a result of that war or against a renewal of aggressive policy by such a state. These provisions do not state for how long this freedom of action as regards ex-enemy states is to last and what shall be the rule if an ex-enemy state becomes a member of the United Nations. However, since article 107 appears in Chapter XVII of the Charter which is entitled: "Transitional Security Arrangements" it may be concluded that the permission contained in article 107 will terminate on the coming into force of a peace treaty with the respective states, since by such a treaty the contracting states renounce resort to force in their mutual relations. This interpreta-

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50. This Russian criticism is only applied in the case of a treaty of the western bloc, while they themselves did not follow this view in concluding the Warsaw Treaty with East Germany.

51. KELSEN, *op. cit. supra* note 13, at 793.

tion is supported by the Briand-Kellogg Pact of 1928<sup>52</sup> by which states have renounced resort to war as an instrument of national policy. Therefore, after these peace treaties become effective, ex-enemy states would also be protected by the Briand-Kellogg Pact against armed aggression on the part of any state, including the members of the United Nations.

The Charter does not contain any provision as to who may decide what is an aggressive policy. This means that these decisions are to be made individually by the respective members without control.

These provisions against ex-enemy states were included in the Charter because its victorious creators feared a come-back by the ex-enemy governments similar to the return of Napoleon from Elba. How these provisions against ex-enemy states correspond to the proclaimed "equal rights of men and women and of nations large and small" was never explained. These provisions demonstrate a lack of foresight on the part of the framers of the United Nations Charter. This is the second instance where the equality of states is not complete under the Charter. The first case is, of course, the preference accorded to the five big powers in the voting system of the Security Council, a preference which has already caused a dilution of the power of the Security Council.

Finally, it is necessary to consider whether the Security Council is the *sole* organ of the United Nations that can recommend or decide what measures must be taken for the maintenance or re-establishment of peace, or whether the General Assembly is also competent to take these steps. This is a question of vital importance because the action of the Security Council may be easily paralyzed and is in fact normally paralyzed by the exercise of the right of veto under article 27(3).<sup>53</sup>

The problem involves the well-known resolution of the General Assembly of November 3, 1950, by which the General Assembly is entrusted with the task of recommending collective measures to members of the organization in cases where the Security Council is not capable of taking the necessary steps for the maintenance or re-establishment of international peace and security. This resolution was partly based on article 24(1) of the Charter, which states that the Security Council merely has the *primary* responsibility for the maintenance of peace and security, and that, therefore its jurisdiction is not exclusive. On the other hand, article 10 of the Charter gives the General Assembly the power to discuss *all* questions within the scope of the Charter, including matters relating to the powers and functions of the Security Council, and to make recom-

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52. General Pact for Renunciation of War, Text of the Pact as signed, notes and papers, Washington, D. C. (1928).

53. See note 6 *supra*.

mendations to the members of the organization or to the Security Council on these questions. There is a single exception to this rule; the provision of article 12 denies the General Assembly power to make recommendations in regard to any dispute or situation in which the Security Council is presently exercising the functions assigned to it by the Charter, unless the Security Council requests the General Assembly to do so. However, the power of the General Assembly to make recommendations revives as soon as the Security Council ceases to deal with the matter.

It seems, moreover, that a *further* limitation is imposed by the last sentence of article 11(2) which provides that any question on which action is necessary shall be referred to the Security Council either before or after discussion by the General Assembly. According to Kelsen, this provision *may* be interpreted to mean that the powers of the General Assembly are limited by the requirement of referring the matter to the Security Council. The General Assembly would, therefore, not be entitled to recommend the taking of enforcement measures against a state that is guilty of aggression or other breach of the peace, or threat to the peace.<sup>54</sup>

An entirely different interpretation of this provision is given in the well-known commentary on the Charter of the United Nations by Goodrich and Hambro.<sup>55</sup> In their view this requirement of reference to the Security Council means that the General Assembly may only make recommendations if the Security Council has failed to act after a question has been referred to it, or when, this action having been unsuccessful, the Security Council ceases to deal with the matter.

In the face of these fundamentally contradictory interpretations, the question arises as to which is in accordance with the letter and spirit of the Charter. In the first place attention must be drawn to article 11(4) which expressly provides that the powers of the General Assembly enumerated in that article shall not limit the general scope of article 10. It follows that the object of the provisions of article 11 is to enumerate the matters falling within the power of the General Assembly by virtue of the general provisions of article 10 without, however, seeking to limit them. The power of the General Assembly to make recommendations is, therefore, *only* restricted by the provision of article 11 which forbids the General Assembly to make recommendations at certain times, namely when the Security Council is exercising its functions in respect to the

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54. KELSEN, *op. cit. supra* note 13, at 959. Kelsen does, however, admit that there is support for the view that the relevant provision of art. 11 is limited by art. 10.

55. *Op. cit. supra* note 11, at 169.

same matter.<sup>56</sup> However, nothing falling within the scope of the Charter is excluded from the general power of making recommendations.

An interpretation of article 11 leads to the same result. Paragraph 2 of this article also provides that the General Assembly may make recommendations with regard to any matter concerning the maintenance of international peace and security, with the *sole* exception being the limitation contained in article 12. The sentence of article 11(2) which states that any matter requiring action "shall be referred to the Security Council," cannot therefore be regarded as limiting the power of the General Assembly to make recommendations. Such provision seems to mean that the General Assembly cannot *order* or *take* enforcement measures, and that it must therefore refer any matter requiring such action to the Security Council. But the right of the General Assembly to make recommendations if the Security Council is not dealing with the question, or has ceased to deal with it, is not excluded.<sup>57</sup>

While the General Assembly can recommend the taking of enforcement measures by states, the states are not bound to act. Even the determination by the General Assembly of the existence of an act of aggression or other breach of the peace only possesses the character of a recommendation. Indeed, by recommending that states take enforcement actions, the General Assembly implicitly recommends that they should regard a particular state as guilty of aggression or other breach of the peace, since according to article 25 the members of the United Nations are only bound to accept and apply the decisions of the Security Council and not those of the General Assembly. A recommendation of the General Assembly consequently does not terminate any action in exercising the right of individual or collective self-defense.

However, even if this interpretation of articles 10 and 11 is not accepted, it must at least be admitted that the General Assembly may recommend that states use their right of self-defense to come to the assistance of a victim of armed aggression. If individual states, even non-members, have this right, it cannot be doubted that the General Assembly can make a recommendation in this regard. Such a recommendation, it is true,<sup>58</sup> implies a determination of who is the aggressor, but since such a determination has only the character of a recommendation, it is legal.

Since the General Assembly will normally recommend enforcement measures only against a state which is guilty of aggression, the result of

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56. VERDROSS, *op. cit. supra* note 15, at 437-38.

57. Verdross seems to have the same ideas on this question. It is not expressly mentioned in his cited book, but the whole tenor of part 3 of his book leads to this conclusion.

58. KELSEN, *op. cit. supra* note 13, at 979.



this interpretation is practically the same as that of the previous ones. Even the theoretically great difference between the powers of the General Assembly and those of the Security Council is appreciably reduced by the fact that the members of the United Nations are not bound to participate in military actions ordered by the Security Council under article 39. This obligation depends upon the conclusion of special agreements under article 43 between the Security Council and the respective states.<sup>59</sup> Before such agreement comes into force, even the Security Council cannot order states to take part in military measures. It can merely recommend such participation, as can the General Assembly.

The foregoing examination indicates that—the unusual case of a functioning Security Council excluded—the General Assembly is the only organ of the United Nations which could act in a case of aggression, and that it has only the power to recommend enforcement measures which have no binding force on the members. This is the same power which the Council of the League of Nations possessed. If the right of self-defense is excluded from the analysis, as it existed prior to the creation of the Covenant as an “inherent” right, it results that the Charter has made no progress over the Covenant in this field except insofar as provisions for actions against ex-enemies remain in effect.

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59. “All Members . . . in order to contribute to the maintenance of international peace . . . [shall] undertake to make available to the Security Council, or its call and in accordance with a special agreement or agreements, armed forces. . . .” U.N. CHARTER art. 43, para. 1.

“Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.” U.N. CHARTER art. 43, para. 2.

“The agreement . . . shall be negotiated . . . on the initiative of the Security Council . . . and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.” U.N. CHARTER art. 43, para. 3.

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