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Peacekeeping Aspects of the Egyptian-Israeli Peace Treaty and Consequences for United Nations Peacekeeping

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STUDENT COMMENT

Peacekeeping Aspects of the Egyptian-Israeli Peace Treaty and Consequences for United Nations Peacekeeping

RICHARD W. NELSON

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I. INTRODUCTION

On 26 March 1979, in Washington D.C., President Mohamed Anwar El-Sadat and Prime Minister Menachem Begin signed the Treaty of Peace Between the Arab Republic of Egypt and the State of Israel.¹ United States President Jimmy Carter signed the Treaty as its witness. The Treaty came into force, in accordance with its terms, on 25 April 1979.²

This historic Treaty constitutes a "major step forward in the seemingly endless search for a resolution of the Arab-Israeli conflict."³ This Comment focuses on the Treaty's peacekeeping⁴ arrangements for the Sinai Peninsula, which raise issues relating both to United Nations peacekeeping forces and observers and to non-U.N. multinational peacekeeping arrangements. The discussion will begin with an overview of the Treaty's provisions, including its prescriptions for permanent security arrangements in the Sinai. Implementation of the peacekeeping provisions will then be addressed in their three phases: Israel's interim withdrawals, during the course of which the United Nations force in the Sinai was disbanded; the period prior to Israel's scheduled final withdrawal from the Sinai in 1982, when the concerned parties fashioned their response to the refusal of the U.N. Security Council to act in accordance with their request; and the period following Israel's final withdrawal, at which time President Carter's pledge concerning an "alternative multinational

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1. Hereinafter referred to as "the Treaty." For text, see EGYPTIAN-ISRAELI PEACE TREATY (1979) (U.S. Dep't of State, Selected Docs. No. 11, Pub. No. 8976); 18 INT'L LEGAL MAT. 362 (1979). Accompanying the Treaty were three annexes, an appendix, agreed minutes, and six letters. Also, the United States exchanged Memoranda of Agreement with Israel. These materials are reprinted in *Middle East Peace Package: Hearings on S. 1007 Before the Sen. Comm. on Foreign Relations*, 96th Cong., 1st Sess. 71-184 app. (1979).

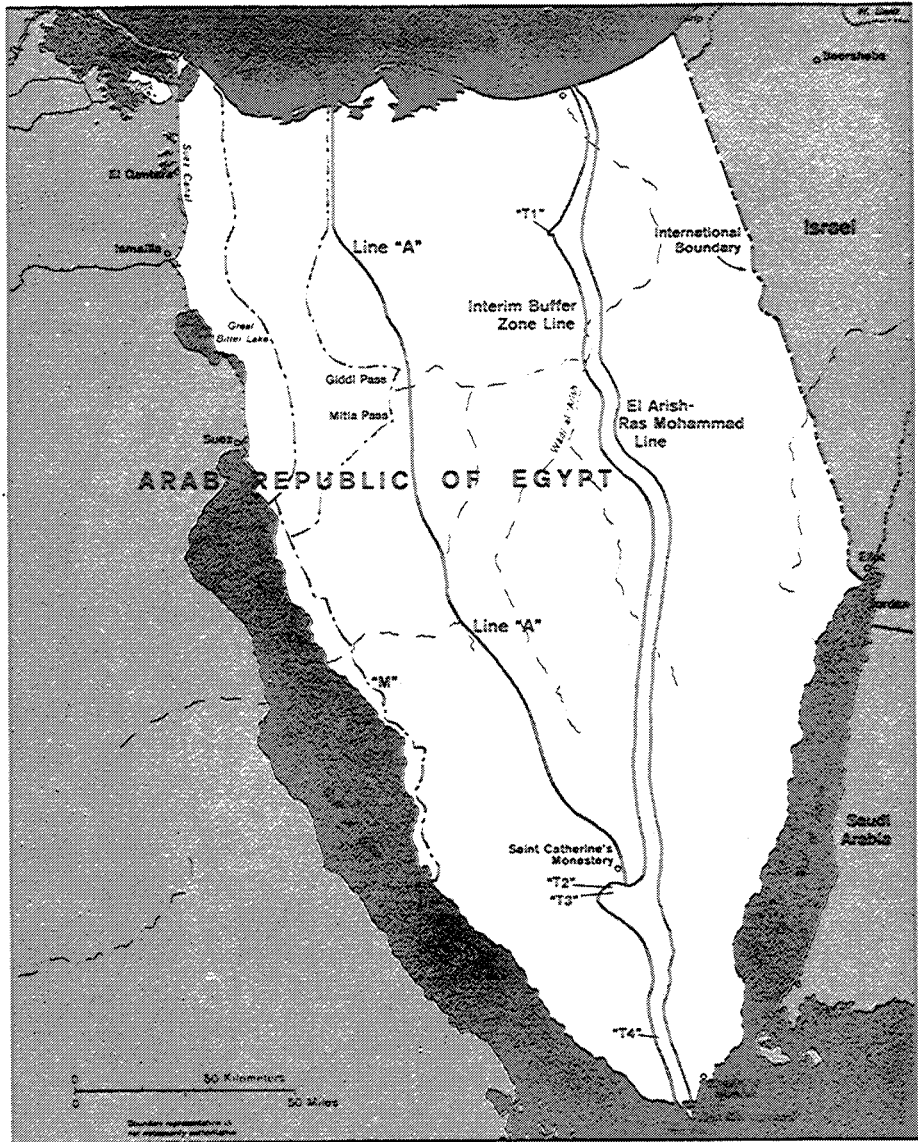
2. Treaty art. IX, para. 1. The exchange of documents of ratification took place at Umm Khisheib, in the Sinai. N.Y. Times, Apr. 26, 1979, at 8, col. 3 (city ed.; all citations *infra* to The New York Times are to the city edition).

3. Murphy, *To Bring to an End the State of War: The Egyptian-Israeli Peace Treaty*, 12 VAND. J. TRANSNAT'L L. 897, 941 (1979). Professor Murphy's article offers an excellent evaluation of the Treaty, as well as a survey of the entire process leading up to its conclusion and of the future Middle East agenda for peace. He acknowledges the difficulties facing the concerned parties. Another scholar, Professor Bassiouni, has concluded, in view of the responses of Egypt, Israel, and the United States to the Western European initiative to recognize the Palestine Liberation Organization as the sole legitimate representative of the Palestinian people, that "[t]his signifies the end of the Camp David Peace Process which has now served its historic usefulness." Bassiouni, *An Analysis of Egyptian Peace Policy Toward Israel: From Resolution 242 (1967) to the 1979 Peace Treaty*, 12 CASE W. RES. J. INT'L L. 3, 26 (1980).

4. On the use of the term "peacekeeping," see note 69 *infra*.

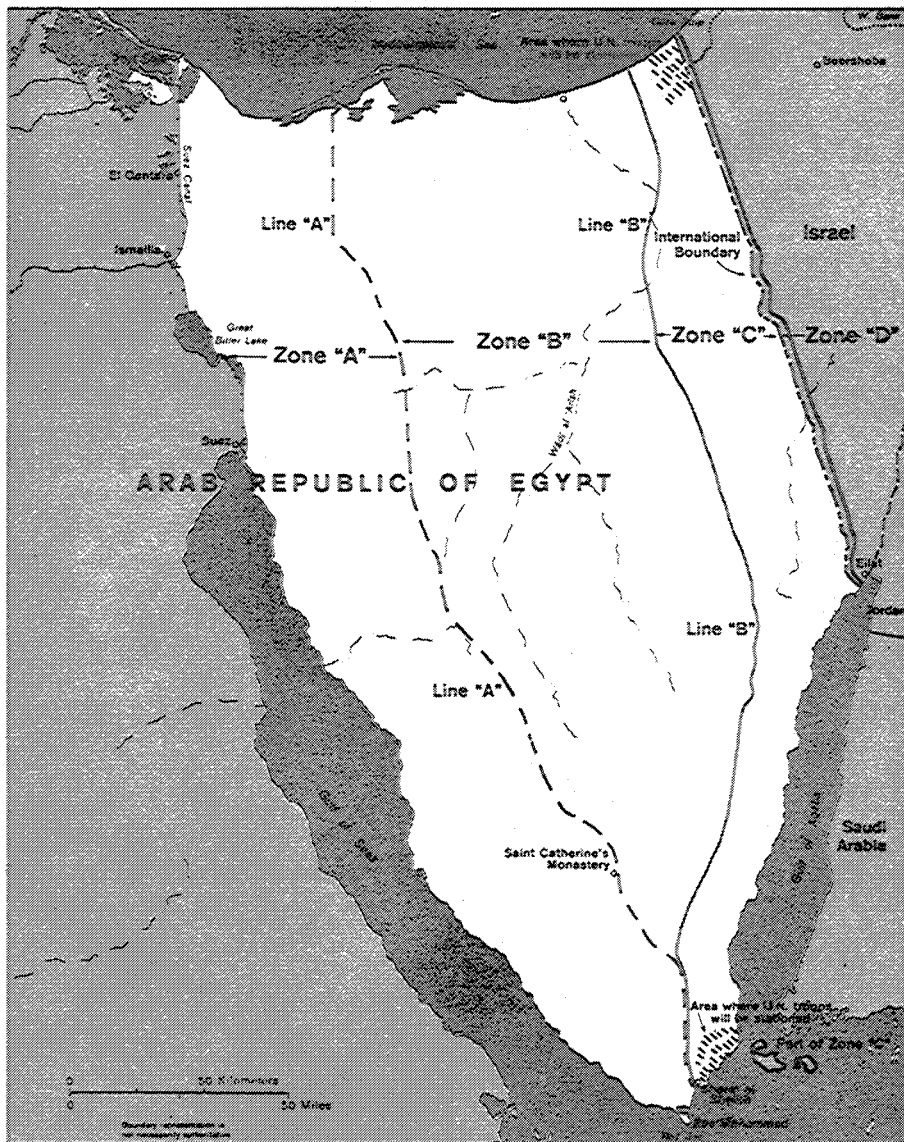
The Situation During the Interim Period
Prior to Final Withdrawal
(January 1980 to April 1982)

MAP 1



Permanent Arrangements in the Sinai
(from April 1982)

MAP 2



Source: The Egyptian-Israeli Peace Treaty (1979) (U.S. Dep't of State, Selected Docs. No. 11, Pub. No. 8976).

force"⁵ may come into play. Conceivable courses of events during this final, indeterminate period will then be explored, including the possibility of a United States-sponsored peacekeeping force. The effects of the dissolution of the United Nations Sinai force on U.N. peacekeeping efforts will then be considered in the course of general comments, in light of the Treaty and its aftermath, on the prospects for U.N. peacekeeping.

II. OVERVIEW OF THE TREATY'S PROVISIONS⁶

A. *Comprehensive Provisions*

1. *Peaceful Relations*

The Treaty terminated the state of war existing between Egypt and Israel since 15 May 1948.⁷ The parties agreed to apply between them the provisions of the United Nations Charter and the principles of international law governing international relations among states in times of peace.⁸ They agreed, in particular, to recognize and respect each other's sovereignty, territorial integrity, and political independence, and to respect each other's right to live in peace within their recognized boundaries.⁹ They also agreed to refrain from the direct or indirect threat or use of force against each other, and to peaceably settle all disputes arising out of the application or interpretation of the Treaty by negotiation or, failing that, by conciliation or arbitration.¹⁰ A claims commission was to be

5. See text, section II(B)(4) *infra*.

6. The Treaty did not deal at length with the Middle East conflict as a whole; neither will this Comment. Rather, it "postponed the confrontation." Abba Eban (paraphrased), *Camp David—The Unfinished Business*, 57 FOREIGN AFF. 343 (1978-79). See Murphy, *supra* note 3, for an analysis of the Treaty's place in the Middle East peace process. Issues concerning the status of the Palestinian people, and the situation in the West Bank, the Gaza Strip, and Jerusalem, were addressed in the Preamble and in the letters attached to the Treaty between President Sadat, Prime Minister Begin, and President Carter. The parties recognized the need to create a first step toward a comprehensive peace based on United Nations Security Council Resolution 242, 22 U.N. SCOR, Supp. (Res. & Dec.) 8-9, U.N. Doc. S/INF/22/Rev.2 (1967); on Security Council Resolution 338, 28 U.N. SCOR, Supp. (Res. & Dec.) 10, U.N. Doc. S/INF/29 (1973); and on the Camp David Agreements. The two documents which together constitute the Camp David Agreements are: 1) A Framework for Peace in the Middle East, *agreed at Camp David*, Sept. 17, 1978 [hereinafter cited as Camp David Framework for Peace], and 2) Framework for the Conclusion of a Treaty Between Egypt and Israel, *agreed at Camp David*, Sept. 17, 1978 [hereinafter cited as Camp David Conclusion of Treaty]. For texts, see THE CAMP DAVID SUMMIT (1978) (U.S. Dep't of State, Pub. No. 8954), *reprinted in* 17 INT'L LEGAL MAT. 1463 (1978). By the Camp David Agreements, the parties initiated negotiations designed to lead to an agreement defining the powers and responsibilities of a "self-governing authority (administrative council)" in the West Bank and Gaza. Camp David, Framework for Peace, *supra*, sections A.1(b)-(c). For recent opposing studies on the Camp David Agreements, see D. ELAZAR, THE CAMP DAVID FRAMEWORK FOR PEACE: A SHIFT TOWARD SHARED RULE (Am. Ent. Inst. Stud. Foreign Pol'y, No. 236, 1979); CAMP DAVID: A NEW BALFOUR DECLARATION (A. Arab-Am. U. Grads, Spec. Rep. No. 3, F. Zeadey ed. 1979).

7. Treaty art. I, para. 1.

8. Treaty art. III, para. 1.

9. Treaty art. III, para. 1(a)-(b).

10. Treaty art. III, para. 1(c) (these provisions reflect those embodied in U.N. CHARTER art. 2, paras. 3 & 4), and art. VII, paras. 1-2 (reflecting U.N. CHARTER art. 33, para. 1).

established for the settlement of all financial claims.¹¹

The parties agreed to fulfill in good faith the obligations imposed by the Treaty, without regard to the action or inaction of the other party, and independently of any other instrument.¹² They agreed not to enter into any obligation in conflict with the Treaty,¹³ and specified that in the event of a conflict between an obligation under the Treaty and any other obligation, the former would be binding and implemented.¹⁴

Each party agreed to ensure that acts or threats of belligerency, hostility, or violence directed against the population or property of the other party would not originate in its territory.¹⁵ The parties also agreed that upon completion of Israel's interim withdrawal from the Sinai,¹⁶ they would establish normal and friendly relations.¹⁷ Those relations were to include full recognition, diplomatic, economic, and cultural relations, and

Neither the Treaty nor any of the accompanying documents specifies who or what organization would arbitrate a dispute.

11. Treaty art. VIII.

12. Treaty art. VI, para. 2.

13. Treaty art. VI, para. 4.

14. Treaty art. VI, para. 5. This provision was stated to be subject to article 103 of the U.N. Charter, which states that the Charter prevails over any other international agreement.

The intent of the parties in article VI, paragraphs 2 and 5, is not clear. Paragraph 2 may be read to mean that regardless of what other Arab states may do concerning the West Bank/Gaza negotiations and regardless of the outcome of those negotiations, the Treaty remains binding; thus, there is no "linkage" between the Treaty and those negotiations. A second possible interpretation is that the Treaty is binding and takes precedence over any other treaties or agreements (save for the U.N. Charter). The Agreed Minutes to article VI, paragraph 2, state that article VI as a whole shall not be construed so as to contradict the Camp David Framework for Peace, and that that rule of construction should not be viewed as contravening article VI, paragraph 2.

During the negotiations leading to the conclusion of the Treaty, Israel insisted that the Treaty should take precedence over Egypt's other treaties, such as the Arab League's Pact, its Joint Defense Treaty, or its Council's resolutions, particularly that of April 13, 1950. See H. HASSOUNA, *THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES*, at 34, 311, 406 (1975). These documents preclude a "separate peace" with Israel and would require Egypt to go to the defense of an Arab state at war with Israel. Arab League Council Res. of Apr. 13, 1950, made mandatory by Arab League Pact art. 7, para. 1; Joint Defense Treaty art. 2. Egypt maintained that the Treaty would not necessarily take precedence over these obligations. N.Y. Times, Apr. 11, 1979, at 3, col. 1. The Agreed Minutes to article VI, paragraph 5, state that neither party asserts that the Peace Treaty prevails over any other treaty or that another treaty prevails over the Peace Treaty. "Not surprisingly," writes Professor Murphy, "armed with this ambiguous language, Egypt and Israel have taken conflicting positions." Murphy, *supra* note 3, at 923. For a more comprehensive treatment of these questions, see Bassiouni, *supra* note 3, at 20-22; Murphy, *supra* note 3, at 920-24.

15. Treaty art. III, para. 2.

16. Israel's interim withdrawal is dealt with in Annex I to the Treaty; see text *infra*. Annex I is entitled Protocol Concerning Israeli Withdrawal and Security Arrangements.

17. Treaty art. I, para. 3. The process for achieving these relations was set out in Annex III to the Treaty (Protocol Concerning Relations of the Parties). By Annex III, the parties agreed, among other things, to establish diplomatic relations and to exchange ambassadors, to recognize international conventions on aviation, to open roads and railways, and to establish postal, telephone, television, and other services. They also reaffirmed their commitments to respect human rights and fundamental freedoms.

termination of economic boycotts and discriminatory barriers to the free movement of people and goods.¹⁸ The parties further agreed to guarantee the mutual enjoyment by their citizens of the due process of law.¹⁹

2. *Permanent Boundary*

Israel agreed to withdraw all its military and civilian elements from the Sinai peninsula,²⁰ Egypt thereupon resuming the exercise of full sovereignty over the area.²¹ The Treaty established as permanent and inviolable the boundary drawn between Egypt and Israel in 1906 by Turkey (then sovereign over Palestine) and Great Britain (then sovereign over Egypt).²² It was stated that the border provision was "without prejudice to the issue of the status of the Gaza Strip."²³

Israeli nationals, vessels and cargoes were to enjoy the right of free passage through the Suez Canal, on the basis of the 1888 Constantinople Convention,²⁴ and were to be accorded non-discriminatory treatment in all matters relating to use of the Canal.²⁵ The parties also agreed that the Strait of Tiran and the Gulf of Aqaba were international waterways, open

18. Treaty art. III, para. 3.

19. *Id.*

20. Treaty art. I, para. 2. Details of the withdrawal are covered in Annex I to the Treaty and in the Appendix to Annex I. [The latter document, entitled Organization of Movements in the Sinai, is hereinafter cited as Appendix.] Egypt considers that implementation of this Treaty clause will constitute a partial implementation of U.N. Security Council Resolution 242 (1967), note 6 *supra*, which states that Israel must withdraw from the territories occupied in 1967. Egypt's Prime Minister Khalil said in March 1979 that withdrawal from the Sinai will set a precedent for total withdrawal from the Golan Heights, the West Bank, including Jerusalem, and the Gaza Strip. Prime Minister Begin said in his speech opening the Knesset debate on ratification of the Treaty that Israel would never withdraw from all the occupied territories, that it would never give up Jerusalem, and that there would never be a Palestinian state in the West Bank and Gaza. N.Y. Times, March 21, at A1, col. 1, & A9, col. 1. Yehuda Blum, currently Israel's Permanent Representative to the United Nations, has considered the topic of withdrawal in the following terms: "It will be noted that nowhere does Security Council Resolution 242(1967) contain any reference to the *status quo ante* June 5, 1967. Instead, it speaks of 'withdrawal of Israel armed forces from territories occupied in the recent conflict,' omitting the definite article before the word 'territories' " Y. BLUM, *SECURE BOUNDARIES AND MIDDLE EAST PEACE* 72 (1971).

21. Treaty art. I, para. 2. Egypt will resume sovereignty over each area as Israel withdraws. Agreed Minutes to art. I. Full Egyptian sovereignty was the subject of vociferous debate in Israel, because many Israelis wanted to retain sovereignty over the civilian settlements in the Sinai. On 28 September 1978, the Knesset voted to remove the Israeli settlements. N.Y. Times News Service, Supp. Mat., Sept. 28, 1978, at 24.

22. Treaty art. II.

23. *Id.* Sovereignty over the Gaza Strip is thus unsettled. Egypt administered the area from 1949 to 1967, but did not claim sovereignty over it. Israel has administered Gaza since the 1967 war.

24. Treaty art. V, para. 1. The Constantinople Convention Respecting the Free Navigation of the Suez Maritime Canal, Oct. 29, 1888, *reprinted in* THE SUEZ CANAL PROBLEM, JULY 26-SEPT. 22, 1956, at 16-20 (1956) (U.S. Dep't of State, Pub. No. 6392). Article I of the Convention states that the Canal shall be open to ships of war or commerce, in time of peace or war, to all nations. Article X gives Egypt the right to defend the Canal. Egypt has cited article X as its justification for closing the Canal to Israeli ships since 1948.

25. Treaty art. V, para. 1.

to all nations for free navigation and overflight.²⁶

B. *Security and Peacekeeping Provisions*²⁷

1. *General Provisions*

The parties, in order to provide for their maximum security on the basis of reciprocity, agreed to establish security arrangements, including limited force zones in Egyptian and Israeli territory.²⁸ They agreed to the stationing of United Nations forces and observers in the buffer zones between Egyptian and Israeli forces, and agreed not to request withdrawal of these personnel.²⁹ They further agreed that the U.N. personnel would not be removed without the approval of the U.N. Security Council, that approval to require the affirmative votes of the five permanent Council members.³⁰ The Treaty also provided that these arrangements could be reviewed at the request of either party, and amended by mutual agreement.³¹

2. *Interim Withdrawals*

Annex I to the Treaty, the implementation of which will be dealt with in section III below, provided details of Israeli withdrawal from and security arrangements in the Sinai Peninsula. Israel was to withdraw from the Sinai under the supervision of an Egyptian-Israeli Joint Commission,³² first to an interim line within nine months from the date of ratification,³³ then to the international border within three years.³⁴ The final withdrawal would include all Israeli armed forces and civilians.³⁵ The parties agreed that, notwithstanding their stipulation that the Treaty superseded the Agreement between Egypt and Israel of September 1975,³⁶ all

26. Treaty art. V, para. 2. The fact that Egypt and Israel agree that the Strait and the Gulf are international waterways does not necessarily make them so, particularly since the other affected states, Jordan and Saudi Arabia, have not so agreed.

27. A number of separate security agreements, intertwined with the Treaty's provisions, were signed by the United States and by Egypt and Israel respectively. For a discussion of these agreements, see Murphy, *supra* note 3, at 915-16.

28. Treaty art. IV, para. 1.

29. Treaty art. IV, para. 2.

30. *Id.*

31. Treaty art. IV, para. 4. A review would commence within three months of a party's request. Agreed Minutes to art. I.

32. Annex I, art. I, para. 4; see also Treaty art. IV, para. 3. The Joint Commission was to function from the date of exchange of instruments of ratification until the date of completion of final Israeli withdrawal. Appendix, art. IV, para. 1. It was to be composed of representatives of each country under a senior officer, and would, among other things, coordinate military activities, assist U.N. forces and observers, and organize the demarcation of the international boundary and all lines and zones. Appendix, art. IV, paras. 2, 3(a), 3(c), 3(d).

33. Annex I, art. I, para. 3(a). Israeli withdrawal to the interim line (the El Arish-Ras Mohammad Line, Map 1) was completed in five subphases, in accordance with Appendix art. II, para. 1.

34. Annex I, art. I, para. 3(b).

35. Annex I, art. I, para. 1.

36. Treaty art. IX, para. 2. For text of Agreement of Sept. 1, 1975, its Annex, and the United States proposal for an early warning system in the Sinai, see DEP'T OF STATE, NEWS

applicable military arrangements under that Agreement would remain in effect until Israeli armed forces completed withdrawal from lines "J" and "M" in the western Sinai established by the Agreement (see Map 1) up to the interim withdrawal line (that running from El Arish to Ras Mohammad; see Map 1).³⁷

During the period of withdrawal of Israeli armed forces, the parties agreed that United Nations forces were to immediately enter each evacuated area and establish interim and temporary buffer zones (see Map 1), for the purpose of maintaining a separation of Egyptian and Israeli forces. The deployment of these forces was to precede the movement of any other personnel into these areas.³⁸ Deployment of Egyptian armed forces, border units, and civil police in the Sinai, and of naval units in the Gulf of Suez, was to follow the stationing of the U.N. forces.³⁹

An interim buffer zone was to be established west of and adjacent to the interim withdrawal (El Arish-Ras Mohammad) line after Israeli withdrawal to the area east of that line. Egyptian civil police were to perform normal police functions in the buffer zone,⁴⁰ while United Nations forces were to operate check points, reconnaissance patrols, and observation posts.⁴¹ Israeli personnel were to operate military technical installations at four locations in the zone.⁴² These installations were to be withdrawn when Israeli forces withdrew from the interim line, or at another time agreed to by the parties.⁴³ Israeli and Egyptian liaison and technical teams were to inspect all installations (for example, utilities, airfields, roads, pumping stations, ports, and water sources) to be transferred to Egypt following Israeli withdrawals.⁴⁴

The parties requested the United States to continue surveillance

RELEASE, Sept. 1, 1975, *reprinted in* Report by the Secretary-General concerning the Agreement between Egypt and Israel, Annex, 30 U.N. SCOR, Supp. (July-Sept. 1975) 54, U.N. Doc. S/11818/Add.1 (1975); *THE ARAB-ISRAELI CONFLICT—READINGS AND DOCUMENTS* 1208 (abridged & revised ed. J.N. Moore 1977) [hereinafter cited as J.N. Moore]. The U.S. proposal on the early warning system is also found at 26 U.S.T. 2271, T.I.A.S. No. 8155.

37. Appendix art. I, para. 2(a).

38. Appendix art. I, para. 2(b).

39. Appendix art. I, para. 2(c)-(f).

40. Appendix art. V, para. 1.

41. Appendix art. V, para. 2.

42. Appendix art. V, para. 3. See Map 1 for the locations of the Israeli military technical installations, sites "T 1-4." These installations were to be manned by technical and administrative personnel equipped with small arms (including rifles, sub-machine guns, and hand grenades) required for their protection. Only officers were to be allowed to carry weapons outside the sites. A third party (unidentified in the Treaty) was to conduct random inspections of the sites at least once a month to verify compliance with Treaty obligations. Access to and exit from the sites was to be monitored by U.N. forces. Appendix art. V, para. 3(a)-(c), (g).

43. Appendix art. V, para. 5.

44. Appendix art. VI, paras. 1 & 2. Israel was to remove all military barriers and mines prior to withdrawal, or to provide maps and technical data for those not removed. Appendix art. VI, para. 4(a)-(b).

flights until the completion of final Israeli withdrawal. Special inspection flights were to be allowed at the request of either party or of the United Nations.⁴⁶ The United States was also requested to continue to operate the Sinai Field Mission until the completion of Israel's withdrawal from the area east of the Giddi and Mitla Passes,⁴⁶ whereupon its activities were to be terminated.⁴⁷

The parties agreed to request that United Nations forces be deployed as necessary until the completion of final Israeli withdrawal, and agreed to the use of the United Nations Emergency Force (UNEF) for that purpose.⁴⁸ The U.N. forces were to "employ their best efforts" to prevent

45. Appendix art. VII, para. 1(a)-(b).

46. See Map 1. This, the last phase of the interim withdrawal, was to be completed within nine months from the date of ratification. The withdrawal was completed on time. See note 70 *infra*.

47. Appendix art. VII, para. 2. The Sinai Field Mission was authorized by a Joint Resolution of Congress on 13 October 1975 (Pub. L. No. 94-110, 89 Stat. 572, codified in 22 U.S.C. 2348(n) (Supp. III 1979)), and was established on 13 January 1976 by Exec. Order No. 11,896, 41 Fed. Reg. 2067 (1976). It became operational on 22 February 1976. For a summary history of the Sinai Field Mission and its Washington-based headquarters, the Sinai Support Mission, see WATCH IN THE SINAI (1980) (U.S. Dep't of State, Pub. No. 9131, General Foreign Policy Series 321).

48. Appendix art. III, para. 1. The U.N. force referred to is that created by the Security Council by Resolution 340, 28 U.N. SCOR, Supp. (Res. & Dec.) 11, U.N. Doc. S/INF/29 (1973). The resolution was adopted by 14 votes in favor to 0 against, with the People's Republic of China not taking part in the vote. [1973] U.N.Y.B. 202. On China's position on this vote, see note 215 *infra*. See also Resolution 341, 28 U.N. SCOR, Supp. (Res. & Dec.) 11, U.N. Doc. S/INF/29 (1973), by which the Council mandated the operations of the force in approving the Secretary-General's initial report thereon. This force will hereinafter be referred to as UNEF. (It is often referred to in the literature as UNEF II.) A predecessor United Nations Emergency Force (UNEF I) was created by the General Assembly at its First Emergency Special Session in 1956. On UNEF I, see generally A. ELKORDY, THE UNITED NATIONS PEACE-KEEPING FUNCTIONS IN THE ARAB WORLD 167-203 (1967); I. R. HIGGINS, UNITED NATIONS PEACEKEEPING 1946-67, at 221-529 (1967); E. LAUTERFACHT, THE UNITED NATIONS EMERGENCY FORCE—BASIC DOCUMENTS (1960); G. ROSNER, THE UNITED NATIONS EMERGENCY FORCE (1963).

The parties' request to employ UNEF was consistent with what one long-time peacekeeping expert described as "the two salient principles that have governed the creation and implementation of United Nations peacekeeping operations" in the period following the creation of UNEF I. Harbottle, *The October Middle East War: Lessons for UN Peacekeeping*, 50 INT'L AFF. (London) 544, 545 (1974), reprinted in J.N. Moore, *supra* note 36, at 615. These principles are: 1) that peacekeeping operations "should be of a peaceful, not of an enforcement nature," and 2) that they should be used "only at the request, or with the consent, of those who are a party to the dispute." *Id.* at 545-46.

This use of UNEF would also fulfill existing expectations concerning peacekeeping under terms described by James, since it would fit into two of the three broad categories of U.N. peacekeeping operations he identified. First, its general purposes would be to maintain peace and security and to prevent a deterioration in the situation, with the more specific aims of maintaining calm and preventing violence. Second, it would assist in the execution of the political settlement. A. JAMES, THE POLITICS OF PEACE-KEEPING 7-9, 15 *passim*, 177 *passim* (1969). But, on the political settlement aspect of peacekeeping, see Saksena, *Not by Design: Evolution of UN Peace-Keeping Operations and its Implications for the Future*, 16 INT'L STUD. 459, 473 (1977). (James' third category is neither a conciliatory nor a pre-

violations of the withdrawal terms,⁴⁹ and to verify troop limitations, operate check points, send out reconnaissance patrols, and man observation posts.⁵⁰

3. *Permanent Arrangements*

The Treaty also dealt at length with security in the Sinai following Israel's final withdrawal in April 1982. Four zones, three in the Sinai and one in Israel—each with specified limitations on military installations and fortifications, weapons, troops, equipment, aircraft, and naval vessels—were to be set up.⁵¹ Egypt and Israel were to be allowed to establish early warning systems in specified zones.⁵² A liaison system was to replace the Joint Commission⁵³ after full withdrawal.⁵⁴

The parties agreed to request the United Nations to provide forces and observers following final withdrawal to operate check points, reconnaissance patrols, and observation posts along the international boundary and along line B—a line running from a point about midway between El Arish and the Gaza Strip in the north to Sharm el Sheikh in the south—and within Zone C, that area between the international boundary and line B (see Map 2).⁵⁵ The United Nations forces were also to carry out verifications of the implementation of pertinent Treaty provisions twice monthly or on the request of either party.⁵⁶ They were also to ensure the freedom of navigation through the Strait of Tiran.⁵⁷

The U.N. forces were to be deployed in Zone C⁵⁸ and stationed mainly in camps located in two areas, shown in Map 2, near the Gaza Strip and Sharm el Sheikh respectively.⁵⁹ Only United Nations observers, as opposed to forces, were to be permitted on the Israeli side of the border, in Zone D, a thin band of territory adjacent to the border running from the Mediterranean Sea at the southern end of the Gaza Strip to the

ventative role. Rather, the peacekeeping unit is designed to "upset certain aspects of the established order of things," with the United Nations attempting to act as an instrument of change. A. JAMES, *supra*, at 9, 371 *passim*.) Other United Nations peacekeeping operations have engaged in both peace maintenance/violence prevention and settlement assistance, notably those in Kashmir, Indonesia, and Cyprus. See generally 2 R. HIGGINS, *supra*; D. WAINHOUSE *et al.*, INTERNATIONAL PEACE OBSERVATION (1966); D. WAINHOUSE *et al.*, INTERNATIONAL PEACEKEEPING AT THE CROSSROADS (1973).

49. Appendix art. III, para. 2.

50. Appendix art. III, para. 3.

51. Annex I, arts. II, III, & IV. The zones are depicted in Map 2.

52. Annex I, art. V. Egypt was to be allowed to set up systems in Zone A; Israel, in Zone D. See Map 2.

53. See note 32 *supra* and accompanying text.

54. Annex I, art. VII.

55. Annex I, art. VI, para. 2(a).

56. Annex I, art. VI, para. 2(b)-(c).

57. Annex I, art. VI, para. 2(d). See also Treaty art. V; note 26 *supra* and accompanying text.

58. Annex I, art. II, para. 1(c)(4); Annex I, art. VI, para. 3.

59. Annex I, art. II, para. 1(c)(5).

Gulf of Aqaba near Eilat.⁶⁰ The forces and observers were to enjoy freedom of movement, and were to be allowed any necessary facilities.⁶¹ They were not to be empowered to authorize the crossing of the international boundary.⁶² The parties were to agree at a later date on the countries from which the United Nations forces and observers would be drawn; nationals of permanent members of the U.N. Security Council were not to be included.⁶³ The parties stipulated that if they could not reach an agreement on the composition of the U.N. forces and observers, they would "accept or support" a United States proposal on that matter.⁶⁴

4. *President Carter's Letters*

On the same day on which the Peace Treaty was signed, President Carter addressed to President Sadat and Prime Minister Begin virtually identical letters by which he "confirm[ed]" certain aspects of United States obligations arising from the Treaty.⁶⁵ The President stated in the letters that in the event of an "actual or threatened violation" of the Treaty, the United States would, on the request of one or both parties, consult with the parties and take such action as it might deem appropriate and helpful to achieve compliance with the Treaty.⁶⁶ The President also confirmed that the United States would conduct aerial monitoring as requested by the parties.⁶⁷

Also by these letters, and of primary importance for the purposes of this Comment, President Carter expressed the conviction of the United States that the Treaty provision for permanent stationing of United Nations personnel in the designated limited force zone⁶⁸ could and should be implemented by the Security Council, and stated that the United States would exert its utmost efforts to obtain the requisite action by the Council. If the Council failed to establish and maintain the arrangements called for in the Treaty, the letters continued, "the President [would] be prepared to take those steps necessary to ensure the establishment and maintenance of an acceptable alternative multinational force." All of these confirmations were made "subject to United States Constitutional processes."

60. Annex I, art. II, para. 1(d)(2); Annex I, art. VI, para. 3.

61. Annex I, art. VI, para. 6.

62. Annex I, art. VI, para. 7.

63. Annex I, art. VI, para. 8.

64. Agreed Minutes to Annex I.

65. The letters, dated 26 March 1979, are published in the State Department publication referred to in note 1 *supra*, at 23, and at 18 INT'L LEGAL MAT. 532 (1979). The only difference between the two letters is the ordering of the Treaty's parties in their texts. The legal and political nature of these letters and the extent of the obligation they impose is discussed in section IV(A) of this Comment.

66. An interesting work on this general topic is A. DOWTY, *THE ROLE OF GREAT POWER GUARANTEES IN INTERNATIONAL PEACE AGREEMENTS* (Jerusalem Papers on Peace Problems, 1974).

67. Appendix art. VII, para. 1(a).

68. Annex I, art. VI.

III. IMPLEMENTATION OF THE TREATY'S PEACEKEEPING⁶⁹ PROVISIONS

A. *International Action: The Situation During the Initial Withdrawals (April 1979 to January 1980)*

Between 25 April 1979 and 23 January 1980,⁷⁰ Israel withdrew, in accordance with the Treaty's provisions, to the interim (El Arish-Ras Mohammad) line. During this period, however, considerable problems concerning the peacekeeping provisions of the Treaty arose. Initially, the problems centered on UNEF, which was called on by the parties to execute tasks similar in many ways to those it had been performing, but over larger areas.

69. The term "peacekeeping" is used neither in the Treaty nor in any of its accompanying documents. Nor does it appear in the United Nations Charter. Professor Inis Claude has written that "the term may come to be generally employed as a designation for whatever may be done or recommended to promote or uphold stability in international relations." Claude, *The Peace-keeping Role of the United Nations*, in *THE UNITED NATIONS IN PERSPECTIVE* 49 (E. Tompkins ed. 1972). Professor Higgins has noted that the term may refer to "the entire role of the UN in maintaining, or restoring, international peace," but that it may also be used with reference to U.N. forces and observer groups or solely to U.N. forces. "There is, of course, no one 'correct' definition." 1 R. HIGGINS, *supra* note 48, at ix.

The use of the term "peacekeeping" derives from the escape fashioned by Secretary-General Dag Hammarskjöld and others from the problems presented by the failure of the United Nations to live up to the Charter's conception of collective security in the enforcement of peace. Hammarskjöld's doctrine of "preventive diplomacy" employed as its central component the proposition that the United Nations could provide an alternative to peace-enforcement in the form of peacekeeping, whereby the Organization, through the employment of somewhat modest forces, would intervene in a situation which threatened international peace. In the words of Brigadier Michael Harbottle:

[P]eacekeeping by definition must be a third party intervention, peaceful and impartial—the task of a referee, equipped with a whistle rather than a gun with which to control the violence. UN peacekeeping is exactly that: an operation that is conducted without force, coercion or undue persuasion, but with tactful reasoning, quiet diplomacy and above all patient restraint.

Harbottle, *supra* note 48, at 545.

Much has been written about whether peacekeeping is action taken under Chapter VI or Chapter VII of the Charter, or whether it is an autonomous function, arising from practice, which in effect lies between those chapters. See generally D. BOWETT, *UNITED NATIONS FORCES* 266-312 (1964); J. BOYD, *UNITED NATIONS PEACE-KEEPING OPERATIONS: A MILITARY AND POLITICAL APPRAISAL* 5-13 (1971); L. FABIAN, *SOLDIERS WITHOUT ENEMIES* 1-12 (1971); L. GOODRICH, *THE UNITED NATIONS IN A CHANGING WORLD* 138-58 (1974); L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 290-317 (3d rev. ed. 1969); J. GUTTERIDGE, *THE UNITED NATIONS IN A CHANGING WORLD* 28-47 (1969); R. KHAN, *IMPLIED POWERS OF THE UNITED NATIONS* 58-73 (1970); A. LEGAULT, *RESEARCH ON PEACE-KEEPING OPERATIONS—CURRENT STATUS AND FUTURE NEEDS* 9-28 (Int'l Information Center on Peacekeeping Operations Monograph No. 5, 1967); M. NAIDU, *COLLECTIVE SECURITY AND THE UNITED NATIONS* 75-82 (1974); Halderman, *Legal Basis for United Nations Armed Forces*, 56 AM. J. INT'L L. 971 (1962).

70. Israel's interim withdrawal was completed two days before the date anticipated by the Treaty. Wash. Post, Jan. 24, 1980, at 1, col. 1.

1. *The Authority of the Secretary-General vis-à-vis the Security Council*

a. *Trends in United Nations Practice*

By the Treaty's terms, Egypt and Israel agreed to request the re-deployment of UNEF to enable it to perform during the interim withdrawals the functions called for in the Treaty.⁷¹ The parties did not indicate to whom this request was to be directed. There are two possibilities: the Security Council and the Secretary-General. UNEF was a creation of the Security Council,⁷² and in modern practice, there is little disagreement that the Council is the United Nations entity which possesses ultimate and dominant power in all matters concerning international peace and security. Arguments over the extent to which the Secretary-General must defer to the Council's authority nevertheless persist.

It was not Mr. Kurt Waldheim, but rather the United States, which asserted that the Secretary-General possessed the authority to order the redeployment of UNEF even lacking a specific decision to that effect by the Council.⁷³ The Secretary-General, while not delving into the matter of his legal right to order redeployment, declined to do so. To one senior United Nations official, it was "a question of prudence." This official feared that the Organization would be "torn apart" if the Secretary-General acted without at least the tacit consent of the U.S.S.R.⁷⁴

There is today no dispute that the Secretary-General cannot establish a peacekeeping force even if all involved parties give their consent. The question of the Secretary-General's authority over existing forces then centers on two issues: whether in some circumstances a significant change in the functioning of an existing force is tantamount to the creation of a new force; and the extent of the authority over existing forces that may in fact be exercised by the Secretary-General.

With regard to the first issue, the clear trend has been and continues to be towards fairly extreme deference to the prerogatives of the Council. In 1965, for example, when U Thant "felt that a further deployment of United Nations personnel was required to contain the Indo-Pakistan dispute he was careful to get the approval of the Security Council."⁷⁵ Also,

71. Appendix art. III, para. 1.

72. See note 48 *supra*. By contrast, UNEF I was created by the General Assembly, to which the matter had been transferred from the Council under the "Uniting for Peace" procedure, where the veto does not operate. (The Uniting for Peace procedure was adopted by G.A. Res. 377, 5 U.N. GAOR, Supp. (No. 20) 10, U.N. Doc. A/1775 (1950).)

73. N.Y. Times, Mar. 27, 1979, at 10, col. 2. This contrasts with the United States position on the *permanent* deployment of a U.N. force during the period following Israel's *final* withdrawal from the Sinai. On that matter, President Carter confirmed in his letters to President Sadat and Prime Minister Begin that the United States would "exert its utmost efforts to obtain the *requisite* action by the Security Council" for the permanent stationing of United Nations forces in the Sinai. (Emphasis added.)

74. *Id.* The official was not named in this report. See also Samuels, *The UN vs. the Treaty*, THE NEW LEADER, Apr. 9, 1979, at 7.

75. Higgins, *A General Assessment of United Nations Peace-keeping*, in UNITED

in October 1967, following an exchange of hostilities between Egypt and Israel, Thant enlarged the United Nations Truce Supervision Organization in Palestine (UNTSO) in the Suez Canal area, thereby creating "a new role in a different geographical area by an adaptation of an existing body."⁷⁶ The United Kingdom and the United States regarded this action as within the discretion of the Secretary-General so long as the directly interested parties consented.⁷⁷ The Soviet Union disagreed, and the Secretary-General awaited Security Council action. The Council used the technique of approval by informal consensus, with the President of the Council issuing a statement, thus avoiding a formal vote.⁷⁸

On the question of the extent in fact of the Secretary-General's authority over existing forces, a similar trend can be identified, though the matter is not yet settled to the same degree as that regarding force creation. Evolving customary practice in this area, as in the entire United Nations experience in peace and security matters, has been determined largely on an ad hoc basis. In the main, the Secretary-General is allowed to take all necessary "day-to-day" decisions on military and administrative matters; the problem, of course, is that no agreed definition of "day-to-day" matters exists. Thus, when a Secretary-General has acted so as to deny wide discretion to the Council, that body—or more to the point, those of its permanent members opposed to the particular actions taken or proposed—have reacted strongly and negatively. In 1960, for example, the controversy over Secretary-General Dag Hammarskjöld's control over the United Nations Operations in the Congo (ONUC) culminated in a Soviet demand for his dismissal.⁷⁹ And, as Jackson has stated:

Since the death of Hammarskjöld, the Soviets have been more determined in their efforts to limit the role of the Secretary-General on peace and security issues. France and, since 1971, the People's Republic of China have also opposed any actions on the part of the Secretary-General reminiscent of the Hammarskjöld model. Moreover, . . . [w]hile Lie and Hammarskjöld could usually count on U.S. support for their initiatives, Thant and Waldheim have not been able to do so.⁸⁰

Nevertheless, the refusal of Secretary-General Waldheim to redeploy UNEF as called for in the Treaty is most accurately explained in terms of political realities. The joint political will of the United States and the U.S.S.R., a necessary element of effective Security Council action, was lacking. A comparison with events that took place in 1975 and 1976 pro-

NATIONS PEACE-KEEPING: LEGAL ESSAYS 1, 7 (A. Cassese ed. 1978) [book hereinafter cited as A. Cassese].

76. *Id.*

77. 1 R. HIGGINS, *supra* note 48, at 62.

78. *Id.* at 62-63, and Higgins, *supra* note 75, at 7.

79. R. SIMMONDS, *LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO* 75 n.6 and accompanying text (1968).

80. Jackson, *The Political Role of the Secretary-General under U Thant and Kurt Waldheim: Development or Decline?*, 140 *WORLD AFF.* 230, 242-43 (1978).

vides an illustration of the fact that it was not so much evolving custom in United Nations practice as practical politics that determined the extent of the Secretary-General's authority vis-à-vis the Council.

In September 1975, Egypt and Israel entered into an Agreement,⁸¹ supplemented by a detailed Protocol,⁸² whereby UNEF was asked to undertake responsibilities more varied and extensive than those it had been performing. The force also was to operate in new and larger areas.⁸³

In his periodic reports on UNEF to the Security Council, the Secretary-General described the new functions the force had in fact taken on.⁸⁴ Among the changes made necessary by the Agreement and Protocol was extensive alteration of UNEF's deployment.⁸⁵ The Council implicitly approved this redeployment after the fact in its resolutions of 23 October 1975⁸⁶ and 22 October 1976.⁸⁷

In this case, of course, virtually none of the opposition of the kind displayed towards the 1979 Peace Treaty was present.⁸⁸ Since the September 1975 Agreement and Protocol were politically acceptable, the Secretary-General was free to act in accord with their terms. In addition, the United Nations had been actively involved in the formulation of the 1975 accords. General Siilasvuo, Chief Coordinator of the United Nations Peace-keeping Missions in the Middle East, actually signed the Egyptian-Israeli Agreement as witness, and he chaired the Military Working Group that negotiated the Protocol.

The question of the authority of the Secretary-General and of the Security Council in peacekeeping was also clarified to some degree by an important initiative by Secretary-General Waldheim. Mr. Waldheim's first report to the Security Council on UNEF⁸⁹ contained a statement of

81. See note 36 *supra*.

82. The text of the Protocol is reproduced as an annex to the 10 October 1975 Report of the Secretary-General concerning the Agreement between Egypt and Israel, 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 5, U.N. Doc. S/11818/Add.5 (1975).

83. Report of the Secretary-General on the United Nations Emergency Force for the period 15 July to 16 October 1975, 30 U.N. SCOR, Supp. (Oct.-Dec. 1975) 12, at para. 20, U.N. Doc. S/11849 (1975).

84. *Id.*; Report of the Secretary-General on the United Nations Emergency Force for the period 17 October 1975 to 18 October 1976, 31 U.N. SCOR, Supp. (Oct.-Dec. 1976) 7, U.N. Doc. S/12212 (1976).

85. During the period under review, the deployment of UNEF changed considerably following the implementation of the new Agreement. This redeployment, which was executed in 15 separate phases, began in November 1975 and was completed on 22 February 1976 in accordance with the time-table set out in the Protocol to the Agreement.

Report of the Secretary-General on the United Nations Emergency Force for the period 17 October 1975 to 18 October 1976, 31 U.N. SCOR, Supp. (Oct.-Dec. 1976) 7, at para. 10, U.N. Doc. S/12212 (1976).

86. S.C. Res. 378, 30 U.N. SCOR, Supp. (Res. & Dec.) 6, U.N. Doc. S/INF/31 (1975).

87. S.C. Res. 396, 31 U.N. SCOR, Supp. (Res. & Dec.) 3, U.N. Doc. S/INF/32 (1976).

88. See note 111 *infra* and accompanying text.

89. Report of the Secretary-General on the Implementation of Security Council Resolu-

certain broad principles to be applied to that force. The approval of these principles was "hailed by many States, including the two major powers, as a good example of the long sought compromise solution."⁹⁰ The Secretary-General's report stated in part that the force "must have at all times the full confidence and backing of the Security Council,"⁹¹ and that "[a]ll matters which may affect the nature . . . of the Force, shall be referred to the Council for its decision."⁹² Thus, whether or not the Council's approval of the report established the ultimate authority of the Security Council in peacekeeping,⁹³ it certainly justified Secretary-General Waldheim's insistence that the redeployment of UNEF called for by the Treaty would have required the Council's approval. The issue of future redeployment is much less military than political in nature, and probably cannot be categorized as a day-to-day operation.

b. *The Special Committee on Peacekeeping*

The issue of authority over peacekeeping operations, including the question of the Secretary-General's powers, and of all other matters concerning peacekeeping, are dealt with on an ongoing basis by the General Assembly's Special Committee on Peace-Keeping Operations (the Special Committee).⁹⁴ The Special Committee was mandated to undertake a "comprehensive review of the whole question of peace-keeping operations in all their aspects,"⁹⁵ and it proceeded in that task by attempting to formulate principles and guidelines for the practice of United Nations peacekeeping. That mandate is far from fulfillment in many respects, including the matter of the extent of the responsibilities of the Secretary-

tion 340(1973), 28 U.N. SCOR, Supp. (Oct.-Dec. 1973) 91, U.N. Doc. S/11052/Rev. 1 (1973) [hereinafter cited as Report of the Secretary-General].

90. Cassese, *Recent Trends in the Attitude of the Superpowers towards Peace-keeping*, in A. Cassese, *supra* note 75, at 223, 233. Cassese cites the statements of the representatives of the U.S.S.R., 28 U.N. GAOR, C.121 (62d mtg.) 4, U.N. Doc. A/AC.121/SR.62 (1973); France, *id.* at 5, 7; the United States, 29 U.N. GAOR, C.121 (63d mtg.) 15, U.N. Doc. A/AC.121/SR.63 (1974; and that of the Chairman of the Special Committee, *id.* at 3-4.

91. Report of the Secretary-General, *supra* note 89, at para. 3.

92. *Id.* at para. 4(a).

93. There is compelling evidence that the effect of the Council's action was to do precisely that. A United States representative at the United Nations spoke of the "absence of any argument over the primacy to the Security Council in peace-keeping operations" in the aftermath of the Council's decision. 28 U.N. GAOR, Special Political Committee (899th mtg.) 16, U.N. Doc. A/SPC/SR.899 (1973). A Soviet representative said that the decision "established officially that all principal United Nations peace-keeping operations [are] entirely the responsibility of the Security Council." 28 U.N. GAOR, Special Political Committee (898th mtg.) 7, U.N. Doc. A/SPC/SR.898 (1973).

Cassese observes that this development met "the essential demands of the Soviet Union to a far greater extent" than those of the United States. He suggests that the United States "gave in" partly because it "could no longer control the other United Nations bodies on which it had previously been able to count for the furtherance of its own interests and goals." Cassese, *supra* note 90, at 236-37.

94. The Special Committee was established by G.A. Res. 2006, 19 U.N. GAOR, Supp. (No. 15) 7, U.N. Doc. A/5815 (1965).

95. *Id.*

General and the Security Council.

In 1974, the Committee's Working Group "was able to prepare a number of alternative or complementary draft formulae for articles of agreed guidelines"96 Using these draft articles as a basis for its further discussions, the Working Group in 1976 refined some of them, reaching "a measure of agreement"97 on the introduction and first four articles, dealing with "the authority and responsibilities of the Security Council and the possible establishment by the Security Council of a committee under Article 29 of the United Nations Charter."98

Article 1, paragraph 2 of these guidelines provided a list of twelve responsibilities to be exercised directly by the Council. Among the items included in this list was "ultimate direction and control during the operation."99 This provision still leaves the controversy quite unclear.100 Indeed, this and each of the other responsibilities on the list were described by the Working Group as "headings for questions of substance which will be discussed at length"101

96. [1974] U.N.Y.B. 102. The draft formulae are contained in the Eighth Report of the Working Group, reproduced in the 1974 Report of the Special Committee, 29 U.N. GAOR, Annexes (Agenda Item 39) 1, 2, U.N. Doc. A/9827 (1974).

97. Tenth Report of the Working Group, reproduced in the 1976 Report of the Special Committee, 31 U.N. GAOR, Annexes (Agenda Item 54) 2, at para. 5, U.N. Doc. A/31/337 (1976) [hereinafter cited as Tenth Report of Working Group].

98. [1976] U.N.Y.B. 110. Article 29 of the Charter reads: "The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions."

99. Tenth Report of Working Group, *supra* note 97, at Appendix I (draft articles), art. 1, para. 2(h).

100. An illustration of the lack of clarity is shown by reference to the views expressed in the General Assembly's Special Political Committee on the draft guidelines:

Indonesia believed that in the interests of efficiency the Secretary-General should be given authority to oversee day-to-day operations. Canada considered it desirable that the Secretary-General be in a position to direct the operations under the broad authority of the Security Council. Pakistan held a similar view: responsibility and ultimate control must rest with the Security Council, but the Secretary-General within the over-all mandate established by the Council should direct the activities of the forces.

[1977] U.N.Y.B. 128.

Voting requirements in the Security Council's exercise of its "ultimate direction and control" are also unclear. The Special Committee's draft guidelines are silent on the question of voting in the Council. The United Kingdom has made "a major effort to change the frame of reference by seeking to recast the debate not so much in terms of Secretary-General versus Security Council, but of simple majority vote in the Council votes requiring the concurrence of the permanent Members." Higgins, *supra* note 75, at 8. The United Kingdom proposed in 1973 that the Special Committee adopt an approach to limit use of the veto to certain questions, including force creation, mandate, duration, and termination. The proposal would nonetheless have allowed any member of the Council to challenge a move by the Secretary-General, whereupon a decision, categorized as substantive in nature (the veto therefore operating), would be required. There was no clear response to this initiative, though it seemed to have made an "imprint" in the Special Committee. *Id.* at 8-9. See letter of 6 September 1973 from the representative of the United Kingdom to the Secretary-General, U.N. Doc. A/9144 (1973).

101. Seventh Report of the Working Group, at para. 3, "reiterated" and reproduced in

In 1977, while it could not "finalize an agreed set of guidelines, the Working Group produced a draft text" of the remaining articles.¹⁰² There was still substantial "absence of agreement"¹⁰³ in this draft. One article, however, contained a sentence which serves to reemphasize the primacy of the Security Council: "It is essential that throughout the conduct of a United Nations peace-keeping operation it shall have the full confidence and backing of the Security Council."¹⁰⁴ This sentence provides a basis for understanding Secretary-General Waldheim's insistence that the Council was required to give its consent to the desired redeployment of UNEF.

Through October 1980, with the Special Committee still using its 1976 and 1977 draft guidelines, there had been no substantial progress. As expressed in the 1979 report of the Committee's Working Group, "[l]aborious discussions reaffirmed that long-standing basic differences remain and that the task of achieving agreed guidelines will continue to be a difficult one, owing to the fundamental nature of the issues with which the Working Group is faced."¹⁰⁵

2. *The Expiration of UNEF's Mandate*

a. *The U.S.-U.S.S.R. Compromise*

A further problem in the implementation process involved the fact that UNEF's mandate was to expire, failing its renewal by the Security Council, on 24 July 1979. On 22 May, news reports from Cairo indicated that the U.S.S.R. had informed the United States that it planned to veto any attempt to expand the mandate to allow the force to police the

Tenth Report of Working Group, *supra* note 97, at para. 6.

102. Interim Report of the Working Group, reproduced in 1977 Report of the Special Committee, 32 U.N. GAOR, Annexes (Agenda Item 56) 2, at para. 6, U.N. Doc. A/32/394 (1977). These draft articles appear in the Eleventh Report of the Working Group, reproduced in *id.* at 4, Appendix I (draft articles) [hereinafter cited as Eleventh Report of Working Group].

103. Eleventh Report of Working Group, *supra* note 102, at para. 7. For example, article 7, dealing with the powers of the Secretary-General, provided:

The Secretary-General, under the authority of the Security Council, [shall direct peace-keeping operations] [is in charge of the implementation of peace-keeping operations, receiving guidance from a subsidiary body of the Security Council], within the mandate entrusted to him by the United Nations Charter, contributing with all means at his disposal to giving effect to relevant decisions of the Security Council.

Id. at Appendix I (draft articles), art. 6. The brackets indicate the "absence of agreement."

104. *Id.* at Appendix I, art. 9.

105. Twelfth Report of the Working Group, reproduced in the 1979 Report of the Special Committee, 34 U.N. GAOR, Annexes (Agenda Item 52) at Annex, para. 4, U.N. Doc. A/34/592 (1979). *See also* the 1980 Report of the Special Committee, which contained the following statements: "The course of discussions, both in the Special Committee and in the Working Group, reaffirmed the wide disparity of members' views . . . and the great difficulty in finding any compromise at all. . . . The Special Committee . . . could not reach agreement on how to carry out its mandate." 35 U.N. GAOR, Annexes (Agenda Item 54) at paras. 7, 9, U.N. Doc. A/35/532 (1980).

Treaty.¹⁰⁶ Indeed, on 6 April, the Soviet Ambassador to the United Nations, Oleg Troyanovsky, had said that to extend UNEF's mandate would "signify approval of the U.S.-Israeli-Egyptian peace pact."¹⁰⁷ Thus, while the Soviet Union grounded its refusal to approve the redeployment of UNEF called for in the Treaty in its opposition to the Treaty, it deemed it a practical necessity to terminate the mandate of the force altogether.¹⁰⁸

The United States, trying to convince the U.S.S.R. to allow UNEF to remain, argued among other things that since one of the goals of Resolution 242 was the withdrawal of Israeli forces from territories occupied in 1967,¹⁰⁹ the Israeli pullout from the Sinai and the use of U.N. troops would constitute steps towards achieving the Security Council's aims, requiring UNEF's continued presence in the Sinai.¹¹⁰ The Soviets and most of the Arab countries, however, disapproved of Egypt's willingness to negotiate a treaty which left unsolved the Palestinian questions, and felt also that linking the operation of UNEF with the Treaty would imply United Nations endorsement of the Camp David Agreements as well as of the Treaty itself. Some reports indicated that the U.S.S.R. may in fact not have wanted to block an extension of UNEF's mandate, partly because of President Carter's promise to arrange an alternative force—possibly involving a United States presence—and because of the possibility that the action could adversely affect the ongoing Strategic Arms Limitation Talks. It did so, according to these reports, mainly to appease the Arab states opposed to the Treaty.¹¹¹

106. LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, EGYPTIAN-ISRAELI PEACE TREATY 12 (Issue Brief No. IB79076, 1979) [hereinafter cited as C.R.S. Issue Brief].

107. N.Y. Times, Apr. 6, 1979, at 29, col. 1. See also N.Y. Times, June 18, 1979, at 14, col. 6.

108. Indeed, without redeployment, UNEF would have been rendered unable to perform any peacekeeping functions as Israeli forces withdrew beyond the former buffer zones. Its mandate would then have lapsed in fact, if not in law, as it became incapable of practical application.

109. S.C. Res. 242, note 6 *supra*, operative para. 1(i).

110. N.Y. Times, Apr. 8, 1979, at 11, col. 5. The Christian Science Monitor also reported that the United States had argued that the Security Council was "morally obliged" on this ground to support the Treaty. Christian Sci. Mon., Apr. 9, 1979, at 10, col. 1. For the views of Egypt and Israel on this point, see note 20 *supra*.

111. See N.Y. Times, Mar. 27, 1979, at 10, col. 1, and May 6, at 11, col. 1. See also Seale, *The Egypt-Israel Treaty and its Implications*, 35 THE WORLD TODAY 189, 193-96 (1979). In a recent article, Raymond Sommereyns provides a list of citations to the reactions in the United Nations of Iraq, Jordan, Syria, the United Arab Emirates (speaking for the Arab group of states at the U.N.), the Council of the League of Arab States, the Co-ordinating Bureau of Non-Aligned Countries, the Palestine Liberation Organization, and the Chairman of the General Assembly's Committee on the Exercise of the Inalienable Rights of the Palestinian People. Sommereyns, *United Nations Peace-keeping Forces in the Middle East*, 6 BROOKLYN J. INT'L L. 1, 50 n.14 (1980). It was also reported that the Soviet Union "[did] not seem particularly inclined to lend a hand to the implementation of a peace treaty that it [felt] . . . would reduce its own influence in the Middle East and, in fact, lead to its expulsion from the area." Christian Sci. Mon., Apr. 9, 1979, at 10, col. 2.

The prospect of a Security Council refusal to renew UNEF's mandate presented the United States and the parties to the Treaty with the problem of reaching agreement on alternative arrangements. By 18 July, six days prior to the expiration of UNEF's mandate, Egypt, Israel, and the United States had not agreed on an alternative to UNEF.¹¹² One day later, however, the United States and the Soviet Union finished working out a formula that would permit the United Nations to play a role in the withdrawal of Israel from the Sinai. The compromise was to allow the military observers of UNTSO—reinforced in numbers—to replace the troops of UNEF.¹¹³

b. *Israel's Objections*

On 22 July, Egypt announced its agreement with the U.S.-U.S.S.R. compromise proposal to station U.N. observers between Egyptian and Israeli forces in the Sinai.¹¹⁴ On the same day, however, Israel rejected the plan.¹¹⁵ Israel cited several objections to the employment of the observers of UNTSO. Foremost among these was the argument that UNTSO was under the direct control of the Secretary-General, who could, in Israel's view, withdraw the observers at any time.¹¹⁶ Israel made reference in that regard to Secretary-General U Thant's withdrawal of UNEF I from the Sinai just prior to the outbreak of hostilities in June 1967.¹¹⁷ Israel also considered that UNTSO was not capable of carrying out the duties assigned to U.N. forces under the Treaty. It was a very small unit in comparison to UNEF,¹¹⁸ and consisted entirely of unarmed officers. Moreover,

112. N.Y. Times, July 19, 1979, at 10, col. 3.

113. N.Y. Times, July 20, 1979, at 3, col. 6. U.N. sources were cited as having said that the unit might be expanded from about 300 to 500 men. Wash. Post, July 24, 1979, at 1, col. 4. Officials in Cairo were reported to have said that 700 to 1,000 observers would be required. N.Y. Times, Aug. 2, 1979, at 3, col. 4. A U.S. Defense Department study concluded that 600-800 observers would be sufficient. N.Y. Times, July 28, 1979, at 3, col. 1.

114. N.Y. Times, July 23, 1979, at 5, col. 1; *see also* N.Y. Times, July 24, 1979, at 9, col. 2.

115. N.Y. Times, July 23, 1979, at 5, col. 1.

116. *Id.*; Wash. Post, July 29, 1979, at 1, col. 5, and at 9, col. 1.

117. On U Thant's withdrawal of UNEF I, *see* the Report of Secretary-General U Thant to the 5th Emergency Session of the General Assembly, 21 U.N. GAOR, Annexes (Agenda Item 5) 4, U.N. Doc. A/6730 and Add. 1-3 (1967), *reprinted in* 1 R. HIGGINS, *supra* note 48, at 344-62. *See also*, among other works, A. KARAOŞMANOĞLU, *LES ACTIONS MILITAIRES COERCITIVES ET NON COERCITIVES DES NATIONS UNIES* 65-68 (1970); A. LALL, *THE UN AND THE MIDDLE EAST CRISIS, 1967*, at 11-21 (1968); A. ROVINE, *THE FIRST FIFTY YEARS: THE SECRETARY-GENERAL IN WORLD POLITICS 1920-1970*, at 393-400 (1970); L. SOHN, *THE UNITED NATIONS IN ACTION 169-94* (1968); Di Blase, *The Role of the Host State's Consent With Regard to Non-Coercive Actions by the United Nations*, in A. Cassese, *supra* note 75, at 55, 73; Elaraby, *United Nations Peacekeeping by Consent: A Case Study of the Withdrawal of the United Nations Emergency Force*, 1 N.Y.U. J. INT'L L. & POL. 149 (1968); Garvey, *United Nations Peacekeeping and Host Country Consent*, 64 AM. J. INT'L L. 241 (1970); Malawer, *The Withdrawal of UNEF and a New Notion of Consent*, 4 CORNELL INT'L L.J. 25 (1971).

118. The Sinai contingent of UNTSO consisted of about 120-130 officers; UNEF was a 4,178-man force in mid-1979. *See* N.Y. Times, July 25, 1979, at 8, col. 2; Wash. Post, July 29, 1979, at 9, col. 1; U.N. CHRONICLE, July-Oct. 1979, at 24.

its use would be inconsistent with the duties specified in the Treaty, which spoke of "forces," not "observers," in the context of the withdrawal from the Sinai.¹¹⁹ Also, Israel argued that by definition, UNTSO was authorized to supervise a "truce," whereas the present situation involved a "peace."¹²⁰ A further Israeli objection concerned the presence of Soviet officers among the UNTSO observers.¹²¹

Israel's complaints also included a general assertion that the United States, and not the United Nations, was the ultimate guarantor of the Treaty. Israel considered the peacekeeping issue to be a "test case"—an indication of whether the United States would stand by its commitments concerning the Treaty.¹²² Related to this was Israel's conviction that the failure of the Security Council to establish the arrangements called for in the Treaty gave it, as a party to the Treaty, the right to invoke President Carter's pledge to establish an alternative force.¹²³

c. *The U.S. Response*

In response to Israel's objections to the U.S.-Soviet compromise, a State Department spokesman stressed that the use of UNTSO was "fully in accord with the peace treaty and the Camp David framework which preceded it."¹²⁴ The spokesman also stated that "through the months of discussions with all of the parties concerned, UNTSO [had] always been considered a viable alternative to UNEF."¹²⁵ Other officials were also quoted as saying that Israeli officials, including Defense Minister Ezer Weizman, were familiar with the plan to use UNTSO as an alternative to UNEF and "did not object."¹²⁶

119. Wash. Post, July 29, 1979, at 9, col. 1.

120. British Broadcasting Corporation radio newscast, July 23, 1979. Although this point was largely ignored by the print media as well as by official spokesmen and presumably the governments they represented, it may have some validity. "Grotius used truce to mean an agreement by which warlike acts are for a time abstained from, though the state of war continues—a period of rest in war, not a peace." Bailey, *Cease-Fires, Truces, and Armistices in the Practice of the U.N. Security Council*, 71 AM. J. INT'L L. 461 (1977), citing H. GROTIUS, *THE LAW OF WAR AND PEACE*, Book III, Ch. XXI (F. Kelsey trans. 1925). See also D. BOWETT, *supra* note 69, at 73-74: "[A] 'truce' . . . incorporates a complex of mutual undertakings and conditions; it is, however, a temporary state of affairs as opposed to an 'armistice.'"

121. N.Y. Times, July 23, 1979, at 5, col. 1. However, the United States and the U.S.S.R. reached an understanding that Soviet and American officers would not serve in the Sinai area. N.Y. Times, July 25, 1979, at 8, col. 2.

122. N.Y. Times, July 25, 1979, at 8, col. 1.

123. *Id.* at 8, col. 2. Some reports quoted Israeli government sources as saying that the United States should send NATO forces to the Sinai to police the Treaty. C.R.S. Issue Brief, *supra* note 106, at 10.

124. N.Y. Times, July 24, 1979, at 9, col. 1, quoting State Department spokesman Hodding Carter III.

125. *Id.* See also N.Y. Times, July 25, 1979, at 8, col. 1.

126. N.Y. Times, July 28, 1979, at 3, col. 1. In this report, Secretary of State Cyrus Vance was described as "furious" about Israel's distortions of the U.S. position, and as "particularly stung by the allegation of Israel officials that the plan to use UNTSO . . . had been abruptly sprung on their Government. . . ."

The United States contended that Israel's objections to UNTSO were "either irrelevant or based on misconceptions."¹²⁷ UNTSO, a United States official noted, had not been withdrawn on the occasion of the 1967 hostilities nor at any other time in its 31-year existence. The Secretary-General would be able to expand and equip the unit such that it would be able to carry out adequately the functions specified in the Treaty.¹²⁸ Finally, it was "clear" to the United States that the Secretary-General would not withdraw the unit "on his own authority without consulting the Security Council."¹²⁹ The official "conceded" that the United States would not be able to veto the withdrawal of UNTSO, but said that if relations between Egypt and Israel deteriorated to such a degree that a party demanded withdrawal, the Treaty would be "dead" and the controversy irrelevant.¹³⁰ A United Nations official, Under-Secretary-General for Special Political Affairs Brian Urquhart, indicated his agreement with the United States' conviction that the Secretary-General would not withdraw UNTSO unilaterally, while disputing the United States' "concession" on the Council's control over the unit. Urquhart wrote that "new dispositions of [the] observers or any major change in their function requires, by long usage, a decision or at least the concurrence of the Security Council."¹³¹

With regard to Israel's argument that, with the expiration of UNEF's mandate, it could demand that the United States establish an alternative force, the United States insisted that President Carter's pledge to that effect "applie[d] to the period after final withdrawal," and would therefore come into effect, if necessary, in 1982.¹³² There is support for this position in the text of the President's message, which refers to "the Treaty provision for *permanent* stationing of United Nations personnel. . . ."¹³³ However, some reports indicated that the United States had approached several countries in an attempt to form a multinational force,

127. N.Y. Times, July 26, 1979, at 3, col. 1.

128. *Id.* This point was clarified when an unidentified State Department official stated: "We have an understanding with all the members of the Security Council, including the Soviet Union, that the secretary general shall be free to establish the number of troops necessary and the equipment and placement necessary to carry out the functions which we spelled out in the treaty." Wash. Post, July 27, 1979, at 17, col. 3.

129. N.Y. Times, July 26, 1979, at 3, col. 1.

130. *Id.*

131. Letter to the editor, N.Y. Times, July 27, 1979, at 22, col. 4. In another letter to the editor, Professor Seymour Maxwell Finger, Director of the Ralph Bunche Institute on the United Nations at the City University of New York and a former United States representative on the Special (Peacekeeping) Committee, pointed out that one of the basic differences between UNEF and UNTSO was that the former had a fixed term, renewable only by Council action, while the latter's mandate continued in force unless ended by the Council, where the United States could veto UNTSO's termination. N.Y. Times, Aug. 11, 1979, at 18, col. 5.

132. Letter from David A. Korn, Director, Office of Israeli and Arab-Israeli Affairs, Department of State, to the present writer (Aug. 29, 1979).

133. President Carter's letters, note 65 *supra*. (Emphasis added.)

but was unsuccessful in winning support.¹³⁴

On 24 July 1979, at midnight (New York time), the mandate of UNEF expired. The Secretary-General ordered the force to suspend its operations and await transportation out of the Sinai. Seven hours earlier, the Security Council had reached an agreement—avoiding an actual vote—by which UNEF was to be pulled out of the Sinai, with UNTSO's observers remaining to monitor Israel's withdrawal.¹³⁵ In his report to the Council on the expiration of UNEF, Secretary-General Waldheim stated that in view of the fact that the withdrawal of the force was without prejudice to the continued presence of UNTSO in the area, he would make the necessary arrangements for the latter's further functions.¹³⁶ On 1 August, UNTSO observers—minus U.S. and Soviet officers—took over checkpoint and patrol duties in the Sinai from the departing UNEF troops, assuming the "most essential positions."¹³⁷

B. National Action: The Situation During the Interim Period Prior to Final Withdrawal (January 1980 to April 1982)

1. The Haifa Agreement

The displacement of UNEF by UNTSO, over Israeli objection, took place during the month of August and into September. On 5 September, at a meeting at Haifa, President Sadat and Prime Minister Begin reached an agreement, not fully detailed, to station joint Israeli-Egyptian patrols as a temporary self-policing mechanism in the Sinai.¹³⁸ This agreement represented a compromise on the part of Egypt, which had theretofore opposed the stationing of Israeli military forces on Egyptian soil.¹³⁹ The agreement was "temporary" in that it left undecided any future United States or United Nations involvement or direct participation in Sinai peacekeeping. These questions were to be discussed at an upcoming meeting in Washington.

134. C.R.S. Issue Brief, *supra* note 106, at 3 (noting reports to this effect from Cairo, and stating also that Egypt had tried to recruit an all-African force); N.Y. Times, Sept. 6, 1979, at 1, col. 3 (specifying that the United States had contacted "Scandinavian countries and others"); Christian Sci. Mon., Apr. 9, 1979, at 10, col.2 (stating that most of the countries contributing troops to UNEF, including some NATO countries, were "unlikely" to agree to station their troops except under United Nations auspices).

135. Letter of 24 July 1979 from the Secretary-General to the Security Council, U.N. Doc. S/13468 (1979); N.Y. Times, July 25, 1979, at 1, col. 1; U.N. CHRONICLE, July-Oct. 1979, at 24.

136. U.N. Doc. S/13468, *supra* note 135, summarized in U.N. CHRONICLE, July-Oct. 1979, at 24.

137. N.Y. Times, Aug. 2, 1979, at 3, col. 1, quoting Major Jorgen Jansen of Denmark, an UNTSO observer. The final, official termination of UNEF's work came on 24 April 1980. Den. Post, Apr. 26, 1980, at 10, col. 1.

138. British Broadcasting Corporation radio newscast, Sept. 5, 1979; N.Y. Times, Sept. 6, 1979, at 1, col. 4. This solution had been mentioned earlier in the press. A 20 May report from Israel stated that Egypt and Israel had agreed at that time to create joint patrols.

139. N.Y. Times, Sept. 6, 1979, at 1, col. 4. In what appeared to be the Israeli part of the compromise, Prime Minister Begin pledged to advance the Treaty timetable by returning Mt. Sinai to Egypt two months ahead of schedule.

2. *The Washington Agreement*

The Washington meeting, involving Secretary of State Vance, Foreign Minister Dayan, and Defense Minister Hassan Ali, was held 18-19 September. It produced the arrangements which are now in existence and which will probably prevail until the end of the interim period in April 1982, when Israel will complete its withdrawal from the Sinai. Those arrangements called for the United States to exercise "overall supervisory responsibilities, possibly augmented by United Nations observers,"¹⁴⁰ in monitoring compliance with the Treaty in areas relinquished by Israel. The agreement was described as "tentative" in that it would require the approval of the U.S. Congress and of the Egyptian and Israeli Governments. The United States was to increase its current ground and air surveillance of the Sinai and, in particular, to extend and broaden the mandate of its Sinai Field Mission. It was not envisioned that the number of personnel at the Mission—200 unarmed civilians—would be altered.¹⁴¹ The Mission had been operating an early-warning system for three years. By a provision of the Treaty, it was to have been disbanded in late January 1980.¹⁴² Regarding air surveillance, the United States agreed to increase the number of flights to improve the accuracy of the monitoring.¹⁴³ The United States had already agreed to operate air surveillance during the interim period.¹⁴⁴

The arrangements would also require Egyptian and Israeli patrols to operate checkpoints in the interim buffer zone. This provision apparently served to clarify the nature of the agreement reached by President Sadat and Prime Minister Begin at Haifa.

While the status of UNTSO was not defined at the time these agreements were reached, it was clarified somewhat in December by Egypt's Ambassador to the United States, Ashraf Ghorbal, who stated that UNTSO "will have equally a role of supervision within the context of [the September] agreement." The Ambassador also indicated that other details of peacekeeping arrangements for the interim period were still being "thrashed out" in meetings between Egypt, Israel, and the United States.¹⁴⁵

IV. THE TREATY'S FRAMEWORK FOR PERMANENT PEACEKEEPING ARRANGEMENTS IN THE SINAI (FROM APRIL 1982)

A. *President Carter's Letters*

The Treaty provisions concerning peacekeeping arrangements during the indeterminate period following final Israeli withdrawal in April 1982

140. N.Y. Times, Sept. 20, 1979, at 1, col. 6.

141. *Id.* This report inaccurately indicated that military personnel would be introduced. The error is corrected in N.Y. Times, Sept. 21, 1979, at B1, col. 8.

142. See notes 46-47 *supra* and accompanying text.

143. N.Y. Times, Sept. 20, 1979, at 1, col. 6, and at 6, col. 5.

144. See notes 45 and 67 *supra* and accompanying text.

145. Response to question posed by the present writer during interview on radio station KOA (Denver, Colorado, Dec. 4, 1979).

envisioned substantial United Nations involvement.¹⁴⁶ The parties did not make specific mention of UNEF or of any other existing U.N. force or observer group for this period, as they had for the period prior to final withdrawal.¹⁴⁷ Given the fact that it is unlikely that a United Nations force for the Sinai will be recreated,¹⁴⁸ President Carter's letters to President Sadat and Prime Minister Begin may take on added importance. By those letters, among other things, the President confirmed that, should the Security Council fail to establish and maintain the peacekeeping provisions called for in the Treaty, the U.S. President would, "subject to United States Constitutional processes . . . be prepared to take those steps necessary to ensure the establishment and maintenance of an acceptable alternative multinational force."¹⁴⁹

1. *The Extent and Commencement of the Obligation*

Israel had been steadfast in its position that the United States must in fact form such a force to take over the peacekeeping role in the Sinai before the final withdrawal in 1982.¹⁵⁰ The posture of the United States, however, was equally firm: "[The United States'] commitment to establish a multinational force will come into effect only at the time of Israel's final withdrawal, in April, 1982."¹⁵¹ At the same time, the United States acknowledged that "any agreements reached for arrangements during the interim period would be without prejudice to the assurance concerning [the] permanent arrangements."¹⁵² Thus, the obligations incurred by the letters are not necessarily to be viewed within the context of the Haifa and Washington agreements.

Moreover, a further agreement between Egypt, Israel, and the United States was reached at the September 1979 Washington meeting, to the effect that the three countries would meet "one year before the beginning of final Israeli withdrawal from the Sinai (that is, April, 1981) to begin discussing arrangements for the establishment of this force."¹⁵³ The United States' "first preference, in accordance with the Treaty and the President's letter, would be a U.N. force."¹⁵⁴

146. The main provisions are in Annex I, art VI; see the text accompanying notes 55-63 *supra*.

147. Appendix art. III, para. 1, whereby the parties specifically requested UNEF's redeployment during the interim period.

148. See text, section IV(B)(1) *infra*.

149. Note 65 *supra*.

150. N.Y. Times, Oct. 8, 1979, at 8, col. 2.

151. Letter from David A. Korn, Director, Office of Israeli and Arab-Israeli Affairs, Department of State, to the present writer (Nov. 9, 1979).

152. Letter from Hodding Carter III, Assistant Secretary of State for Public Affairs and Department spokesman, to the present writer (Nov. 5, 1979).

153. Letter from David A. Korn, note 151 *supra*. The words in parentheses form part of the quotation.

154. Letter from Hodding Carter III, note 152 *supra*.

2. *The Legal Status of the Obligation*

a. *Under International Law*

The precise nature under international law of the United States "confirmation" set forth in President Carter's letters is subject to debate. First, it is not absolutely certain whether they in fact form part of the Treaty.¹⁵⁵ Article IX, paragraph 3 of the Treaty provides that "[a]ll protocols, annexes, and maps attached to this treaty shall be regarded as an integral part hereof." The letters could be considered "annexes" in that they are "added statements";¹⁵⁶ however, the term "annex" must be presumed to refer to those documents attached to the Treaty proper which specifically carry the title "Annex."

If the letters are not part of the Treaty itself, it remains to ask what kind of documents they do constitute. A recent volume on the law of treaties¹⁵⁷ lists thirty-two different "Types of Treaties and Instruments Resembling Treaties,"¹⁵⁸ two of which—unilateral declaration and unilateral note—might describe President Carter's letters. It is submitted, however, that regardless of the term employed to describe the letters, the effect in international law would be the same: the United States would be bound.¹⁵⁹

This proposition is supported by a holding of the International Court of Justice in the *Nuclear Tests Cases*.¹⁶⁰ In that case, France had conducted atmospheric tests of nuclear devices during the years 1966-1968 and 1970-1972 at a site in the South Pacific. Australia and New Zealand had protested the tests through diplomatic exchanges, but France refused to refrain from testing. Australia and New Zealand brought the dispute to the Court, which in 1973 declined France's request that the cases be removed from the list and indicated interim measures to the effect that France should avoid nuclear tests which would cause the deposit of radio-

155. Though apparently bilateral, the Treaty has multilateral features. The Treaty was witnessed by the United States. It refers to the U.N. peacekeeping forces and additional documents referring to it commit the United States to certain undertakings. Thus, the Treaty embodies certain multilateral aspects which tend to give it a *sui generis* multilateral character even though it is labelled a bilateral agreement between Egypt and Israel.

Bassiouni, *supra* note 3, at 19.

156. WEBSTER'S NEW COLLEGIATE DICTIONARY 46 (1973).

157. THE TREATY MAKER'S HANDBOOK (H. Blix & J. Emerson eds. 1973).

158. *Id.* at 7-8.

159. It is possible to argue that the President's "confirmation" is not in fact a declaration, but a promise, if the latter is defined as a specific subset of the former: "a declaration in which the maker commits himself to another subject to a specific action." W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 214 (1979). Some writers have argued that promises, declarations, and other unilateral acts should be consolidated under the conceptual heading "legal acts," which would be binding if intent was shown to exist. See, e.g., E. SUV, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 22 (1962).

160. (Australia v. France), Judgment, [1974] I.C.J. 253; (New Zealand v. France), Judgment, [1974] I.C.J. 457.

active fallout on Australia or New Zealand.¹⁶¹

France recommenced atmospheric testing in 1973-1974. In 1974, however, the President of the Republic and other French government officials unilaterally declared that following the completion of tests planned for that year, France would discontinue atmospheric testing. These declarations were made publicly and were transmitted officially to Australia and New Zealand.

The Court, in deciding the issue whether it possessed jurisdiction to consider the merits of the dispute, noted that while the Applicants had formally asked for a judicial determination of the issue, they had also "repeatedly sought from the Respondent an assurance that the tests would cease."¹⁶² The Court found that France's unilateral declarations—and particularly those of the President¹⁶³—that it would discontinue atmospheric testing "constitute[d] an undertaking possessing legal effect."¹⁶⁴ The objectives of the Applicants in bringing the dispute to the Court thus having been achieved, and "the dispute having disappeared,"¹⁶⁵ the Court then held, by nine votes to six, that it was "not called upon to give a decision"¹⁶⁶

In reaching this decision, the Court examined "the status and scope on the international plane" of unilateral declarations, stating that it was "well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."¹⁶⁷ The Court's criteria were set forth as follows:

When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect¹⁶⁸

161. Order of 22 June 1973 on Request for the Indication of Interim Measures of Protection, [1973] I.C.J. 99, 106; [1973] I.C.J. 135, 142.

162. [1974] I.C.J. 271; [1974] I.C.J. 476.

163. "There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State." [1974] I.C.J. 269; [1974] I.C.J. 474.

164. *Id.* It has been argued that the Court erred in holding that France's statement that it would cease its atmospheric nuclear testing was intended to be legally binding. M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 121 (3d ed. 1977). Even if true, the Court's factual error would not affect its legal holding that statements which do reflect actual intent are binding.

165. [1974] I.C.J. 271; [1974] I.C.J. 476.

166. [1974] I.C.J. 272; [1974] I.C.J. 478.

167. [1974] I.C.J. 267; [1974] I.C.J. 472.

168. *Id.*

Judge Jessup, in his separate opinion in the *South West Africa Cases* (Preliminary Objections),¹⁶⁹ also made these points and cited other instances of judicial approval of them.¹⁷⁰

The most important criterion, of course, is that concerning intent to be bound.¹⁷¹ President Carter, in the letters addressed to President Sadat and Prime Minister Begin, referred not to himself personally, but rather to "the United States" and to "the President." Moreover, Carter Administration officials made it very clear that the government considered itself bound. One official stated that should the situation depicted in the President's letters arise, the United States "will of course be prepared to fulfill this commitment."¹⁷² The International Court indicated, moreover, that a unilateral declaration "made within the context of international negotiations"¹⁷³ would be more likely to embrace the required intent to be bound than would, for example, a declaration made *erga omnes*. President Carter's letters did emanate from negotiations and were directed specifically towards Egypt and Israel and not to the world at large.¹⁷⁴

While no *quid pro quo* was specified in the letters, and while none is required, the fact is that the Treaty could not have been concluded in their absence. Israel in particular has made clear its reliance on and expectations with regard to the commitments they impose on the United States. Both parties have acted in direct reliance on the U.S. "guarantees": witness the fundamental changes in the status of the Sinai.¹⁷⁵

169. (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, [1962] I.C.J. 319, 387.

170. The examples included the Case of the Free Zones of Upper Savoy and the District of Gex (France v. Switzerland), [1932] P.C.I.J., ser. A/B, No. 46 (unilateral manifesto issued by a domestic Sardinian organ had the character of a treaty obligation); and the Interpretation of the Statute of the Memel Treaty Case (United Kingdom, France, Italy, and Japan v. Republic of Lithuania), [1932] P.C.I.J., ser. A/B, No. 49 (the Statute, even if a Lithuanian enactment, had the juridical nature of a treaty). [1962] I.C.J. at 403.

171. This point is stressed by Sir Gerald Fitzmaurice. A unilateral declaration, even if lacking a specific *quid pro quo*, will "create binding legal obligations . . . if clearly intended to have that effect, and held out, so to speak, as an instrument on which others may rely and under which the declarant purports to assume such obligations." Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4*, [1957] BRIT. Y.B. INT'L L. 203, 230.

172. Letter from David A. Korn, note 132 *supra*. Moreover, the letters are listed in the State Department's most recent compilation of United States treaties in force. TREATIES IN FORCE AS AT 1 JANUARY 1980, at 56, 106 (1980) (Dep't of State, Pub. No. 9136).

173. [1974] I.C.J. 267; [1974] I.C.J. 472.

174. While the import of the declarations in the *Nuclear Tests Cases* was transmitted officially to the Governments of Australia and New Zealand, the Court seemed to rely primarily on statements made *erga omnes*; hence the Court's requirement that the undertaking be "given publicly." *Id.*

175. Fitzmaurice stated that a unilateral declaration would be binding particularly . . . where other countries have, on the faith of the Declaration, changed their position or taken action on the basis of it. It seems clear that once a Declaration of this kind is established as containing binding obligations, its terms will, *mutatis mutandis*, fall to be interpreted much as if they figured in an actual treaty text.

These facts operate to strengthen the binding character of the letters.

b. *Under United States Law*

The "confirmations" expressed in President Carter's letters were prefaced by the phrase "subject to United States Constitutional processes." This raises questions regarding the legal status and extent of the obligations set forth in the letters under United States law.

The phrase makes one thing clear: the letters are not self-executing instruments. It is not clear whether they should be categorized as "sole" executive agreements¹⁷⁶ or congressional-executive agreements,¹⁷⁷ the most likely descriptions in United States constitutional terminology.¹⁷⁸

While the constitutional foundations of both of these kinds of agreements are uncertain,¹⁷⁹ the viability of each is "widely accepted" and largely unquestioned.¹⁸⁰ The President's power to make at least certain "sole" agreements in the area of foreign affairs was upheld by the United States Supreme Court in 1937.¹⁸¹ These agreements, moreover, have been concerned with a wide variety of issues in foreign affairs.¹⁸² Arguments

Fitzmaurice, *supra* note 171, at 230.

176. See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 176-88 (1972). Professor Henkin's book is an excellent reference work for this area of the law.

177. See generally *id.* at 173-76; *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY* 126-27 (F. Wilcox & R. Frank eds. 1976) [hereinafter cited as Wilcox & Frank]. A congressional-executive agreement requires approval by a simple majority of both houses of Congress. For an analysis of historical factors in the development of the practice of using congressional-executive agreements, see Slonim, *Congressional-Executive Agreements*, 14 *COLUM. J. TRANSNAT'L L.* 434 (1975).

178. Professors McDougal and Lans have argued convincingly that, save for procedural aspects, there are "no significant criteria" under international law or United States constitutional law or practice for making terminological distinctions among international instruments. The term "treaty" is thus described strictly in terms of the Senate advice and consent requirement, while the term "executive agreement" is used "as a convenient catch-all to subsume all other international agreements intended to bind the United States and another government." McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 *YALE L.J.* 181, 198-99 (1945) (Part II is published in 54 *YALE L.J.* 534 (1945)), reprinted in M. McDOUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 404 (1960). For a reply, see Borchard, *Treaties and Executive Agreements*, 54 *YALE L.J.* 616 (1945). The McDougal & Lans article was itself written in response to an article by Professor Borchard. Note 183 *infra*.

179. L. HENKIN, *supra* note 176, at 174, 176.

180. *Id.* at 175-77.

181. *United States v. Belmont*, 301 U.S. 324 (1937). Belmont involved the making of the "Litvinov Agreement" subsequent to United States recognition of the U.S.S.R. Since recognition is a concern exclusively of the Executive, the agreement was found to be "incidental" to such a power and hence valid. In dicta, however, Justice Sutherland "seemed to find authority for the Litvinov Agreement not in the President's exclusive control of recognition policy but in his authority as 'sole organ,' his 'foreign affairs power' which supports not only recognition but much if not most other foreign policy." L. HENKIN, *supra* note 176, at 178-79.

182. Professor Henkin provides two examples of interest for present purposes. The Root-Takahira and Lansing-Ishii Agreements "defined American policy in the Far East," much as the Egyptian-Israeli Peace Treaty and the Camp David Agreements sought to define United States foreign policy in the Middle East. Second, President McKinley by execu-

have been made on the limitations on "sole" executive agreements; among these is the notion that it is effective only for the President who makes it.¹⁸³ Professor Henkin asserts, however, that these arguments have no "apparent basis relevant to the scope of Presidential power generally, or to the Treaty Power, where any limitations on the power to make executive agreements should lie."¹⁸⁴

Congressional-executive agreements are normally made pursuant to a ratified treaty or to "either a prior or subsequent grant of authority by Congress."¹⁸⁵ They amount, in effect, to "a complete alternative to a treaty."¹⁸⁶ Professor Henkin writes, in sum, that "[o]ne is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, but [no one] has told us which are which."¹⁸⁷

The prospects for President Carter's pledge itself are clearly foreseeable through political, if not legal lenses. Neither the Congress nor a successor Administration is likely to challenge the pledge as *ultra vires*. Rather, and this is probably a major reason why the "Constitutional processes" phrase was included, the Congress would accept the obligation as externally binding, but would exercise its legislative and appropriative authority to play its important role in the making of United States foreign policy.¹⁸⁸ Congress could, therefore, preempt the effect of the pledge. In addition, President Carter or a successor executive would be free to seek to renegotiate the obligation with Egypt and Israel in light of changing conditions.

tive agreement agreed to contribute American troops during the Boxer Rebellion in China; President Carter, in his letters to President Sadat and Prime Minister Begin, agreed to arrange for multinational troop contributions if necessary. L. HENKIN, *supra* note 176, at 179-80.

183. *Id.* at 181, citing Borchard, *Shall the Executive Agreement Replace the Treaty?* 53 YALE L.J. 664, 678-79 (1944).

184. L. HENKIN, *supra* note 176, at 181.

185. Wilcox & Frank, *supra* note 177, at 127.

186. L. HENKIN, *supra* note 176, at 175.

187. *Id.* at 179.

188. Congress has, in fact, gone on record as neither approving nor disapproving the United States commitments contained in President Carter's letters. The Special International Security Assistance Act of 1979 reads in part as follows:

§ 3401. Congressional findings and declaration of policy

(a) Policy of support for peace treaty

It is the policy of the United States to support the peace treaty concluded between the Government of Egypt and the Government of Israel on March 26, 1979. . . .

(c) Other agreements, understandings, or commitments

The authorities contained in this chapter to implement certain arrangements in support of the peace treaty between Egypt and Israel do not signify approval by the Congress of any other agreement, understanding, or commitment made by the executive branch.

22 U.S.C. § 3401 (Supp. III 1979) (enacted by Pub. L. No. 96-35, § 2, 93 Stat. 89).

3. *The Nature of a U.S.-Sponsored Force*

It would be overly speculative to attempt to forecast the nature of a United States-sponsored alternative multinational force. It is quite probable that the United States would find it a very difficult task to organize such a force,¹⁸⁹ though there are examples of peacekeeping forces—some much less successful than others—established outside United Nations auspices.¹⁹⁰

B. *Other Possible Developments*

Answers to questions concerning the permanent situation in the Sinai as envisioned by the Treaty and its accompanying documents must await crucial upcoming events. Meetings on peacekeeping issues between Egypt, Israel, and the United States are scheduled for April 1981.¹⁹¹ Also, the United States presidential election will predate that event, and Israeli elections may do so.¹⁹²

1. *A United Nations Force*

It is extremely doubtful that by the end of the interim period in April 1982 the situation will have changed such that extensive United Nations involvement will have become practicable.¹⁹³ For this to eventuate, the political climate will have to have improved to the point that the Soviet Union could find itself able at least to abstain in a vote to recreate a United Nations force in the Sinai. This would probably require one or more other parties in the overall Middle East dispute to have joined the process initiated by Egypt and Israel. It is also possible, of course, that a United Nations force could result from a further outbreak of hostilities. UNEF itself was an offspring of the 1973 war.

2. *Status Quo*

Egypt and Israel might find that outside peacekeeping mechanisms, beyond those established initially at the Washington conference of Sep-

189. See note 134 *supra* and accompanying text. An additional complicating factor is the possibility that the United States, facing the difficulty of organizing an "acceptable" multinational force, might consider sending U.S. troops as a complete or partial alternative to a United Nations force in the Sinai. (*But see* note 121 *supra*, concerning the agreement between the United States and the Soviet Union that American and Soviet officers would not serve in the UNTSO Sinai contingent.) In that event, the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976), and perhaps other statutes might come into play, the Congress asserting its intention to "insure that the collective judgment of both the Congress and the President" is applied where United States armed forces become involved in foreign conflicts. 50 U.S.C. § 1541(a).

190. Many of these would not qualify as peacekeeping operations under the standard definitions of United Nations operations. They include, for example, the peacekeeping mission in Kuwait under the League of Arab States (1961-1963), the Inter-American Armed (later Peace) Force in the Dominican Republic under the Organization of American States (1965-1966), the International Commission for Supervision and Control in Vietnam (1954).

191. See text accompanying note 151 *supra*.

192. National elections in Israel are due in November 1981 but, depending on political conditions, may be held earlier.

193. For a brief discussion of the conditions necessary for the creation of a U.N. force, see note 48 *supra*.

tember 1979, are not necessary. If the current status quo, with accommodation as required, were to be maintained in the period following withdrawal to the international border in April 1982, the United States would continue to "exercise overall supervisory responsibilities."¹⁹⁴ It would conduct ground and air surveillance, and its Sinai Field Mission and early-warning system would continue to operate. In addition, UNTSO would continue to play a role.

V. THE EFFECT OF THE PASSING OF UNEF ON UNITED NATIONS PEACEKEEPING

A. *The UNEF Consensus*

The passing of a United Nations peacekeeping force will always give rise to questions concerning the future of peacekeeping generally. This was the case, it will be recalled, upon the withdrawal by Secretary-General U Thant of UNEF I in 1967. In some ways, that event was more foreboding for the future of peacekeeping than is the termination of UNEF's mandate.¹⁹⁵ Peacekeeping has shown remarkable resiliency, indicating perhaps that in the right circumstances it is very much needed and indeed wanted by states, and that it has simply not yet matured to the point of becoming fully institutionalized in a form acceptable to states. UNEF itself is a prime example of this resiliency. One key question on the matter of the future of United Nations peacekeeping, therefore, is whether whatever consensus on the use of peacekeeping that may have emerged in the period following the October 1973 war can survive the death of UNEF.

The creation of UNEF in 1973 constituted an important revitalization of peacekeeping generally. It came nearly ten years after the establishment of the last United Nations force, that in Cyprus.¹⁹⁶ To some observers, it appeared that the Cyprus force would be the U.N.'s last.¹⁹⁷ That feeling was resoundingly shattered when the United States and the Soviet Union, along with the other Security Council members, decided to use the Council and the United Nations to seek a settlement of the immediate and ongoing crises in the Middle East.¹⁹⁸

194. See text at note 140 *supra*.

195. "[UNEF I] had remarkable success in maintaining stability in Israel-Egypt relations, and . . . there can be no doubt that it ranked among the most effective of all UN peacekeeping operations. But the manner and occasion of its withdrawal caused widespread doubt about the overall efficacy of UN peacekeeping." 1 R. HIGGINS, *supra* note 48, at 481.

196. The United Nations Force in Cyprus (UNFICYP) was created by the Security Council by Resolution 186, 19 U.N. SCOR, Supp. (Res. & Dec.) 2 U.N. Doc. S/INF/19/Rev.1 (1964). See generally J. STEGENGA, *THE UNITED NATIONS FORCE IN CYPRUS* (1968).

197. See, e.g., I. RIKHYE, M. HARBOTTLE & B. EGGE, *THE THIN BLUE LINE* 334 (1974) [hereinafter cited as RIKHYE *et al.*].

198. The establishment of UNEF

followed a Soviet invitation to the United States to jointly intervene to stop the fighting . . . with a warning that the USSR might intervene unilaterally if the United States refused. This threat impelled President Nixon to order an alert of United States armed forces. Thus the proposal of UNEF II by nonper-

The Secretary-General submitted his initial report on the implementation of the Security Council's decision to create UNEF only two days after that decision was taken.¹⁹⁹ This document contained a set of "general considerations" to be applied to UNEF. These broad principles, together with the draft formulae for peacekeeping guidelines contained in the 1976²⁰⁰ and 1977²⁰¹ reports of the Special Committee on Peace-Keeping Operations, still constitute the basic working documents of U.N. peacekeeping. It is to these documents that one must look to find areas of consensus among states, and most importantly among the major powers.

It has been argued that, owing to the Security Council's acceptance²⁰² of the principles set forth in the Secretary-General's report, they should be thought of as applicable to peacekeeping generally.²⁰³ The principles avoided seriously offending any major power,²⁰⁴ incorporated all elements agreed upon over a number of years in the forum of the Special Committee, and "[drew] up a *modus operandi* in which all powers [could] acquiesce even though they would not specifically endorse some of its features."²⁰⁵ Professor Finger, a long-time United States representative on the Special Committee, suggested for these reasons that "the future of peacekeeping might be better served by using UNEF II as a model or precedent, as in common law, rather than to attempt to codify guidelines."²⁰⁶

Desirable as such a course of action might be, the fact remains that the Special Committee struggles on to codify official guidelines. It is in-

manent members of the Security Council . . . might also have prevented a very dangerous Soviet-American confrontation in the Middle East.

Finger, *The Maintenance of Peace*, in *THE CHANGING UNITED NATIONS* 195, 197 (D. Kay ed. 1977) [book cited hereinafter as Kay].

199. Report of the Secretary-General, note 89 *supra*.

200. Tenth Report of Working Group, *supra* note 97, Appendix I (draft articles).

201. Eleventh Report of Working Group, *supra* note 102, Appendix I (draft articles).

202. The Council approved the Secretary-General's report by its Resolution 341, note 48 *supra*. The vote was 14 to 0; the People's Republic of China did not participate in the vote. [1973] U.N.Y.B. 214.

203. A high-ranking U.N. official, James O.C. Jonah, has written (in his private capacity) that "[b]y its acceptance of the Secretary-General's report in its resolution 341, the Security Council endorsed . . ." its terms. Jonah, *Peacekeeping in the Middle East*, 31 *INT'L J.* 100, 114 (1975-76). See also Pelcovits, *UN Peacekeeping and the 1973 Arab-Israeli Conflict*, 19 *ORBIS* 146, 161 (1975), where it is stated that

the UNEF 'terms of reference,' drafted by the Secretary-General and approved by the Security Council, pragmatically settled certain issues on the conduct of peacekeeping operations that had long been deadlocked in the UN's peacekeeping committee. . . . [T]he UNEF guidelines provide a practical model that is likely to become the general pattern for future operations.

But see Wiseman, *United Nations and UNEF II: A Basis for a New Approach to Future Operations*, 31 *INT'L J.* 124, 133 (1975-76): "[A]greement there is on UNEF II, but not necessarily as a precedent for future operations." However, the overall tenor of Wiseman's article is much more optimistic than this isolated statement would seem to indicate.

204. See note 90 *supra* and accompanying text.

205. Finger, *supra* note 198, at 200.

206. *Id.*

teresting, however, to note the similarities in language in several instances in the Secretary-General's report on the one hand and the Special Committee's draft guidelines on the other. For example, the report reads in part as follows:

Three essential conditions must be met for the Force to be effective. Firstly, it must at all times have the full confidence and backing of the Security Council. Secondly, it must operate with the full cooperation of the parties concerned. Thirdly, it must be able to function as an integrated and efficient military unit.

. . . .
The Force must enjoy the freedom of movement . . . necessary for the performance of its tasks.

. . . .
In performing its functions, the Force will act with complete impartiality²⁰⁷

Article 9 of the draft guidelines, which contains no brackets indicating "absence of agreement,"²⁰⁸ reads:

It is essential that throughout the conduct of a United Nations peace-keeping operation it shall have the full confidence and backing of the Security Council. Such forces must operate with the full cooperation of the parties concerned, particularly of the Government of the host country, due account being taken of its sovereignty. Such forces must function as integrated and efficient military units and act with complete objectivity. It is also of the utmost importance to secure freedom of movement for each unit irrespective of its nationality.²⁰⁹

The correspondence in language in other instances varies, and each document touches on certain aspects of peacekeeping not mentioned in the other.²¹⁰ The point, however, is that very substantial progress in institutionalizing the regime of United Nations peacekeeping was made in the UNEF era, and a good deal of consensus was either established or identified.

One area of consensus, discussed above, is the relationship between the Secretary-General and the Security Council.²¹¹ Other fundamental aspects of peacekeeping operations upon which some degree of consensus

207. Report of the Secretary-General, *supra* note 89, at paras. 3, 4(b), 4(e).

208. Eleventh Report of Working Group, *supra* note 102, at para. 7.

209. *Id.* at Appendix I (draft articles).

210. For example, the Secretary-General's report stated that UNEF "will be provided with weapons of a defensive character only. It shall not use force except in self-defence." Report of the Secretary-General, *supra* note 89, at para. 4(d). The Special Committee's draft guidelines do not yet offer guidance on use of force questions. The draft guidelines go beyond the Secretary-General's report in numerous respects, as would be expected. *See, e.g.*, note 98 *supra* and accompanying text, on the possible establishment by the Security Council of a subsidiary body to assist it.

211. *See* text section III(A)(1) *supra*.

seems to have been reached include financing and force composition.²¹² On the question of financing, the Council, in accepting the Secretary-General's initial report on UNEF, agreed that the costs of that force should be "considered as expenses of the Organization to be borne by the Members in accordance with Article 17, paragraph 2, of the Charter."²¹³ However, this agreement was limited to the case of UNEF when the General Assembly adopted a resolution embodying a Soviet-sponsored amendment to the effect that UNEF financing was strictly "*ad hoc*" and did not constitute a precedent.²¹⁴ Nevertheless, UNEF was the first force for which the Soviet Union and France agreed to pay proportionate shares. The People's Republic of China refused to bear any part of the costs, but did acquiesce in the creation of the force rather than using its veto as it might have wished to do.²¹⁵ Moreover, the financing arrangement adopted proved workable, as it was reconfirmed in the periodic renewals of UNEF's original mandate.²¹⁶ The Special Committee is yet undecided on the question of financing.²¹⁷

On the matter of composition, UNEF was the first force to achieve "equitable geographical balance," long demanded by the U.S.S.R. Poland became the first Warsaw Pact country to serve in a United Nations force, and it shared, with Canada, the important responsibility for logistic sup-

212. Consensus has not been reached on other matters, including for example the appointment of the force commander. The Secretary-General felt that he ought to make that appointment, "with the consent of the Security Council." Report of the Secretary-General, *supra* note 89, para. 4(a). The Special Committee has not yet been able to agree whether the commander would be appointed "on the proposal of the Secretary-General," "by the Secretary-General," "with the consent of the Secretary-General," or "by the Security Council." Eleventh Report of Working Group, *supra* note 102, Appendix I (draft articles), art. 8.

213. Article 17, paragraph 2 of the Charter reads: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." *Id.* The Council's statement accords with the holding of the International Court of Justice in its Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151.

214. G.A. Res. 3101, 28 U.N. GAOR, Supp. (No. 30) 122, U.N. Doc. A/9030 (1973).

215. In explaining its non-participation in the creation of UNEF, the representative of China stated:

With regard to the draft resolution before us, the Chinese delegation understands the good desire of the sponsors. However, we deem it necessary to point out that the dispatch of a United Nations emergency force will be of no avail. . . .

China has always been opposed to the dispatch of the so-called "peace-keeping forces". . . . Such a practice can only pave the way for further intervention and control with the super-Powers as the behind-the-scenes boss. . . . It is only out of consideration for the requests repeatedly made by the victims of aggression that China is not in a position to veto the draft resolution. China has decided not to participate in the voting on that draft.

28 U.N. SCOR (1750th mtg.) 2, U.N. Doc. S/p.v. 1750 (1973).

216. Wiseman, *supra* note 203, at 136.

217. Article 11 of the Committee's draft guidelines would establish that the costs of peacekeeping operations would be governed by Article 17 of the Charter, but additional clauses still under consideration would allow the Council to decide to employ any other method of financing. Eleventh Report of Working Group, note 102 *supra*.

port. The Secretary-General's report described "equitable geographical balance" as an "accepted principle,"²¹⁸ and the Special Committee's draft guidelines termed it "one of the guiding principles" in force composition.²¹⁹ UNEF also served to clarify, in a positive way, the meaning of "host country consent." Working from the assumption that Israel, though not in fact a host country, had to consent to the stationing of the force, an expansive interpretation might have meant that Poland and the other participating states which had no diplomatic relations with Israel would have been barred.²²⁰ A more permissive interpretation was followed, to the benefit of the institution of peacekeeping.

Beyond these elements of consensus on peacekeeping furthered by the UNEF experience, significant new tasks were assigned to UNEF and to another new peacekeeping unit in the Middle East, the United Nations Disengagement Observer Force (UNDOF),²²¹ thereby developing the functions of peacekeeping. It was UNEF that "moved from the concept of an inter-position force to a buffer force,"²²² meaning among other things that in addition to manning positions and observation posts, it verified force and armament limitations in specified areas on each side of the buffer zone. The success of UNEF, in both its military and diplomatic roles, helped make possible the separation of forces agreement in the Golan Heights and the creation of UNDOF. As evidenced by its name, UNDOF combined the two different types of peacekeeping operations: forces and observers. The same was true of UNEF.

It is also a "tribute to the conciliatory role played by UNEF"²²³ that two states at war for over thirty years explicitly recorded their desire to employ United Nations forces and observers, and that this intention was defeated by political events largely unconnected with confidence in United Nations peacekeeping.²²⁴ The withdrawal of UNEF did not adversely affect the status of UNTSO, and the use of the latter unit has served to maintain a United Nations peacekeeping presence in the Si-

218. Report of the Secretary-General, *supra* note 89, para. 4(c).

219. Eleventh Report of Working Group, *supra* note 102, Appendix I (draft articles), art. 10. Another "guiding principle," the overall efficiency of the operation, does not yet enjoy consensus in the Special Committee. *Id.*

220. States which contributed troops to UNEF were: Australia, Austria, Canada, Finland, Ghana, Indonesia, Ireland, Nepal, Panama, Peru, Poland, Senegal, and Sweden.

221. UNDOF was established by Security Council Resolution 350, 29 U.N. SCOR, Supp. (Res. & Dec.) 4, U.N. Doc. S/INF/30 (1974).

222. Jonah, *Importance of UN Peace-Keeping Operations Emphasized*, U.N. CHRONICLE, July 1979, at 78, 81.

223. Sommereyns, *supra* note 111, at 53.

224. Sommereyns also remarked that:

It would be wrong . . . to interpret UNEF's disappearance as detrimental to the role of the United Nations in the field of peace-keeping. . . . The real measure of success of a temporary United Nations peace-keeping operation is not the length of time the operation can be maintained, but the fact that the peace-keeping force can be withdrawn under durable peaceful circumstances.

Id. at 48, 53.

nai.²²⁵ Moreover, another United Nations peacekeeping force in the Middle East was brought into existence during the UNEF era. In March 1978, the United Nations Interim Force in Lebanon (UNIFIL) was established after the outbreak of hostilities in southern Lebanon.²²⁶ This force, in the words of one U.N. official, "represents the most difficult peace-keeping operation ever launched by the Organization."²²⁷ UNIFIL has encountered serious obstacles, but has performed a very difficult task admirably.²²⁸

One other UNEF-era hopeful sign was the preparation by the International Peace Academy of a pragmatic peacekeeping handbook.²²⁹ For some time, a complaint of both participants in and observers of peacekeeping forces was the lack of a handbook or guide to peacekeeping. "If the fault lies anywhere," wrote Harbottle, "it lies with the United Nations for not giving member states the information they need to prepare themselves."²³⁰ The Academy's handbook was developed by military experts, lawyers, diplomats, and scholars from twenty countries, and is now used by all governments participating in the UNIFIL operation.

All of these progressive developments, it seems reasonable to say, are undiminished by the dissolution of UNEF, since the cause of UNEF's demise was completely unrelated to them. It was not opposition to a peacekeeping force in the Sinai nor to peacekeeping generally that caused the blockage of the extension and expansion of UNEF's mandate. Rather, it was opposition, on the part of the U.S.S.R. and of the majority of the Arab governments, to the Egyptian-Israeli Peace Treaty.

B. *Prospects for United Nations Peacekeeping*

To cite progressive developments is not, however, to imply that there are no problems with peacekeeping. Many of the inadequacies and inefficiencies in the machinery of peacekeeping involve force preparation and organization, and center on a general conception of peacekeeping as com-

225. See generally text sections III(A)(2) and III(B) *supra*.

226. S.C. Res. 425 & 426, 33 U.N. SCOR, Supp. (Res. & Dec.) 5, U.N. Doc. S/INF/34 (1978).

227. Jonah, *supra* note 222, at 81.

228. See Sommereyns, *supra* note 111, at 10-14.

229. INTERNATIONAL PEACE ACADEMY, *PEACEKEEPER'S HANDBOOK* (1978). The Academy's President is General Indarjit Rikhye, formerly a military advisor to Secretaries-General Hammarskjöld and Thant. The Academy is technically outside the aegis of the United Nations, but its membership comprises many individuals in the United Nations community.

230. Harbottle, *supra* note 48, at 549. The writer continues: "The need for such a handbook is strongly supported by almost all those who have a wide experience of international peacekeeping, particularly those who have held senior command and staff appointments." *Id.* at 549-50. See also RIKHYE *et al.*, *supra* note 197, at 336:

The impression obtained from talking to those who are meeting the responsibilities of peacekeeping for the first time [in service in UNEF] is that a basic manual of peacekeeping covering all its operational aspects of organization, administration, standing operating procedures, preparation, and training, as well as status of force agreements and international law as it affects international peacekeeping, would be of inestimable value to all concerned.

pletely *ad hoc* and hence inevitably disorganized.²³¹ Harbottle has written that "the biggest limitation to the effective implementation of peacekeeping is the Charter itself,"²³² which makes no provision for modern peacekeeping, and therefore serves as a constraint on the institutionalization of peacekeeping.

Prospects for the future are neither bright nor dim, but uncertain and largely indeterminable. Like all political-legal institutions, peacekeeping's future is subject to unpredictable developments. In negotiations on the situation in southern Africa, the possibility of United Nations peacekeeping machinery has been mentioned. The Western proposals for settlement in Namibia (South-West Africa) called for "comprehensive arrangements for a United Nations peace-keeping force in the context of the United Nations Transition Assistance Group (UNTAG)."²³³ Both sides in the Namibia conflict—the liberation movements, notably the South-West Africa People's Organization, and the Republic of South Africa—"have reconciled to the fact that if a cease-fire is to be maintained in Namibia, United Nations peace-keeping forces will have to provide the guarantees."²³⁴

The establishment in the future of other United Nations peacekeeping operations will depend most fundamentally on the existence of the requisite political will in the given circumstances on the part not only of the parties in the dispute, but also of the permanent members of the Security Council and of other involved states. There is no particular reason to expect expeditious and material progress on guidelines in the Special Committee.²³⁵

While the Egyptian-Israeli Peace Treaty could conceivably have made a significant contribution to United Nations peacekeeping, it was not afforded that opportunity.²³⁶ Indeed, in this case, the political will of

231. Wiseman has coined a phrase to describe "the law of U.N. peacekeeping": "Ad-hocracy." *Supra* note 203, at 124.

232. The 1971 Memorial Lecture of the David Davies Memorial Institute of International Studies, reprinted in R. HIGGINS & M. HARBOTTLE, UNITED NATIONS PEACEKEEPING: PAST LESSONS AND FUTURE PROSPECTS 18 (1971).

233. Jonah, *supra* note 222, at 82.

234. *Id.* The Anglo-American proposals for a settlement of the war in Zimbabwe contained provisions for a United Nations role in the transitional period. As part of the actual settlement of that conflict, the United Kingdom acceded partially to a demand of the Patriotic Front that an international peacekeeping force be brought into the country by agreeing to assemble an international force consisting of some 1,000 British and Commonwealth soldiers. Den. Post, Nov. 11, 1979, at 32, col. 1.

Also, though one might well and rightly be skeptical, news reports from London indicated that the Soviet Union might be willing to accept United Nations troops in Afghanistan as part of a plan to "neutralize" the country. The reports specified that these comments were made "unofficially" by "high-level sources close to President Brezhnev." Den. Post, Feb. 27, 1980, at 4, col. 1.

235. See note 105 *supra*.

236. It is possible that the Treaty actually contributed to a loss in credibility for United Nations peacekeeping since, "[a]ccording to UN officials, those who wrote the provisions

certain states came into conflict with that of certain others, and the result was the discontinuance of a major United Nations force and harm to the institution of peacekeeping. In its almost six-year life, however, UNEF helped make possible the achievement of a measure of consensus theretofore unreachable. Today, there is "sufficient consensus for the United Nations to stay in the business of peacekeeping."²³⁷ This is encouraging, since peacekeeping can, as it has proven in practice, offer an invaluable contribution to the cause of the peaceful settlement of international disputes.²³⁸ Its contribution in fact goes beyond keeping the peace: it also constitutes an aid to peacemaking and peacebuilding.²³⁹ The future of peacekeeping is uncertain, but since it is one of the few multinational institutions states have entrusted with a role in the area of peace and security, one must hope for positive developments in the years to come.

referring to the UN role in the peace treaty appear to have hastily and inadvertently assumed that the UN would simply go along with their plan." *Christian Sci. Mon.*, Apr. 9, 1979, at 10, col. 2.

237. Higgins, *supra* note 75, at 12.

238. It has been argued, too, that "[t]he peace-keeping function of international organization is peculiarly appropriate to such an era as our own The very features of the contemporary international system and situation that make collective security irrelevant bolster the relevance of peace-keeping." Claude, *supra* note 69, at 53-54.

239. See, e.g., Forsythe, *United Nations Peacemaking*, in Kay, *supra* note 198, at 206; Jonah, *supra* note 203, at 118-19; Gordon, *In the Mideast, the UN keeps the peace but doesn't make it*, *INTERDEPENDENT*, Apr. 1979, at 3; Wiseman, *supra* note 203, at 553.

