

**THE UNITED NATIONS AND INTERNATIONAL
PEACE AND SECURITY:
A LEGAL AND PRACTICAL ANALYSIS**

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ABSTRACT

The United Nations, as an organisation created by equal sovereign states and built upon a single set of principles as the UN Charter, has the capacity and responsibility to deal with matters in the sphere of international peace and security. The Cold War put an obstacle in the way of the Organisation to use its delegated powers in conflict resolution within the few years of its establishment. As a result, and because of the necessity to deal with international conflicts, the institution of peace-keeping emerged with the aim of deploying forces not to end the aggression, breach of or threat to the peace, but for supervision of cease-fires or providing an interposition force between the belligerents, characterised by impartiality and a limited military capability.

The demise of the Cold War offered the opportunity to the Organisation, especially to the Security Council, to use its powers to implement law and order among nations. In the post-Cold War era, the Security Council extended its interpretation of the notion of "threat to the peace" and restricted the principle of "domestic jurisdiction". The Council has authorised an individual state or a group of states to use force for humanitarian purposes and human rights concerns.

To study the role of the United Nations in the field of international peace and security, and to investigate its developments, legality of actions, successes and failures, it is necessary to gain a clear understanding of what was originally intended by the founders of the Organisation. This thesis examines initially the provisions of the Charter on the role of the UN organs in maintaining and restoring international peace and security with reference to the discussions at the San Francisco Conference. Since the institution of peace-keeping was not envisaged in the Charter, an investigation is carried out on its constitutional and legal basis, referring to the advisory opinion of the International Court of Justice and Chapters VI and VII of the Charter.

A distinction is drawn between peace-keeping, observation and humanitarian operations and the cases dealt with by the UN are distinguished accordingly. The facts of the disputes are briefly described and the constitutional basis of the operations are analysed, followed by an assessment of their effectiveness. It is stressed that peace-keeping forces should be given achievable mandates, the period of their presence should be kept to a minimum, and peaceful efforts to settle the disputes should accompany peace-keeping. In humanitarian crises, a balanced humanitarian, political and peace-keeping presence by the UN should be more successful than a dominant military intervention.

Two conflicts in the Persian Gulf, the Iraq-Iran war of 1980 and the Kuwait crisis of 1990, are considered separately as the two extremes of the Council's approach toward aggression that represent the spectrum of measures taken by the UN in restoring international peace and security. The background of the disputes and the position of the parties are examined, and the constitutional basis of the UN operations is analysed. In the case of Kuwait, a discussion is made on the legal basis of UN economic sanctions and the authorisation of the enforcement action against Iraq, which has necessitated a comparative study of the cases of Korea and Haiti. The legality of the intervention by the UN and individual states on humanitarian grounds is finally investigated that includes the establishment of no-fly zones in Iraq.

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ABBREVIATIONS

| | |
|-----------------------------------|------------------------------------------------------------------|
| A | United Nations Document (General Assembly) |
| African J. Int. and Comp. L | African Journal of International and Comparative Law |
| A. J. I. L. | American Journal of International Law |
| Alta. L. Rev. | Alberta Law Review |
| A. S. I. L Proc. | American Society of International Law Proceeding |
| Austl. Y. B. Int'l L. | Australian Yearbook of International Law |
| Brit. Y. B. Int'l L. | British Yearbook of International Law |
| Can. Y. B. Int'l L. | The Canadian Yearbook of International Law |
| Cal. W. Int'l L. | California Western International Law Journal |
| Colum. Hum. Rts. L. Rev. | Columbia Human Rights Law Review |
| Colum. J. Transnat'l L. | Columbia Journal of Transnational Law |
| Eur. J. Int'l L | European Journal of International Law |
| GAOR | General Assembly Official Record |
| Ga. J. Int'l & Comp. L. | Georgia Journal of International and Comparative Law |
| Geo. L. J. | Georgetown Law Journal |
| Harv. Int'l L. J. | Harvard International Law Journal |
| Hous. J. Int'l L. | Houston Journal of International Law |
| ICJ Rep. | Reports of the International Court of Justice |
| ICRC | International Committee of the Red Cross |
| Ind. L. J. | Indiana Law Journal |
| Int'l & Comp. L. Q. | International and Comparative Law Quarterly |
| Int'l J. Refugee L. | International Journal of Refugee Law |
| ILC | International Law Commission |
| ILM | International Legal Materials |
| J. Int'l Aff. | Journal of International Affairs |
| J. Int'l L. & Pol. | Journal of International Law and Politics |
| Liverpool L. Rev. | Liverpool Law Review |
| Loy. L. A. Int'l & Comp. L. J. | Loyola of Los Angeles International and Comparative Law Journal |
| Md. J. Int'l L. & Trade | Maryland Journal of International Law and Trade |
| Melb. U. L. Rev. | Melbourne University Law Review |
| Mich. J. Int'l L. | Michigan Journal of International Law |
| Naval L Rev. | Naval Law Review |
| New L. J. | New Law Journal |
| N. Y. Int'l L. Rev. | New York International Law Review |
| N. Y. L. Sch. J. Int'l & Comp. L. | New York Law School Journal of International and Comparative Law |

| | |
|----------------------------------|-------------------------------------------------------------|
| Oxford Int'l Rev. | Oxford International Review |
| Pac. Rim L. & Pol'y J. | Pacific Rim Law and Policy Journal |
| Recueil Des Cours | Collected Courses of the Hague Academy of International Law |
| S | United Nations Document (Security Council) |
| SCOR | Security Council Official Record |
| Suffolk Transnat'l. L. Rev. | Suffolk Transnational Law Review |
| Temp. Int'l & Comp. L. J. | Temple International and Comparative Law Journal |
| Tex. Int'l L. J. | Texas International Law Journal |
| Trans'n'l L. & Contemp. Problems | Transnational Law and Contemporary Problems |
| Vill. L. Rev. | Villanova Law Review |
| Va. J. Int'l L. | Virginia Journal of International Law |
| Yale L. J. | Yale Law Journal |

INTRODUCTION

The United Nations was founded in the wake of World War II with the expectation of saving future generations from the scourge of war, and maintaining peace and security in conformity with the principles of justice and international law. The first draft of the United Nations Charter prepared by the United Kingdom, the Soviet Union, the United States, with some input from China, at the Dumbarton Oaks Conference, was not pure invention. In fact, the United Nations was structured on the basis of the same general type of institution as the League of Nations and shared many characteristics with its predecessor, endowed with more power for maintaining and restoring peace, through combining the negative function of preventive or punitive nature, and the positive function of promoting peaceful relations among nations. Making decision on these matters needed a positive vote of the Permanent Members of the Security Council.

Shortly after the establishment of the United Nations, the essential condition of co-operation among the Council's members was clearly not present, and relations between them seemed to be based on mistrust and disagreement. Consequently, the provisions of the United Nations Charter on peace and security, particularly in relation to coercive measures, could not be fully applied. As a result of this failure, a new institution has emerged as peace-keeping which was not envisaged in the UN Charter. The analysis of the discussions made at the San Francisco Conference provides a necessary background for the development of the role of the United Nations with regard to international peace and security since its establishment.

The United Nations' own comprehensive definition of peace-keeping is as follows: "a peacekeeping operation has come to be defined as an operation involving military personnel, but without enforcement powers, undertaken by the United Nations to help

maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and co-operation. While they involve the use of military personnel, they achieve their objectives not by force of arms, thus contrasting them with the 'enforcement action' of the United Nations under Article 42."¹

Secretary-General Boutros Boutros-Ghali in his *Agenda for Peace* defines peace-keeping as "the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well."²

Peace-keeping is distinct from peacemaking and enforcement action. Peacemaking in *An Agenda for Peace* has been defined as "action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations".³ Regarding enforcement action, the Secretary-General asserted "[o]ne of the achievements of the Charter of the United Nations was to empower the Organisation to take enforcement action against those responsible for threats to the peace, breaches of the peace or acts of aggression".⁴ Furthermore, the International Court of Justice in its advisory opinion in *Certain Expenses* case recognised peace-keeping operations as a non-enforcement measure which, not only could be established by the Security Council, but also by the General Assembly.⁵ This opinion became a legal and supportive basis for developing peace-keeping and observation operations.

1- The Blue Helmets: A Review of United Nations Peacekeeping, UN Department of Public Information, New York, 1990), pp. 4-5.

2- Boutros Boutros-Ghali, An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, 17 June 1992, A/47/277-S/24111, para. 20.

3- Id.

4- Boutros Boutros-Ghali, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, 3 Jan. 1995, A/50/60-S/1995/1, para. 77.

5- Certain Expenses of the United Nations Case, ICJ Rep. (1962), pp. 165-6.

Thus, peace-keeping is neither UN involvement in an operational effort and military action to terminate an armed conflict and to punish an aggressor, nor is it a peaceful means to resolve a dispute. Observer forces are similarly not designed to defend a territory or to end a dispute by negotiation. Peace-keeping and observer forces share basic elements of consent, impartiality and non-use of force except in self-defence.

Yet, there are differences between peace-keeping and observer forces. Observer missions may be deployed before a cease-fire to consider the possibility of deploying peace-keeping forces. They may be stationed on either side of the conflict and only observe the cease-fire. Besides, observers are not usually large enough in numbers to create a buffer zone between the belligerents, a function that has been performed in some occasions by peace-keeping forces. In addition, while observers are not equipped to perform activities such as guarding border areas or checking vehicles for weapons, peace-keeping forces are often stationed as an interposition force between the belligerents. Peace-keeping forces may be authorised to use force, not only for self-defence, but also for performing their mandates.

During the life of the United Nations, peace-keeping and observing have been the most concerted efforts by the Organisation in dealing with international peace and security. The UN has increasingly deployed these forces with varying scope, duration and degree of success. There has been 42 United Nations peace-keeping operations since 1945, out of which 16 operations are currently operative.⁶ The Security Council has created 29 operations in the years between 1988 and 1996, compared to only 13 operations between 1945 and 1988.⁷ This demonstrates the enhanced role of the United Nations peace-keeping in the recent years.

⁶- United Nations Department of Public Information, UN Homepage: <http://www.un.org>, under UN News.

⁷- Id.

By the demise of the Cold War and dramatic events that occurred since then, peace-keeping forces have been deployed in intra-state conflicts, in most cases without the consent of the parties concerned, behaved in a manner that was perceived to be partial, and used force to protect humanitarian efforts. The cases of Bosnia and Somalia exemplify such operations. *An Agenda for Peace* considers that "existing peace-keeping operations were given additional mandates that required the use of force and therefore could not be combined with existing mandates requiring the consent of the parties, impartiality and the non-use of force".⁸ However, as the practice of the UN demonstrates, use of peace-keeping in the absence of the main principles would not be successful, since the idea of peace-keeping flows from the legal, political and military requirements which are distinct from peace-enforcement.

Since the concept of peace-keeping was not defined in the Charter, it is difficult to give a clear constitutional definition for peace-keeping actions and make an absolute distinction between observer missions and peace-keeping forces. Furthermore, peace-keeping forces may be involved also in actions relating to humanitarian purposes. In practice, the United Nations has dealt with various crises having different characteristics which necessitated special and *ad hoc* mandates to be given to the UN forces. The appropriate approach to analysing the legal and practical aspects of these missions seems to be the study of each case separately.

An occurrence since the end of the Cold War has been the use of Chapter VII in both inter-state and intra-state conflicts by the Security Council. In fact, during the Cold War period, use of the veto power by one of the permanent members could prevent the Council's involvement in an internal conflict. In the post-Cold War era, humanitarian crises and human rights violations have been recognised as a "threat to the peace" requiring UN action. As a result of the broad interpretation of the concept of "threat to the peace", the principle of domestic jurisdiction of states, the subject of

⁸- *An Agenda for Peace*, (1995), *op. cit.*, para. 35.

Article 2(7), has been applied narrowly. This necessitates a discussion on the Council's determination of "threat to the peace" during and after the Cold War, and on the principle of domestic jurisdiction of states.

In fact, the drafters of the Charter considered the domestic jurisdiction clause as one of the principles of the Organisation. In this regard, *An Agenda for Peace* states that, although the respect for states' fundamental sovereignty and integrity are crucial to any common international progress, the time of absolute and exclusive sovereignty has passed.⁹ However, the Secretary-General emphasised that "principles of the Charter must be applied consistently, not selectively, for if the perception should be of the latter, trust will wane and with it the moral authority which is the greatest and most unique quality of that instrument".¹⁰

Another development of the role of the United Nations in respect of international peace and security has been the states' authorisation for enforcement action in response to aggression as in the case of Kuwait in 1990, or to restore democracy as in the case of Haiti in 1994. During the Cold War era, in the case of Korea in 1950, the Council recommended a group of willing states to undertake enforcement action. It is important to analyse and compare the legal basis of these actions, and to respond to this question whether they can be considered as enforcement actions under Article 42 in Chapter VII of the Charter or as an application of the traditional right of collective self-defence.

Although an act of aggression in some cases received a rapid and effective response by the United Nations, the extreme example being the case of Iraq-Kuwait, in some other cases the United Nations played a reduced role in dealing with the conflicts, the notable example being the case of Iraq-Iran war as the other extreme where the scope

⁹- *An Agenda for Peace*, (1992), *op. cit.*, para. 17.

¹⁰- A/47/277, S/24111, 17 June 1992, p. 23.

of the war and the use of prohibited weapons was a clear breach of international peace and security. The matter merits a full analysis; at the least it is deemed necessary to consider the facts of the conflicts and compare the nature of the United Nations response in the cases of Iraq-Iran and Iraq-Kuwait wars as the two cases represent the spectrum of the role of the UN in respect of international peace and security.

The purpose of this thesis is to study the role of the United Nations regarding international peace and security of the Organisation through a legal and practical analysis. It is intended to investigate the United Nations practice in conflict resolution, consider the legal basis of its actions in respect of maintenance and restoration of international peace and security, and evaluate the outcomes of its actions. This study offers an assessment of the decisions and actions of the United Nations during and after the Cold War era in the fundamental areas of international peace and security.

The provisions of the United Nations Charter will first be examined with reference to the discussions of delegates at the San Francisco Conference, followed by an analysis of some developments of the UN's role in relation to international peace and security as the Organisation confronted with numerous threats to or breach of the peace. A comparative and analytical study will be carried out on the cases dealt with by the United Nations in maintaining or restoring international peace and security, discussing both the establishment of peace-keeping/observation forces and authorisation of the use of force. Although the provisions of the Charter on peaceful settlement of disputes are considered together with other means of conflict management, peaceful settlement of disputes is not the focus of the thesis. The present study is divided into eight main chapters.

In the first Chapter, the constitutional basis of provisions for peace and security in the UN Charter is analysed by examining the intentions of the drafters of the UN Charter at the Dombarton Oaks and San Francisco Conference. The proposals and the points

of view of delegations presented at the latter conference will be discussed as relate to international peace and security. The role of the Security Council, the General Assembly, the Secretary-General and regional arrangements in conflict management by peaceful and forceful means will be investigated in the light of relevant articles in the Charter.

In Chapter Two some main developments of the role of the United Nations relating to international peace and security in the years after its establishment will be examined. Chapter Two will discuss the emergence of the institution of peace-keeping with consideration of the advisory opinion of the International Court of Justice in *Certain Expenses* case regarding the legality of this institution. The legal basis of peace-keeping will be investigated by reference to Chapters VI and VII of the Charter, particularly Articles 40 to 42, followed by an examination of the basic principles of peace-keeping. A discussion will be made on the enlargement of the concept of "threat to the peace" with a comparative study of the Council's determinations during and after the Cold War. The general nature of Article 2(7) will be studied and an evaluation made of UN practice concerning domestic jurisdiction. The question of reviewing Security Council's decisions on matters relating to international peace and security will be examined. Finally, a discussion will be made on the development of the role of the Secretary-General regarding conflict management during the life of the Organisation.

Chapters Three and Four focus on the constitutional basis of UN peace-keeping and observation operations. A distinction is initially made between the two types of operations. The facts of the disputes are described in brief, their failure or success is assessed, and the legal basis of the establishment of each operation is analysed. Both chapters will conclude with a general discussion on the significant aspects of the missions.

Chapter Five will investigate the nature and the constitutional basis of humanitarian forces in cases of Bosnia-Herzegovina, Somalia and Rwanda. This chapter will discuss the legal basis of peace-keeping/peace-enforcing operations and establishment of safe areas with reference to Security Council's resolutions. The authorisation of regional organisations and individual states to use force to support humanitarian aid, and the legality of arms embargo in the case of Bosnia will be discussed. Furthermore, an evaluation is made of the outcome of mixed operations of peace-keeping and peace-enforcement. The general conclusions drawn from these cases will finally be presented.

In Chapter Six, the Iraq-Iran war of 1980 is analysed as an example of the reduced role of the Security Council in restoring international peace and security. It examines the facts of this dispute as the longest war in the history of the United Nations, and investigates the UN response to this conflict, and refers to the unlawful acts committed during the war. The constitutional basis of the UN peace-keeping operation is described and considered as a successful mission. Finally, the results of inaction of the Security Council and the role of the Secretary-General are discussed, and comparison is made between the response of the United Nations to the Iraq-Iran war and the Kuwait crisis.

In Chapter Seven, an analysis is carried out of the Kuwait crisis of 1990. The reason that the conflicts of 1980 and 1990 in the Persian Gulf are examined separately is that they are two extremes of the Council's approach toward aggression where two distinctive courses of action were taken by the Security Council in attempting to restore international peace and security. An analytical discussion is made of the legal basis of UN economic sanctions and the authorisation of the enforcement action against Iraq, with a comparative study of the Council's recommendation of use of force in the case of Korea and authorisation of use of force in the case of Haiti. The constitutional basis of peace-keeping operations in Iraq and Kuwait is then

considered. Following an examination of the legality of the intervention by the United Nations and individual states on the humanitarian grounds, the legality of no-fly zones in Iraq by coalition is finally discussed.

Among the UN operations around the world, this study has deliberately omitted several cases because no important legal point arose in these cases with direct relevance to the subject of this thesis, e.g. monitoring referenda¹¹ or human rights¹², or where there existed a similarity between a number of cases, e.g. cease-fire observation¹³ or implementation of peace agreements.¹⁴

¹¹- MINURSO, United Nations Mission for the Referendum in Western Sahara, SC Res. 690, 29 Apr. 1991; UNTAC, United Nations Transitional Authority in Cambodia, SC Res. 745, 28 Feb. 1992.

¹²- ONUSAL, United Nations Observer Mission in El Salvador, SC Res. 693, 20 May 1991, for monitoring the human rights situation in EL Salvador, promoting human rights in the country; ONUMOZ, United Nations Operation in Mozambique, SC Res. 797, 16 Dec. 1992, with political, military, electoral and humanitarian mandate.

¹³- UNOMIG, United Nations Observer Mission in Georgia, SC Res. 858, 24 Aug. 1993, to verify compliance with the cease-fire agreement and to investigate reports of cease-fire violations; ONUCA, The United Nations Observer Group in Central America, SC Res. 644, 7 Nov. 1989, to verify compliance with security commitments undertaken by the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua; UNAMIC, United Nations Advance Mission in Cambodia, SC Res. 717, 16 Oct. 1991, to assist the Cambodian parties to maintain the cease-fire.

¹⁴- UNOMIL, United Nations Observer Mission in Liberia, SC Res. 866, 22 Sep. 1993, to implement the Cotonou Peace Agreement; UNMOT, United Nations Mission of Observers in Tajikistan, SC Res. 968, 16 Dec. 1994, to assist the Joint Commission to monitor the implementation of the Agreement on a Temporary Cease-fire and the Cessation of Other Hostile Acts on the Tajik-Afghan Border and within the Country for the Duration of the Talks.

CHAPTER ONE

THE CONSTITUTIONAL BASIS OF PROVISIONS FOR PEACE AND SECURITY IN THE UN CHARTER

The main aim of the United Nations, as stated in its Charter, is to maintain international peace and security.¹ In this chapter the constitutional basis of provisions for peace and security in the Charter is examined by considering the negotiations from 1941 (the Atlantic Charter) until the signing of the Charter in San Francisco in 1945.

As the Second World War progressed, many states thought that a new world organisation was necessary for preventing war and establishing peace. The Atlantic Charter, of 14 August 1941, referred to the creation of a "wider and permanent system of general security", which would "afford to all nations the means of dwelling in safety within their own boundaries" at the War's end.²

It was thought necessary to create an organisation which was more effective than the League of Nations, though some writers believed that "the League's record in fact, even in matters of peace and war, was not altogether bad"³, since it had resolved several frontier and territorial disputes between states.

The primary purpose of the League of Nations, as its Covenant envisaged, was to maintain international peace and security on the basis of law and justice.⁴ To achieve this purpose, the members of the League agreed to submit their disputes to peaceful

1- Article 1(1) of the United Nations Charter.

2- Photographic reproduction of the text given in U.S. Department of State, Cooperative War Effort, Executive Agreement Series 236, Publication 1732 (1942) p. 4.

3- E. Luard, A History of the United Nations, Vol. 1, (Macmillan, London, 1984), p. 3.

4- Preamble of the Covenant.

procedures of settlement or adjustment.⁵ The members undertook not to resort to war in violation of the Covenant.⁶ If a member state resorted to war, it should *ipso facto* be deemed to have committed an act of war against all other members of the League, and the members were obliged to sever all trade or financial relations with that state.⁷ The Council had the right to recommend the use of force to protect the Covenant of the League.⁸ Under the Covenant, both member states and the Council were obliged to keep and make peace. While the League had no role to enforce peace and security, the members of the League undertook definite legal obligations which, if observed or enforced, would undoubtedly have prevented another great war.⁹

However, the League of Nations failed to prevent the Second World War, essentially because the concept of collective security was far weaker than the individual states' desires to protect what they perceived as their national interests.¹⁰ In fact, at the time of the establishment of the League, the United States refused to join because it believed that collective security was not in its best interests.¹¹ It is generally accepted that the League failed partly because some of the big powers played no role. If a new successor organisation was to succeed there would have to be a dominant place within it for the great powers.¹²

THE DRAFTERS' INTENTIONS

The Four Power Plan, which was produced by US officials in August 1942, described and analysed a system in which the primary responsibility for maintaining peace in

5- Article 12(1) of the Covenant.

6- The Preamble and Article 10 of the Covenant.

7- Article 16(1) of the Covenant.

8- Article 16(2) of the Covenant.

9- George A. Finch, "International Law in the United Nations Organisation", 1945-48 A. S. I. L. Proc., p. 30.

10- N. D. White, The United Nations and the Maintenance of International Peace and Security, (Manchester, 1990), p. 3.

11- Id.

12- E. Luard, op. cit., pp. 18, 19.

the post-War World would be placed upon the United States, the Soviet Union, Britain and China.¹³ This centrality of the great powers represented a recognition of the fact that any new security system could not possibly function without the support, much less against the will, of any of them.¹⁴ Their unity was to be the key to the post-war order and their co-operation the basis of any collective actions.¹⁵

In the Declaration of Four Nations on General Security (Moscow, 30 October 1943), in paragraph 4, the necessity of establishing a general international organisation was recognised, based on the principle of sovereign equality of all peace-loving states for the maintenance of international peace and security.¹⁶

Subsequently, at Tehran, on 1 December 1943, the Big Three, in China's absence, declared that the supreme responsibility would rest upon them and other states to make peace which would command the good will of the overwhelming mass of the peoples of the world and would banish the scourge and terror of war for many generations.¹⁷

These endeavours show an overwhelming desire to achieve peace and maintain security by means of an international organisation. At the beginning of 1945 the big powers began, as they had agreed at Moscow, to "draw up a more detailed and comprehensive document" on the form of a post-war organisation. The British representative believed that the United States should take the initiative in this process; the Soviet Union did not object, and the United States finally took the initiative.¹⁸

13- Id.

14- Mark W. Zacher, International Conflicts and Collective Security, 1946-77, (Praeger Publishers, USA, 1979), p.31.

15- Id.

16- The text is given in: U.S. Department of State, Toward the Peace Documents, Publication 2298 (1945), p. 6.

17- Foreign Relations to the US, Diplomatic Papers: The Conferences at Cairo and Tehran 1943, (1961).

18- E. Luard, op. cit. p. 24.

The American proposal

During World War II, officials in the United States began to create a plan for the post-war world. They had realised that at the end of the war the military power of the world would be concentrated primarily in the hands of the leading victors and that ways would have to be sought to prevent the enemy states from waging another war.¹⁹

Anglo-American leaders, as the Allied countries' core, tried to attain this aim through the framework of an international organisation. However, America was opposed to participation in an international organisation with the characteristics of a world government or a supranational federation of states. It believed that sovereign nation states would have to remain the basis of any new organisation; and participation in an international association of governments to keep the peace, if necessary by the use of force, would involve neither the establishment of a supranational government nor the "sacrifice" of national sovereignty.²⁰ This principle is clear from the words of the Moscow Declaration (October, 1943), which stipulated that the new organisation was to be "based on the principle of the sovereign equality of all peace-loving states". In this respect, Kirk has written that "structurally, the new organisation was to be little more than a mechanism through which the existing sovereign states would try to coordinate their policies with respect to matters vital to world peace... [C]learly, an organisation of this character would not be compatible with a powerful international police force."²¹

The Americans recognised that the new organisation had to be different from the League of Nations in relation to peace and realised that, if the new organisation was to succeed, the lessons of the League's failure had to be taken into consideration.

19- R. B. Russell, The United Nations and United States Security Policy, (Washington D. C., 1968), p. 51.

20- R. B. Russell assisted by J. E. Muther, A History of the United Nations Charter, (Washington, Brookings Institutions, 1958), p. 207.

21- G. Kirk, "The Enforcement of Security", 55 Yale L. J., (1945-1946), p. 1083.

The main assumption for keeping international peace was that the concerted efforts of major powers was necessary to control the military power of the world. The Americans suggested that the first responsibility of maintaining peace and security should be vested in the Security Council which would have in this respect a mandatory role to enforce military measures. All the permanent members of the Security Council would have to agree to apply the military measures.

It was assumed that one of the reasons for the League's failure was that it had no effective mechanism for enforcing peace. The Covenant emphasised procedures for the peaceful settlement of disputes. America, in its plans for the new organisation, favoured structuring world security on the basis of the same general type of institution as the League of Nations, but endowed with more power to maintain the peace. Department of State officials generally thought in terms of a single global organisation that would combine the negative function of preventing or punishing aggression with the positive function of promoting conditions conducive to peaceful relations among nations.²²

Finally, in 1942 under the title of "The Four-Power Plan", the British Foreign Office suggested that the "supreme direction" of a post-war organisation come from a council composed of Great Britain, the United States, the Soviet Union and China.²³ Therefore, the privileged position of the victorious powers became part of the plan for keeping peace through the new organisation.

Although the Americans tried to create new procedures for maintaining peace and security, the system of enforcement measures which they proposed had an inherent

22- *Ibid*, p. 206.

23- W. Churchill, "The Hinge of Fate", p. 561, in Russell and Muther, *op. cit.*, p. 103.

weakness in that it would need a positive vote of the permanent states and enforcement measures would not be immediately available.

The Dumbarton Oaks discussions

At the Dumbarton Oaks Conference on 21 August 1945, discussions began between Britain, China, the Soviet Union and the United States on the US proposal. In the course of these discussions it was agreed that the proposed organisation should not be exclusively limited in its functions to the maintenance of international peace and security.²⁴

Also discussed was the role of the major and lesser powers in the proposed organisation. All four governments had no difficulty in agreeing that they themselves should enjoy the privilege of permanent membership of the Council.²⁵ This special position was given effect in the right of each power to veto Council decisions, as subsequently agreed at the Yalta Conference.

An important issue was the right of veto for one of the so-called big powers being involved in a dispute or having committed a breach of the peace and security. Britain proposed that a party to the dispute should, as in the League, be unable to vote and therefore unable to veto.²⁶ The United States proposed a compromise under which, even in such cases, the veto could be used to prevent enforcement action being taken against the permanent member concerned. The Soviet Union had another proposal: that a great power should be able to prevent any action by the Council, even including

24- L. M. Goodrich, The United Nations, (Stevens & Sons, London, 1960), p. 23. Goodrich has written that it had been the original Soviet position that the organisation should be exclusively devoted to that task.

25- E. Luard, op. cit., p. 29.

26- Id.

measures of peaceful settlement.²⁷ The big three could not reach any decision so this point remained unresolved.²⁸

It has been argued that the Dumbarton Oaks proposals, representing the views of the Governments of the United States, the United Kingdom, the Soviet Union and China, did not sufficiently take into account the interests and possible contributions of the small nations and went too far in institutionalising the dominant power position of the four nations.²⁹

The draft constitution of a new international organisation prepared by the big powers was put forward for negotiation by other states and for their approval.³⁰ There were several problems which had remained unresolved; and the draft was only a preliminary proposal and would then need amending.

The San Francisco Conference

The San Francisco Conference convened on 25 April 1945 with representatives from the Sponsoring and invited governments. The invitation contained a suggestion that the Conference would consider the Dumbarton Oaks proposals as affording a basis for the proposed charter. The Conference organised itself into a number of commissions and committees.³¹ Each country submitted proposals for preparing a charter which

²⁷- Id.

²⁸- At Yalta Conference (February 1945) it was argued by U.S. and British that if a great power could veto even the discussion of peaceful means of resolving disputes, some of the most important post-war issues might be excluded altogether from the authority of the new organisation. Small states would feel aggrieved, they argued, if the great powers were uniquely protected in this way, and might decline to join the organisation altogether. The Soviet Union was finally satisfied with no veto in such cases if peaceful settlement of a dispute only was under discussion. Ibid, p. 34.

²⁹- L. M. Goodrich, op. cit., p. 107.

³⁰- Documents of the United Nations Conference on International Organization, (United Nations Information Organisations, London, New York, 1945), (hereinafter referred to as UNCIO), Vol. 3.

³¹- There were four commissions each comprising several committees:

Commission I on General Provisions including Committee 1 on Preamble, Purposes and Principles, Committee 2 on Membership, Amendment and Secretariat; Commission II on General Assembly including Committee 1 on Structure and Procedures, Committee 2 on Political and Security Functions, Committee 3 on Economic and Social Cooperation, Committee 4 on Trusteeship System; Commission

would oblige all the countries to prevent war and to provide grounds for economic and social improvements. In the next sections the legal framework of provisions for peace in the Charter will be discussed with reference to the representatives' arguments.

LEGAL FRAMEWORK OF PROVISIONS FOR PEACE IN THE CHARTER

The basic aspiration of the participants at the San Francisco Conference for the maintenance of international peace and security is expressed in the Preamble of the United Nations Charter, and in the basic Principles and Purposes set forth in Article 1. The Charter called for (Article 1(1)) effective collective measures and peaceful means to be used for preventing and removing threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and for adjustment or settlement of international disputes. The collective measures are specified in Articles 41 and 42 of the Charter.

Relevant to the discussions on provisions for peace in the Charter, there are some notions argued at the San Francisco Conference which should be explained here. These are the concepts of "peace, security and justice" disputed in relation to Article 1(1); and, "internal and international peace" in connection with Article 2(7). The means to achieve and maintain peace and security through the provisions of the Charter will then be analysed with reference to the discussions.

Peace, security, justice

The League's Covenant in its Preamble had provided that peace and security were to be promoted "by the firm establishment of the understandings of international law as

III on Security Council including Committee 1 on Structure and Procedures, Committee 2 on Peaceful Settlement, Committee 3 on Enforcement Arrangements, Committee 4 on Regional Arrangements; Commission IV on Judicial Organization including Committee 1 on International Court of Justice, Committee 2 on Legal Problems. UNCIO, Vol. I, pp. 10-12.

the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another."³²

The conformity of the Security Council's action with international law and justice was the subject of significant debate in the *travaux préparatoires* of the Charter. The discussions were focused on whether and where to refer to the principles of justice and international law. The first draft of Article 1(1) made no reference to international law and justice, and was as follows: "To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means adjustment or settlement of international disputes which may lead to a breach of the peace."³³

At the San Francisco Conference (Committee I/II and Commission 1) there were suggestions on adding the phrases "the principles of justice and international law", since the delegates were anxious about the dangers of a repetition of the so-called "appeasement policy", i.e. less powerful states should not be forced to act in favour of the powerful in the name of peace.³⁴ Two kind of suggestions were made by delegates. First, a suggestion on the first part of the draft to read "... to maintain international peace, security and justice",³⁵ and second, a suggestion on the same part to read "... to maintain international peace and security in accordance with the principles of justice and international law".³⁶

Those countries which insisted on the addition of "justice and law" after "peace and security" believed that a guarantee of justice must exist as an assurance of peace.

³²- Preamble of the League's Covenant.

³³- UNCIO, Vol. 3, Doc. 1, G/1, p.2.

³⁴- UNCIO, Vol. 6, Doc. 1006, p. 27.

³⁵- UNCIO, Vol. 3, Doc. 2, G/7(a)(1), p. 34.

³⁶- Ibid, G/7(0), p. 383.

because real peace and security would not be achieved with the sacrifice of justice.³⁷ They argued that, although these phrases, namely peace, security, justice and international law, might make the burden on the organisation heavier, it would not be much as compared with the sacrifices which all countries suffered and all would be ready to suffer for the sake of maintaining peace and security in the world.³⁸

Several states (including the Sponsoring Governments) argued for maintaining the original text and were opposed to the change. These delegations agreed that the concept of justice was a norm of fundamental importance, and all affirmed that real peace could not be based on anything other than justice. But they held that "justice" was "...a notion which lacks in clarity" while "peace and security" was a "more clear and almost tangible notion".³⁹ They further argued that this would tie the hands of the Security Council, and the concept of justice and international law would find a more appropriate place in context of the last part of paragraph 1(1).⁴⁰

Finally, the proposal of adding "justice" to "peace and security" was put forward and delegates voted 19-12 in favour of the proposal, but it was not adopted since it lacked the necessary two-thirds majority.⁴¹ The proposal to change the first part of the draft to read "to maintain international peace and security in accordance with the principles of justice and international law" also received a majority of votes but not the two-thirds necessary for adoption.⁴²

At the end, the phrase "in conformity with the principles of justice and international law" was inserted at the end of the paragraph. The delegate of Panama stated that Article 1(1) covers three points: the maintenance of international peace and security,

37- *Id.*

38- *Ibid.*, p. 24.

39- *Ibid.*, p. 22.

40- *Ibid.*, Doc. 944, p. 453.

41- *Ibid.*, Doc. 742, p. 318.

42- *Id.*

the suppression of aggression and the settlement of international controversies. He felt that inserting the phrase "in conformity with the principles of justice and international law" in the second part of paragraph applied only to the settlement of international conflicts and not to the other parts of the paragraph.⁴³

Internal and international peace

As stated in paragraph 1 of Article 1, the peace to be maintained is "international" peace, not "internal" peace. Article 2(7) provides that "nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State ... but this principle shall not prejudice the application of enforcement measures under Chapter VII". Under Chapter VII of the Charter, the Security Council determines the existence of a threat to the peace, breach of the peace or act of aggression, and may adopt measures to maintain or restore peace.

The League's Covenant in Article 15(8) had laid down that international law would have to be the criterion for testing whether a situation or dispute arose out of a matter would be within the domestic jurisdiction of a state. If the dispute arose out of a matter which by international law was solely within the domestic jurisdiction of one party, the Council should make no recommendation as to its settlement.⁴⁴

Comparing Article 15(8) of the Covenant and Article 2(7) of the Charter, it is understood that "international law" as an objective criterion to delimiting the international sphere of domestic jurisdiction was abandoned. It seems that the drafters of the UN Charter intended that questions of domestic jurisdiction no longer be considered with reference to international law. Another conclusion might be that the

⁴³- *Ibid*, Doc. 926, p. 422.

⁴⁴- Article 15(8) of the Covenant.

drafters of the Charter had deemed that, since the Charter is an international treaty and international treaties are considered by the norms of international law, therefore Article 2(7) and the principle of non-intervention in domestic jurisdiction should be considered by international legal rules.

The United States delegation, John Foster Dulles on behalf of the sponsoring governments said that international law "was subject to constant change" and it would "be difficult to define whether or not a given situation came within the domestic jurisdiction of a state".⁴⁵ The US delegation added in his report that "the body of international law on this subject is indefinite and inadequate" and that "to the extent that the matter is dealt with by international practice and textbook writers, the conceptions are antiquated and not of a character which ought to be frozen in the new organisation".⁴⁶

This opinion was faced with considerable opposition particularly on the part of the delegations of the smaller countries who believed that the proposal of the great powers would mean a step backwards from the wording of the Covenant of the League of Nations.⁴⁷ The delegates of Uruguay and of Belgium took a leading part in these debates.⁴⁸

Furthermore, there is no article in the Charter to provide which organ or authority had to determine, according to international legal rules, whether a situation or dispute was outside the international jurisdiction of the organisation. It is believed that "[i]n practice...[e]ach organ has interpreted the paragraph [7 of Article 2] as it is applicable to its particular functions, and, except when the organ has the authority to take a

⁴⁵- UNCIO, Vol. 6, Doc. 1019, p. 508.

⁴⁶- Charter of the United Nations: Report to the President on the result of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State, (Department of State Publication 2349, Conference Series 71, 1945), pp. 44-45.

⁴⁷- UNCIO, Vol. 6. Doc. 1167, pp. 110-1.

⁴⁸- Id.

binding decision (as in the case of the exercise by the Court of its contentious jurisdiction), members have not necessarily considered themselves bound by such interpretations."⁴⁹

At the San Francisco Conference, the word "solely" in Article 15(8) of the Covenant was replaced with the word "essentially".⁵⁰ The inclusion of the term "essentially" in Article 2(7) was the result of the intention the drafters had to broaden the scope of domestic jurisdiction, and to limit the scope of UN activities.

The Australian representative to the San Francisco Conference, Evatt, stated that "the field of matters which are essentially within the domestic jurisdiction is wider than matters 'solely' within the domestic jurisdiction ... And this forbids the Organisation to intervene in a larger number of matters than would be permissible if we altered the word to matters 'solely' within the domestic jurisdiction ... In other words the very persons, the very countries, which are so jealous about intervention in domestic jurisdiction are, I submit, placed in a position which is at once stronger and more in keeping with modern development if this amendment of the sponsoring powers is admitted ... Broaden the field, [of] matters essentially within the domestic jurisdiction and the field of the international organisation is correspondingly contracted, and I think that is right."⁵¹

He further implied that there are matters which, although regulated by international law, would still remain "essentially" within the reserved domain.⁵² He stated that "matters solely within domestic jurisdiction were constantly contracting. For example, international agreements to promote full employment would have been unheard of a few years ago and even now, although this matter remained within domestic

⁴⁹- L. M. Goodrich, E. Hambro and A. P. Simons, Charter of the United Nations, Commentary and Documents, (Columbia Univ. Press, USA, 1969), p. 64.

⁵⁰- UNCIO, Vol. 6. Doc. 1167, pp. 110-1.

⁵¹- Ibid, p. 512.

⁵²- Id.

jurisdiction. It was, however, 'essentially within domestic jurisdiction and that was a better criterion to apply'.⁵³

It seems that the drafters of the Charter were determined to establish a formula to ensure that certain matters would fall "essentially" within the domestic sphere, even though there is a relevant international legal obligation. However, both terms "essentially" and "solely" are vague, and Article 2(7) does not contain a clear standard to determine what matter falls under domestic jurisdiction of states. Even a review of the discussions at the San Francisco Conference does not lead to a clear understanding of what the drafters intended in Article 2(7).

At the San Francisco Conference, the Sponsoring Governments proposed a substantial revision of the text of the domestic jurisdiction limitation and its transfer from the section on "Pacific Settlement of Disputes" to the chapter on "Principles" with the result that it would become a governing principle for the Organisation and its members.⁵⁴ This proposal was accepted but it was not intended to weaken the effectiveness of the United Nations in maintaining or restoring international peace and security.⁵⁵ Therefore, a new proposal was agreed on which provided "this principle shall not prejudice the application of Chapter VIII, Section B".⁵⁶

At the Conference several countries submitted amendments that the International Court of Justice should be the organ to make the decision on domestic jurisdiction of a state. The Belgian delegate proposed that any state, party to a dispute brought before the Security Council, should have the right to ask the Court whether a recommendation or a decision made by the Council or proposed in it infringed its essential rights. If the Court considered that such rights had been disregarded or

⁵³- *Id.*

⁵⁴- *UNCIO*, Vol. 6, Doc. 1070, p. 486.

⁵⁵- *Ibid.*, Doc. 976, p. 494.

⁵⁶- Chapter VIII contained the provisions regarding threat to the peace, breach of the peace and act of aggression.

threatened, it would be for the Council either to reconsider the question or to refer the dispute to the Assembly for decision.⁵⁷ The Belgian delegate stated the reason for submitting this proposal: "[n]ext to political security, comes juridical or legal security. Several delegations have expressed concern lest influence or political pressure might induce the Security Council to impose on a state modifications of essential rights which are derived, in the case of that state, from the general rules of international law or from treaties."⁵⁸ However, this amendment was opposed by the Sponsoring Governments and ultimately defeated.

It should be noted that the only basis for the Security Council's intervention in domestic affairs of states would be a clear violation of the international legal rules constituting a threat to the international peace.

Peaceful settlement of disputes

At the San Francisco Conference five graduated steps were outlined whereby the Security Council could preserve the peace:⁵⁹

- making a decision that there is a threat to peace;
- instructing the disputants to settle their differences by pacific means;
- recommending to the disputants the most appropriate ways of settling their differences;
- diplomatic and economic enforcement measures;
- use of armed force.

Article 12 of the League's Covenant provided that disputes would be submitted to arbitration or judicial settlement or to inquiry by the Council. Chapter VI of the United Nations Charter on the peaceful settlement of disputes arose out of Chapter VIII

⁵⁷- UNCIO, Vol. 3, Doc. 2, p. 336.

⁵⁸- Id.

⁵⁹- Summary Report of Second Meeting of Committee III/3, UNCIO, Vol. 12, Doc. 140, p. 278.

section A of the Dumbarton Oaks proposals. The Charter contains an obligation imposed upon members to settle, by peaceful means, their disputes "the continuance of which" are "likely to endanger the maintenance of international peace and security".⁶⁰ Article 33(1) provides a number of methods for settlement of disputes such as negotiation, mediation, arbitration and resort to regional arrangements. Articles 1(1) and 2(3) also contain the principle of pacific settlement of disputes.

The Security Council

The Security Council has been conferred primary responsibility for the maintenance of international peace and security.⁶¹ In discharging its duties, the Security Council should act in accordance with the Purposes and Principles of the United Nations, and with the specific powers granted to it by Chapters VI, VII, VIII and XII of the Charter.⁶²

The role of the Security Council in the peaceful settlement of disputes is not mandatory. Although Article 33(2) states that the Security Council shall, where it is deemed necessary, call upon the parties to settle their disputes, the wording does not purport to impose a mandatory obligation on the Council to enforce the provisions of Article 33(1). The Council's role under Article 33 is one of supervision of the obligation to settle placed on members.⁶³

The Security Council may investigate "any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of

60- Article 33(1) of the Charter.

61- Article 24(1) of the Charter.

62- Article 24(2) of the Charter.

63- White, *op. cit.*, p. 62.

international peace and security".⁶⁴ But the Council may recommend appropriate procedures or methods of adjustment.⁶⁵

At the San Francisco Conference an amendment was suggested by the Turkish delegate to ensure that the Security Council would not intervene in a case which was being heard by the International Court of Justice. If the dispute developed into a threat to the peace during proceedings before the Court, then the Council might intervene but otherwise it should be clear that there would be no interference with judicial proceedings.⁶⁶ The delegate of the United States expressed the view that, if a dispute was being satisfactorily handled by the Court and there was no threat to the peace, then there should be no interference by the Council.⁶⁷

In respect to Article 37(2) there was a suggestion for ensuring that the Security Council implements its duties relating to peace and security. The Belgian delegate suggested that the International Court of Justice could be asked by a state party to a dispute, on whether a recommendation or a decision made by the Council or proposed in it infringed on its essential rights. In the case of the Court considering these rights to have been disregarded or threatened, the Council would either reconsider the question or refer the dispute to the Assembly for decision.⁶⁸

As mentioned earlier, the Belgian amendment met opposition from the Sponsoring Governments, such as the United States, the Soviet Union and the United Kingdom. The US delegate asserted that the Council was already required by the terms of the Charter to act in accordance with the purposes and principles of the organisation, and referred to the Council's obligation to act in accordance with principles of

⁶⁴- Article 34 of the Charter.

⁶⁵- Article 36 of the Charter.

⁶⁶- *UNCIO*, Vol. 12, Doc. 530, pp. 73-74.

⁶⁷- *Id.*

⁶⁸- *Ibid.*, Doc. 433, pp. 47-55.

international law.⁶⁹ France recommended that there should be an endeavour to give the most complete guarantees possible that the Security Council accomplish its task according to law and justice⁷⁰; this amendment was ultimately defeated.⁷¹

The General Assembly

There was a desire at the San Francisco Conference to increase the competence of the General Assembly in connection with the procedure of pacific settlement.⁷² According to the Charter, any dispute or situation may be brought before either the Security Council or the General Assembly.⁷³ The General Assembly may discuss any questions relating to the maintenance of international peace and security, but if action is required, the Assembly must refer the matter to the Security Council.⁷⁴

Referring to Article 11(2) of the Charter, the General Assembly might find a "threat to the peace", a "breach of the peace" or an "act of aggression", and to make recommendations to restore international peace. However, the mandatory decision on international peace and security is rested in the Security Council. Furthermore, while the Security Council is in the process of exercising, in respect of any dispute or situation, the functions assigned to it in the Charter, the General Assembly shall not make any recommendation.

69- *Ibid*, p. 49.

70- *Id.*

71- Subcommittees had been composed of the several representatives to facilitate the work of the Committee and it should be appointed to prepare a systematic arrangement of the observations and recommendations of the participating governments.

72- *UNCIO*, Vol. 12, Doc. 321, pp. 22-23.

73- Article 35(1).

74- Articles 11 and 12.

The Secretary-General

Other than these two main United Nations organs, a political function is envisaged for the Secretary-General in the Charter. The Secretary-General has the right to draw the attention of the Security Council to any matter which in his opinion may threaten the maintenance of international peace and security.⁷⁵ "This authority contains the three elements of right, responsibility and discretion".⁷⁶ It follows from the consideration of Article 6 of the League's Covenant and Articles 97 to 101 of the UN Charter that the drafters of the UN Charter gave the Secretary-General a larger political role. "Sir Eric Drummond, the first Secretary-General of the League, is said to have remarked that if Article 99 of the Charter had been at his disposal, the position of his office and, by implication, the influence of the League on events would have developed differently"⁷⁷

Although the authorities of the Secretary-General have been expanded in the Charter, they are general and not detailed. It is upon his initiatives and policies to use his powers for settlement of disputes. However, the role of the Secretary-General for independent initiative is ambiguous. In fact, he can exercise his good offices through conciliation and mediation. The Secretary-General may initiate and direct a fact-finding operation and he has to obtain the consent of the states in question to engage in fact-finding. Because of the necessity of the parties' consent, his initiative may fall under Chapter VI. The potential of the Secretary-General's role "can be used effectively only on the basis of interaction with other principal organs of the United Nations, especially the Security Council and the General Assembly, and under the condition of full support by states."⁷⁸

⁷⁵- Article 99 of the Charter.

⁷⁶- Javier Perez de Cuellar, "The Role of the UN Secretary-General", in: A. Roberts and B. Kingsbury (ed.), United Nations, Divided World, (Clarendon Press, Oxford, 1993), p. 129.

⁷⁷- Ibid.

⁷⁸- Ibid., p. 133.

Regional arrangements

Regional arrangements or agencies can deal with matters relating to the maintenance of international peace and security. The Charter emphasises that the Members of the United Nations entering into such arrangements shall make every effort to achieve pacific settlement of local disputes through such arrangements or agencies before referring them to the Security Council.⁷⁹

If one of the parties to a local dispute is interested in bringing the dispute to the United Nations, the Security Council will put the matter in its agenda. However, if the dispute has not yet endangered international peace and security, the Council may decide, under Article 52, to refer the dispute to the regional forum, but keep the matter in its agenda to resume its consideration if the regional attempt has failed.⁸⁰

As mentioned earlier, Chapter VI of the Charter in general terms refers to the means for pacific settlement of disputes without a mandatory role for the United Nations organs. Indeed the main condition for member states to settle their disputes is their commitment to use peaceful means. If states failed, the Security Council can intervene with its recommendatory role. The General Assembly may discuss any question referred to it, but if action is required the Assembly must refer the matter to the Security Council. In Kelsen's opinion, it is the Security Council, not the General Assembly, which will be empowered to recommend appropriate procedures or methods for the adjustment of the disputes; it is the Security Council, not the General Assembly, which will be empowered "to take any measures necessary for the maintenance of international peace and security," should this body deem that a failure to settle a dispute in accordance with the Charter constitutes a threat to the

⁷⁹- Article 52, para. 2.

⁸⁰- Office of Legal Affairs, Handbook on the Peaceful Settlement of Disputes between States (United Nations, New York, 1992), p. 96.

maintenance of international peace and security.⁸¹ In fact, the Security Council has supremacy over matters coming within Chapter VI.

Enforcement measures with regard to peace

The most important initiative in the Charter of the United Nations relating to international peace and security is the provision of enforcement measures in Chapter VII. These include measures involving the use of armed force and measures not involving the use of armed force. "Effective collective measures" have generally been provided for in Article 1(1) "for the prevention and removal of threats to the peace, and for the suppression of acts of aggression and other breaches of the peace". Collective measures would be applied only by the Security Council. The General Assembly and the Secretary-General have not been given authority for such measures.

Regional arrangements or agencies cannot take enforcement action without the consent of the United Nations given through the Security Council.⁸² At San Francisco it was found necessary to enable regional arrangements or agencies to take initial action. One proposal was to make the veto power in the Security Council inapplicable to regional enforcement measures.⁸³ However, this proposal was not adopted. Instead, it was decided to incorporate in the Charter a recognition of the right of collective self-defence. The reason was that "the requirement of Security Council authorisation made it possible for a permanent member to prevent any action from being taken by the Council, this might lead to a situation in which a state would be deprived of any protection against an attack directed or supported by a permanent member."⁸⁴ The Charter provided that enforcement actions would continue until the Security Council

81- H. Kelsen, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals", 39, *A. J. I. L.*, (1945), p. 52.

82- Article 53, para. 1.

83- *UNCIO*, Vol. 12, Doc. 196, p. 668.

84- L. M. Goodrich, *op. cit.*, p. 163.

has taken measures.⁸⁵ Therefore the authorisation by the Charter or the Security Council does not mean that the United Nations would lose its control over enforcement actions taken by regional arrangements.

These actions by regional agencies or arrangements of their own volition must still conform to the principle stated in Article 2(4). If the United Nations should consider that such actions constituted a threat or breach of international peace and security, "it could decide accordingly and proceed to take such action as seemed to be called for, acting in accordance with its general powers for the maintenance of international peace and security".⁸⁶

Regarding enforcement measures in the League system, it should be said that Article 16(1) of the Covenant of the League of Nations obliged the members, in the event of a member-state's resort to war, to sever immediately all trade and financial relations and to prohibit all commercial intercourse between the respective nationals, whether a member of the League or not. The Council could under Article 16(2) recommend military measures after having determined the existence of a breach of the Covenant. The automatic reaction on the part of the members under Article 16(1) seems to result from the provision that an illegal resort to war should *ipso facto* be deemed to be an act of aggression against the members.

The United Nations Charter has not provided automatic action against an aggressor state and the decision of the Security Council is essential. Nonetheless, Kelsen has argued that "as a sanction, such reaction can take place only after the violation of the law has been ascertained by an authority determined by the law".⁸⁷ He thus believed

⁸⁵-Article 51 of the Charter.

⁸⁶- J. W. Halderman, "Regional Enforcement Measures and the United Nations", 52, *Geo. L. J.*, (1963), p. 110.

⁸⁷- H. Kelsen, *The Law of the United Nations*, (Stevens & Sons, London, 1950), p. 726.

that there is no difference between the Covenant and the Charter as to the automatic character of the sanction.

However, the critical difference between the two international organisations in enforcement actions is the recommendatory role of the League's Council and the central and decisive role of the UN Security Council.

Determination of act of aggression, breach of or threat to the peace

According to Article 39 of the Charter, only the Security Council is authorised to determine the existence of a threat to the peace, a breach of the peace or an act of aggression. This provision is strengthened by Article 25 by which members of the Organisation are bound to accept the decisions of the Security Council, whereas the members of the League were free to accept the Council's recommendation on the contributions to military measures. In other words, the League's system was nearly decentralised, whereas the United Nations system is completely centralised.⁸⁸

Some writers believe that both centralised and decentralised systems are envisaged in the Charter. In other words, collective security, under Articles 39 and 42 are "centralised actions of the organisation, whereas the process of collective self-defence (under Article 51) is a completely decentralised one".⁸⁹ Indeed, the question of whether or not an act of aggression exists is to be decided in the case of a collective security by a central organ of the United Nations, the Security Council, whereas in the case of collective self-defence, so long as the Security Council does not intervene, the question is to be decided by the individual states concerned.⁹⁰

⁸⁸- H. Kelsen, *The Old and the New League*, *op. cit.*, p. 74.

⁸⁹- H. Kelsen, "Collective Security and Collective Self Defence Under the Charter of the United Nations", (1948), 42 *A.J.L.L.*, p.794.

⁹⁰- K. P. Saksena, *The United Nations and Collective Security*, (D. K. Publishing House, Delhi, 1974) p.4.

The Security Council has been given the power to determine the existence of any "threat to the peace", "breach of the peace", or "act of aggression" to make decisions regarding the measures to be taken in such cases (Article 39). The expressions mentioned in Article 39 have been left undefined and the determination of the Council must depend upon any meaning which may be attributed to it. It is not clear what are the differences and relations between "threat to the peace" in Article 1(1), "threat or use of force" in Article 2(4), and "breach of the peace" and "act of aggression" in Article 39. It seems, however, that in the drafters' opinion an "act of aggression" is other than a "breach of the peace". Logically, where "use of force" or "act of aggression" has taken place, a "breach of the peace" has also occurred.

At the San Francisco Conference it was strongly desired to incorporate a definition of aggression in the Charter.⁹¹ Since some of the smaller states were fearful that the great powers would under certain conditions close their eyes to aggressive action as a way of avoiding the obligation to take enforcement measures, they listed circumstances in which the Security Council should automatically and without delay take action.⁹²

The opposition states argued that it would be impossible to enumerate all the acts that constitute aggression. It was further argued that progress in the techniques of warfare made a definition difficult, if not impossible. Such arguments, combined with the firm stand taken by the Sponsoring Governments, led Committee III/3 and the Conference

91- The phrase "aggression" was included in the Charter as the result of a Soviet proposal at the Dumbarton Oaks Conference. The United States considered that the term "breach of the peace" was broad enough to cover the "aggression". Both the United States and the United Kingdom accepted the Soviet proposal, although at the time the United Kingdom argued against any attempt to define the term. Russell and Muther, *op. cit.*, pp. 464-5.

92- The argument was that "It should be known beforehand what acts would constitute aggression and, consequently, what acts would be subject to sanctions, the Council's work would be facilitated if a definite list were written in the Charter... The list was not intended as a definitive one nor as one which would prohibit the Council from acting in other cases...The organization must bind itself to oppose lawless force by lawful forces in certain cases where action should be obligatory... If one vote on the Security Council could prevent action, then it would be essential to have a list of circumstances when Council action would be automatic." UNCIO, Vol. 12, Doc. 881, p. 505.

to decide that no definition of aggression should be attempted other than that found in Article 2(4).⁹³

At the San Francisco Conference some delegates proposed that the action of the Security Council should be supplemented by participation of the General Assembly in decisions related to enforcement measures.⁹⁴ There was also a suggestion for a fixed period of time for action by the Council; if no action was taken within that period, then the Assembly would be free to act.⁹⁵ However, none of these proposals was accepted.

One of the weaknesses of Article 39 was, as argued, the inadequate position of the small powers in the Security Council. It seemed rather impossible for smaller nations to contribute to peace-enforcement operations without having a voice in the decision making process. The Sponsoring Governments insisted that the Council's powers should not be impaired by requesting a "voice" for the smaller nations. A "voice" would be heard only in fighting a war not in keeping the peace.⁹⁶

The Canadian delegate suggested a middle point which provided for the participation of members of the General Assembly on decisions made in the Security Council which gravely affected them.⁹⁷ France and the Soviet Union agreed to find a formula satisfying both views.⁹⁸ The amendment was referred to the Subcommittee. It was accepted and a new paragraph (Article 44) was recommended and then ratified. Article 44 provides: "when the Security Council has decided to use force it shall, before calling upon a member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the

93- UNCIO, Vol. 12, Doc. 881, p. 505.

94- Ibid, p. 503.

95- Iranian amendment, ibid, Doc. 320, p. 316.

96- Ibid, Doc. 231, p. 296.

97- Ibid, p. 303.

98- Ibid, Doc. 355, p. 327.

Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces". However, this article does not recognise a right of participation in decision making on the side of that member. It does not refer to the role of smaller powers in making decisions for military actions and is merely about the employment of contingents. No change was therefore made in Article 39.

According to Article 39, when the Security Council determines the existence of threat to the peace, breach of the peace or act of aggression, it shall make recommendations or decide on the measures to be taken. There is a question whether the Council can make recommendations on enforcement measures.

In this respect and following the request of Belgian delegate, Committee III voted unanimously on the following interpretation: "[i]n using the word 'recommendations' in Section B (corresponding to Chapter VII of the Charter), as already found in paragraph 5, Section A (corresponding to Chapter VI of the Charter), the Committee has intended to show that the action of the Council so far as it relates to the peaceful settlement of a dispute or to situations giving rise to a threat of war, a breach of the peace or aggression, should be considered as governed by the provisions contained in Section A. Under such an hypothesis, the Council would in reality pursue simultaneously two distinct actions, one having for its object the settlement of the dispute or the difficulty, and the other the enforcement or provisional measures, each of which is governed by an appropriate section in Chapter VIII."⁹⁹

It can be concluded that "recommendations" in Article 39, as the drafters of the UN Charter had in mind, were understood to refer to Chapter VI provisions to call for peaceful settlement of disputes, and the Security Council should decide, not recommend, the enforcement measures.

⁹⁹- *Ibid*, Doc. 881, p. 507.

Provisional measures

Although the Covenant of the League had not expressly referred to provisional measures, it had envisaged that in the event of "[a]ny war or threat of war, whether immediately affecting any of the Members of the League or not ... the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."¹⁰⁰

It seems that the drafters of the Covenant tried to empower the League to take effectual action to prevent conflicts developing into large scale real conflicts. However, the League of Nations failed to take such actions to safeguard the international peace.

In the Dumbarton Oaks proposals there was no reference to provisional measures; China proposed it within the framework of Chapter VII which was accepted by the United Kingdom, the USA and the USSR.¹⁰¹ However, during the discussions at San Francisco Conference, there was an opinion that, by applying provisional measures, there would be a very great latitude left to the Council and it should retard its action or diminish its effectiveness.¹⁰²

Committee III approved the following observations in the report of the Rapporteur Paul-Boncor, "[i]t is the Committee's view that the power given to the Council under paragraphs 1 and 2 (corresponding to Articles 39 and 40 of the Charter) not to resort to the measures contemplated in paragraphs 3 and 4 (corresponding to Articles 41 and 42 of the Charter) or to resort to them only after having sought to maintain or restore peace by inviting the parties to consent to certain conservatory measures, refers above

^{100.} Article 11(1) of the Covenant.

^{101.} UNCIO, Vol. 3, Doc. 2 G/29, pp. 625-6.

^{102.} Ibid, Vol. 12, Doc. 881, p. 507.

all to the presumption of a threat of war. The Committee is unanimous in the belief that, on the contrary, in the case of flagrant aggression imperilling the existence of a member of the Organisation, enforcement measures should be taken without delay, and to the full extent required by circumstances, except that the Council should at the same time endeavor to persuade the aggressor to abandon its venture by the means contemplated in Section A (corresponding to Chapter VI of the Charter) and by prescribing conservatory measures".¹⁰³

From these observations, it would appear that, although drafters of the Charter inserted provisional measures as an optional action before the application of enforcement measures, at the same time leaving no question as to the duty of the Council to take necessary enforcement measures when faced with a flagrant act of aggression.

Physical means of coercion

As mentioned earlier, the intention of the planners of the United Nations was to give the power to the Security Council to maintain the peace of the world through the use of international force. This idea came from a general feeling that the failure of the League of Nations in keeping peace was due to the absence of the physical means of coercion. All four governments at Dumbarton Oaks favoured the basic principle of making contingents of national armed forces available to the Security Council for enforcement purposes.¹⁰⁴

The reason for including the provisions of collective measures was to bring sufficient pressure upon an aggressor state to comply with its international commitments. Failure of the pacific settlement of disputes and provisional measures used by the

¹⁰³- *Id.*

¹⁰⁴- Russell and Muther, *op. cit.*, p. 467.

Council for warning the parties concerned would result in the Security Council taking various courses of action provided in Articles 41 and 42. However, before taking any action, the Security Council should determine, according to Article 39, the existence of a threat to the peace, breach of the peace, or act of aggression.

If non-military enforcement measures provided for in Article 41 proved to be inadequate, the Security Council might take military enforcement measures. However, the Council would not need to wait for such proof. At the San Francisco Conference, it was agreed that "in the case of flagrant aggression imperilling the existence of a member of the Organisation, enforcement measures should be taken without delay, and to the full extent required by the circumstances, except that the Council should at the same time endeavour to persuade the aggressor to abandon its venture, by the means contemplated in section A and by prescribing conservatory measures."¹⁰⁵

The armed forces supplied to the Security Council are not different or independent from the members' armed forces (as it had been provided in the League of Nations). At the time of drafting the Charter there were three ideas for supplying the Security Council with military forces: a permanent international force over national armies, an *ad hoc* coalition of national forces acting under some form of overall international direction, and national contingents.¹⁰⁶ The last option was accepted at the Dumbarton Oaks and subsequently in the San Francisco Conference. In fact, all members of the United Nations have undertaken to make available to the Security Council with special agreement, armed forces, assistance and facilities for maintaining international peace and security.¹⁰⁷

There was an amendment to the costs of enforcement action. It was suggested that it would be required to add a sentence in the Charter to oblige aggressor nations to pay

¹⁰⁵- UNCTAD, Vol. 12, Doc. 881, p. 507.

¹⁰⁶- Russell and Muther, *op. cit.*, p. 235.

¹⁰⁷- Article 43(1) of the Charter.

the costs of enforcement action taken against them since this would be an additional deterrent to aggression. The amendment was defeated because the Sponsoring Governments believed that this amendment would be a further obstacle to the satisfactory operation of the enforcement machinery of the Security Council.¹⁰⁸

A desire was expressed that the Organisation should seek to promote a system aiming at the fairest possible distribution of expenses incurred as a result of enforcement action.¹⁰⁹ Under Article 17(2) of the Charter the cost of the operations is to be provided by the Members as apportioned by the General Assembly.

CONCLUSION

After the abortive attempt of the League of Nations to keep international peace and security, it was the overwhelming desire to establish a world organisation with effective powers. It was expected that the new organisation would create efficient rules for maintaining and restoring the peace.

At the San Francisco Conference participating delegates made enormous endeavours to amend provisions relating to international peace and security. They sought to minimise the differentiation between the Security Council and the General Assembly, and remove the control of the Security Council over regional fora. The delegates were anxious that the Security Council would be paralysed in maintaining peace because of the veto power, and therefore, sought a reliable alternative for occasions where the veto power is exercised. However, the original proposal prepared at the Dumbarton Oaks Conference was adopted without fundamental changes.

¹⁰⁸- UNCIO, Vol. 12, Doc. 649, p. 391.

¹⁰⁹- Ibid, Doc. 881, p. 513.

In the present system, the Security Council has supremacy over other organs of the United Nations on the matters coming within Chapters VI and VII of the Charter and bears primary responsibility for maintaining peace and security. At the San Francisco Conference, Chapter VI received lengthy arguments where the role of the Security Council was concerned, though, Chapter VII was not substantially questioned by the delegates.

The main aim of the United Nations was described as maintaining international peace and security. The peace to be maintained was international peace not internal peace except incidentally and on account of international implications; and importantly, the peace "in conformity with the principles of justice and international law".

The economic and military punitive techniques of the new Charter for handling disputes which have deteriorated into armed conflict was the most important difference to the old Covenant. The Security Council has been recognised as a central organ of the United Nations for maintaining international peace and security. To this end, collective interests are to be considered over national interest.

Several methods have been provided in the Charter to bring about peace and security when they are deemed to have been endangered. The Security Council may call upon the parties to settle their differences, and may investigate any dispute or situation the continuance of which is likely to endanger international peace and security. The General Assembly may discuss any questions relating to the maintenance of international peace and security, but if action is required, the Assembly should refer the matter to the Security Council.¹¹⁰ Other than these two main UN organs, a political function is envisaged in the Charter for the Secretary-General. The Secretary-General has the right to draw the attention of the Security Council to any matter which

¹¹⁰- Article 11(2) of the Charter.

in his opinion may threaten the maintenance of international peace and security.¹¹¹ The Secretary-General may initiate and direct a fact-finding operation, and establish good offices through conciliation and mediation. Regional arrangements or agencies can also deal with matters relating to the international peace and security.¹¹²

If the parties to a dispute failed to use peaceful means in order to settle their differences, the Security Council could use enforcement measures, including military and non-military measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression and other breaches of the peace. The armed forces supplied to the Security Council for such measures are not different and independent from the members' armed forces. The General Assembly and the Secretary-General have not been given authority for enforcement measures. Regional arrangement or agencies cannot take enforcement action without the consent of the Security Council.

¹¹¹- Article 99 of the Charter.

¹¹²- Article 52 of the Charter.

CHAPTER TWO

DEVELOPMENT OF THE ROLE OF THE UNITED NATIONS RELATING TO INTERNATIONAL PEACE AND SECURITY

In the previous chapter an analysis was made of the discussions on provisions for peace and security during the drafting of the UN Charter. The present chapter will analyse later developments concerning the role of the UN in respect of the maintenance and restoration of international peace and security since the creation of the Organisation.

One of the most important developments during the Cold War era was the emergence of the institution of peace-keeping. The legal basis of UN peace-keeping will be analysed with reference to the opinion of the World Court and Chapters VI and VII of the UN Charter, followed by an examination of the basic principles of peace-keeping.

The concept of "threat to the peace" has been expanded in practice of the UN during the post-Cold War era. A comparison will be made of the UN practice during and after the Cold War period in determining the "danger" or "threat" to the peace. On the other hand, the scope of Article 2(7) of the Charter regarding the limits of powers delegated to the UN has reduced to a point that some issues that would have been considered in the past as internal matters are now deemed international matters and under the jurisdiction of the Organisation. The various aspects of Article 2(7) will be discussed with reference to UN practice concerning domestic jurisdiction, and the competent body to interpret this article will be investigated.

Another view that has been developed in recent years is the view that a mechanism of a judicial nature over the Security Council's decisions would be necessary. This issue is of particular importance where decisions on matters relating to international peace and security are concerned. The possibility of such a review will be discussed and different ideas presented.

Finally, the development of the role of the Secretary-General since the establishment of the UN will be discussed based on the provisions in the Charter, followed by a discussion on Secretary General's independent initiatives in respect of international peace and security.

EMERGENCE OF THE INSTITUTION OF PEACE-KEEPING

Within a few years of the establishment of the United Nations it became clear that, because of the division between two Permanent Members of the Security Council, it was not able to operate under Chapters VI and VII in the specific manner provided by the Charter. Defensive measures taking place by each superpower and its supporters put an obstacle in the way of the Organisation performing its tasks according to the Charter. In fact, the system collapsed before being put to the test.

The main disagreement in the Security Council was on the enforcement measures by the United Nations under Chapter VII, especially Article 43 which grants the Security Council the power to acquire armed forces, assistance and facilities from member states. As a result of this disagreement, the institution of "peace-keeping" emerged for which member states voluntarily provide troops and equipment. Such an institution had not been envisaged by the drafters of the Charter at the San Francisco Conference.

The superpowers' views

The United States and the former Soviet Union had different views as to how a peace-keeping force could be established. The Soviet Union argued that the Security Council, as specified in Article 24 of the Charter, had the sole authority to decide on all questions relating to the maintenance of international peace and security, including, by implication, the creation of peace-keeping forces.¹

The United States challenged the Soviet argument by maintaining that Article 24 did indeed give the Security Council "primary responsibility for the maintenance of international peace and security", but that this was primary and not exclusive authority.²

The interpretation of the International Court of Justice

Following the establishment of the United Nations Emergency Force (UNEF I) by the General Assembly in 1956 in the Middle East, and the establishment of ONUC (known by its French initials) by the Security Council in 1960 in the Congo, a number of questions arose with regard to the expenses of these forces. In fact, the expenses of these two forces became very heavy and there were different opinions of how, legally and politically, the financial obligations of peace-keeping forces should be met

On 20 December 1961 the General Assembly, by Resolution 1731(XVI), decided to request the International Court of Justice for an advisory opinion on the question as to whether certain expenditures authorised by the General Assembly to cover the costs of

1- A/5721, 10 Jul. 1964.

2- A/5739, 8 Oct. 1964.

ONUC and UNEF constituted "expenses of the Organisation" within the meaning of Article 17(2) of the Charter.³

Article 17(2) refers to the "expenses of the Organisation" without offering any definition for such expenses.⁴ This article is the only article in the Charter which refers to budgetary authority or to the power to apportion UN expenses.

The Court in its advisory opinion of 20 July 1962 made clear important issues to solve the crisis. It observed that the expenses of the Organisation means all the expenses and not just certain types of expenses which might be referred to as "regular expenses".⁵ However, there was an argument before the Court that one type of expenses, namely those resulting from operations for the maintenance of international peace and security, are not "expenses of the Organisation" within the meaning of Article 17(2), because they fall to be dealt with exclusively by the Security Council, and more especially through agreements referred to in Article 43 of the Charter.⁶ It was also argued that since the General Assembly is limited to discuss, consider and recommend, it cannot impose an obligation to pay the expenses that result from the implementation of its recommendations.⁷

These arguments led the Court to consider the respective functions of the General Assembly and the Security Council under the Charter. The Court made it clear that the Security Council has "primary" but not exclusive competence under Article 24(1) to maintain or restore international peace and security.⁸ To this end, the Security Council is given a power to impose an explicit obligation on an aggressor under Chapter VII

3- GA Res. 1731(XVI), 20 Dec. 1961.

4- Article 17(2) says: "The expenses of the Organisation shall be borne by the members as apportioned by the General Assembly."

5- Certain Expenses of the United Nations Case, ICJ Rep. (1962), p. 161.

6- Ibid., p. 162.

7- Id.

8- Ibid., p. 163.

and only the Council can require enforcement by coercive action against an aggressor. However, according to the Charter, the General Assembly is also to be concerned with international peace and security.⁹

The powers of the General Assembly

The Court referred to the measures to be recommended by the General Assembly under Article 14 that these measures imply some kind of action and the only limitation is a restriction in Article 12 that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so.¹⁰ Article 11(2) provides that questions relating to the maintenance of international peace and security for which action is necessary shall be referred to the Security Council by the General Assembly.¹¹

However, it is not clear that, if the General Assembly recommends to establish a peace-keeping operation, this recommendation should be considered as an "action" and referred to the Security Council. The International Court of Justice considered that the kind of action referred to in Article 11(2) was coercive or enforcement action.¹²

⁹- Article 14 of the Charter has envisaged: "Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare of or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."

¹⁰- Certain Expenses Case, *op. cit.*, p. 163.

¹¹- Article 11(2) of the Charter reads: "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the States concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

¹²- Certain Expenses Case, *op. cit.*, pp. 164-5.

Furthermore, the Court said that the word "action" must mean such action as was solely within the province of the Security Council and could not refer to recommendations which the Council might make, as for instance under Article 38, because the General Assembly has a comparable power under Article 11(2).¹³ The "action" which was solely within the province of the Security Council, the Court added, was that which was indicated by the title of Chapter VII of the Charter, namely "action with respect to threats to the peace, breach of the peace and acts of aggression".¹⁴ The Court concluded that the last sentence of Article 11(2) had no application where the necessary action was not enforcement action.¹⁵

With respect to the function of the General Assembly, the Court stated that "[i]f the word 'action' in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by states or by the Security Council".¹⁶ Consequently, the General Assembly can establish a peace-keeping force but not in the sense of "coercive or enforcement action". In fact, the Court by its opinion made clear the distinction between peace-keeping and enforcement measures. It also determined that both UNEF I and ONUC were peace-keeping forces and not enforcement actions within the compass of Chapter VII and Article 43 could not have any applicability to these cases.¹⁷

With regard to the Security Council's powers, it was determined that if agreements under Article 43 had not been concluded, in cases of "situations" as well as disputes, it

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Ibid.*, p. 166.

must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a state. The Court added that the costs of action which the Security Council is authorised to take constitute "expenses of the Organisation" within the meaning of Article 17(2).¹⁸

The actual expenditures of the United Nations

There is a question as to what are the actual expenditures which should be constituted as expenses of the Organisation under Article 17(2)? The Court's opinion was that these expenditures must be tested by their relationship to the purposes of the United Nations laid down in Article 1 of the Charter, and, if an expenditure were made for a purpose which was not one of the purposes of the United Nations, it could not be considered as one of the "expenses of the Organisation".¹⁹

In fact, the purposes of the United Nations are broad, but neither they nor the powers conferred to effectuate them are unlimited and the presumption is that the action taken by the Organisation to fulfil one of the purposes is not *ultra vires* the Organisation.²⁰

At the outset of its opinion, the Court noted that the expenses of the Organisation are the amounts paid out to defray the costs of carrying out the purposes of the Organisation, and that the expenditures authorised in General Assembly resolutions with regard to UNEF and ONUC constituted "expenses of the Organisation" within the meaning of Article 17(2) of the Charter.²¹

Although this advisory opinion of the Court did not lead to an immediate solution to the crisis, it settled any doubts about the legality of peace-keeping and it became a

18. *Ibid.*, p. 167.

19. *Id.*

20. *Ibid.*, p. 168.

21. *Ibid.*, pp. 179-80.

support for developing the institution of peace-keeping. Another legal point which was examined by the Court was an *ultra vires* act of the Organisation. It was said that the internal legal systems of states had often some procedure for determining the validity of a legislative or governmental act, but no analogous procedure was to be found in the structure of the United Nations.²²

During the drafting of the Charter, there were proposals to place the ultimate authority to interpret the Charter in the International Court of Justice which were not accepted, and, as was anticipated at San Francisco, each organ must in the first place at least, determine its own jurisdiction.

The World Court in its opinion made it clear that the Assembly cannot even by recommendation undertake enforcement action. It should be noted that under the "Uniting for Peace Resolution" the General Assembly may recommend the adoption of certain measures which might be decided by the Security Council under Chapter VII, specially collective measures. "At no time does the Court uphold the right of the Assembly to recommend enforcement measures (though it emphasises *repeatedly* that only the Council may order coercive action), either under the Charter generally or under the Uniting for Peace Resolution. Moreover, the opinion of the Court studiously avoids all mention of that Resolution, even though it was much discussed in the pleadings."²³

Except UNEF I, which was authorised by the General Assembly after the vetos of the United Kingdom and France had paralysed the Security Council, the peace-keeping function of the UN is now firmly in the control of the Security Council.

22- *Ibid*, p. 168.

23- D. W. Bowett, United Nations Forces, (Stevens & Sons, London, 1964), p. 291.

The legal basis of peace-keeping

The institution of peace-keeping was not foreseen in the Charter; it is therefore necessary to investigate its legal basis in the developments of United Nations practice for the maintenance of international peace and security. The resolutions passed by the Security Council and the General Assembly have invariably not articulated the constitutional basis of peace-keeping. The only exceptions are the cases of Palestine and Iraq-Iran war in which the Security Council expressly referred to Articles 39 and 40 to call for provisional measures. Also, the Security Council referred to Chapter VII when it created peace-keeping forces between Iraq and Kuwait, but with no mention of a specific article. Therefore, the legal basis of peace-keeping operations in general needs careful consideration.

General powers

The first possibility for the legal basis of peace-keeping operations is Articles 24 to 26 of the Charter with regard to general functions and powers of the Security Council for the maintenance of international peace and security. However, specific powers granted to the Security Council regarding international peace and security are in Chapters VI and VII. There is an opinion that Article 24 of the Charter is not as it would seem a general determination of the competence of the Security Council, and it would not be admissible to interpret the text in a way that confers upon the Council powers which does not possess under other provisions of the Charter.²⁴

²⁴- H. Kelsen, The Law of the United Nations, (Stevens & Sons, London, 1950), pp. 283-4.

Chapter VI

Since peace-keeping operations were not foreseen under either Chapter VI or Chapter VII, they seem to fall in unwritten Chapter VI^{1/2} and this sounds legally defensible because peace-keeping operations are a more ambitious level of UN involvement than anything provided for in Chapter VI.²⁵ In response to the view that peace-keeping should be seen as "squarely derived from Chapter VI",²⁶ it has been said that Chapter VI deals with pacific *settlement* of disputes, while *peace-keeping* has been defined as a technique that does not lead to a settlement or solution *per se*.²⁷ Indeed, peace-keeping forces try to help maintain or restore peace in areas of conflict leading to final solution of conflicts.

Furthermore, Chapter VI can hardly be considered as a constitutional basis of all peace-keeping operations, because the concept of peace-keeping has been created as a result of the Council's failure to take action under Chapter VII and as an alternative to these actions.

Articles 41 and 42

It has been suggested that Article 41 may provide the constitutional basis for peace-keeping operations since they could be characterised as "measures not involving the use of armed force" in the meaning of that article.²⁸ However, although peace-keeping operations are not enforcement actions, the use of armed force is not excluded from them.²⁹ In addition, peace-keeping forces are authorised to use force not only in self-

25- Ove Bring, "Peacekeeping and Peacemaking: Positive Issues for the United Nations", in, 20 Melb. U. Law Review, (1995), p. 56

26- Gareth Evans, The Use of Force in Peace Operations, Address to the Stockholm International Peace Research Institute (SIPRI), Stockholm, 10 Apr. 1995, p. 3.

27- O. Bring, op. cit., p. 57.

28- Sohn, "The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force", A.J.I.L., (1958), p. 230.

29- Certain Expenses of the United Nations Case, ICJ Rep., (1962), p. 166.

defence but also in some cases in order to bring about their mandate if armed resistance be mounted to hinder their actions.³⁰

Another assumption is that, under Article 42, the Council "... may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security...", and since there is no reason that only war should be considered under this article, it has been concluded that the constitutional basis of peace-keeping operations can be Article 42.³¹

It has also been stated that "the nature of international police action under Article 42 is not diminished because the blue helmets are usually forbidden to fire (except in self-defence), just as the action of national police who are forbidden to fire on demonstrators is not any less a police action".³²

Schwarzenberger has stated that "whether armed for defensive or offensive purposes, a force on the UNEF model is an armed force and, therefore, falls under Article 42 if established by the Security Council. Yet nothing in the wording of Article 42 suggests that the creation of armed forces under this Article depends either on the special agreements referred to in Article 43 or on the proper functioning of the Military Staff Committee provided for in Article 47".³³

Although the language of Article 42 does not disclose its connection with Article 43, the link between the two articles is specifically indicated in Article 106, which envisages possible joint action by the permanent members "pending the coming into

30. Dan Ciobanu, "The Power of the Security Council to Organize Peace-Keeping Operations", in, A. Cassese (ed.), United Nations Peace-keeping Legal Essays, (Sijhoff & Noordhoff, The Netherlands, 1978), p. 18.

31. Benedetto Conforti, The Law and Practice of the United Nations, (Kluwer Law International, The Hague, 1996), p. 200.

32. Id.

33. D. Ciobanu, op. cit., p. 18.

force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibility under Article 42".

Furthermore, *travaux préparatoires* indicate that drafters of the UN Charter intended that the application of Article 42 was to be dependent on the entry into force of the special agreements that are provided for in Article 43. It was concluded at the San Francisco Conference, in respect of the force put at the disposition of the Security Council under Article 43, that this force should take the form of *national contingents* furnished by the members according to the *special agreements* to be negotiated subsequently.³⁴ These contingents would be put into action in accordance with the plans of a Military Staff Committee.³⁵

As mentioned earlier, the International Court of Justice in its advisory opinion stated that peace-keeping operations such as UNEF are not enforcement actions within the compass of Chapter VII and Article 43 could not have any applicability to these cases.³⁶ In fact the consensual nature of peace-keeping operations determines that they have not enforceable rights and once the host state withdrew its consent, peace-keeping forces have to withdraw its territory.

Finally, as the Secretary-General Boutros-Ghali stated in his Agenda for Peace. "[p]eace-keeping can rightly be called the invention of the United Nations. It has brought a degree of stability to numerous areas of tension around the world"³⁷. Since peace-keeping forces mostly have been dispatched to monitor cease-fires or withdrawal of foreign forces as provisional measures, Article 40 would seem to provide a possible legal basis for peace-keeping operations.

34. UNCIO, Vol. 12, Doc. 881, p. 509.

35. Id.

36. Certain Expenses Case, op. cit., p. 166.

37. ILM, (1992), p. 967, para. 46.

Article 40, its relation to Article 39, and its binding effects

Under Article 40 "the Security Council may, before making the recommendation or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable". It is not clear whether the "call" of the Security Council should be considered as "recommendation" or "decision", and it is not clear that the Security Council is obligated to make a formal determination under Article 39 before calling upon the parties to comply with provisional measures.

It seems that provisional measures should be considered as emergency measures before adopting any resolution under Chapter VII and "before making the recommendations or deciding upon the measures provided for in Article 39". It might be said that international crises can develop over long periods of time and the Council can take several measures at the same time and take up provisional measures also after having adopted a resolution under Chapter VII either to recommend settlement procedures under Article 39 or after having decided upon measures involving or not involving the use of force.³⁸

Higgins believes that "there must surely be an implied finding under Article 39 for action under Chapter VII to be taken."³⁹ However, as will be discussed in the proceeding chapters, most of the provisional measures have been adopted by the Security Council without *any* finding under Article 39.⁴⁰

38. B. Conforti, *op. cit.*, p. 183.

39. R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, (Oxford University Press, London, 1963), p. 236.

40. With regard to a tendency among states which try to avoid the use of Chapter VII when they wish to retain the option of not being bound under Article 25 Higgins says: "it is misconceived to suppose that all Chapter VII resolutions are binding, while no Chapter VI resolutions are ... the binding quality of a resolution turns upon whether it is a decision or a recommendation ... not its placing in Chapter VI or Chapter VII".

Rosalyn Higgins, "A General Assessment of United Nations Peace-keeping", in, A. Cassese (ed.), *op. cit.*, p. 4.

In United Nations practice there are few cases where the Security Council called for provisional measures with explicit reference to Articles 39 and 40. In the case of Palestine, the Council in Resolution 54 determined a threat to the peace under Article 39, and ordered under Article 40 for a cease-fire.⁴¹ In the case of Iraq-Iran war the Security Council called for provisional measures under Article 40 with a prior finding of Article 39.⁴²

In the case of Cyprus, the Security Council in its recommendation to create peace-keeping forces referred to the situation as being likely to endanger the maintenance of international peace and security.⁴³ It seems the Council implicitly referred in this case to Chapter VI (Article 33(1)). In fact, in most cases, it is not clear whether the provisional measures adopted by the Council could fall under Chapter VII or Chapter VI. Since recommendations for provisional measures could be adopted either under Chapter VI or VII, it is most appropriate that the Council determines the constitutional basis of its decisions in its resolutions.

There is a question whether the "call" of the Security Council under Article 40 should be considered as mandatory or recommendatory. The second part of Article 40 has two contradictory statements. According to this article, the Security Council may

"call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures"

41- SC Res. 54, 15 July 1948. The Security Council again referred to Articles 39 and 40 in Resolution 62 of 16 November 1948.

42- SC Res. 598, 20 July 1987.

43- SC Res. 186, 4 Mar. 1964.

The "necessary or desirable" provisional measures which should be taken "without prejudice to the rights of the parties" would imply that the provisional measures are recommendatory rather than mandatory. Furthermore, the provisional nature of these measures to prevent the worsening of a situation demonstrates that they must not prejudice the rights and claims or positions of the parties concerned. However, the Council take account of failure to comply with provisional measures.

In practice, the Security Council, in ordering a cease-fire in the case of Palestine, stated that failure to comply would demonstrate the existence of a breach of the peace and it might adopt further action under Chapter VII.⁴⁴ As the hostilities broke out, the Council appointed a committee to study the further measures that would be appropriate to take under Chapter VII if the parties failed to comply with provisional measures; these threats had some effect.⁴⁵

In the case of the Congo, the Council adopted serious action to obtain compliance with provisional measures. In the crisis over Katanga, the Council urged the UN to take all appropriate measures to prevent the occurrence of civil war in the Congo including the use of force, if necessary, in the last resort.⁴⁶ It seems that the mandatory or recommendatory nature of provisional measures depends on the nature of the Council's resolution. The Council in few cases has determined the consequences of failure of the parties to comply with provisional measures. States have considered the Council's request as an invitation rather a mandatory call. It might be said that mandatory call by the Security Council might be inconsistent with the "without prejudice" clause.

44- S/801, 29 May 1948, S/902, 15 July 1948, S/1070, 4 Nov. 1948.

45- Id.

46- SC Res.161, 21 Feb. 1961.

It should be noted that, under Article 33, the Council may call upon parties to settle their disputes by peaceful means. Goodrich, Hambro and Simons believe that "the term 'calls upon' is used would suggest ... that resolutions adopted under Article 40 are more than 'recommendations'" and the same verb used in Article 33 authorises "the Council to call the attention of members to their obligations of peaceful settlement. Moreover, under Article 41, the Council may 'call upon' members to apply non-military measures which they are obligated to 'accept and carry out'".⁴⁷ They concluded that "[p]rovisional measures' are not 'enforcement measures' and do not therefore fall under the specific exception stated in Article 2(7)".⁴⁸

In fact, the provisional measures in Article 40 are sharply distinguished from enforcement measures under Article 42. Bowett believes that Article 40 would be brought into operation in cases of threats to the peace or breaches of the peace.⁴⁹ "It is difficult to envisage it being an appropriate measure where there has been a clear finding of aggression - though a state may be called upon to cease fire, and its refusal to obey such a call may well provide further, and final evidence of its aggressive intent."⁵⁰

With regard to the attacked state, it should be noted that in practice it can be expected that an attacked state which has conducted a successful defence will not easily comply with a mere call for a cease-fire.⁵¹ Furthermore, the Council may hesitate to employ enforcement measures under Articles 41 and 42 against the attacked state, even when this state disregards calls for provisional measures.⁵² Therefore, in case of flagrant aggression, it would be appropriate that the Council take effective measures under

47- L. M. Goodrich, E. Hambro and A. P. Simons, Charter of the United Nations, Commentary and Documents, (Columbia Univ. Press, USA, 1969), p. 306.

48- Id.

49- D. W. Bowett, op. cit., p. 281.

50- Id.

51- Bruno Simma (ed.), The Charter of the United Nations, A Commentary, (Oxford University Press, Oxford, 1994), p. 620.

52- Id.

Articles 41 and 42 rather than call for provisional measures under Article 40, to avoid encouraging the aggressor to continue its aggression and to prevent the attacked state from disregarding the Council's calls for provisional measures.

The Security Council might call for provisional measures such as cease-fire, cessations of hostilities, withdrawal of forces, conclusion of truce, release of prisoners or any measure to maintain cease-fire and truce agreements. However, there is a question whether the establishment of a peace-keeping operation *per se* can constitute provisional measures? One might suggest that the Security Council and the General Assembly may establish subsidiary organs under Articles 29 and 22 of the Charter, as it deems necessary for the performance of their functions. It seems that, the creation of peace-keeping forces by a simple procedural vote applicable to the setting up of subsidiary organs is questionable, since the establishment of a subsidiary organ cannot be divorced from the functions entrusted to that organ.⁵³

Peace-keeping operations might be organised by the Security Council with a view to supervising and assisting in the implementation of the provisional measures requested under Article 40.⁵⁴ Peace-keeping operations might be complementary to and conditional on the existence of other provisional measures, and the power of the Security Council to organise the operations would be in this case an implied power which is directly related to its express power to call upon the parties concerned to comply with such provisional measures as it deems necessary and desirable.⁵⁵ Being complementary to and conditional on the existence of other provisional measures, the peace-keeping operations must be organised under the same conditions which are set forth in Article 40 for the provisional measures. This amounts to saying that the Security Council could not exercise, under Article 40, its power to organise peace-

⁵³- Bowett, *United Nations Forces: A Legal Study*, (1967), 178.

⁵⁴- *Ibid*, p. 280.

⁵⁵- *Id.*

keeping operations unless the conditions set forth for the exercise of the power expressly provided for by that legal rule to call for provisional measures are ascertained by the Council.⁵⁶

It is reasonable to conclude that the establishment of peace-keeping forces is based on Article 40 in the sense that they are established for purposes such as cease-fire and either include or are confined to the supervision of provisional measures.

The basic principles of peace-keeping

There are three important basic principles of peace-keeping which are essential to its success. These are: the consent of the parties, impartiality, and non-use of force except in self-defence.⁵⁷ The examination of these principles clarifies the real concept of peace-keeping and its differences from other actions authorised by the United Nations. The application of these principles has developed by the evolution of mandates of peace-keeping operations as will be discussed in the context of the practice of the Organisation later in this thesis.

Consent

Since peace-keeping is a consensual type of operation and is quite different from enforcement measures, it is necessary that the parties to the conflict, after accepting a cease-fire, give their consent to the presence of peace-keeping forces.

It is clear that, if the consent of the host state was withdrawn, the peace-keeping force should withdraw immediately, as was the case with UNEF I in 1967. However, there

⁵⁶- D. Ciobanu, *op. cit.*, p. 45.

⁵⁷- Boutros Boutros-Ghali, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, 3 Jan. 1995, A/50/60-S/1995/1, para. 33.

is an argument that, since the establishment of peace-keeping forces is by the decision of UN organs (the Security Council or the General Assembly), the withdrawal of the force should be a decision made by the UN and not the host state.⁵⁸ It seems that the consensual nature of peace-keeping forces requires the consent of the host state in line with its sovereignty.

In fact, these operations cannot be successful without the consent and co-operation of host states and all disputant parties. The United Nations forces in Lebanon (UNIFIL) was established with the consent of Lebanese government, but lacked the co-operation of Israel as a party to the dispute; it was unable to perform its mandate and is still experiencing difficulty in performing its tasks in a hostile environment.

In recent years, peace-keeping has forfeited the consent of the parties specially in intrastate conflicts such as in Bosnia and Somalia.⁵⁹ In fact, the warring factions, by breaking their agreements for UN supervision, effectively withdrew their consent and announced non-co-operation with the United Nations. In such an environment, peace-keeping would be impossible since there is no peace to keep.

The principle of "consent" as a constitutional basis of peace-keeping has been rejected by some scholars. Bowett has argued that "the constitutional basis of a United Nations force is not to be found in the consent of any state upon whose territory the force may be required to operate: such constitutional basis is to be found in the Charter and not in matters extraneous to the Charter (for the Charter nowhere refers to the necessity for such consent). Hence the existence of such a consent may be relied upon to indicate that the operations are in the nature of 'peace-keeping' operation rather than 'preventive or enforcement action' but this is to treat consent as evidence of a

⁵⁸- This argument was made by Israel, New Zealand and Australia in the case of UNEF I. *GAOR*, 592 mtg., paras. 13, 111, 79, 1956.

⁵⁹- The nature of intrastate conflicts will be discussed later and their effectiveness in performing their traditional mandate will be assessed.

particular Charter basis, not to accept consent as in itself a constitutional basis of the force ... the right of the United Nations to place a United Nations force in the territory of a state is best dealt with as a question separate from the constitutional basis of the force".⁶⁰ Thus, Bowett has separated the consent of the host state from the legal basis of peace-keeping.

However, it should be noted that, although the Charter nowhere refers to the necessity for such consent, Article 2(7) provides that UN should not intervene in the territory of a state. Therefore, obtaining the consent of host state entitles the UN to intervene in the territory of that state; otherwise, the principles of sovereignty and territorial integrity prevent the UN from such intervention.

Retrospectively, the necessity of consent is implied by the Charter, though not explicitly referred to, and is necessarily an element of the legal basis of peace-keeping. Moreover, there is no single case in the practice of the UN of a peace-keeping force established without the consent of the host state which remained in operation when that consent was terminated by the host state. Practically, obtaining consent is also an operational matter without which the mandate of the force cannot be performed without serious difficulties.

Impartiality

The second principle of peace-keeping is impartiality. This principle distinguishes peace-keeping from peace enforcement, because in the latter the UN identifies the aggressor which becomes the target of enforcement action - hence the UN is no longer impartial. The UN should take no sides in peace-keeping and should establish a

⁶⁰- D. W. Bowett, *op. cit.*, pp. 311.

neutral military presence to prepare an environment for the parties to solve their conflict peacefully.

In fact, peace-keeping forces are deployed to control the borders and supervise cease-fires. They are armed to fulfil these functions, and they do not pursue military objectives nor have the function of combatants.⁶¹ It is imperative that peace-keeping forces must not take part in a conflict. The creation and the function of peace-keeping forces should not cause any prejudice to the claims or rights of the parties concerned.⁶²

Other than the impartiality of the Organisation, the states participating in UN peace-keeping should not pursue individual economic or political interests concerning themselves or any of the disputant parties. Although disarmament is a separate issue, it should be borne in mind that the countries participating in peace-keeping would contravene the principle of impartiality if they at the same time exported weapons to the field of conflict. The contributors to peace-keeping are not expected to exploit the situation and stimulate the global arms race; otherwise it may seem more appropriate if they withdrew from peace-keeping.

Use of force only in self-defence

Indeed the principle of impartiality implies the neutrality of peace-keeping forces and has a direct relation to the third principle, i.e. the use of force only in self-defence. The status of neutrality requires that UN forces do not take coercive action against any of the combatants, and are prohibited from taking the initiative in the use of

⁶¹- Report of the Secretary-General, A/3943, 9 Oct. 1958, para. 15.

⁶²- A/3302 para. 8.

weapons.⁶³ That is why the UN forces have always had difficulty in using force in self-defence.

In the case of the Congo, the Security Council authorised the Secretary-General to take "vigorous action" including use of force "if necessary" for the expulsion of foreign military personnel not under UN command.⁶⁴ This authorisation by the Council was much wider than the principle of self-defence by which the forces are only allowed to react in self-defence when attacked. In fact, UN forces was given a new mandate by the Security Council for peace-enforcement.⁶⁵ However, the Secretary-General had always affirmed that peace-keeping forces in Congo never exceeded the scope of self-defence.⁶⁶

It cannot be concluded that these forces acted merely under Article 40 or 42, because their legal basis was much wider than Article 40 and very similar to Article 42. It may be concluded that, since UN forces could use force only for the expulsion of foreign forces to facilitate the settlement of the dispute, this use of force *per se* was not considered as the final settlement of the dispute. The International Court of Justice, with regard to ONUC, in the *Expenses* case stated that "the operation did not involve 'preventive or enforcement measures' against any state under Chapter VII".⁶⁷

In recent years, by establishing a new concept of "safe areas", peace-keeping forces have undertaken a new mandate. The UN forces in defence of these "safe areas" have used force to a greater extent than in self-defence. The United Nations forces in Bosnia were authorised by the Security Council to carry out their mandate in the safe

63- A/3943 para. 179, S/5653 para. 6.

64- SC Res. 169, 24 Nov. 1961.

65- *Id.*

66- S/4940/Add. 4 para. 7.

67- Certain Expenses of the United Nations Case, ICJ Rep., 1962, p. 177.

areas "acting in self-defence, to take the necessary measures, including the use of force, to reply to bombardments against the safe areas by any of the parties ...".⁶⁸

Although enforcing the safe areas is much wider than the use of force for individual self-defence, UN forces in Bosnia cannot be considered as an enforcement measure under Article 42, because they were not authorised to use force for the final settlement of the dispute.

In the author's opinion, there are two kinds of enforcement action by the United Nations. The first is the enforcement action for final solution of the conflict. This has been used by recommendation in the case of Korea (1950) and by authorisation in the case of Kuwait (1990). Albeit these actions cannot be considered under Article 42, they were used to end the hostilities. The second is the enforcement action against the forces which would violate the bans established by the United Nations. This kind of action may be considered as a provisional measure under Article 40 since it would not be used to settle the dispute by war.

THE ENLARGEMENT OF THE CONCEPT OF "THREAT TO THE PEACE"

The concept of "threat to the peace" has been expanded in practice of the United Nations during the post-Cold War era. In this section, a comparison will be made of the UN practice during and after the Cold War period in determining the "danger" or "threat" to the peace.

⁶⁸- SC Res. 836, 4 June 1993.

Danger to the peace

One of the vague and broad concepts in the UN Charter is the concept of "threat to the peace" stated in Article 39. The Charter has not clarified the difference and the relation of the latter to the concept of endangering the maintenance of international peace and security in Article 34 in Chapter VI.

Chapter VI relates to the Council's powers of pacific settlement of disputes or situations which are "likely to endanger the maintenance of international peace and security", while the title to Chapter VII reads "action with respect to threats to the peace, breaches of the peace, and acts of aggression". Under Chapter VII the Council has enforcement powers for maintaining peace and security. White believes that, conceptually, "there is a legal distinction between a 'danger' and a 'threat'. The latter, for example, is often used as a legal tool to facilitate the imposition of mandatory measures under Chapter VII, a function which the label 'danger' is not legally qualified to perform."⁶⁹ However, it seems that a clear distinction between a threat to the peace and a danger to the peace is not conceptually possible.

During the Cold War, the Security Council was reluctant to determine that a situation constituted a threat to or a breach of the peace or act of aggression. The Council's tendency in most cases was to consider the matters under Chapter VI. For example, the Security Council's Resolutions 163 and 186 of 1961 and 1964 respectively have referred to situations which were "likely to endanger the maintenance of international peace and security" or "likely to threaten international peace and security". In 1970 the Council's Resolution 282 referred to a "potential threat to international peace and security". There is an opinion that "potential threat" is not different to danger to the peace, and it is a product of the Cold War which forced members to achieve

69- N. D. White, Keeping the Peace, (Manchester University Press, Manchester, 1995), p. 38.

consensus by appeasing all sides.⁷⁰ It seems that political considerations are the motivating factor behind the Council's finding or not finding of a "threat to the peace".

Threat to the peace

The Council's determination during the Cold War

The Security Council has referred to the term "threat to the peace" in both intra-state and inter-state conflicts. The Council's recent usage of this term has accompanied the actions taken by this organ.

The earliest reference to "threat to the peace" was in Security Council Resolution 54 of 15 July 1948 when hostilities had broken out in Palestine after Israel's Declaration of Independence. The Council determined that the situation in Palestine constituted a threat to the peace within the meaning of Article 39 and ordered a cease-fire under Article 40.⁷¹ It declared that, in case of non-compliance, it would take further action under Chapter VII. However, an armistice was agreed later. It is not clear why the Security Council did not refer to the situation in Palestine as a breach of the peace.

The next move by the Security Council to determine "threat to the peace" was in 1966 with regard to the situation in Southern Rhodesia. Although the Western powers were unwilling to consider that the racial policies could be considered as a "threat to the peace", the African and Asian members, backed by the Soviet Union, emphasised the serious effects of these policies on Africa and considered the application of sanctions

70- *Ibid*, p. 42. In this respect White says: "[i]f some members desired a finding of a threat accompanied by Chapter VII action, whilst others, for equally political reasons, desired only a finding of a danger and a recommendation of peaceful settlement under Chapter VI, in order to produce some sort of resolution a compromise was often achieved by the use of 'potential threat' accompanied perhaps by voluntary measures. If a compromise was not achieved the veto was inevitably used." *Id.*

⁷¹- SC Res. 54, 15 Jul. 1948.

for maintaining the peace of the continent.⁷² The Security Council in Resolution 232 of 16 December 1966 referred to Articles 39 and 41 and determined that the situation in Southern Rhodesia was a threat to international peace and security,⁷³ but the Council did not make it clear why the situation was a threat to the peace. It may however be said that the Council was unwilling to recognise the racial policies within a state as a threat to the peace.

In 1977 the Council, with reference to racial discrimination and *apartheid* in South Africa and the persistent acts of aggression by South African Government against neighbouring States, acted under Chapter VII and determined that the policies and acts of South Africa constituted "a threat to the maintenance of international peace and security".⁷⁴ In fact, the Security Council determined the threat to the peace with reference to both the internal and external actions of South African Government.

However, in 1985, South Africa was condemned by the Security Council because of an act of aggression against Angola and in this connection it determined that a violation of the sovereignty and territorial integrity of the latter was a danger to international peace and security.⁷⁵ It should be noted that, although the act of aggression was recognised by the Council, the danger fell within the provisions of Chapter VI.

Earlier in 1961, the Security Council in case of the Congo had emphasised that the danger of wide-spread civil war in the Congo was a threat to international peace and security, and urged the UN to take appropriate measures to prevent the occurrence of civil war in the Congo; it also urged the withdrawal of all Belgian troops.⁷⁶ It might

⁷²- For more information see: Goodrich et.al., *op. cit.*, pp. 296-7.

⁷³- SC Res. 232, 16 Dec. 1966.

⁷⁴- SC Res. 418, 4 Nov. 1977.

⁷⁵- SC Res. 567, 20 June 1985.

⁷⁶- SC Res. 161, 21 Feb. 1961.

be concluded that during the Cold War, the external element, i.e. a hostility between two states, was essential for the Council to determine a situation as a threat to the peace.

The Council's determination after the Cold War

By the end of the Cold War, the Security Council extended the concept of a "threat to the peace" to different situations which has not been without controversy. In fact, the Council's reluctance to refer to the concepts of Article 39 has decreased.

The Security Council in 1991 in Resolution 688 condemned the repression of the Iraqi civilian population in many parts of Iraq, including Kurdish populated areas, "the consequences of which [would] threaten international peace and security in the region".⁷⁷ It is interesting to note that the repression itself was not called a threat to the peace, but its consequences, which could be the mass flow of refugees towards and over the Turkish and Iranian frontiers, was considered a threat to international peace.

The Council in Resolution 688 made no reference to Article 39 or Chapter VII and did not take economic sanctions against Iraq (since comprehensive sanctions had already been adopted), and did not authorise member states to take forceful measures (as it did in Resolution 678). The Council by Resolution 688 reaffirmed the commitment of all member states to respect the sovereignty, territorial integrity and political independence of Iraq, and insisted that Iraq give immediate access to international humanitarian organisations and appealed to all member states to contribute to the humanitarian relief efforts.⁷⁸ Resolution 688 received ten votes in favour, three

⁷⁷- SC Res. 688, 5 Apr. 1991.

⁷⁸- *Id.* In the Chapter on Kuwait crisis the action by individual states to create safe areas will be discussed.

against (Cuba, Yemen, Zimbabwe), and two abstentions (China and India). The states which could not support the resolution expressed alarm at the intrusion into another State's internal affairs.⁷⁹

In the former Yugoslavia in 1991, when several republics unilaterally declared independence, the hostilities began between the forces of the Federal government and the state of Croatia. The Security Council in Resolution 713 determined the continuation of this situation "a threat to international peace and security". The Council referred to the consequences for the countries of the region, in particular in the border areas of neighbouring countries. It can be said that in this case also the flow of refugees to the other countries in the region was considered as a threat to the peace. The Council decided, with reference to Chapter VII, to implement a general and complete embargo. However, since the republics had not been recognised at that time, the situation was deemed as an internal matter with consequences for other states.

Following the recognition of the republics and their admission to the United Nations, the Council determined that the situation in Bosnia and Herzegovina and in other parts of the former Yugoslavia, constituted a threat to the international peace and security.⁸⁰ By changing the system in the former Yugoslavia, the situation was no longer a civil crisis.

In the case of Somalia, where the head of the State had fallen and the fighting between different factions began, the Security Council by Resolution 733 determined that a threat to international peace and security existed.⁸¹ In this resolution there was no reference to the consequences on the stability and peace in the region, and it was

⁷⁹- White, op. cit., p. 47.

⁸⁰- SC Res. 757, 30 May 1992.

⁸¹- SC Res. 733, 23 Jan., 1992.

decided to implement a complete embargo under Chapter VII. No particular party was addressed and it is not clear which entity was targeted for embargo.

The Security Council referred to the concept of "threat to the peace" in 1992 in the case of Libya which has not been without controversy. After the United States and United Kingdom had requested the two Libyan officials who had been indicted on the suspicion of having caused the air crash over Scotland (Lockerbie) to be handed over to them, the Security Council decided, without mentioning Chapter VII, that Libya should meet these requests.⁸²

Although Libya offered a trial for the two Libyans in Libya, and thereby purporting to comply with its obligations under Article 7 of the Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971,⁸³ this did not satisfy the Council, and led it to adopt Resolution 748.

The Security Council in Resolution 748, after recalling Article 2(4) of the Charter, qualified as a threat to international peace and security the failure by the Libyan Government to demonstrate its renunciation of terrorism by not surrendering two officials to the United States or the United Kingdom.⁸⁴ Furthermore, the Council went on to impose enforcement measures under Chapter VII to obtain Libya's compliance with the requests.⁸⁵

Another broad interpretation of the concept of the "threat to the peace" was in the case of Haiti in 1993. On 16 June 1993, the Security Council determined that it was a unique and exceptional circumstance, i.e. the legitimate government which had been

⁸²- SC Res. 731, 21 Jan. 1992.

⁸³- Convention on Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sep. 1971, 24 U.S.T. 65, 974 U.N.T.S. 177.

⁸⁴- SC Res. 748, 31 Mar. 1992.

⁸⁵- Id.

overthrown by a military government was not reinstated, and that the "continuation" of the situation threatened international peace and security.⁸⁶ Furthermore, the Council referred to the refugee problem and decided to apply economic sanctions against Haiti.⁸⁷ The Council in its Resolution 940 recognised that the unique character of the situation in Haiti required an exceptional response, and, under Chapter VII, authorised member states "to use all necessary means to facilitate the departure from Haiti of the military leadership".⁸⁸

The recent practice of the Security Council demonstrates its tendency to enlarge the concept of "threat to the peace". The refugee problem (in the cases of Iraq and Yugoslavia), the non-action *per se* (in the case of Libya), the existence of a dictatorship regime (in the case of Haiti): each has been recognised by the Council as a "threat to the peace".

The Security Council has not made clear what standards a situation should meet to be recognised as a "threat to international peace" within the context of Article 39. Combacau believes that "[a] threat to the peace in the sense of Article 39 of the Charter is a situation which the organ, competent to impose sanctions, declares to be an actual threat to the peace".⁸⁹ He felt that there must be an explosive situation which would constitute an actual and persistent threat to international peace and security.⁹⁰

At the conclusion of a meeting of the Security Council, held on 31 January 1992 at the level of Heads of States, a statement was read as follows: "[t]he absence of war and military conflicts amongst States does not in itself ensure international peace and

⁸⁶- SC Res. 841, 16 June 1993.

⁸⁷- SC Res. 841, 16 June 1993.

⁸⁸- SC Res. 940, 31 Jul. 1994.

⁸⁹- J. Combacau, *Le pouvoir de sanction de l' ONU*, (Paris, 1974), p. 100, quoted in, Peter H. Kooijmans, "The Enlargement of the Concept 'Threat to the Peace'", Rene-Jean Dupuy (ed.), *The Development of the Role of the Security Council*, (Martinus Nijhoff Publishers, Dordrecht, 1993), p. 111.

⁹⁰- *Ibid*, p. 114.

security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security."⁹¹ It is believed that the words "threat to the peace" in this statement are not used in the sense in which they have been used in Article 39 of the Charter.⁹² The reason for this opinion may be that economic, social, humanitarian, and ecological fields are essentially considered as internal matters of any state. The subject of domestic jurisdiction will be discussed in more detail later.

Regarding the actions necessary to remove a threat to the peace, reference should be made to a report submitted by the Secretary-General Boutros Boutros-Ghali in 1992 entitled "An Agenda for Peace". It has distinguished four areas for action under the titles of preventive diplomacy, peacemaking, peace-keeping and peace-building.⁹³

The Secretary-General suggested that "[t]he most desirable and efficient employment of diplomacy is to ease tensions before they result in conflict - or, if conflict breaks out, to act swiftly to contain it and resolve its underlying causes. Preventive diplomacy may be performed by the Secretary-General personally or through senior staff or specialised agencies and programmes, by the Security Council or the General Assembly, and by regional organisations in cooperation with the United Nations. Preventive diplomacy requires measures to create confidence; it needs *early warning* based on information gathering and *informal or formal fact-finding*; it may also involve *preventive deployment* and, in some situations, *demilitarised zones*." (Emphasis added.)⁹⁴

91. S/23500.

92. P. H. Kooijmans, *op. cit.*, p. 118.

93. Boutros Boutros-Ghali, An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, A/47/277 - S/24111.

94. *Ibid.*, para. 23.

It is believed that "[a] number of suggestions and recommendations made in the Chapter on preventive diplomacy may be of relevance for a future interpretation of the concept 'threat to the peace'. Now it is clear that preventive diplomacy itself will be carried out under Chapter VI but through it threats to the peace can be identified at an earlier stage".⁹⁵ In fact, if there is no evidence of real explosive crisis with regard to the international peace and security, it seems there will be no legal basis for action under Chapter VII.

Brownlie has emphasised that "[a] determination of a threat to the peace as a basis for action necessary to remove the threat to the peace cannot be used as a basis for action which (if the evidence so indicates) is for collateral and independent purposes, such as the overthrow of a Government or the partition of a State".⁹⁶ By an extensive use of the notion "threat to the peace", the action which would be followed may be in contrary of the sovereignty of states. Therefore, it is required that the concepts of the UN Charter be employed with careful considerations to prevent raising high costs for the United Nations as well as avoid severe consequences for the population.

THE DEMISE OF ARTICLE 2(7)

Article 2(7) of the UN Charter refers to the limits of the Organisation's delegated discretionary powers which is the "touchstone of the Organisation's legitimacy, much as a nation judges the legitimacy of exercises of its public power by standards set out in its constitution".⁹⁷ Article 2(7) provides that "[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members

95- P. H. Kooijmans, *op. cit.*, p. 118.

96- Ian Brownlie, "International Law at the Fiftieth Anniversary of the United Nations", *Recueil Des Cours*, (Martinus Nijhoff Publishers, The Hague, Boston, London, 1995), p. 218.

97- Thomas M. Franck, "The Security Council and 'Threat to the Peace': Some Remarks on Remarkable Recent Developments", in R. J. Dupuy, *op. cit.*, p. 83.

to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII".

General nature of Article 2(7)

Article 2(7) contains a prohibition against all forms of intervention by the United Nations "in matters which are essentially within the domestic jurisdiction of any State". It has also been envisaged that the member states are not required to submit matters within their domestic jurisdiction for settlement to the United Nations.⁹⁸ However, Article 2(7) contains an exception to the prohibition of intervention in relation to enforcement measures, which will be discussed later.

According to this article, states are not obliged to submit matters which are essentially within their jurisdiction to the means of dispute settlement listed in Article 33 and other measures under Chapter VI. In fact, UN resolutions demanding such settlement need not be observed by the state concerned, and UN organs may choose not to assign disputes of this kind to any international procedure of dispute settlement.⁹⁹

As discussed in Chapter One, it seems that the drafters of the Charter were determined to establish a formula to ensure that certain matters would fall "essentially" within the domestic sphere, even though there is a relevant international legal obligation. However, both terms "essentially" and "solely" are vague, and Article 2(7) does not contain a clear standard to determine what matter falls under domestic jurisdiction of

⁹⁸- Ermacora believes that UN members should not submit to the UN a request for a dispute settlement concerning questions of domestic jurisdiction (Bruno Simma, *op. cit.*, p. 149). It seems that this is a misinterpretation of the article, because the states are not required to submit the "matters within their domestic jurisdiction", but nothing in the Charter prevents states to submit "questions of domestic jurisdiction".

⁹⁹- Bruno Simma, *op. cit.*, pp. 149-50.

states.¹⁰⁰ Even a review of the discussions at San Francisco Conference does not lead to a clear understanding of what the drafters intended in Article 2(7).

Preuss, who was the assistant secretary at Dumbarton Oaks conversations (1944) and the United States technical expert at the San Francisco Conference (1945), states that "[i]f the purpose of the Sponsoring Governments was to safeguard the domestic domain by limiting the powers of the United Nations, they chose an unreliable instrument for accomplishing this aim. For Article 2(7), with its vague and elastic phraseology, was to prove in practice to be susceptible of an interpretation in a sense precisely opposite to that which was intended by its framers. Devoid of accepted or technical meaning, it left to those who in the future would be called upon to apply it an almost unlimited discretion, which could be exercised either to protect the traditional sovereignty of states or to extend the scope of international action."¹⁰¹

Although international law as an objective legal criterion was abandoned at the San Francisco Conference and it was expected that a subjective political criterion, imposed by the more powerful and politically more influential states, would take its place,¹⁰² the role of international law to determine what is essentially within domestic jurisdiction of states is still crucial. It rests upon the political organs of the United Nations to somehow emphasise the rule of law in their decision making.

¹⁰⁰- The Permanent Court of International Justice in its advisory opinion in the Nationality Decrees case held that, "[the] question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations". PCJI, Series B, No.4, (1923), p. 24.

¹⁰¹- Lawrence Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction", *Recueil Des Cours*, (1949), p. 604.

¹⁰²- See: Djura Nincic, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*, (Martinus Nijhoff, The Hague, 1970), pp. 158-61.

Discussion of the term "intervention"

The Security Council has the primary responsibility for the maintenance of international peace and security. The General Assembly was given certain powers with respect to the adjustment of settlement of international situations or disputes. Action taken by the Security Council is necessarily directed toward a particular situation or dispute and might take the form of a recommendation or a decision addressed to a party or parties concerned. Article 2(7) prevents the Organisation's interference in the domestic affairs of any state; however, this principle should not prejudice the application of enforcement measures under Chapter VII.

There is a question as to what actions of the UN organs may be considered as "intervention". Actions which might be defined as "intervention" range from the placing of a matter on the agenda, discussion, formal investigation, and the passing of a resolution.¹⁰³ There are two views, depending on whether to construe the term "intervention" broadly or restrictively.

Among the authors who have given the restrictive and "technical" interpretation of the term "intervention" is Lauterpacht. His opinion was on the basis of Oppenheim's classical definition of intervention, according to which "intervention is dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things".¹⁰⁴ Lauterpacht believed that the only prohibited intervention under Article 2(7) was in the sense of this definition.¹⁰⁵ However, this definition would make Article 2(7) meaningless. Because the United Nations can carry out dictatorial interference only by enforcement measures under

103. R. Higgins, *op. cit.*, p. 68.

104. See: H. Lauterpacht, *International Law and Human Rights*, (New York, 1950), pp. 167-72.

105. *Id.*

Chapter VII, and these measures have been allowed under the last part of Article 2(7) to be taken even if matters of domestic jurisdiction are involved.

The broad interpretation suggests that intervention should not be interpreted in a narrow technical sense but rather in the sense understood by the layman to mean interference in any form and that the narrow interpretation would deprive the article of all meaning.¹⁰⁶

No clear interpretation was given at the San Francisco Conference, though the *travaux preparatoires* show that the US delegation stated that domestic jurisdiction should be viewed as a fundamental principle and not as a mere "technical and legalistic formula".¹⁰⁷ It seems that at San Francisco Conference there was a tendency for an extensive interpretation of the term "intervention" in Article 2(7).

To examine the term "intervention", it is primarily necessary to consider whether the discussion of a question within the domestic jurisdiction of a state would constitute "intervention"?

Goodrich, Hambro and Simons believe that placing a matter on the agenda and discussion do not constitute intervention.¹⁰⁸ While there is a belief that, at the stage of discussion, the UN organs do not have real decision-making powers, the questions examined usually have political importance, and the UN constitutes a center where world public opinion is reflected, discussion "has an importance that is equal to if not greater than the decision-making stage."¹⁰⁹

106. L. Preuss, *op. cit.*, p. 553-653.

107. *UNCIO*, Vol. 6, Doc. 1019, Verbatim minutes, 17th Meeting of Committee 1/1, p. 512.

108. Goodrich et.al., *op. cit.*, p. 67.

109. B. Conforti, *op. cit.*, p. 147.

However, discussion in order to establish whether or not a matter comes within domestic jurisdiction would be permissible "but the discussion must be kept within the limits necessary for this purpose. The natural, even if not the only, time for such discussion is before a matter is placed on the agenda. Placing a question of domestic jurisdiction on the agenda does not therefore constitute an intervention under Article 2, para. 7 as long as such placement occurs in order to discuss and assess whether the question has purely a domestic nature or not."¹¹⁰ According to this opinion, the involvement of the Organisation in the primary stages of consideration of a matter should not contravene the domestic jurisdiction of a state..

Recommendations and resolutions of an organ of the United Nations are controversial issues and need an examination of whether they constitute "intervention" in domestic affairs of the state concerned, within the meaning of Article 2(7). Some interpreters believe in a narrow and restrictive interpretation of the term "intervention". Among them, Lauterpacht introduced a distinction in recommendations of the Organisation.¹¹¹

Lauterpacht explained that there is no legal obligation for member states to accept a recommendation or take into account the general sense of a discussion or to act upon the results of an enquiry and there may be pressure of the public opinion of the world on them.¹¹² The only possible exception would be that of recommendations whereby direct pressure, likely to be followed by enforcement measures upon a state in a matter

¹¹⁰- Id.

¹¹¹- H. Lauterpacht, "The International Protection of Human Rights", Recueil Des Cours, (The Hague Academy of International Law, the Hague, 1947-I), p. 100. In the economic, social and humanitarian spheres, he believes "a recommendation, even if specifically addressed to a state, not being in the nature of a binding decision the disregard of which may entail legal consequences, does not constitute intervention". Ibid, p. 21. He said "a recommendation is in fact in the nature of a decision the disregard of which may in certain eventualities involve coercion, it may fall within the terms of Article 2, paragraph 7". Ibid, p. 20.

¹¹²- Id.

which is essentially within its domestic jurisdiction, probably would come within the terms of Article 2(7).¹¹³

Higgins also believes that "[c]ertainly it does tend to show that the primary aim of the clause was to exclude direct legislative intervention by the United Nations in matters normally reserved to the legislation of the state".¹¹⁴ However, according to Preuss "[i]t is impossible to find any warrant, either in the text or in the general scheme of the Charter, for a distinction between a recommendation *toute simple*, and a 'recommendation' which is in some ways indistinguishable from a decision".¹¹⁵

Member states should settle their international disputes by peaceful means. This obligation is not enforceable and, under Article 2(7) when the dispute arises out of a matter essentially within the domestic jurisdiction of a state, does not apply.¹¹⁶ Therefore, there is "no Charter basis either for the restrictive interpretation of 'intervention' or for the distinction between coercive and non-coercive recommendation which is its corollary. The purpose of Article 2(7) is to prohibit the application, in the course of peaceful settlement, of every form of pressure against a state within whose domestic jurisdiction the subject matter of the dispute has been determined to fall."¹¹⁷

Consequently, when an internal matter is concerned, the United Nations must refrain from adopting a resolution whether it is a recommendation addressed to a state, or an act of an organising nature (such as the establishment of a committee of enquiry), or a decision of an operational nature (such as a decision by the General Assembly to undertake a study of the economic or social situation within a state).¹¹⁸

113. H. Lauterpacht, *International Law and Human Rights*, (New York, 1950), pp. 169-70.

114. R. Higgins, *op. cit.*, p. 72.

115. L. Preuss, *op. cit.*, p. 609.

116. *Id.*

117. *Ibid.*, p. 610.

118. B. Conforti, *op. cit.*, p. 147.

With regard to the power of the United Nations, specially the General Assembly and the Economic and Social Council, in the economic and social fields, it is believed that recommendations could not be made where they constituted "intervention", even if they did relate to "domestic" questions, because they dealt with them on the general plane of international cooperation, and not within the domestic sphere of a certain state.¹¹⁹

It seems that the scope of powers of the United Nations in the economic and social fields is restricted not only by the rule contained in Article 2(7), but also by the limitation imposed generally by the Charter upon the powers of the General Assembly and the Economic and Social Council.¹²⁰ Preuss emphasises that "[t]here is no provision of the Charter which empowers any organ of the United Nations to penetrate directly into the domestic life of member states in order to regulate their economic and social affairs".¹²¹

It can be concluded that the framers of the Charter inserted Article 2(7) as a reassurance that the United Nations would not undertake to intervene in domestic affairs of member states. The conclusions based upon the *travaux préparatoires* indicate "a use of the term (intervention) in the broad and non-technical sense".¹²²

¹¹⁹- D. Nincic, *op. cit.*, pp. 168-9. The US delegation to the San Francisco Conference, in his report to the president said, "to extend this principle (non-intervention in domestic affairs) to the activities of the Organisation as a whole, instead of limiting it to the pacific settlement of disputes as had been proposed at Dumbarton Oaks, seemed desirable because of the amplification of the power and authority given to the Assembly and, particularly, to the Economic and Social Council. Without general limitation, which now flows from the statement of the principle in Chapter I, it might have been supposed that the Economic and Social Council could interfere directly in the domestic economy, social structure, or cultural or educational arrangements of the member states. Such a possibility is now definitely excluded." Charter of the United Nations: Report to the President on the result of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State, (Department of State Publication 2349, Conference Series 71, 1945), p. 44.

¹²⁰- L. Preuss, *op. cit.*, p. 608. Lauterpacht has also supported this view. See: L. Oppenheim, *International Law*, (7th ed., 1948), p. 379, note 1.

¹²¹- *Ibid.*, p. 578.

¹²²- *Ibid.*, p. 619.

Therefore, discussion and investigation in disputes concerning questions within the domestic jurisdiction of a state, or recommendation on settlement of a dispute that the subject matter is within the domestic jurisdiction of a state, are excluded from the activities of the United Nations.

The exception to Article 2(7)

"The United Nations is the creature of a treaty and, as such, it exercises authority legitimately only in so far as it deploys powers which the treaty parties have assigned to it."¹²³ The treaty parties decided to create Article 2(7) to protect their sovereignty from UN interference in matters which essentially are internal *except when the Security Council authorises enforcement measures under Chapter VII*. When the Security Council, acting under Chapter VII, decides upon enforcement action, it should decide that the matter threatened international peace and security and therefore has already gone beyond the limits of domestic jurisdiction.

The United Nations is essentially an international organisation, concerned only with international matters.¹²⁴ Although the limitation under Article 2(7) is on measures short of enforcement, the power of the Security Council for collective measures, like other powers of the UN organs, is limited to purposes which are essentially international in character.

There is a question whether recommendations under Chapter VII are excluded from the general rule contained in Article 2(7). Higgins believes that the *travaux préparatoires* indicate that the restriction of the exception to enforcement measures was deliberate.¹²⁵ She explains that, "[i]f a matter is giving rise to apprehension

123. T. M. Franck, *op. cit.*, p. 83.

124. John W. Halderman, *The United Nations and the Rule of Law*, (Oceana Publications Inc., USA, 1966), p. 196.

125. R. Higgins, *op. cit.*, p. 87.

relating to the maintenance of international peace and security, but it is a potential threat rather than an actual threat and is causing international friction rather than a breach of the peace, then - in spite of an obligation under Article 2(7) - the Security Council may recommend measures under Chapter VI, for the question has become one of international concern ... if, there is no finding, implied or express, under Article 39, and there is only a question of international friction, no recommendations under Chapter VII may be made in the face of an objection on grounds of domestic jurisdiction, though in certain circumstances, where the element of international concern becomes pronounced, action may be available to the Council under Chapter VI."¹²⁶

However, "international concern" is a vague concept to which the Charter has not referred, and there is no definition for it. Article 11 of the Covenant of the League of Nations had stated that "any war or threat of war ... is hereby declared a matter of concern to the whole League ...". It is believed that "in League practice, however, there was a distinction between concern and jurisdiction".¹²⁷ "Concern" is a broad political concept while "jurisdiction" is a legal one.¹²⁸ If we accept that the political concept controls the legal one, it means effectively that the latter is no longer treated with the uniformity and predictability that one tends to associate with law, or at least with the legal ideal.¹²⁹ "Obviously, many more matters may be of international concern than of international jurisdiction, and as a result this substitution of 'concern' for 'jurisdiction' as the complement to domestic jurisdiction has created a concept of unparalleled scope and ambiguity."¹³⁰

126- Ibid, p. 90.

127- Howell, "Domestic Question in International Law", 48 ASIL Procs. (1954), pp. 90, 93.

128- J. S. Watson, "Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter", 71 A. J. I. L. (1977), p. 78.

129- Id.

130- Id.

To apply the domestic jurisdiction clause contained in Article 2(7), it seems it would be inappropriate to shift from legal criteria of "international jurisdiction" as opposed to "domestic jurisdiction" to a political element of "international concern" as opposed to "domestic concern". The scope of "international jurisdiction" has been determined by Chapters VI and VII, and once the procedural and substantive standards have been met, the Organisation can use the powers which are delegated to it.

When a bona fide¹³¹ "threat to the peace, breach of the peace, or act of aggression"¹³² is discovered by the Security Council, the Charter empowers the Council to take action, even when the object of its action is "essentially within the domestic jurisdiction of state".¹³³ The Security Council might take action in the form of "measures not involving the use of armed force",¹³⁴ or enforcement action "by air, sea or land forces as may be necessary to maintain or restore international peace and security",¹³⁵ and "may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations".¹³⁶

Consequently, international jurisdiction will be established when any of the three strands of Article 39, i.e. threat to the peace, breach of the peace, or act of aggression, is determined by the Security Council. It seems that "breaches of the peace and acts of aggression" might not be discovered in a matter which is "essentially domestic". Even an actual "threat to the peace" needs to have an international element to be considered as a threat to international peace and security.

The United Nations has not referred systematically to the three categories of act of aggression, breach of or threat to the peace. In recent years, the Security Council has

131. This expression in respect of Article 39 has been used by T. M. Franck, *op. cit.*, p. 86.

132. Article 39.

133. Article 2(7).

134. Article 41.

135. Article 42.

136. Article 42.

demonstrated its tendency to invoke Chapter VII in circumstances that there was no international military confrontation, and the subject matter could hardly be considered as an international matter.

The UN practice concerning domestic jurisdiction

There have been cases of discussion undertaken or resolutions adopted by the General Assembly or the Security Council that may imply interference with the internal affairs of a state by the United Nations. In some cases the UN has condemned fascist governments such as the Franco regime in Spain, or governments established by force as in Czechoslovakia, Hungaria and Haiti, or the governments imposed by foreign powers as in Cambodia in 1979 and Afghanistan in 1980. In some cases internal crises or civil wars have led the UN to intervene, such as the cases of Yugoslavia, Somalia and Rwanda. Racial policies in South Rhodesia and South Africa led the UN to intervene.

The nature of a nation's regime and its policies has been the basis of United Nations intervention in Iraq in matters essentially domestic, in the absence of military hostilities or occupation.¹³⁷ Iraq's "uncooperative behaviour"¹³⁸ rose to the level of a threat to the peace implicating the use of collective measures to compel co-operation with matters beyond those specified as binding obligations of the Charter.¹³⁹ In the name of restoring peace and security in the region, the Council imposed intrusive conditions on Iraq comparable to those of the Treaty of Versailles.¹⁴⁰ The Security

137. SC Res. 687, 3 Apr. 1991.

138. "Uncooperative behaviour" is the wording used by the United Nations Under-Secretary-General for Legal Affairs in justifying the legitimacy of extending and augmenting Council's jurisdiction indefinitely with regard to its demands from Iraq. C. A. Fleischhauer, "The Year of International Law in Review", Address to the 86th Annual Meeting of the A. S. I. L., 4 April 1992.

139. T. M. Franck, *op. cit.*, p. 99.

140. O. Schachter, "United Nations Law in the Gulf Conflict", 85 *A. J. I. L.*, (1991), p. 456. Franck quotes the same statement by Schachter and further explains that, in respect of the military capability, the Council required Iraq to destroy all its chemical and biological weapons, to renounce development of nuclear weapons and all but short range ballistic missiles (Res. 687 paras. 8, 12). It empowered the

Council recognised its authority to continue to use economic sanctions and mandatory inspections to control important aspects of the armament policy of a sovereign state.¹⁴¹ The Council decided that it would "remain seized of the matter" and could "take such further steps as may be required for the implementation of the present resolution [Res. 687] and to secure peace and security in the area".¹⁴² It is implied that the "uncooperative behaviour", and "non-compliance" of a state "with its obligations",¹⁴³ would cause the Council's interference in domestic jurisdiction of that state.

Two separate issues need be considered in evaluating the United Nations practice concerning domestic jurisdiction, namely the right of self-determination and human rights. With regard to colonial question in the context of the right of self-determination, the United Nations has had an important role in the process of decolonisation. The General Assembly took the initiative in the matter including deciding if and when the various peoples subject to foreign rule were to gain independence,¹⁴⁴ "thereby realising the most far-reaching type of intervention in the internal affairs of the colonising powers".¹⁴⁵

It seems that United Nations practice in respect of decolonisation has been inspired by the principle of self-determination referred to in Article 1(2) of the Charter. However, not only the General Assembly resolutions and declarations, but also the actual

International Atomic Energy Agency to engage in extensive inspection of suspected nuclear capabilities within Iraq and permits an international commission to conduct searches by land and air and to destroy a large range of prohibited weapons and facilities for their manufacture (*Ibid*, para. 9). T. M. Franck, *op. cit.*, p. 97.

141. SC Res. 687, 3 Apr. 1991, paras. 21-25.

142. *Ibid*, para. 34.

143. SC Res. 707, 15 Aug. 1991, para. 2. This paragraph refers to Iraq's "non-compliance" with its obligations under its safeguard agreement with the International Atomic Energy Agency "which constitutes a violation of its commitments as a party to the treaty on the non-proliferation of Nuclear Weapons of 1 July 1968". *Id.*

144. The General Assembly Declaration of 1960 on the Granting of Independence to Colonial Countries and Peoples recognised that the subjection of a people to alien domination was to be considered contrary to the Charter. GA Res. 1514-XV, 14 Dec. 1960.

145. B. Conforti, *op. cit.*, p. 143.

behaviour of states, show that the principle of self-determination, or more correctly the right of self-determination, has a limited sphere of application. It is believed that "it applies only in territories under a domination of a *foreign* Government and, therefore, besides colonial territories, in those which have been conquered and occupied by force (for example, the territories occupied by Israel in 1967)."¹⁴⁶

However, by the end of the Cold War, new interpretations have been given in the spheres of the right of self-determination and human rights. These interpretations represent new attacks to weaken state sovereignty claims and the domestic jurisdiction clause in Article 2(7). It is an opinion that the domain reserved to the exclusive jurisdiction of the state is quite small and "international law has evolved to the point that matters which would have been unthinkable for states to have relinquished only twenty years ago are now subject to international security".¹⁴⁷ It is also a belief that "the international community has a right to intervene to uphold basic humanitarian rights ... The rise of collective humanitarian intervention and the shrinking of traditional conceptions of sovereignty and domestic jurisdiction are essential for the preservation of peace in the new international order".¹⁴⁸

Another argument to extend international power and limit domestic jurisdiction is that "the Security Council (or at least its members) should pursue initiatives that foster the creation and development of rule of law institutions within countries as a process of 'deterrence from within'. Initiatives of this type are the most likely to be considered as intruding upon 'the sovereignty' of nations. Yet threats to international peace and security have their roots in internal structures, and if we are to take such threats seriously we must be willing to rethink our methods of addressing them".¹⁴⁹

146. *Ibid*, p. 250.

147. F. R. Teson, "Collective Humanitarian Intervention", 17 *Mich. J. Int. L.*, No. 2, (1996), pp. 370-1

148. *Id.*

149. S. D. Murphy, "The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War", 32 *Colum. J. Transnat'l L.*, No. 2, (1994), pp. 287-8.

A few scholars have asserted that some controversial rights, such as the right of self-determination, exercised through secession has achieved the status of a legal right with universal application.¹⁵⁰ However, most scholars would agree that no such universally cognisable right to self-determination yet exists.¹⁵¹ In fact, from a legal point and in the context of the exercise of enforcement measures by the Security Council, "[i]t would be misleading to say that the International Community can require that all Governments of the earth must have the consent of the majority of their subjects and have been freely chosen by them. Similarly it would be misleading to say that it may allow all secessionist aspirations of regions that are ethnically distinct from the rest of the country".¹⁵² It may also be argued that it is not acceptable that the Organisation exercise its enforcement powers to impose any form of government, democratic or otherwise, on the population of a state.¹⁵³

Indeed, the UN Charter has referred to the principle of self-determination (Article 1(2)), to promote and encourage respect for human rights and for fundamental freedoms for all (Articles 1(3) and 55(c)), but how are these compatible with the principle of the sovereign equality and the domestic jurisdiction clause (Articles 2(1) and 2(7))? There should be a kind of reconciliation between the above-mentioned principles without sacrificing either. Such reconciliation can be achieved by holding that in all matters of domestic jurisdiction, "the Organisation may adopt only resolutions of general applicability (drafts for multilateral conventions,

150. Gebre H. Tesfagorias, "Self-determination: Its Evolution and Practice by the United Nations and Its Application to the Case of Eritrea", 6 Wis. Int'l. L. J., (1992), pp. 75, 92.

151. Angela M. Lloyd, "The Southern Sudan: A Compelling Case for Secession", 32 Colum. J. Transn'l L., No. 2, (1994), p. 427.

152. B. Conforti, op. cit., pp. 249-250.

153. Gill argues that "the UN - specifically the Security Council - does not have the legal power to rule a population by force or impose alien rule in the guise of a UN 'imperial role' ... or maintain colonial or colonial-type rule upon an alien population under contemporary international law". T. D. Gill, "Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter", XXVI Netherlands Yearbook of International Law, (1995), p. 75.

recommendations addressed to *all* the states, and so on), while it is precluded from adopting resolutions concerning *individual* states. This is objectively the only convincing solution if we consider the opening phrase of Article 2, para. 7 ..."¹⁵⁴

By broadening the concepts of international peace and threat to the peace, negating domestic jurisdiction clause in the name of human rights, and abolishing the distinction between international wars and civil wars, as Leo Gross states, "the area of matters covered by Article 2(7) has been reduced to the vanishing point".¹⁵⁵

The debate on human rights has increased in the Security Council's work in the post-Cold War era. On the other hand, the fear that the issue of human rights becoming an excuse for intervention in the domestic affairs of states has been reinforced. The reason for such fear is that "any situation within a given state which is injurious to human dignity - from mistreatment of minorities to the adoption of economic and social policies detrimental to the population, to suffering imposed on the civilian population by civil wars - is now the object of United Nations action whether or not it constitutes the violation of a specific international obligation".¹⁵⁶

It might be said that where human rights violations are short of genocide or apartheid (which are severe and brutal violations of human rights), despite the general ratification of the two UN covenants on human rights in 1966 and other international agreements promoted by the UN, other violations of human rights which are not gross violations come within the matters "essentially" within domestic jurisdiction.¹⁵⁷ In the absence of an objective definition of what constitutes a human rights violation, the intervention in domestic affairs of states should be restricted.

154. B. Conforti, *op. cit.*, p. 142.

155. Leo Gross, Selected Essays on International Law and Organisation, (Transnational Publishers and Martinus Nijhoff Publishers, Dordrecht, 1992), p. 618.

156. B. Conforti, *op. cit.*, p. 145.

157. *Ibid.*, p. 144.

Such statements as "[t]he non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to the peace"¹⁵⁸ which represent the new thinking of the post-Cold War leaders, are not certainly what the drafters of the UN Charter had mind. Following the World War II there was a trend to broaden the limit of domestic jurisdiction under Article 2(7) compared to the limit in Article 15(8) of the Covenant. As mentioned earlier, the US delegate emphasised on extension of the principle of non-intervention in domestic affairs of states and on national sovereignty.¹⁵⁹ There was also considerable concern in relation to the American domestic policy that the US Senate would not ratify the Charter, as it had not in the past ratified the Covenant, if the limit of domestic jurisdiction (including their own) was not strongly defended.¹⁶⁰

The above-mentioned concern is still important not only to Americans but also to all other countries. Therefore, it will be dangerous to claim that "non-military sources of instability in the economic, social, humanitarian and ecological fields" constitute threat to the peace, and justify the United Nations intervention in domestic affairs of states.

Although the human rights conventions restrict the area of domestic jurisdiction, this does not mean that the principle of non-intervention has vanished. In fact, the conventions on human rights have not so far been enforced by international society, and it is still widely held that intervention to protect human rights is not permissible under international law.¹⁶¹

158. British Prime Minister John Major in a joint declaration on behalf of the Security Council members. S/PV. 3046 (1992).

159. Report to the President on the Result of the San Francisco Conference, op. cit., p. 44.

160. B. Conforti, op. cit., p. 139.

161. J. Charvet, "The Idea of State Sovereignty and the Right of Humanitarian Intervention", 18 International Political Science Review, No. 1, (1997), p. 47.

Respect for human rights involves an acceptance of the fundamental principle of an equality of rights to the basic goods of life, liberty and property; "this principle can be interpreted and developed in various ways, and its recognition should thus be compatible with the existence of a variety of cultural practices in different states".¹⁶²

The idea of supranational role for the United Nations in protecting human rights and the right of self-determination is not compatible with the structure, principles and purposes of the Organisation. As mentioned in the previous chapter, the United States was opposed to giving a supranational role to the new organisation at the primary discussions to create the international organisation. The main drafters intended that the UN should be based on the same basis that the League was based. It would be a great mistake to recognise the UN as a supranational government with supranational jurisdiction on the basis of the rules and principles of international law. Because international law and supranational law are distinct legal systems which derive their validity from different bases, the former from the concept of the legal equality of states and the latter from the idea of the ultimate unity of the legal systems of the world.¹⁶³

The competence of interpretation of Article 2(7)

The Covenant of the League of Nations in Article 15(8) required that the determination of whether a matter was of domestic jurisdiction was to be made by the League Council.¹⁶⁴ However, in Article 2(7) of the UN Charter there is a complete absence of any reference to an organ authorised to decide whether or not a question falls within domestic jurisdiction. At the San Francisco Conference some delegates believed that the effect of the omission would be to confer the essentially juridical

162. *Id.*

163. J. S. Watson, *op. cit.*, p. 83.

164. Article 15(8) of the Covenant.

function of determination upon the Security Council - a political body unrestricted in its judgments by objective legal standards.¹⁶⁵

In order to prevent such a possibility the Greek Government proposed that: "It should be left to the International Court of Justice at the request of a party to decide whether or not such situation or dispute arises out of matters that under international law, fall within the domestic jurisdiction of the State concerned".¹⁶⁶ However, this proposal failed to receive the required two-third majority. A proposal that the General Assembly might be given the power to interpret the Charter also failed to be adopted.¹⁶⁷

At the Conference no article was created to determine that who has the competence to decide on the applicability of domestic jurisdiction. Lauterpacht pointed out that "the authority to decide upon disputed questions of interpretation of the Charter belongs, in principle, to the organ charged with its application".¹⁶⁸ It was generally assumed at the Conference that each organ of the UN would interpret the Charter for itself as related to its functions. In this regard a quotation from the Rapporteur of Committee IV/2 is useful: "In the course of the operations from day to day of the various organs of the Organisation, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of anybody which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorising or approving the normal operation of this principle."¹⁶⁹

165. L. Preuss, *op. cit.*, p. 595.

166. *UNCIO*, Vol. 6, Doc. 1019, p. 509.

167. *Ibid.*, Vol. 13, Doc. 933, pp. 709-10.

168. H. Lauterpacht, *International Law and Human Rights*, *op. cit.*, p. 181.

169. *UNCIO*, Vol. 13, Doc. 933, p. 709.

However, it has been argued that "[f]irstly, the Rapporteur is directing his remarks at 'day to day' operations, which is a far cry indeed from legally binding interpretations on highly charged political issues. Secondly, this statement is obviously aimed at interpretations made by the organ for its own use. There is no mention here of the legal significance of such interpretations for a member state."¹⁷⁰

It might be said that the Charter's silence with regard to interpretation is an element contributing to proving this view that interpretation of each organ of the United Nations on its own at the time it adopts specific measures, would not be binding for the member states, though the attribution of a sovereign power of interpretation by the organs owing to its importance would have required an explicit provision.¹⁷¹

There is an argument that if the UN organs had the sovereign power to interpret the Charter provisions with a binding effect on the member states, there would be the possibility of violating them with impunity, since any decision could be justifiable in the light of a subjective and "special" interpretation of the Charter.¹⁷²

The right of interpretation (without binding force) by the UN political organs within the context of domestic jurisdiction would be the source of confusion. Goodrich believes that the responsibility of political organs for interpreting and applying the domestic jurisdiction principle "has undoubtedly resulted in a more liberal, and some would say more confused, interpretation of the powers of United Nations organs and consequently a more narrow interpretation of the domestic jurisdiction limitation than would have been given by a court of law ... there has been a tendency on the part of individual Members to play down the domestic jurisdiction principle in those

170. J. S. Watson, *op. cit.*, p. 63.

171. B. Conforti, *op. cit.*, p. 15.

172. *Id.*

instances where they want United Nations actions and to stress its importance and inviolability when it is to their interests not to have the United Nations take any action. As a result, decisions of United Nations organs on the application of the domestic jurisdiction principle ... are likely to be decided more by bloc alignments and considerations of advantage and expediency than by any reasoned attempt to apply objective standards to the situation in question".¹⁷³ The net result according to Goodrich would be the reduction of the importance of the domestic jurisdiction principle as a limitation and to enlarge the possibilities of UN actions.¹⁷⁴

However, it is clear from the following statement that interpretation of UN organs would not have binding force for member states. Reference should be made to a passage from the Rapporteur of Committee IV/2 as follows: "It is to be understood, of course, that if an interpretation made by any organ of the Organisation or by a committee of jurists is not generally acceptable, it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment"¹⁷⁵

Regarding the states' interpretation, Kelsen has said that "this is one of the absurd consequences of the interpretation, compatible with the wording of the Charter, that it is upon the state concerned to decide for itself whether a matter is essentially within its domestic jurisdiction".¹⁷⁶ It seems the drafters of the Charter left the organs and members of the Organisation free to determine for themselves and by such procedures as they might choose the meaning of Charter provisions.¹⁷⁷ Therefore, the Security

173. Leiland M. Goodrich, The United Nations, (Stevens and Sons, London, 1960), p. 77.

174. Id.

175. UNCIO, Vol. 13, Doc. 933, p. 710.

176. H. Kelsen, op. cit., pp. 783-4.

177. L. M. Goodrich, op. cit., p. 70.

Council and the General Assembly may adopt different views with regard to the interpretation of a specific provision of the Charter, and also a member state may adopt a view of its own. If the interpretation of a political organ lead to taking action, the member state concerned may question that interpretation. Its question would contain whether the action is in accordance with the Charter and international law.

In fact, the element of law rather than the political purposes of individual states should be employed by the UN organs. There is a possibility that the conduct of a state does not violate the rights of other states or international rules, and is essentially domestic, but in some ways might be injurious to the interests of other states. In this case, it may be claimed that there is an international concern but neither the United Nations nor the individual states would be permitted to take action against that state. The UN action should be completely compatible with all principles and purposes of the Charter, and none of these principles and purposes be sacrificed. Furthermore, they should be applied equally to all states and not to a group of states.

REVIEWING SECURITY COUNCIL'S DECISIONS

There is a question as to, if the Security Council in its interpretation of the Charter or in making a decision committed a grave mistake either because its decision was *ultra vires* or in violation of principles of international law, how the Council's decision could be reviewed and whether the Council is obliged to change its decision.

The UN Charter did not envisage any review mechanism of a judicial nature over the legality of the actions of the UN organs. The advisory function of the International Court of Justice cannot serve this purpose, since it cannot be requested by states but can only be requested by the UN organs.¹⁷⁸

¹⁷⁸- Article 96 of the Charter.

There were many amendments to the Dumbarton Oaks Proposals submitted in order to secure the collaboration of the General Assembly with the Security Council in the management of conflicts. These amendments were not accepted by the four sponsoring powers, and the US delegate observed that it was inconceivable that any action of the Council would be contrary to the wishes of a majority of the Assembly and so the Council would be a representative body of the Assembly just as the Assembly would be representative of the various countries.¹⁷⁹

As mentioned earlier, at the San Francisco Conference there were amendments for ensuring that the Security Council implements its duties relating to peace and security. It was suggested that the International Court of Justice could be asked by a state party to a dispute on whether a recommendation or a decision made by the Council or proposed in it infringed its essential rights.¹⁸⁰ It was proposed that, if the Court considered that these rights have been disregarded or threatened, the Council would either reconsider the question or refer the dispute to the Assembly.¹⁸¹ However, these suggestions were not accepted at the Conference.

It might be said that none of the organs of the United Nations is in a position of hierarchial superiority or subordination. In fact, primary organs of the Organisation are institutionally equal and no organ can serve as an appellate body over the other's actions.¹⁸² Once the Court determines it has jurisdiction in a particular dispute, it can and must carry out its functions, despite the fact that each question is possessed of both a legal and political dimension.¹⁸³ The Council is also an organ with a political

179. UNCIO, Vol. 12, Doc. 108, pp. 296-316.

180. UNCIO, Vol. 12, Doc. 433, pp. 47-55; and, Vol. 3, Doc. 2, p. 336.

181. Id.

182. T. D. Gill, op. cit., pp. 117-8.

183. Id.

nature to ensure collective security whose decisions would not be apart from the legal considerations.

However, because of the East-West conflict and the Cold War, the Council had minimum role in conflict management over forty years. It was expected that, by the end of the Cold War, the Council would respond to conflicts properly and effectively according to the principles and purposes of the Charter.

In fact, the Council extended its actions from a response to classical international aggression to measures adopted in fundamentally different situations. Several examples of recent Security Council measures in the context of Chapter VII exist which have broken new ground and triggered a certain amount of controversy. These include providing the terms of cessation of hostilities against a defeated aggressor state with far reaching effects on that state's sovereignty;¹⁸⁴ ordering the transfer of two individuals allegedly responsible for acts of state sponsored terrorism directed against two permanent members of the Council for trial in their national courts;¹⁸⁵ military intervention in response to the breakdown of civil authority and the resulting international anarchy in another state;¹⁸⁶ and the severe limitation of a UN member state's right of individual and collective self-defence through a mandatory arms embargo¹⁸⁷.

"Whether or not one feels that any of these, or other examples of recent measures taken by the Security Council, is in any way *ultra vires*, illegal or just poor policy, it is clear that they all fall outside the classical type of activity envisaged in the Charter

184. SC Res. 687, 3 Apr. 1991.

185. SC Res. 748, 31 Mar. 1992, in conjunction with SC Res. 731, 21 Jan. 1992.

186. SC Res. 794, 3 Dec. 1992.

187. SC Res. 713, 25 Sep. 1991.

and give rise to reasonable questions regarding the role and function of the Council in the exercise of its authority."¹⁸⁸

It is useful at this point to discuss the case of Libya which relates to allegations of acts of state sponsored terrorism directed against two permanent members of the Council. The remaining cases, relating to other categories mentioned above, will be discussed in detail in the relevant chapters of this thesis.

In the case of Libya several issues raised regarding the Security Council, as the organ charged with primary responsibility for international peace and security, and the International Court of Justice, as the principal judicial organ of the United Nations. In this case, the demands were put forward in the Council by the United States and the United Kingdom for handing over of two Libyans who had been indicted in the US and the UK on the suspicion of having caused the explosion of the American Airliner over Lockerbie in Scotland.¹⁸⁹

Libya had denied the allegations made by the US and the UK, and in its communications to the Security Council reserved "the right to legitimate self-defence before a fair and impartial jurisdiction, before the United Nations and before the International Court of Justice and other bodies".¹⁹⁰ Libya asserted that the matter was "purely legal question" outside the competence of the Council, and this organ should recommend settlement through legal channels within the framework of the Montreal Convention, in particular arbitration as envisaged in Article 14 of the Convention.¹⁹¹

By adopting Resolution 731 by the Council on 3 March 1992, in which the Council urged the Libyan Government to provide a full and effective response to the above

188. T. D. Gill, *op. cit.*, p. 36.

189. SC Res. 731, 21 Jan. 1992.

190. S/23221, 16 Nov. 1991.

191. S/PV. 3033.

mentioned requests, Libya asked the Court to enjoin the United States and the United Kingdom from taking action to compel or coerce it into surrendering the accused and to ensure that no steps be taken.¹⁹²

The United States and the United Kingdom preferred further action by the Security Council. On 31 March the Council adopted Resolution 748 and qualified as a threat to international peace and security the failure by Libya to demonstrate its renunciation of terrorism by not surrendering two officials to the United States or the United Kingdom and decided to impose enforcement measures under Chapter VII to obtain Libya's compliance.¹⁹³

On 14 April, the day before the Council's measures were to come into effect, the International Court of Justice denied interim measures.¹⁹⁴ The Court emphasised that it was not called to decide definitely the legal effect of Resolution 748 or its jurisdiction to entertain the merits of the case.¹⁹⁵

The Court considered that "whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures."¹⁹⁶ It found that the parties as members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter and this obligation extended to the decision contained in Resolution 748.¹⁹⁷

192. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie (Libya v. U.S.), *ICJ Rep.*, (1992), para. 9.

193. SC Res. 748, 31 Mar. 1992.

194. S/ 23992, 31 ILM (1992), p. 755.

195. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Request for the indication of Interim Measures, (Libya v. U.K.), *ICJ Rep.*, (1992), p.15, paras. 40, 42.

196. *Ibid.*, para. 39.

197. *Id.*

The Court stressed that, in accordance with article 103 of the Charter, the obligations of the parties under this resolution superseded any obligations under any other international agreement, including the Montreal Convention.¹⁹⁸ The Court concluded that the indication of provisional measures would deprive the United States and the United Kingdom of their rights under the resolution 748.¹⁹⁹

The opinion of the World Court in the case of Libya demonstrates that states would remain under an obligation provisionally to comply with decisions of the Security Council even if they consider them *ultra vires*.²⁰⁰ However, as some of the judges in separate and dissenting judgements suggested, it seems that the Court would be prepared to act as guardian of Charter law which implies the possibility of the Court overruling decisions of the Council.²⁰¹ Nevertheless, the Court has been reluctant to discuss the Council's decisions, most likely because the former prefers to avoid opposing the latter.

Judge Bedjaoui noted that for the first time there was the possibility of one organ of the UN influencing the decision of the other and the possibility of conflict between the two decisions.²⁰² He questioned the prudence of the Council in acting under Chapter VII, referring to the three years time between the event and the Council deciding that the matter constituted an imminent threat to the peace.²⁰³ Having recognised the Council's role as the sole determiner of the position of a political dispute, he regretted that the Council did not seek an advisory opinion of the Court since Article 36 of the Charter requires that all legal disputes be addressed to the Court.²⁰⁴

198. *Id.*

199. *Ibid.*, para. 41.

200. Mark Weller, "The Lockerbie Case: A Premature End to the 'New World Order'?", 4 *African J. Int. and Comp. L.*, (1992), p. 324.

201. *Libya v. U.K.*, *ICJ Report*, (1992), for example Judge Shahabuddeen, p. 142.

202. *Ibid.*, p. 33.

203. *Ibid.*, p. 41. He also noted that the evidence implicating the accused did not appear strong and drew attention to GA Res. 41/38 of 20 Nov. 1986, indicating that the US was engaged in a campaign of misinformation against Libya. *Ibid.*, p. 42-3.

204. *Ibid.*, pp. 42-6.

Bowett in an example considers a decision by the Council on sovereignty and territorial integrity of a state. He writes: "it is possible that the surest way to restore international peace and security, in a situation created by the aggression of a powerful State A, would be for the Council to agree that A should have what it covets, namely part of the territory of weaker State B. But could the Council decide, with binding effect, that B must transfer the territory to A in the interests of restoring peace? Instinctively, one would reply in the negative, and, clearly, the simple recital of the binding effect of Council decisions under Article 25 would provide no kind of satisfactory answer".²⁰⁵

The member states agreed to carry out decisions of the Council in accordance with the Charter.²⁰⁶ On the other hand, the Security Council must act in accordance with the purposes and principles of the Charter,²⁰⁷ and is obliged under Article 1(1) to adhere to the principles of international law and justice. Consequently, *ultra vires* decisions may not be obligatory for member states.

Judicial review of Security Council resolutions is as much a concern today as it was when the Charter was drafted in 1945. Kelsen considered the Security Council as a political agency whose decisions would be determined rather by political principles than by rules of positive law. He suggested that where "the Security Council takes enforcement action against any state under the Charter, it should at the same time submit the case to the international court of justice and should stop its action if the court should decide that the state in question had not been guilty of a violation of the Charter".²⁰⁸

205. Derek W. Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures", Eur. J. Int'l. L., (1994), p. 93.

206. Article 25 of the Charter.

207. Article 24 of the Charter.

208. H. Kelsen, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals", 39 A. J. L. L., (1945), p. 74-5.

The drafters of the Charter did not envisage the right of member states if their essential rights under the Charter are breached by the Council's action, nor did they make a provision for judicial control or review of the acts of the UN political organs. Reisman points to the existence of the veto and the expansion of the non-permanent seats in the Council in 1963 from six to ten to show that these political checks and balances are adequate constraints on Council's conduct.²⁰⁹ It seems that Reisman focused on an internal check, and believed that the freedom of the Security Council's authority should not be fettered by external sources.

There is another view that, if the UN system is to be effective, it is necessary that the checks and balances should not be exclusively internal to each organ; rather the checks should be carried out by the interaction of the organs.²¹⁰ In this case the International Court of Justice is considered as a guardian of legality of actions by the UN organs and in particular the Security Council, though the International Court of Justice is not a kind of constitutional court exercising general powers of judicial review.

It is believed that, although the Council has the responsibility for enforcement measures to affect and suspend the rights of states and individuals, its powers are not unlimited, nor is it impossible to determine whether the Council has or has not these legal standards.²¹¹ For determination of the legal limits of the Council's powers close examination of the Charter's principles and purposes shows that they include well-recognised and defined principles of international law which provide a sufficient legal

209. W. Michael Reisman, "The Constitutional Crisis in the United Nations", 81 *A. J. I. L.*, (1993), pp. 83-4.

210. Craig Scott et al, "A Memorial for Bosnia : Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina" 16 *Mich. J. Int'l L.*, (1994), p. 91.

211. T. D. Gill, *op. cit.*, p. 135.

basis to determine whether measures taken by the Council are or are not legal.²¹² These principles and purposes include, together with long existing rules and principles relating to the rights of states such as territorial integrity and independence, also fundamental rules of human rights law and rules relating to the humanitarian conduct of armed conflict.²¹³

In case of violations of these standards by the Security Council, it is necessary to look at the possible remedies. Countermeasures to restore equalities between the injured state and the offending state by suspension or withdrawal of some privilege or right by the former *vis-a-vis* the latter in order to induce the offending state to cease its illegal conduct, are only likely to be practical and effective in situations where the injured state has some degree of leverage over the offending state, and would be unsuitable and inappropriate remedies for illegal Council action.²¹⁴

Although another remedy has been suggested²¹⁵ as non-compliance by the member states, which is claimed to be probably an effective remedy (not immediately, but in the long term), it may only be effective if a large number of states do not comply, and it cannot be considered as a guaranteed response to an illegal act by the Council. On the other hand, the Council derives its authority from the member states which have invested it with the powers delegated to it. Therefore, the Council should maintain its legitimacy and effectiveness by reflecting the legitimate will of states and having the role of representation of all states in maintaining international peace and security.

Several suggestions have been made on the mechanism of legal control of Security Council decisions. One suggestion is that the World Court has no direct power of judicial review, but "is competent to pronounce on the validity of Security Council

212. *Id.*

213. *Id.*

214. *Ibid.*, pp. 114, 135.

215. *Ibid.*, p. 115.

determinations of legal responsibility either where this arises as an issue in an inter-state dispute or when an advisory opinion is requested Alternatively, the Council is free to refer such challenges by any state to arbitration or to a Commission of Jurists".²¹⁶ Another suggestion is that "the Council or the Assembly could establish a set of guidelines that would provide for automatic involvement of the Court" under certain circumstances.²¹⁷ The final suggestion is that the General Assembly could establish an impartial body under Article 96 that would monitor internal crises and request an advisory opinion when it deemed necessary.²¹⁸

It is true that the Permanent Members of the Security Council act politically. It is also understood that they may not be represented by lawyers, though, this cannot be accepted as a justification for ignoring the rule of law. The Security Council, with its powers conferred by the Charter, should put the legal basis for its decisions as the prime objective, and political considerations should fall within the framework drawn by legal considerations. It is primarily essential that the Council clarify the constitutional basis of each and every decisions in its resolutions. "Common sense would suggest that the authority of a political organ must depend on respect for the Rule of Law and that there is an essential link between operational efficacy and legality."²¹⁹

THE DEVELOPMENT OF THE ROLE OF THE SECRETARY-GENERAL

The role of the Secretary-General of the United Nations has developed during the life of the Organisation. The Secretary-General can act within narrow and undefined limits with independence in respect of international peace and security. His

216. Derek Bowett, *op. cit.*, p. 101.

217. Anthony Clark Arend, "The United Nations and the New World Order", 81 *Geo. L. J.*, (1993), p. 531.

218. *Id.*

219. I. Brownlie, *op. cit.*, p. 227.

personality, intelligence and experience are important in performing his duties. Within the UN Charter, Chapter XV has been devoted to the Secretariat, the articles of which relating to the political function of the Secretary-General will be discussed here.

Article 99 and the political function of the Secretary-General

The direct political function of the Secretary-General derives from Article 99. This article says: "The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the international peace and security." This article has put the Secretary-General in a position that, in case of beginning the occurrence of a breach of the peace, he may bring the matter to the attention of the Security Council for consideration. The implication of this right makes him an integral part of the discussions and actions regarding peace and security in the Security Council.

Article 99 refers to "any matter" not exclusively of a "dispute or situation". This implies a broad scope regarding international peace and security. However, the matter should be accompanied by convincing evidences with serious content to engage the Security Council. "Because of the possibility of a determination that a breach of the peace has occurred, the direct interests of the great powers are automatically engaged. Whatever the estimates of the Secretary-General may be, the permanent members of the Council have the ultimate burden of responding to his initiative ... Whatever his decisions in regard to Article 99, the Secretary-General faces a difficult and delicate set of political problems."²²⁰

220. Leon Gordenker, The Secretary-General and the Maintenance of Peace, (Columbia University Press, New York and London, 1967), p. 139.

The Secretary-General Hammarskjold was the first who invoked Article 99 at the time of beginning the Congo crisis in 1960.²²¹ Earlier, the President and the Prime Minister of the Congo jointly had asked the Secretary-General for military assistance to end a "Belgian ... act of aggression against our country".²²² There was also an internal crisis in the Congo regarding the secession of Katanga. The Secretary-General did not refer to the Belgian "aggression" as a main problem in the Congo, rather he considered the Congo's internal matter as a threat to the international peace.²²³ The Security Council by its resolution called upon Belgium to withdraw, and authorised the Secretary-General to take necessary steps to provide "military assistance" in consultation with the Congolese government until the Congolese security forces met their tasks fully.²²⁴

Although Resolution 143 did not refer to any finding under Article 39, Secretary-General Hammarskjold's first report on the the deployment of forces contained that the breakdown of the instruments of the government for maintenance of law and order "represented a threat to peace and security justifying United Nations intervention on the basis of the explicit request of the Government of the Republic of the Congo. Thus the two main elements, from the legal point of view, were on the one side this request and, on the other hand, the implied finding that the circumstances to which I had referred were such as to justify United Nations action under the Charter".²²⁵

Hammarskjold's use of Article 99 to start the the Council in motion gives the first indication as to the possible constitutional basis of the action for he believed that his use of Article 99 necessarily implied a finding by himself of a situation falling within Article 39.²²⁶ The Secretary-General did not want to categorise the Belgian

221. 15 SCOR, 873rd mtg., para 18, (1960).

222. S/4382, 12 July 1960.

223. 15 SCOR, 873rd mtg., para. 18, (1960).

224. SC Res. 143, 14 July 1960.

225. S/4389, 18 July 1960.

226. J. Lash, "Dag Hammarskjold's Conception of his Office", 16 International Organisation, (1962), p. 551.

intervention as aggression in order to obtain the support of the Western powers on the Council.²²⁷ It was obvious that if only the matter of Belgian action had been put on the Council's agenda, the veto power of at least one of the permanent members would have prevented Council's action regarding Belgian aggression.²²⁸ Secretary-General Hammerskjold by his initiation and under Article 99 found a path through this minefield by proposing to create such conditions as to facilitate Belgian withdrawal with a United Nations force filling the vacuum.²²⁹

The second case in which the Secretary-General invoked his political powers under Article 99 in order to draw the attention of the Security Council to a matter which might pose a threat to international peace and Security was in 1979 in the case of capture and detention of hostages in the United States Embassy in Tehran.²³⁰ Secretary-General Kurt Waldheim sent a communication addressed to the President of the Security Council, in which he gave an account of the situation in which the USA and Iran found themselves.²³¹ He stated that the crisis posed a serious threat to world peace and therefore called upon the SC to convene an emergency meeting in order to seek a peaceful solution to this problem.²³²

The Security Council in its Resolution 457 of 4 December 1979, expressed its deep concern over the alarming amount of tension between the USA and Iran which could have serious consequences for international peace and security, and advised Iran to release the hostages being held in the embassy in Tehran.²³³ Both parties were admonished to proceed with the greatest caution.

227. N. D. White, *op. cit.*, p. 236.

228. L. Gordenker, *op. cit.*, pp. 140-3.

229. Georges Abi-Saab, The United Nations Operations in the Congo (1960-1964), (Oxford University Press, Oxford, 1978), p. 13.

230. S/13646

231. *Id.*

232. *Id.*

233. SC Res. 457, 4 Dec. 1979.

The Secretary-General was asked to offer his good offices in order to ensure the immediate implementation of the resolution and to avail himself of all measures necessary to this effect, about which he should submit a report to the Security Council.²³⁴

There is an opinion that although in the Congo crisis as well as the occupation of the American Embassy in Tehran the Security Council agreed with the Secretary-General in his assessment of the danger inherent in the situation and entrusted him with important political duties to the extent that he should deem necessary, an express application of Article 99 has not played the decisive role in the political development of the office of the Secretary-General which had been anticipated by the drafters of the Charter.²³⁵

However, the Secretary-General may perform his duties assigned by the Security Council and may suggest the instructions he considers appropriate and ask for the powers he deems necessary to perform his duties. Therefore, he may get special powers to deal with a dispute by his initiation, confidence and responsibility.

Article 98 and delegated functions

Another important power of the Secretary-General regarding international peace and security is drawn from Article 98. Article 98 of the Charter says: "The Secretary-General ... shall perform such other functions as are entrusted to him by these organs". Article 98 has not made clear what the entrusted functions are nor did it clarify the conditions according to which UN organs may delegate functions to the Secretary-General. Yet it might be said that these functions should not be other than those the delegating organ would apply under the Charter.

234. SC Res. 461.

235. Bruno Simma, *op. cit.*, pp. 1050-1.

As mentioned earlier, in performing his political functions, the Secretary-General might use his initiatives which are necessary for fulfillment of his task. However, the Secretary-General's autonomy must be exercised in compliance with eventual limits and instructions imposed by the delegating organ as well as with the observance of the Charter provisions.²³⁶

The most important example of delegation power in the context of applying provisional measures to keep the peace is the entrusted power by the Security Council for establishing and commanding peace-keeping forces. Under this function, the Secretary-General should conclude agreements with host states and other states which would contribute in the operations. The Secretary-General also might, according to his delegated powers, perform investigation, conciliation, mediation and good offices.

In case of Congo the Secretary-General was authorised to take necessary steps to provide "military assistance" in consultation with the Congolese government until the Congolese security forces met their tasks fully.²³⁷

In cases of Cyprus,²³⁸ East Timor,²³⁹ Libya,²⁴⁰ the Middle East,²⁴¹ Namibia,²⁴² and Yugoslavia,²⁴³ the roles of the Secretary-General's good offices were authorised by the Security Council resolutions. In cases of Afghanistan²⁴⁴ and the Western Sahara²⁴⁵, the Secretary-General's activities were authorised by the General Assembly resolutions.

236. B. Conforti, *op. cit.*, p. 219.

237. SC Res. 143, 14 Jul. 1960.

238. SC Res. 367, 12 March 1975, para 6.

239. SC Res. 384, 22 Dec. 1975, para 5.

240. SC Res. 731, 21 Jan. 1992, para. 4.

241. SC Res. 242, 22 Nov. 1967, para. 3.

242. SC Res. 435, 2 Sep. 1978, para. 3.

243. SC Res. 713, 25 Sep. 1991, para. 3.

244. GA Res. ES-6/2, 14 Jan. 1980, para. 7.

245. GA Res. 40/50, 2 Dec. 1985, para. 4.

The past practice of the Organisation offers many examples in which the Secretary-General performed conciliation, mediation and investigation, without specific delegation by the UN organs. This will be discussed together with representative examples in the following section.

Independent initiatives by the Secretary-General

The UN Charter did not envisage the power of the Secretary-General to take initiatives independently. With regard to the constitutional basis of these initiatives, it has been argued that it cannot be accepted to assume that they implicitly come under Article 99, since this article deals with a procedural matter, the convening of the Council, and it cannot serve to solve a question of substance.²⁴⁶ It might be said that independent initiatives are placed outside of the formal institutional framework of the United Nations though they are entirely compatible with the position covered.²⁴⁷ It is useful at this point to consider some examples of the Secretary-General taking independent initiative.

The Secretary-General Trygve Lie conducted an independent power of investigation in 1946 to investigate alleged infiltration across Greece's northern frontier during the civil war. At a Security Council meeting, Lie announced his own right to make enquiries or investigations in order to establish whether a question should or should not be brought to the attention of the Council.²⁴⁸

Another example of independent action by the Secretary-General was during the Iraq-Iran war. In response to the repeated request by Iran to investigate the Iraqi use of

246. B. Conforti, *op. cit.*, p. 221.

247. *Id.*

248. SCOR, 1st year, 70th mtg., 20 Sept. 1946, p. 404.

chemical weapons, Secretary-General Perez de Cuellar decided in March 1984 to send a team of experts to Iran.²⁴⁹ The Secretary-General, as a fact finder and on his own authority, sent several missions from March 1984 onwards, to examine the evidence on the ground.²⁵⁰ Although the findings of the missions confirmed the Iraqi use of chemical weapons²⁵¹, which damaged the impartiality of the Secretary-General in Iraqi eyes, both disputant parties continued to accept him as a mediator, and he continued to advance proposals to both sides.²⁵²

The Secretary-General's efforts during this conflict, including mediation, fact-finding and attempts to end attacks on civilians, were considerable. The Secretary-General's impartial approach was the main reason that parties, particularly Iran, emphasised cooperation with him. It seems that, if the organs of the United Nations fail to consider a dispute and take appropriate action, the role of the Secretary-General could be essential at least in negotiation and mediation.

The role of the Secretary-General during the Iraq-Iran war will be discussed in detail in Chapter Six of this thesis. It should be mentioned however that "the Iran/Iraq conflict demonstrates that, under favourable conditions, the Secretary-General can integrate several different roles: as impartial intermediary, investigator and voice of world conscience".²⁵³

However, in the case of the Kuwait crisis, the Secretary-General felt constrained to limit his negotiations to securing Iraqi compliance with decisions made at the Security Council.²⁵⁴ It is believed that "[m]ore constraining were the insistent prompting, of

249. A/39/127, S/16397.

250. S/17911, S/18852, S/19823.

251. S/20060/, S/20134.

252. UN Press Release SG/SM/3956, 13 Jan. 1987, p. 4.

253. Thomas M. Franck, "Fairness in the International Legal and Institutional System", *Recueil Des Cours*, 1993-III, (Martinus Nijhoff Publishers, The Netherlands, 1994), p. 168.

254. UN Press Release SG/T/1624, 30 Aug. 1990.

some permanent members of the Security Council, particularly those pertaining to the timing of his approaches to Iraq".²⁵⁵

In the case of Lybia, the Secretary-General declined to have a role as a mediator, and emphasised that his own authority under the Council's terms²⁵⁶ was too limited to permit an invitation of the Libyan Government to negotiate a "mechanism" to implement Resolution 731.²⁵⁷

The cases of Kuwait and Libya demonstrate the fact that, by the end of the Cold War and the emergence of unipolarity of the United Nations political balance of power, there is a shrinkage of the role of the Secretary-General performing mediation, good offices, etc. It is believed that in the post-Cold War period "the capacity of the Security Council to perform its political functions effectively has narrowed the former role of the Secretary-General as an honest broker between forces locked into intractable enmity. The Council, now more readily able to take decisions, tends to ask the Secretary-General to go to Tripoli and to Baghdad not to exercise an independent political role but more as a letter carrier to help execute its own plan of action."²⁵⁸

There is a strong possibility that situations of threat to to the peace may come where the Council will need a role of mediation, conciliation, investigation, fact finding, good offices, etc. to be performed by the Secretary-General as an impartial body acceptable to the parties concerned. He "can effectively exercise his good offices in combination with other means at his disposal, to bring relevant pressure to bear on

255. T. M. Franck, "Fairness in the International Legal and Institutional System", *op. cit.*, p. 182.

256. SC Res. 731, 21 Jan. 1992.

257. S/23574, 11 Feb. 1992.

258. T. M. Franck, *op. cit.*, pp. 185-6.

parties to a grave conflict".²⁵⁹ There exists a need to encourage and reinforce the independent role of the Secretary-General for such circumstances.

"An Agenda for Peace"

In 1992 the members of the Security Council asked Secretary-General Boutros Boutros-Ghali to prepare "an analysis and recommendations on ways of strengthening and making more efficient within the framework and provisions of the Charter the capacity of the United Nations for preventive diplomacy, for peacemaking and peace-keeping".²⁶⁰ The Secretary-General prepared a report entitled "An Agenda for Peace"²⁶¹ in which he recognised the basic principles of new concepts of preventive diplomacy, peacemaking, peace-keeping and peace-building. He proposed suggestions to be applied by the Security Council, General Assembly, the regional organisations and member states for changes and improvements with regard to maintaining international peace and security, conflict management and UN financial matters.

The dramatic events that occurred since the end of Cold War era made it necessary for the Secretary-General in 1995 to prepare a supplement to "An Agenda for Peace",²⁶² taking into account the practical problems of the emerging world order. In this supplement, qualitative and quantitative changes were considered, and significant suggestions were made in respect of instruments for maintaining peace and security. The changes include increasing intra-state conflicts rather than inter-states conflicts, the use of UN forces to protect humanitarian operations, the presence of UN peace-keeping forces after negotiations, and the emergence of multifunctional peace-keeping

²⁵⁹- Thomas M. Franck and George Nolte, "The Good Offices Function of the UN Secretary-General", in: A. Roberts and Benedict Kingsburg (ed.), United Nations, Divided World, (Clarendon Press, Oxford, 1993), p. 159.

²⁶⁰- S/23500.

²⁶¹- Boutros Boutros-Ghali, An Agenda for Peace, (1992), op. cit.

²⁶²- A/50/60 - S/1995/1.

operations.²⁶³ The instruments for maintaining peace and security suggested by the Secretary-General were preventive diplomacy and peacemaking, peace-keeping, post-conflict peace-building, disarmament, sanctions, and enforcement action.²⁶⁴

According to the Secretary-General, "[p]reventive diplomacy seeks to resolve disputes before violence breaks out; peacemaking and peace-keeping are required to halt conflicts and preserve peace once it is attained. If successful, they strengthen the opportunity for post conflict peace-building, which can prevent the recurrence of violence among nations and peoples".²⁶⁵

Preventive diplomacy, peacemaking, peace-keeping and peace-building can be employed only with the consent of the disputant parties.²⁶⁶ However, sanctions and enforcement actions are coercive measures and by definition do not require the consent of the party concerned, and disarmament can take place according to an agreement or in the context of coercive action under Chapter VII.²⁶⁷

As discussed earlier, three basic principles of peace-keeping are consent of the parties, impartiality, and the non-use of force except for self-defence. However, these principles, in the last few years and in response to the new political environment resulting from the end of the Cold War, have been changed. According to the Secretary-General, three aspects of recent mandates have led peace-keeping operations to forfeit the consent of the parties to behave in a way perceived as partial and/or to use force other than in self-defence.²⁶⁸ These aspects, he states, are the tasks of protecting humanitarian operations during war, protecting civilian populations in

263. Boutros Boutros-Ghali, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, 1995, A/50/60 - S/1995/1, paras. 8-22.

264. Ibid, paras. 23-80.

265. An Agenda for Peace, (1992), para. 21.

266. An Agenda for Peace, (1995), para. 23.

267. Id.

268. Ibid, para. 34.

designated safe areas, and pressing the parties to achieve national reconciliation at a pace faster than they were ready to accept.²⁶⁹ Regarding the establishment of "safe areas" in the case of Bosnia, the UN force was given a humanitarian mandate under which the use of force was authorised, but for limited and local purposes and not to bring the war to an end.²⁷⁰

The mechanism of enforcement measures envisaged in Chapter VII of the Charter is also limited since, according to Boutros-Ghali, neither the Security Council nor the Secretary-General at present has the capacity to deploy, direct, command and control an operation, except perhaps on a very limited scale.²⁷¹ The Security Council in several cases authorised a group of willing member states to undertake enforcement action.²⁷² Entrusting enforcement tasks to groups of states might provide the Organisation with an enforcement capacity but there is the danger that the states concerned may claim international legitimacy and approval for forceful actions that were not envisaged by the Security Council when it gave its authorisation to them.²⁷³

The Secretary-General has suggested that it would be more desirable to prevent conflicts through early warning, quiet diplomacy and in some cases preventive deployment than to have to undertake major politico-military efforts to resolve them after they have broken out.²⁷⁴ He has recommended that in interstate disputes preventive deployment could take place when two countries feel that a United Nations presence on both sides of their border can discourage hostilities.²⁷⁵ Preventive

269. *Id.* The cases of Bosnia and Somalia are two examples which will be discussed in the proceeding chapters.

270. *Ibid.*, para. 19.

271. *Ibid.*, para. 77.

272. In cases of Korea, Kuwait, Somalia, Rwanda and Haiti.

273. *An Agenda for Peace*, (1995), para.80.

274. *Ibid.*, para. 26.

275. *An Agenda for Peace*, (1992), para. 28.

deployment also may take place when a country feels threatened and requests the deployment of an appropriate UN presence along its side of the border alone which.²⁷⁶

In intra-state crises there could be preventive deployment at the request of the government or all parties concerned or with their consent.²⁷⁷ In an internal crisis, the Secretary-General emphasised that, the UN will need to respect the sovereignty of the state, to do otherwise would not be in accordance with the understanding of member states in accepting the principles of the Charter.

With regard to humanitarian assistance, the Secretary-General has made reference to General Assembly Resolution 46/182 of 19 December 1991. Among guidelines which has been referred to in this resolution is that humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality, and that the sovereignty, territorial integrity and national unity of states must be fully respected in accordance with the Charter.²⁷⁸ In this context, humanitarian assistance should be provided with the consent of the affected country and on the basis of an appeal by that country.²⁷⁹

Although the Secretary-General emphasises on respect for fundamental sovereignty and integrity of states which are crucial to any common international progress, he mentions that the time of absolute and exclusive sovereignty has passed and its theory was never matched by reality, and it is the task of leaders of states to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.²⁸⁰

276. *Id.*

277. *Id.*

278. *Ibid.*, para. 30.

279. *Id.*

280. *Ibid.*, para. 17.

Regarding the delegated power of the United Nations and its limitations, he stressed on the fact that "principles of the Charter must be applied consistently, not selectively, for if the perception should be of the latter, trust will wane and with it the moral authority which is the greatest and most unique quality of that instrument".²⁸¹

Indeed, the Secretary-General in his Agenda for Peace made an important analysis and recommendations on making more efficient UN organs and even regional organisations, regarding conflict management, within the framework of the Charter, and it is necessary international organisations (world and regional), consider these recommendations in their endeavour in maintaining international peace and security.

281. A/47/277, S/24111, 17 June 1992, p. 23.

CHAPTER THREE

UNITED NATIONS PEACE-KEEPING FORCES

Although the institution of peace-keeping was not envisaged in the UN Charter, it probably has been the most concerted effort by the United Nations regarding international peace and security. These forces are usually deployed following a cease-fire and have limited objectives. Their establishment is based on the consent of host states, and their presence does not affect the sovereignty of host states. While peace-keeping operations involve the use of military personnel, they do not undertake enforcement action for final solution of a dispute.

There is a distinction between peace-keeping forces and observer missions though they share the feature of not being enforcement measures to end a conflict. Observer missions have been deployed before cease-fires in some cases to consider the possibility of deploying peace-keeping forces. Observer groups may be stationed on either side of the conflict and only observe the cease-fire. Another distinction is that observers are not usually large enough to create a buffer zone between the belligerents, a function that has been performed in some occasions by peace-keeping forces. In addition, while observers are not equipped to perform activities such as guarding border areas or checking vehicles for weapons, peace-keeping forces are often stationed as an interposition force between the belligerents and guard border areas. Peace-keeping forces use force not only for self-defence but also they may be authorised to use force necessary for performing their mandates. In recent years peace-keeping forces have been deployed to protect humanitarian operations during continuing warfare. These operations will be discussed in Chapter Five.

Since the concept of peace-keeping was not defined in the Charter, it is difficult to give a clear constitutional definition for peace-keeping actions and make an absolute distinction between observer missions and peace-keeping forces. In practice, the United Nations has dealt with various conflicts having different characteristics which necessitated special and *ad hoc* mandates to be given to the UN forces. The appropriate approach seems to be the study of each case separately in order to comprehend the basis of their establishment.

In this chapter, the background information and important facts of six cases in which peace-keeping forces were deployed will be summarised as deemed necessary for the analysis of the cases. The constitutional basis of the establishment of each force and the effectiveness of its operation will then be investigated. The conclusions drawn from the examination of these cases will finally be presented.

First United Nations Emergency Force (UNEF I)

Egyptian President Gamal Abdel Nasser, in his speech at Alexandria on 26 July 1956, announced the Egyptian nationalisation of the Suez Canal Company. American Secretary of State John Foster Dulles, on 19 July 1956, had announced the US refusal to finance the Aswan High Dam project on the Nile River.¹ Nasser stated that the Canal dues would be used to finance the Aswan dam.²

Nasser intended to pay compensation to the shareholders of the Canal Company. The compensation which was determined was on the basis of the market value of the

¹- For more information see: Anthony Nutting, No End of a Lesson: The Story of Suez, (Constable, London, 1967).

²- It is believed that while Nasser established his leadership in Egypt and the Arab world, Britain took the first step toward establishing a politico-military alliance, later to become known as the Central Treaty Organisation (CENTO), to protect its interests in the Middle East. Although the United States increased its aids to Egypt, with the establishment of the Baghdad Pact and the signing of bilateral treaties with Iran, Iraq, and Turkey, changed its policy. Egypt was the one that suffered. By US reversal policy, Nasser viewed the new treaties as anti-Egyptian rather than an anti-Soviet alliance. Rikhye et al, *op. cit.*, pp. 49-50; R. Higgins, *op. cit.*, pp. 221-2.

shares on 25 July 1956, having received all the assets and property of the Canal Company.³ The British and French, which were the principal shareholders in the Suez Canal Company, being the most concerned, reacted strongly and supported the use of force as an appropriate solution to the question.⁴

Between 16 and 24 August 1956, the London Suez Conference was held to prepare an agreement on proposals to be presented to Egypt. Eighteen of the 22 powers who attended proposed a definite system to guarantee at all times and for free use of the Canal, with due regard to the sovereign rights of Egypt.⁵ However, the plan was rejected by Egypt which proposed the establishment of a negotiating body representative of the different user views to seek solutions to questions relating to freedom of navigation of the Canal and its development and equitable tolls.⁶ This proposal was considered by the Second London Suez Conference, held between 19 and 21 September 1956.⁷

The Canal worked efficiently and without incident for over two months.⁸ On 12 September, France and the United Kingdom placed the matter before the Security Council.⁹ They asserted that the situation created by the action of Egypt in attempting unilaterally to bring to an end the system of international operation of the Suez Canal might endanger the free and open passage of shipping through the Canal.¹⁰ Egypt asked the Council to consider the French and British assertions to be threats to international peace and serious violations of the Charter of the United Nations.¹¹

³- *Id.*

⁴- *Ibid.*, p. 224.

⁵- *UN Yearbook* (1956), p. 19.

⁶- *Ibid.*, p. 20.

⁷- *Id.*

⁸- Gabriella Rosner, *The United Nations Emergency Force*, (Columbia University Press, New York and London, 1963), p. 227.

⁹- S/3654.

¹⁰- *UN Yearbook*, (1956), p. 20.

¹¹- *Id.*

Although Secretary-General Hammarskjold had started his good offices, and discussions with the foreign ministers of Britain, France and Egypt seemed close to a peaceful settlement of the crisis, the Anglo-French attack was agreed.¹² On 29 October 1956, Israel attacked Egypt. On the same day the United States requested the Security Council to order an Israeli withdrawal behind the armistice lines.¹³ It is believed that, by this action, the US was attempting to demonstrate that its policy did not agree with the British policy, and to preempt possible Soviet efforts to adopt a leadership role sympathetic to smaller nations.¹⁴

Britain and France, on 30 October, issued an ultimatum to Egypt and Israel, calling on them to stop their fighting. Egypt refused, stating that it is "totally inappropriate that she should be told by Britain and France to cease the defence of her own territory".¹⁵ On 31 October, Britain and France attacked Egypt. Since Britain and France would veto any move in the Security Council, no action could be expected from that organ. Therefore, the General Assembly acted under its own "Uniting for Peace" Resolution (377 (V)).¹⁶ The General Assembly approved, on 2 November, a resolution based on the US proposal, calling for an immediate cease-fire and the withdrawal of all forces behind armistice lines.¹⁷ This resolution made no reference to the United Nations Charter.

Canada proposed a draft resolution which became Resolution 998, requesting the Secretary-General to submit a plan for setting up, with the consent of the nations concerned, an emergency international United Nations' Force to secure and supervise the cessation of hostilities.¹⁸ The General Assembly's next resolution (Resolution 999)

12- A. Nutting, *op. cit.*, pp. 93-5.

13- S/3706.

14- William Roger Louis and Roger Owen, Suez 1956: The Crisis and its Consequences, (Clarendon Press, Oxford, 1989), p. 401.

15- R. Higgins, *op. cit.*, p. 226.

16- Yugoslavian delegate's proposal.

17- GA Res. 997 (ES-I), 2 Nov. 1956.

18- GA Res. 998 (ES-I), 4 Nov. 1956.

emphasised on the necessity of achieving an immediate cease-fire, and authorised the Secretary-General to arrange immediately with the parties concerned a cease-fire and a withdrawal of forces behind the armistice lines.¹⁹

On 5 November, the General Assembly adopted Resolution 1000 to establish the United Nations Emergency Force (UNEF). In this resolution, the Secretary-General's plan for UNEF I was approved by the General Assembly.²⁰

A plan for the guiding principles for the organisation and functioning of the UNEF, reported by the Secretary-General, was accepted by the Assembly in Resolution 1001.²¹ Although some countries, including France and Britain, insisted that the function of UNEF must be more than returning to the *status quo*, including achieving a solution to the major Arab-Israel problem, the Secretary-General in his plan for UNEF indicated that, as the Assembly intended, the force should be of a "temporary nature", the "length of the assignment being determined by the needs arising out of the present conflict".²²

UNEF's functions were limited to the objectives set out in the General Assembly resolutions. UNEF could not remain in the area for an unspecified period of time to solve all the political questions affecting the area. The Secretary-General in his report on 6 November stipulated that "the Force obviously should have no rights other than those necessary for the execution of its functions, in co-operation with local authorities. It would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor, moreover, should the force have military functions exceeding those necessary to secure peaceful conditions

¹⁹- GA Res. 999 (ES-I), 3 Nov. 1956.

²⁰- A/3289.

²¹- GA Res. 1001 (ES-I), 7 Nov. 1956.

²²- Report of the Secretary-General on the plan for an emergency international UN force, A/3302, 6 Nov. 1956. This report about UNEF's functions was approved by the General Assembly in its Resolution 1001.

on the assumption that the parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly." He also stated that: "[t]here is an obvious difference between establishing the Force in order to secure the cessation of hostilities, with a withdrawal of forces, and establishing such a Force with a view to enforcing a withdrawal of forces."²³

Therefore, UNEF I had no mandate for enforcement action, but it was more than an observer force. This elaboration of the UNEF's functions by the Secretary-General illustrates the divisions between peace-keeping, enforcement action, and observation. UNEF I was not intended to be an enforcement organ, and was to be placed in the area after the cease-fire had been established. There is an argument that, had the foreign forces still remained the moment UNEF entered Egypt, the UN Force would have been helpless, and Egypt could not have performed its rights under the Charter to defend its independence and sovereignty because of the cease-fire.²⁴

The General Assembly approved the Secretary-General's recommendation regarding the functions of UNEF; it was to be placed on the Egyptian-Israeli armistice demarcation line, "after" full withdrawal by Israel from Egyptian territory.²⁵

The constitutional basis of UNEF I is not clear from the General Assembly resolutions. The General Assembly has general powers regarding international peace and security in the Charter. The Uniting for Peace Resolution has created a procedural device for the transfer of a matter from the Council (when it is paralysed by a veto of a permanent member) to the Assembly. On the other hand, the Charter authorises the General Assembly to act with regard to international peace and security, as long as the Charter does not expressly forbid it. It is believed that "peace-keeping forces could be reconciled with the general powers of the Assembly contained in Articles 10, 11 and

23- *Id.*

24- The representative of Syria, GAOR, 1st emerg. spec. sess., 566th mtg, para. 102.

25- GA Res. 1121 (XI), 24 Nov. 1956.

14 - in other words, they are express powers or at least powers implied directly from express powers".²⁶

The Secretary-General mentioned the constitutional basis of UNEF I in his later report. "The force which has an international character as a subsidiary organ of the General Assembly, as affirmed in its regulations, was not established to undertake enforcement actions. While UNEF has a military organisation, it does not use all normal military methods in achieving the objectives defined for it by the General Assembly."²⁷

In his opinion, while the General Assembly is enabled to *establish* the force with the consent of those parties which contribute units to the Force, it could not request the Force to be *stationed* or *operate* on the territory of a given country without the consent of the government of that country.²⁸

Some countries, including the Soviet Union, believed that enforcement actions include peace-keeping, and that Article 11(2), which provided that "any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion", prohibited the General Assembly from establishing peace-keeping operations.²⁹ The International Court of Justice, in 1962, in the *Expenses* case regarding the word "action" in Article 11(2), asserted this paragraph, "in its first sentence empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organise peace-keeping operations, at the request, or with the consent, of the States concerned. This power of the General Assembly is a special power which in no way derogates from its general powers under Articles 10 or 14 except as limited by the last sentence of

²⁶- N. D. White, *op. cit.*, p. 194.

²⁷- Report of the Secretary-General, A/3694, 9 Oct. 1957.

²⁸- A/3302.

²⁹- GAOR, 1st emerg. spec. sess., 567th mtg., 7 Nov. 1956.

Article 11 paragraph 2. This last sentence says that when "action" is necessary the General Assembly shall refer the question to the Security Council. The word 'action' must mean action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power".³⁰

The Court concluded that, according to the articles relating to the General Assembly's powers, the General Assembly had the legal power to create UNEF I.³¹ Consequently, like the Security Council, the General Assembly can take measures regarding international peace and security. The constitutional basis of the General Assembly's action is Articles 10, 11, 14 and 22, while the Security Council would act under Chapter VII of the UN Charter. The General Assembly would act with the consent of the countries. However, the Security Council has a mandatory power.

The Court also argued that the General Assembly has been empowered by means of recommendations to states or to the Security Council, or both, to organise peace-keeping operations at the request, or with the consent, of the states concerned.³² According to the Court, UNEF I was not enforcement action within the compass of Chapter VII of the Charter. Consequently, UNEF I was a force for securing and supervising the cease-fire which was established by the consent of the parties concerned.

After fulfilling its mandate, UNEF I's mission was terminated. It was one of the most successful peace-keeping missions. Its withdrawal was not similar to its establishment, as UNEF I was established by the General Assembly, but withdrew because Egypt withdrew her consent on its presence. The importance of the consent of

³⁰- Certain Expenses of the United Nations Case, ICJ Report, 1962, p. 164-5.

³¹- Ibid, p. 151.

³²- Id.

host state is well emphasised in the case of UNEF I as the most important element in establishing and continuing peace-keeping missions.

UN Operation in the Congo (ONUC)

During the period from 1960 to 1964 the United Nations was deeply involved in a conflict in the Belgian Congo, now Zaire. The pressure for independence from the colonial domination led the Congo to become an independent republic on 30 June 1960.

The Congo consisted of a large number of tribes which had little role in the political and economic control of their country. The colonial power, Belgium, put Belgians into senior positions in the civil and military authorities and made little attempt to prepare the Congolese to take on these positions. Thus, after independence, the Congolese were unprepared to conduct the affairs of their country.³³

By the early June 1960, the parliament was established, and two rival dominant Congolese leaders were elected as President (Joseph Kasavubu) and Prime Minister (Patrice Lumumba). However, the Belgian commander of the *Force Publique*, General Janssens, having the functions of an army and a police force, had no plans for accelerating the training of the Congolese.³⁴ He expressed the view that, as far as the *Force Publique* is concerned, independence had changed nothing.³⁵ As a result, a mutiny broke out in the Leopoldville (now Kinshasa) garrison and spread to several other cities. The Congolese Senate renamed the *Force Publique* the *Armee Nationale Congolaise* (ANC). General Janssens, who was suspected of planning to organise

³³- For more information see: Catherine Hoskyns, *The Congo Since Independence: January 1960-December 1961*, (Oxford University Press for the Royal Institute of International Affairs, London, 1965), pp. 1-41; and, Ernest W. Lefever, *Uncertain Mandate, Politics of the UN Congo Operation*, (The John Hopkins Press, Baltimore, Maryland, 1967).

³⁴- E. W. Lefever, *op. cit.*, p.7.

³⁵- *The Blue Helmets: A Review of United Nations Peacekeeping*, (United Nations Department of Public Information, New York, 1990), p. 217.

resistance to the successor government, was dismissed and Lumumba appointed a Congolese commander.³⁶

The Belgian forces, who had remained in the country under the terms of the unratified Belgium-Congo Treaty of Friendship, against the wishes of the Congo government, reinforced and moved into several parts of the Congo, justifying their action as humanitarian intervention.³⁷ By 10 July 1960, Belgian troops landed in Katanga, and the day after, Moïse Tshombe declared the secession of Katanga.³⁸

The Secretary-General, Dag Hammarskjöld, who was following the situation through Under Secretary-General Ralph Bunche resident at the time in Congo to work out the UN technical assistance, suggested that, if the Congolese government were to request for military personnel as "technical assistance of a military nature", rather than a "military assistance", he could take immediate action on his own authority without referring the matter to the Security Council.³⁹

Lumumba made his first call to Bunche on 10 July asking for technical assistance of a military nature to train the ANC for the twin purposes of national defence and the maintenance of law and order.⁴⁰ On 12 July, the Secretary-General received the request of Congolese government to send UN military assistance to protect the national territory of the Congo against the external aggression which was considered as a threat to international peace.⁴¹

36. Indarjit Rikhye, Military Advisor to the Secretary-General, UN Peacekeeping and the Congo Crisis, (Hurst & Company, London, 1993), p. 1.

37. William J. Durch (ed.), The Evolution of UN Peacekeeping, (St. Martin's Press, New York, 1993), p. 318.

38. Id.

39. The Blue Helmets, op. cit., p. 218.

40. W. J. Durch, op. cit., p. 319.

41. S/4382, 13 July 1960.

On 13 July, Hammarskjold, using his authority under Article 99 of the Charter, requested a meeting of the Security Council that convened on the same day.⁴² The Secretary-General recommended dispatching UN peacekeeping forces to assist the government until the Congolese were able fully to meet their tasks, and if the UN acted as proposed, the Belgian forces would withdraw from Congo.⁴³ On 14 July, the Security Council adopted Resolution 143, calling upon Belgium to withdraw, and authorised the Secretary-General to take necessary steps to provide "military assistance" in consultation with the Congolese government until the Congolese security forces, in the opinion of the government, met their tasks fully.⁴⁴

Despite establishing the UN operation in Congo, known by its French initials as Operation des Nations Unies au Congo (ONUC), Belgian troops remained and the situation in Congo deteriorated. The Security Council in its second resolution (Res. 145) again called on the Belgians to withdraw and authorised the Secretary-General to take all necessary actions to this effect.⁴⁵ It also recommended the admission of the Republic of the Congo to membership in the UN as a unit. The Council in its resolution requested all states to refrain from any action and interference in the Congo.

However, the question of the secession of Katanga and the withdrawal of Belgians from Congo persisted and further action was needed by the UN. On 9 August 1960, the Council in its Resolution 146 again authorised the Secretary-General to take all necessary action, and noted that the UN had been prevented from implementing the resolutions in Katanga, calling again for the withdrawal of Belgian troops from Katanga. It declared that the entry of the UN force into Katanga was necessary but emphasised that the UN in the Congo would not be a party to, or in any way intervene

42- S/4381, 13 July 1960.

43- The Blue Helmets, *op. cit.*, p. 219.

44- SC Res. 143, 14 Jul. 1960.

45- SC Res. 145, 22 Jul. 1960.

in, internal conflict. The Council called on the UN Member States, in accordance with Articles 25 and 49 of the Charter, to accept and carry out the decisions of the Security Council.⁴⁶

The dispute within the leadership of the Congo in September posed another problem for the UN. Kasavubu dismissed Lumumba, and himself was dismissed by Lumumba. Lumumba believed that UN should assist the Congolese government in pacifying the country and in restoring law and order. The differences between Lumumba and Hammarskjold became serious.⁴⁷ On the other hand, the Security Council could not take more action because of the Permanent Members' support of the disputants in the Congo. Lumumba was supported by the Soviet Union while the United States supported Kasavubu, and French, British and Belgians appeared to be supporting Tshombe.⁴⁸

By a procedural veto, and according to the US proposal, the matter was transferred to the General Assembly under the Uniting for Peace Resolution (Res. 377 of 1950).⁴⁹ Resolution 157 stated that the lack of unanimity of the Council's Permanent Members prevented it from exercising its primary responsibility for the maintenance of international peace and security, and therefore, it was decided to call an emergency session of the General Assembly to make appropriate recommendations. Higgins believed that "as this resolution was procedural, it was not susceptible to the veto".⁵⁰

On 20 September 1960, the General Assembly adopted Resolution 1474, requesting all states to refrain from intervening in the Congo, and, in accordance with Articles 25 and 49 of the Charter, to accept and carry out the decisions of the Security Council.

46- SC Res. 146, 9 Aug. 1960.

47- I. J. Rikhye, *op. cit.*, pp. 45-6.

48- Thomas M. Franck, *Nation Against Nation*, (Oxford University Press, Oxford and New York, 1985), p. 176.

49- SC Res. 157, 17 Sep. 1960.

50- Rosalyn Higgins, *United Nations Peacekeeping*, Vol. III, (Oxford University Press, Oxford, 1980), p. 22.

The Secretary-General was requested to continue to take vigorous action in accordance with these resolutions.⁵¹

At the beginning of January 1961, Lumumba was handed over to Tshombe by Mubuto, the Army Chief of Staff, and was subsequently killed.⁵² The situation deteriorated, and the Security Council adopted a resolution on 21 February 1961⁵³ which contained two parts. Part A emphasised that the danger of wide-spread civil war in the Congo was a threat to international peace and security, and urged the UN to "take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort". It urged the withdrawal of all Belgian troops and advisors, of other foreign military and paramilitary personnel not under the UN command and all mercenaries.

In Part B it was noted that "the systematic violations of human rights and fundamental freedoms" in the Congo had occurred. Part A was particularly relevant to the use of force in the last resort. By this resolution the UN force was given a new mandate by which military action "could be used 'if necessary, in the last resort', for this purpose - and not only in self defence".⁵⁴

ONUC's operation (Round One) failed to bring about the end of Katanga's secession.⁵⁵ On 24 November, the Security Council adopted Resolution 169 which approved the authority of the Secretary-General "to take vigorous action, including the use of the requisite measure of force, if necessary, for the immediate apprehension, detention, pending legal action and/or deportation of all foreign military and paramilitary

⁵¹- GA Res. 1974, 20 Sep. 1960.

⁵²- Indarjit Rikhye, Michael Harbottle and Bjorn Egge, The Thin Blue Line, International Peacekeeping and Its Future, (Yale University Press, New Haven and London, 1974), p. 78.

⁵³- SC Res. 161, 21 Feb. 1961.

⁵⁴- R. Higgins, op. cit., p. 31.

⁵⁵- Rikhye et al, op. cit., p. 80.

personnel and political advisors not under the United Nations command, and mercenaries...". To this end, the Secretary-General was authorised "to take all necessary measures to prevent entry or return of such elements...". The situation in Katanga deteriorated and the second ONUC operation failed. Finally, the third operation ended the secession of Katanga after 36 hours fighting between UN troops and Katangese forces, and ONUC withdrew from the Congo on 30 June 1964.⁵⁶

The constitutional basis of ONUC was not mentioned in the Security Council's resolutions. The Secretary-General initially convened the Security Council under Article 99 of the Charter. Although Article 39 was not mentioned in the resolutions, the Security Council stated that the situation in Congo was a threat to international peace and security. However, the Secretary-General did not want to categorise the Belgian intervention as an act of aggression because it was obvious that at least one of the permanent members of the Council would have prevented taking action against Belgian aggression. In Chapter Two of this thesis, more discussions have been made regarding the Secretary-General's initiatives in case of Congo.

In different stages of the crisis in the Congo, ONUC had different mandates: as military assistance for the Congolese government for the withdrawal of Belgian forces;⁵⁷ to assist the government of the Congo in restoring law and order;⁵⁸ to take measures to prevent civil war using force if necessary;⁵⁹ to take vigorous action including the requisite measures of force for the deportation of all military and paramilitary personnel.⁶⁰

In fact, ONUC was permitted to use force for more than self-defence and to prevent the occurrence of a civil war. ONUC is considered to have performed provisional

⁵⁶- *Ibid*, p. 82.

⁵⁷- SC Res. 143, 14 Jul. 1960.

⁵⁸- GA Res. 1474, 20 Sep. 1960.

⁵⁹- SC Res. 161, 21 Feb. 1961.

⁶⁰- SC Res. 169, 24 Nov. 1961.

measures under Article 40, rather than enforcement measures under Article 42. The General Assembly in its resolution also recommended provisional measures which the Security Council provided as a mandatory action.

The International Court of Justice, in the *Expenses Case* with regard to the resolutions relating to the Congo, stated that "the operation did not involve 'preventive or enforcement measures' against any state under Chapter VII".⁶¹ The Court in its judgement suggested that the General Assembly made no recommendation of enforcement action and indeed the Assembly reaffirmed the mandate which was created by the Security Council.⁶²

Eventually, ONUC used force to subdue the Katangese rebellion in April and December 1961 and between December 1962 and January 1963.⁶³ The use of force by ONUC was much wider than acting in self-defence, while the Secretary-General had always affirmed that ONUC never exceeded the scope of self-defence.⁶⁴

Bowett believed that the constitutional basis of ONUC was wider than Article 40. He considered ONUC as a force "for the purpose of supervising and enforcing compliance with the provisional measures ordered under Article 40 and for other purposes which were consistent with the general powers of the Council under Article 39".⁶⁵ Although ONUC was not completely impartial, since it was against foreign elements and secessionists, it could not be considered as a force with a mandate under Article 42 to enforce peace. In fact, ONUC had a mandate to enforce provisional measures assisting the Congolese government to restore and maintain law and order, and securing the withdrawal of foreign military forces.

61. Certain Expenses of the United Nations Case, ICJ Rep. (1962), p. 177.

62. Ibid, p. 151.

63. S/5240 (1963).

64. S/4940/Add. 4 para. 7.

65. D. W. Bowett, United Nations Forces, (Stevens & Sons, London, 1964), p. 180.

UN Peace-Keeping Force in Cyprus (UNFICYP)

The Cyprus conflict involves a long-running Greek-Turkish Cypriot dispute. Cyprus is the third-largest Mediterranean island, with the population 80 percent Greek Cypriot and 18 percent Turkish Cypriot. The island has been ruled by many rulers such as the Venetians, the Turks and the British.⁶⁶

In the nineteenth century the idea of *enosis* or union with Greece emerged and intensified when Cyprus came under British rule in 1878.⁶⁷ Pressures to end British rule continued until World War II. Turkey and the Turkish Cypriots opposed the Greeks' demand for *enosis* both in Cyprus and in Greece.⁶⁸

Turkish Cypriots, in a memorandum in 1950, asked the General Assembly that Cyprus should remain British or revert to Turkish rule.⁶⁹ A campaign began by Greek Cypriots against the British authorities in the cause of self-determination and *enosis* (EOKA). The Charter of EOKA declared that it was dedicated to focus "international public opinion" on the problem of Cyprus "until international diplomacy - the United Nations - and the British" were forced to solve it.⁷⁰

After intensified violence, in 1959, representatives of Greece, Turkey and the United Kingdom started negotiations about the future status of Cyprus. In February, their negotiations resulted in the Zurich and London Agreements.⁷¹ The agreements were embodied in four documents: the Treaty of Establishment of the Republic of Cyprus⁷²

⁶⁶- For more information see: Thomas Ehrlich, Cyprus 1958-1967, (Oxford University Press, London, 1974); I. J. Rikhye et al, op. cit. pp. 97-120.

⁶⁷- Augustus Richard Norton (ed.), The Cyprus Conflict and the Role of the United Nations, (Norwegian Institute of International Affairs, Oslo, 1988), p. 5.

⁶⁸- T. Ehrlich, op. cit., p. 2.

⁶⁹- GAOR (1950), p. 18.

⁷⁰- T. Ehrlich, op. cit., p. 11.

⁷¹- The Blue Helmets, op. cit., p. 281.

⁷²- 382 UNTS No. 5476.

(signed by Cyprus, the UK, Turkey and Greece), the Treaty of Guarantee⁷³ (with the same signatories), the Treaty of Alliance⁷⁴ (signed by Cyprus, Greece and Turkey), and a constitution for the new republic⁷⁵ (signed in Nicosia on 16 August 1960).

The Republic of Cyprus was formally established on 16 August 1960 and became an independent state. Its constitution expressly forbade the partitioning of Cyprus and its union with any other state. The Treaty of Guarantee had provided that the three powers undertook to consult each other in case of breach, but retained the right to intervene unilaterally to re-establish the political *status quo* set out in the Treaty.⁷⁶

Under the Treaty of Alliance, Greece and Turkey were allowed to station armed contingents on the island, numbering 950 and 650 respectively.⁷⁷ The constitution provided for participation of the Greek and Turkish Cypriot communities to promote peaceful co-existence. It recognised that the President, a Greek Cypriot, and the Vice-President, a Turkish Cypriot, were elected by their respective communities, each having veto powers over certain legislation.⁷⁸ However, the agreements could not promote peaceful co-existence between the two communities, and political and constitutional crises led to growing tension in Cyprus.⁷⁹

On 30 November 1963, Archbishop Makarios, the President of Cyprus, proposed an amendment to the constitution.⁸⁰ The Turkish Cypriots refused to consider the amendment on the ground that it was designed to weaken those parts which recognised the existence of the Turkish Cypriot community.⁸¹ The situation in Cyprus

⁷³- *Ibid*, No. 5475.

⁷⁴- *Ibid*, Vol. 397, No. 5712.

⁷⁵- S/6253, 26 Mar. 1965.

⁷⁶- Treaty of Guarantee. This treaty also permitted the United Kingdom to retain sovereignty over two areas which were excluded from the territory of Cyprus.

⁷⁷- Treaty of Alliance.

⁷⁸- The Constitution of 16 August 1960, S/6253, 26 Mar. 1965.

⁷⁹- The Blue Helmets, *op. cit.*, p. 282.

⁸⁰- Makarios, "Proposals to Amend the Cyprus Constitution", *International Relations* (Athens), Apr. 1964, pp. 8-25.

⁸¹- The Blue Helmets, *op. cit.*, p. 283.

deteriorated and violence intensified between the two communities. On Christmas Eve of 1963 Makarios and Dr. Kutchuck, the Vice-President, called for peace and an end to bloodshed. A similar call was made by the British, Greek and Turkish governments. However none of them was successful.⁸²

The Turkish government sent a national military contingent to Cyprus under the Treaty of Alliance.⁸³ On 24 December 1963, Greece, Turkey and the UK informed Cyprus of their readiness to assist in restoring peace by means of a joint "peacemaking" force under British command.⁸⁴ This offer was accepted by Cyprus, and a few days later agreement was reached on a line and a neutral zone dividing the Greek and Turkish areas of Nicosia (the Green Line). The zone was to be patrolled by the joint "peacemaking" force. In the negotiations in January 1964, in London, the UK proposed that the peacekeeping force should be strengthened by NATO countries. However, Cyprus rejected this proposal and Makarios insisted that the UN must be brought into the picture in some substantial way.⁸⁵

The UN organs were already engaged: the Secretary-General with his consultations, and the Security Council with its resolution. The latter adopted Resolution 186 on 4 March 1964 based on the non-Permanent Members' proposal. This resolution noted that the situation in Cyprus was likely to threaten international peace and security, and recommended the creation, with the consent of the government of Cyprus, of a United Nations Peace-keeping Force in Cyprus (UNFICYP). The Council recommended in its resolution that the function of the force should be to preserve international peace and security, to use its best efforts to prevent a recurrence of the fighting, and to contribute to the maintenance and restoration of law and order and a return to a

⁸²- T. Ehrlich, *op. cit.*, p. 45.

⁸³- The Blue Helmets, *ibid.*

⁸⁴- *Id.*

⁸⁵- A. James, *op. cit.*, p. 323.

normal conditions.⁸⁶ The Secretary-General was asked to arrange for a mediation in agreement with the governments of Cyprus, Greece, Turkey and the UK.⁸⁷

Although Resolution 186 referred to Article 2(4) of the Charter, it did not refer to any specific article to create UNFICYP. The Secretary-General, in his interpretation of the function of UNFICYP, stated that it was a consensual type of peacekeeping operation based on UNEF I to create an improved climate in which political solutions may be sought. The Secretary-General emphasised that the force should not take any action to influence the political situation in Cyprus.⁸⁸ According to the Secretary-General's interpretation, UNFICYP could not take enforcement measures. However, Chapter VI of the Charter has not provided a satisfactory basis for peace-keeping in Cyprus, and it has "a more natural legal basis in Article 40 for provisional measures".⁸⁹

On 15 July 1974, after a coup against Makarios, backed by Greece, the Secretary-General and the Cypriot representative requested that the Security Council convene a meeting.⁹⁰ On 20 July, Turkey, invoking the Treaty of Guarantee, attacked Cyprus and the Council on the same day adopted Resolution 353. The Security Council in its resolution called upon all parties to cease-fire and demanded an immediate end to foreign military intervention.⁹¹

The Council called on all parties to co-operate with UNFICYP to enable it to carry out its mandate. The function of UNFICYP did not change and, in different circumstances, it had to perform the original mandate determined in 1964. The Secretary-General proposed that UNFICYP should create a security zone between the

⁸⁶- SC Res. 186, 4 Mar. 1964.

⁸⁷- *Id.*

⁸⁸- S/5653, and S/11335.

⁸⁹- Rosalyn Higgins, United Nations Peacekeeping, Vol. IV, (Oxford University Press, Oxford, 1981), p. 144.

⁹⁰- S/11334.

⁹¹- SC Res. 353, 20 Jul. 1974.

Turkish forces in the North and the Greek Cypriot forces in the south. This proposal was accepted by the Security Council.⁹²

The UN forces in Cyprus were not sent as a provisional measure to an international frontier, but to an internal and unofficial dividing line between the Greek and Turkish Cypriots. However, in 1974, by the military involvement of another state, its function changed from applying intra-state provisional measures to inter-state provisional measures. UNFICYP, like UNEF I, was established by the consent of host state, and it could not take the initiative in the use of force except in self-defence. Its objectives were to prevent a recurrence of fighting and to contribute to the maintenance and restoration of law and order. There are two assumptions for the constitutional basis of UNFICYP. One assumption is that it was to implement non-mandatory provisional measure under Article 40. The other assumption is that it was established under Chapter VI Article 33(1), since the Security Council Resolution 186 had referred to the situation in Cyprus as likely to endanger the maintenance of international peace and security.

Second United Nations Emergency Force (UNEF II)

On 6 October 1973, Egyptian forces crossed the Suez Canal and attacked the Israeli positions entrenched on the east bank of the Canal since the 1967 War, and Syrian troops simultaneously attacked the Israeli positions on the Golan Heights, occupied also by Israel in June 1967.⁹³

Disagreement among the members of the Security Council resulted in no decision being taken on the situation for seventeen days. The Arab forces had some initial gains, but the resupply of Israeli forces by the United States strengthened Israel, and

⁹²- SC Res. 355, 1 Aug. 1974.

⁹³- For more information see: Anthony Cordesman and Abraham R. Wagner, The Lessons of the Modern War, Vol. I, (Westview Press, Boulder, Co., USA, 1990).

by 21 October the situation improved for the Israelis.⁹⁴ On the other hand, the Soviet Union supplied the forces of Egypt and Syria. In such a situation, where two major powers became involved in the hostilities, it proved impossible for the Security Council to reach an agreement on a cease-fire.

Finally, with the prospects of escalation of the war in sight, the Soviet Union and the United States agreed on a cease-fire. They requested an urgent meeting of the Security Council and in the early hours of 22 October 1973, the Council adopted Resolution 338 which called for a cease-fire and a start to implementing Resolution 242 of 1967.⁹⁵ Resolution 242 had called for Israeli withdrawal from the lands occupied in the 1967 war to the lines as prior to 5 June 1967.⁹⁶ The Secretary-General, in a further resolution, was requested to dispatch United Nations' observers immediately.⁹⁷

Resolution 338 made no reference to any specific article of the UN Charter justifying its terms. Meanwhile, war continued and the Egyptian Third Army was encircled by Israeli forces and cut off from its supplies. Egypt requested that the Soviet Union and the United States send their troops to the area to enforce the cease-fire.⁹⁸ The US Government opposed the request, but the Soviet Union agreed and suggested the establishment of a joint US-Soviet force to implement the UN cease-fire resolutions; otherwise a Soviet force would intervene unilaterally.⁹⁹

The threat of military intervention by the major powers resulted in a growing fear of a global conflict. The Non-Aligned members of the Security Council introduced Resolution 340 on 25 October 1973. This resolution demanded an immediate and

⁹⁴- Paul F. Diehl, International Peacekeeping, (The John Hopkins University Press, Baltimore and London, 1993), p. 74.

⁹⁵- The Blue Helmets, op. cit., p.79.

⁹⁶- SC Res. 242, 22 Nov. 1967.

⁹⁷- SC Res. 339, 23 Oct. 1973.

⁹⁸- UN Yearbook, (1973), p. 200.

⁹⁹- Raymond Garthoff, De'tente and Confrontation, (The Brookings Institution, Washington D. C., 1985), pp. 376-7.

complete cease-fire and the setting up of a United Nations Emergency Force (excluding the permanent members of the Council) under its authority . The Secretary-General was requested to increase the number of UNTSO observers on each side. He was given whatever powers were necessary to enforce the cease-fire.¹⁰⁰

The guidelines for the functioning of UNEF II have been described in the Secretary-General's report requested by the Security Council.¹⁰¹ He reported that UNEF II, in its supervision of the implementation of the cease-fire, must enjoy certain essential conditions: it must have at all times the full confidence and backing of the Security Council, and it must operate with co-operation of the parties. He emphasised that the force must enjoy freedom of movement and communications, and it should be provided with weapons of a defensive character and would not use force except in self-defence. "Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties"¹⁰²; and the force would act with complete impartiality and avoid actions which could prejudice the rights, claims or positions of the parties concerned. The Security Council approved the Secretary-General's report in its Resolution 341 on 27 October 1973.¹⁰³

The functions of UNEF I and UNEF II were similar. They had to supervise the cease-fire and withdrawal as provisional measures. However, UNEF I was created by the General Assembly and UNEF II was created under the Security Council's auspices. The General Assembly acted under Articles 10, 11, 14 and 22, and the Security Council under Article 40.

The withdrawal of UNEF I was requested by Egypt, and it was subsequently withdrawn under direct control of the Secretary-General. But UNEF II was withdrawn

100. S/11049.

101. S/11052/Rev. 1.

102. *Id.*

103. SC Res. 341, 27 Oct. 1973.

by the Security Council's decision. It should be mentioned that the consent of the host state is essential for the presence of a peace-keeping operation.

Neither of the forces was authorised to undertake enforcement measures. They had to act with complete impartiality to supervise the cease-fire and withdrawal. Although the Security Council did not mention the constitutional basis of UNEF II, it must be considered to be a supervising force set up to give effect to the provisional measures (under Article 40) clearly implicit in Resolution 338.

United Nations Disengagement Observer Force (UNDOF)

Following the October 1973 Arab-Israeli war, though UNEF II was established between Egypt and Israel, fighting continued between Syria and Israel in the Golan Heights occupied by Israel since the 1967 war.¹⁰⁴

By the end of May 1974 the situation became increasingly unstable. The United States Secretary of State undertook a diplomatic mission, which resulted in the conclusion of an Agreement on Disengagement between Israeli and Syrian forces on 31 May 1974.¹⁰⁵

On 30 May, the Secretary-General transmitted to the Security Council the text of the Agreement on Disengagement between Israeli and Syrian forces, with the protocol called for the creation of a United Nations Disengagement Observer Force (UNDOF).¹⁰⁶

According to the Agreement, Israel and Syria were scrupulously to observe the cease-fire on land, sea and in the air, and refrain from all military actions against each other

104. For more information see: A. Cordesman and A. R. Wagner, *op. cit.*

105. The Blue Helmets, *op. cit.*, p. 99.

106. S/11302/Add. 1, Annexes I and II.

from the time of the signing of the document, in implementation of Security Council Resolution 338 of 1973.¹⁰⁷ By the terms of the Protocol to the Agreement, Israel and Syria agreed that the function of UNDOF would be to maintain the cease-fire, to see that it was strictly observed, and to supervise the Agreement and Protocol.¹⁰⁸

On the day of signature, the Security Council adopted Resolution 350, sponsored by the United States and the Soviet Union,¹⁰⁹ which recognised the disengagement agreement negotiated in implementation of Security Council Resolution 338 of 1973, and requested the Secretary-General Waldheim to establish UNDOF.¹¹⁰

By June 1974 UNDOF began its work with a renewable mandate of six months.¹¹¹ The Secretary-General interpreted UNDOF's functions as the supervision of disengagement and the observation of cease-fire lines, with the same principles followed by UNEF II.¹¹²

UNDOF was not despatched to enforce peace. Its mandate was that of supervision of cease-fire as provisional measures under Article 40 of the Charter, which was agreed by the parties and approved by the Security Council, for implementation of Security Council Resolution 338 of 1973.

107. *Id.*, see also case UNEF II in this thesis.

108. *Id.*

109. The China's representative abstained from voting who charged the US and the Soviet Union with having hegemony designs in the region. He stated that in seeking a fundamental solution to the Middle East question, it was imperative to stop their interference in the region and demanding the withdrawal of Israel from the occupied Arab territories. *UN Yearbook*, (1974), p. 200.

110. SC Res. 350, 31 May 1974.

111. *The Blue Helmets*, *op. cit.*, p. 102.

112. S/11302.

United Nations Interim Force in Lebanon (UNIFIL)

Israel invaded southern Lebanon in March 1978. According to the report of Chief of Staff of UNTSO, heavy ground, naval and air attacks were committed by Israel against Lebanon.¹¹³

The Non-Aligned countries in an emergency session condemned this action as an aggression as well as Israel's expansionist policy, and it was announced that the aim of that action had put in jeopardy the existence of the Palestinian people in Lebanon and would further aggravate the explosive situation in the region.¹¹⁴ However, the Israeli representative to the United Nations denied that his country had any territorial design on southern Lebanon and that it acted against PLO to prevent Palestinian raids into Israel.¹¹⁵

Following an appeal by Lebanon for immediate action, the Council held a meeting on 19 March. The United States proposed a draft resolution to end military action against Lebanon,¹¹⁶ because the US was concerned about the impact of Israel's invasion on the peace negotiations underway between Egypt and Israel. Furthermore, since the Cold War was still very real, the United States supported a UN peace-keeping force both to assist with the withdrawal of the Israeli Defence Force (IDF) and to avert a direct Israeli-Syrian confrontation.¹¹⁷

The Security Council in its meeting adopted the US draft as Resolution 425. In this resolution, the Council called for strict respect for the territorial integrity, sovereignty and political independence of Lebanon within its internationally recognised

113. UN Yearbook (1978), p. 296.

114. Id.

115. Ibid., p. 301.

116. S/12610.

117. Mona Ghali, "United Nations Interim Force in Lebanon: 1978-Present", in, William J. Durch, op. cit., pp. 185-6.

boundaries.¹¹⁸ It called upon Israel immediately to cease its military action against Lebanese territorial integrity and withdraw forthwith its forces from all Lebanese territory.¹¹⁹ The Council, at the request of the Lebanese government, decided to establish a United Nations Interim Force for southern Lebanon to confirm the withdrawal of Israeli forces, restore international peace and security and assist the government of Lebanon in ensuring the return of its effective authority in the area.¹²⁰

The resolution was carried by a vote of 12 in favour with the abstentions of the Soviet Union and Czechoslovakia. China did not participate in the vote. Although the USSR opposed the resolution, it did not use its veto because of Lebanese and other Arab states support for the resolution.¹²¹

The USSR delegation stated that the sending of United Nations troops to Lebanon should not infringe the sovereign rights of the government and should fully take account of the responsibility borne by Israel for its aggression. He emphasised that the costs of the UN peace-keeping in Lebanon should be borne by Israel.¹²² In fact, the USSR and its allies, in support of that position, withheld their share of the cost of UNIFIL until 1986, when USSR changed its policy under the influence of Gorbachev's *glasnost* (new thinking).¹²³

The Chinese delegation said that since the resolution failed to condemn the Israeli armed aggression against Lebanon and to support the just struggle of the Arab and Palestinian people, China decided not to participate in the voting.¹²⁴

118. SC Res. 425, 19 Mar. 1978.

119. *Id.*

120. *Id.*

121. *UN Yearbook* (1978), pp. 300, 302.

122. *Id.*

123. Mona Ghali, *op. cit.*, p. 186.

124. *UN Yearbook* (1978), p. 300.

On the same day, the Secretary-General in his report set out the terms of reference of the United Nations Interim Force in Lebanon (UNIFIL)¹²⁵ with the main task of confirming the withdrawal of the Israeli forces from Lebanese territory to the international border. The Secretary-General indicated that, as a preliminary measure for the implementation of the Security Council resolution, it might be necessary to work out arrangements with Israel and Lebanon. He also emphasised the principle of non-use of force and non-intervention in the internal affairs of the host country. UNIFIL would not use force except in self-defence. Furthermore, UNIFIL could not and should not take on responsibilities which fell under the government of the country in which it was operating; those responsibilities should be exercised by the competent Lebanese authorities.¹²⁶

On 6 April 1978, the Chief of Staff of the Israeli Defence Force submitted a plan for an initial withdrawal of the Israeli forces.¹²⁷ However, the Secretary-General indicated that the Israeli plan was not satisfactory since Security Council Resolution 425 called for the withdrawal of Israeli forces without delay from the entire occupied Lebanese territory.¹²⁸ Finally, the plan was accepted, and several positions were evacuated and handed over to UNIFIL troops. However, the manner in which the Israeli forces carried out the fourth and last phase created major problems for UNIFIL. In contrast to the previous three phases, the Israeli Defence Force on 13 June turned over most of its positions not to UNIFIL but to the De Facto Forces (DFF) which were supported by Israel.¹²⁹ The DFF, which had been strongly armed by the Israelis, threatened to use force to oppose any attempts by UNIFIL to gain wider deployment. In response to the Israeli Foreign Minister, who had stated that Israel had fulfilled its part in the implementation of Resolution 425, the Secretary-General observed that the difficult

125. S/12611.

126. *Id.*

127. S/12620/Add. 2.

128. *Id.*

129. *The Blue Helmets, op. cit.*, p. 124.

task lying ahead for UNIFIL had not been facilitated by the decision of the Israeli government not to turn over control of the evacuated area to UNIFIL.¹³⁰

Justifying its action, on 13 June, Israel stated that, in the wake of the Israeli withdrawal from Lebanon on the same day, members of the PLO had returned to the area and that UNIFIL was permitting the transit of supplies to them, and some units of UNIFIL treated the PLO elements with indulgence and even co-operated with them.¹³¹ However, the Secretary-General expressed his surprise at the allegations made, acknowledging that there were PLO liaison officers with UNIFIL, as there were liaison officers of all parties concerned, and noted that PLO had undertaken to co-operate with UNIFIL in the implementation of Resolution 425.¹³²

The inability of UNIFIL to take over the enclave from DFF, prevented UNIFIL from fulfilling an essential part of its mandate and made its other tasks considerably more difficult. In April 1980 the DFF under the command of Major Haddad proclaimed the constitution of the so-called "State of Free Lebanon".¹³³

The Security Council by Resolution 444 of 19 January 1979 invited the Lebanese government to draw up, in consultation with the Secretary-General, a phased programme of activities to promote the restoration of its authority in southern Lebanon.¹³⁴ Within the programme, as worked out by the Lebanese government with the assistance of UNIFIL, a Lebanese army battalion was deployed in the UNIFIL area in April 1979. Although, the DFF tried to prevent the deployment by subjecting

130. S/12736, S/12738.

131. S/12736.

132. S/12738.

133. The pressure on the local population increased and the DFF sent raiding parties into the UNIFIL area to abduct persons suspected of being pro-PLO or to blow up their houses. *The Blue Helmets*, *op.cit.*, p.129.

134. SC Res. 444, 19 Jan. 1979.

UNIFIL headquarters to intense shelling which caused casualties and heavy material damage, the deployment of the Lebanese battalion was proceeded as planned.¹³⁵

Despite the measures to improve UNIFIL's operational capacity, serious incidents occurred in the UNIFIL area in April 1980. The DFF attempted to establish more armed positions in the UNIFIL area; their action was firmly resisted by UNIFIL, which led to serious confrontations resulting in the death of UNIFIL soldiers and UNIFIL headquarters in Naqoura was subjected to heavy bombardment.¹³⁶ Following these incidents, the Security Council in Resolution 467 of 24 April 1980 commended UNIFIL for its great restraint in carrying out its duties and also called attention to the provisions of its mandate that would allow the Force to use its right to self-defence.¹³⁷

On 3 June 1982 the Israeli Ambassador to Britain was attacked in an assassination attempt and Israel immediately accused the PLO.¹³⁸ The PLO denied responsibility, stating through its London representative that the attack served Israeli interests and not Palestinian ones.¹³⁹ On 4 June Israel launched massive bombing raids against PLO targets in Lebanon.¹⁴⁰ On 5 June it was announced at the United Nations that the British authorities had arrested three individuals who were part of an anti-PLO group, and charged them with the crime.¹⁴¹ The Security Council adopted Resolution 508, charging all parties to discontinue armed military activities in Lebanon.¹⁴²

On 6 June 1982, UNIFIL Force Commander Lieutenant General William Callaghan met the Chief of Staff of the IDF to discuss the implementation of Security Council Resolution 508, but instead he was informed by the Chief of Staff of the IDF that the

135- The Blue Helmets, *op. cit.*, p.136.

136- S/13888.

137- SC Res. 467, 24 Apr. 1980.

138- The Blue Helmets, *op. cit.*, pp. 140-1.

139- W. Thomas Mallison, "Aggression or Self-Defence in Lebanon in 1982?", 78 *A. J. I. L.* (1984), p. 175.

140- The Blue Helmets, *ibid.*

141- W. T. Mallison, *ibid.*

142- SC Res. 508 , 5 June 1982.

IDF planned to launch a military operation into Lebanon within half an hour.¹⁴³ The UNIFIL Commander ordered that all UNIFIL troops block the advance of IDF, adopt defensive measures, and remain in position unless their safety was "seriously imperilled".¹⁴⁴

With regard to the role of UNIFIL during the attack by Israel, the Chief of Staff of the IDF informed the UNIFIL Commander that the Israeli forces would pass through or near UNIFIL positions and that he expected that UNIFIL would raise no physical difficulty to the advancing troops. These words were described by the UNIFIL Commander as a totally unacceptable course of action.¹⁴⁵ Despite the efforts by UNIFIL soldiers, they could not withstand the massive Israeli invading forces with their light defensive weapons.¹⁴⁶ During a week of Israeli invasion into Lebanon it was estimated that 10,000 people were killed or wounded and some refugee camps were completely destroyed and a number of towns and cities were reduced to rubble.¹⁴⁷

The IDF began to withdraw from several parts of Lebanon in September 1983 with a further withdrawal in February 1985, but despite the efforts by the Secretary-General and the Lebanese government, the Israeli government refused to withdraw completely from Lebanese territory. The Israelis continued to hold positions in southern Lebanon, creating a "security zone" controlled by the IDF and the South Lebanon Army (SLA).¹⁴⁸

In order to analyse the constitutional basis of UNIFIL and to explain the nature of its mandate, the Security Council resolutions, the positions of parties, and the

143. S/15194/Add. 1.

144. The Blue Helmets, *op. cit.*, p. 142.

145. *Id.*

146. *Id.*

147. W. T. Mallison, *ibid.*

148. *ibid.*, pp. 146-9.

effectiveness of UNIFIL should be considered in the same context. UNIFIL was created to confirm Israeli withdrawal and to ensure "the effective restoration of Lebanese sovereignty".¹⁴⁹ UNIFIL's mandate was to be applied with the consent of the parties. Its guidelines were essentially the same as those applied to UNEF II and UNDOF, i.e. a consensual type peace-keeping, as White¹⁵⁰ puts it, without the right of use of force for its purposes. As Resolution 467 emphasised, UNIFIL could use force for self-defence to perform its mandate. However, the right of self-defence had no effect on the implementation of UNIFIL's mandate. UNIFIL was not given the means to carry out its mandate and thus was faced with an impossible task.

If the parties provided consent and co-operation, UNIFIL could have implemented its mandate successfully. Although UNIFIL was a response to the Lebanon's request and had the consent of Lebanon for its presence, Israel was not prepared to co-operate fully with UNIFIL.

As the Secretary-General stated in 1991, the Israeli authorities continued to state that they had no territorial ambitions in Lebanon and that the "security zone" was a temporary arrangement.¹⁵¹ The Secretary-General concluded that Israel continued "to build up DFF and to improve the ability to reinforce IDF's strength inside Lebanon quickly. A consequence of this policy is that the Israeli-controlled area is becoming increasingly separated from the rest of Lebanon".¹⁵² Therefore, UNIFIL's original mandate, i.e. to facilitate the restoration of Lebanese sovereignty, was impossible to achieve. UNIFIL also was ignored by Israel in the attacks which were launched by the latter in 1992 and 1996. Israel in its last attack targeted UNIFIL's headquarters in Qana (Lebanon), resulting in the killing and wounding of both UN personnel and Lebanese who took refuge in the peace-keepers' base.¹⁵³

149. Res. 425.

150. N. D. White, *Keeping the Peace*, (Manchester University Press, Manchester, 1993), p. 246.

151. S/22129, 23 Jan. 1991, p. 8.

152. *Id.*

153. *The Guardian*, 19 Apr. 1996, p. 1.

UNIFIL had successful negotiations for a short-lived cease-fire between Israel and the PLO. In addition, UNIFIL worked closely with the special representative of the Secretary-General for humanitarian assistance in Lebanon. Nevertheless, UNIFIL should be considered as an inter-state peace-keeping force with its mandate based on Article 40 for provisional measures. However, UNIFIL has had a unique mandate, because it should ensure the restoration of Lebanese governmental authority and its territorial integrity, sovereignty, and territorial independence. This task seems impossible because of the limited power of UNIFIL and lack of co-operation of the parties concerned.

The Council has preferred to make no effective move and allow Israel to continue the occupation of the Lebanese territory. Even the attacks on the positions of United Nations forces in 1992 and 1996 have been ignored, although the reports of the UN fact-finding missions to the area have confirmed that those attacks had been committed intentionally.¹⁵⁴ At least the United Nations should be able to protect its personnel and areas. On the other hand, the United Nations should take such courses of action that do not imply the peace-keeping operations tend to sanctify the *status quo* and give the impression that they would remain in the area forever.

Conclusion

The mandate for peace-keeping operations, according to the nature of the conflict concerned, will differ. Conflicts can be divided into inter-state and intra-state conflicts. Until the 1980s, most of peace-keeping operations were concerned with inter-state conflicts. There were various causes for these conflicts, ranging from the

¹⁵⁴. *Ibid.*, 24 July 1996, p. 1.

ideological, territorial, strategic, imperialistic, class, non-colonial and de-colonial to self determination.¹⁵⁵

During the Cold War, ONUC became involved because of external intervention and internal destabilisation; UNIFIL was involved because of conflicts between Lebanon and Israel; UN Commission in Indonesia was involved because of decolonisation and of national self-determination; UNFICYP was involved after decolonisation by the United Kingdom; UNAVEM was dispatched following the independence of Angola from Portuguese colonial rule, and all the Middle East cases stemmed from the period of the withdrawal of the colonial powers from the area.¹⁵⁶

During the Cold War, peace-keeping forces were dispatched for supervising, observing, and securing cease-fire and ensuring that no party violated the cease-fire. They had to observe and report the violations of cease-fire without an active role to keep the peace; even "ensuring" did not mean that they had to use force in the conflicts to maintain the peace.

ONUC had an initial mandate which was to assist the government of Congo for the withdrawal of Belgian forces.¹⁵⁷ With the continuation of the war, ONUC's mandate was changed to "prevent the occurrence of civil war in the Congo including arrangements for cease-fire, the halting of all military operations, the prevention of clashes, and the use of force if necessary, in the last resort".¹⁵⁸ However, the Security Council decided to reinforce the mandate of ONUC and authorised the Secretary-General "to take vigorous action including the requisite measures of force".¹⁵⁹ ONUC could not be impartial because it had to fight, not only in self-defence, but also to

155. Henry Wiseman, "Peacekeeping: The Dynamics of Future Development", in Henry Wiseman (ed.), *Peacekeeping. Appraisals and Proposals*, (Pergamon Press, New York, 1983), p. 346.

156. *Ibid.*

157. SC. Res. 143, 14 Jul. 1960.

158. SC. Res. 161, 21 Feb. 1961.

159. SC. Res. 169, 24 Nov. 1961.

perform its mandate, i.e. assisting the central government against foreign forces and secessionists. In practice, ONUC during its operation used force when attacked by Katangese forces.

The presence of peace-keeping forces in most cases has proved to be a technique capable of expanding the possibilities for both prevention of conflict and resolving the dispute. The consent and co-operation of the parties concerned are the most important elements for the success of a peace-keeping force. Otherwise, their success is doubtful as seen in the case of UNIFIL. UNIFIL's main function still remains the supervision of Israeli withdrawal from Lebanese territory, and dependent on Israeli co-operation. In the absence of co-operation, the change of its mandate might be necessary to implement the Council's resolution.

On the contrary, UNEF I which was created by the General Assembly with the substantial assistance of the Secretary-General, has been considered one of the most effective UN peace-keeping operations. Its mandate was to secure a cease-fire, supervise the withdrawal of foreign forces from the area, observe the armistice agreement and patrol armistice lines. As the Secretary-General explained the mandate of UNEF I, the force was not authorised to use force other than to carry out its mandate and it was more than an observation mission, but it was not an enforcement measure. Even ONUC, which was authorised to use force in the last resort, could not be considered as an enforcement action because its purpose was not to use force to end the hostility.

Although the presence of peace-keeping forces provide conditions for a political solution or, as in the case of UNDOF, to help to stabilise the cease-fire, UNFICYP's experience shows that a long-standing peace-keeping body not only has a high cost for the Organisation, but also its presence may only maintain the *status quo* rather than assist the parties to solve their dispute.

Regarding the constitutional basis of peace-keeping operations, it should be noted that, as discussed in Chapter Two, there is doubt that peace-keeping is derived from Chapter VI of the Charter since this chapter deals with *pacific settlement* of disputes. While peace-keeping may be characterised as a technique that does not lead to a settlement or solution *per se*. However, as Chapter Four will discuss, observer missions have been deployed to investigate and mediate, the functions which are deemed under Article 34 of Chapter VI of the Charter.

Article 42 also cannot be considered as a legal basis of peace-keeping, because this institution has been created as a result of the Council's failure to take action under Chapter VII. In fact, it could be said that peace-keeping is to supervise or to ensure compliance with provisional measures contained in Article 40, as it deems necessary or desirable, which shall be without prejudice to the rights, claims or positions of the parties concerned.

The General Assembly also may recommend provisional measures. UNEF I was established by the General Assembly after the disputant parties had accepted the General Assembly's recommendation for a cease-fire. The General Assembly possesses such power under Articles 10 and 14 of the Charter.

The International Court of Justice in the *Certain Expenses* case, regarding the establishment of ONUC and UNEF I, confirmed that peace-keeping forces are not enforcement action within the compass of Chapter VII. Therefore, the General Assembly, which could make recommendations of a general character affecting peace and security, could establish a peace-keeping force for this purpose. Except UNEF I, which was established by the General Assembly, the establishment of peace-keeping forces is firmly in the control of the Security Council.

CHAPTER FOUR

UNITED NATIONS OBSERVATION MISSIONS

Over the years observer groups have undertaken several missions of varying scope, duration and degree of success. They have been dispatched to observe both side's behaviour and report on what they see to assist resolving the dispute. Observer missions might undertake several functions, such as observation of the cease-fire orders, investigation of allegations of violations, assistance in arranging cease-fires and provision of operational data for the Security Council.

This chapter will review nine cases in which observation missions were deployed. The facts of the cases are given in brief, followed by an analysis of the constitutional basis of the observer groups involved and the effectiveness of these missions. The chapter will conclude with a general discussion on the presented cases.

UN Observers in Indonesia

The first United Nations' observer mission is the UN involvement in the archipelago of Indonesia in 1947. Indonesian colonial history began in 1511 when the Portuguese seized Moluccas, to be followed by Spaniards, Dutch and British. By the end of 17th century the Dutch had gained control over Indonesia and maintained their authority until the mid-20th century. The Japanese invasion of Indonesia in 1942 did not face serious local opposition because they were regarded as liberators from Dutch colonialism. After Japan's surrender to the Allies in 1945, Sukarno, the leader of the Indonesian nationalist movement, proclaimed independence.¹

¹- For more information see: Rosalyn Higgins, United Nations Peacekeeping, Vol. II, (Oxford University Press, Oxford, 1970), pp. 3-9; A. Taylor, Indonesian Independence and the United Nations, (Ithaca: Cornell University Press, 1960), pp. 5-40; Indar Jit Rikhye, Michael Harbottle and Bjorn Egge, The Thin Blue Line, (Yale University Press, London and New Haven, 1974), p. 138.

The Netherlands government was prepared to accept the *de facto* situation of Indonesia, but insisted that the new state would remain under the Dutch rule. The Nationalists did not accept this as it was not recognition of the Republic of Indonesia. The Republicans insisted that any agreement should be in the form of a treaty. The Dutch argued that, under Netherlands' law, they could conclude treaties only with foreign independent powers. Indonesians wanted an agreement to provide for international arbitration, but the Netherlands disagreed, seeing this as an opening for international intervention.²

Despite a third party intervention by Britain and the concluding of the Linggadjati Agreement, which was far from precise especially in establishing the *de jure* authority of Indonesia, the first "police action" was attempted by the Netherlands against the Republic of Indonesia on 20th July 1947 in Java and Sumatra.³ On 30th July India drew to the attention of the Security Council that Dutch forces had embarked, without warning, on large scale military action against the Indonesian people. In the opinion of the Indian government, the situation was covered by Article 34 of the Charter (Chapter VI); thus, the Security Council should take necessary measures to put an end to the military operations.⁴ On the same day Australia, in a letter to the Secretary General, considered these hostilities as constituting a breach of the peace under Article 39 and proposed that the Security Council, as a provisional measure under Article 40, should call upon the parties to cease hostilities.⁵

The Dutch representative argued that the Netherlands had sovereignty in the region and that, since the Charter operated between sovereign states, it was not applicable; this matter was solely within the domestic jurisdiction of the Netherlands.⁶ Britain and

2- R. Higgins, *op. cit.*, p. 5.

3- *Ibid*, p. 8, A. Taylor, *op. cit.*, p. 30-33, Rikhye et al, *op. cit.*, p. 139.

4- S/447, UN SCOR, 2nd yr, suppl. 16, Annex 40, (1947).

5- S/449, *ibid*.

6- UN Yearbook, (1947-48), p. 363.

France sympathetically favoured a settlement outside the United Nations and vigorously opposed sending an investigatory or supervisory body to the scene.⁷ The Australian representative stated that the situation constituted not a mere "police action", but armed conflict between two states according to international law and was therefore covered by Articles 39 and 40 of the UN Charter.⁸ The representative of the United States suggested that references to specific articles should be deleted and a simple statement would be enough.⁹

Goodrich and Hambro, on UN jurisdiction in this case and the interpretation of Article 2(7), stated that: "The question of jurisdiction was never explicitly decided by the Council, though the action subsequently taken could only have been justified on the assumption that competence to act existed. Nor was it made clear whether the action of the Council was based on the exception to the domestic jurisdiction principle or on the view that the matter was not essentially within the domestic jurisdiction of The Netherlands."¹⁰

The Security Council, on 1st August, in its first resolution, called on the Netherlands and the Republic of Indonesia to cease fire and to settle the dispute by arbitration or by other peaceful means.¹¹ When the Council, at its 171st meeting on 31st July, invited the representative of the Netherlands and India to participate in the discussion of the Indonesian question, the representative of Australia and the USSR proposed that a similar invitation should be sent to the government of the Republic of Indonesia under Article 32.¹² At the 181st meeting of the Council on 12th August, the representative of the Netherlands, supported by the representatives of the United Kingdom, Belgium and France, reiterated the argument that the Republic of Indonesia

7- *Ibid.*, p. 365; see also SC 172nd mtg, 2nd yr UN SCOR (1947), pp. 1700-1703.

8- UN Yearbook, (1947-48), p. 363.

9- *Ibid.*, p. 364; see also SCOR, *op. cit.*, p. 1659.

10- L. M. Goodrich, E Hambro and A. P. Simons, Charter of the United Nations, (Columbia University Press, U.S.A., 1969), p. 118.

11- S/454

12- UN Yearbook, (1947-48), p. 364.

could not be admitted to participate in the discussion under Article 32 as it was not a sovereign and independent state generally recognised as such, because it had received only *de facto* recognition. Finally, the Council decided in favour of this invitation.¹³

The government of the Netherlands requested career consuls stationed in Batavia to report jointly on the situation. The government of the Republic of Indonesia requested a commission of observers appointed by the Security Council.¹⁴ Although it was deemed necessary as an immediate step to appoint a neutral observer for the cease-fire, the Netherlands' suggestion was accepted.¹⁵ The Security Council in its resolution requested the Governments members of the Council which had career consular representatives in Batavia "to instruct them to prepare jointly for the information and guidance of the Security Council reports ... to cover the observance of the cease-fire orders and the conditions prevailing in areas under military occupation or from which armed forces now in occupation may be withdrawn by agreement between the parties".¹⁶ Thus the Consular Commission was established. This Commission at its first meeting unanimously agreed that each of the powers represented should be requested to furnish military officers to observe any possible violations of the cease-fire orders; to investigate, where possible, allegations of violations of the cease-fire orders; and to gather any other data that might be of value to the Commission and to the Security Council.¹⁷ The observers were formally the Consular Commission's, and the states from which they were drawn were Australia, Belgium, France, China, the United Kingdom, and the United States.¹⁸ The Security Council at the next stage established a Committee of Good Offices (GOC) to assist disputants in the peaceful settlement of their dispute.¹⁹

13. *Ibid.*, p. 367.

14. S/525 (1), 25 Aug. 1947.

15. *Ibid.*

16. *Ibid.*

17. Report by the Consular Commission, S/586, 22 Oct. 1947.

18. R. Higgins, *op. cit.*, p.38.

19. S/525 (II), 25 Aug. 1947.

The Security Council on 1st November requested the Committee of Good Offices set up under Resolution 31 to assist the parties in reaching agreement on an arrangement to ensure the observance of the cease-fire resolution.²⁰ The Security Council also requested the Consular Commission, together with its military assistants, to make its services available to the GOC.²¹ The GOC was composed of Belgium, nominated by the Netherlands,²² and Australia, nominated by Indonesia²³; Belgium and Australia selected the United States as the third member.²⁴ Thus, GOC and the Consular Commission with its military assistants were constituted for peace-keeping and peaceful settlement of dispute in the area. "The military assistants assumed broad reporting functions related to observation of violations of the cease-fire orders, investigation of allegations of violations, assistance in arranging cease-fires, and provision of operational data for the GOC and the Security Council."²⁵

The GOC aided the parties in reaching agreement on a truce which was signed by the Netherlands, the Republic of Indonesia and the GOC as the Renville Agreement²⁶ on 17 January 1948. Unfortunately, the Renville Agreement could not prevent the second "police action" (military action) of the Netherlands against Indonesia and hostilities were renewed on 18-19 December 1948.²⁷ Some writers believe that resumed hostilities and ineffectiveness of the Renville Agreement indicated a failure of the Council's good offices, founded on a "piecemeal approach" and separating the political and military aspects of the controversy.²⁸

The Security Council's reaction to the second military action was different to that over the first Netherlands' military action. In fact, the Netherlands lost its support in the

20. SC Res. 31, 1 Nov. 1947.

21. *Ibid.*

22. S/545, 4 Sep. 1947.

23. S/564, 18 Sep. 1947.

24. S/558, 18 Sep. 1947.

25. Rikhye et al, *op. cit.*, p. 140.

26. For provisions of the Renville Agreement, see, *UN Yearbook* (1947-48), pp. 376-77.

27. *Ibid.*, pp. 212-213.

28. A. Taylor, *op. cit.*, pp. 365-373.

Security Council which perhaps was one of the reasons of the renewal of hostilities. The Security Council in its resolution on 28 January 1949 (S/1234) clearly condemned the occupation of the territory of Indonesia by the armed forces of the Netherlands which was incompatible with restoration of good relations between the parties and with the final achievement of a just and lasting settlement of dispute.²⁹ Besides, all of the arguments of the Netherlands under Article 2(7) and the competence of the Security Council and refusing to *de jure* recognition of Indonesia were rejected.³⁰

The Committee of Good Offices was reconstituted as the United Nations Commission for Indonesia (UNCI) and the Consular Commission was requested to facilitate the work of UNCI by providing military observers and other facilities.³¹

Mentioned in the Council resolution³² were the transfer of sovereignty by the Government of the Netherlands to the United States of Indonesia at the earliest possible date and in any case not later than 1 July 1950; and a request to the Secretary General to make available to the Commission staff, funds and other facilities for the discharge of its functions and all the duties of the UNCI.

The Security Council had not specified in its Resolutions the constitutional basis and specific article of the Charter about observing groups in Indonesia. Higgins and Wainhouse believe that, in spite of the silence of the resolutions, the Security Council acted both under Chapter VI and Chapter VII.³³

²⁹. S/1234, 28 Jan. 1949.

³⁰. *Ibid*, see also, *UN Yearbook* (1948-49), pp. 215-216.

³¹. S/1234, 28 Jan. 1949.

³². *Id.*

³³. R. Higgins, *op. cit.*, p. 25; D. W. Wainhouse, *International Peace Observation*, (John Hopkins Univ. Press, Baltimore, 1966), p. 322.

The present author believes that the Security Council's peace-keeping and peaceful settlement of dispute in Indonesia was under both Chapter VI (Article 33(1)) and Chapter VII (Article 40). The request of the Security Council for the settlement of dispute by arbitration or by other peaceful means (good offices) was justified by Chapter VI, and the use of military observers was justified under Chapter VII (Article 40). The Security Council action could not be considered as an enforcement action since the observer forces were established by the consent of both parties, without any authorisation to use force to prevent breaches of the cease-fire. The establishment of UN military observers in Indonesia demonstrates the emergence of the institution of peace-keeping to monitor cease-fire as a provisional measure for further steps to be taken to settle the dispute.

UN Special Committee on the Balkans (UNSCOB)

The United Nations Special Committee on the Balkans (UNSCOB) was created on 21 October 1947 by General Assembly Resolution 109 (II) to deploy an observation group to observe the frontiers between Greece and Albania, Bulgaria and Yugoslavia and to ascertain whether Greek Communist guerrillas were receiving outside support in their insurgency against the government.³⁴

The dispute originated out of the Cold War tensions focused on the Greek crisis. The actions of third states and the superpowers increased the danger to international peace and security. After the occupation of Greece by Axis powers in 1941, the British Government evacuated King George II from Greece and he with his government began a period of exile in London and in Cairo.³⁵

³⁴. GA Res. 109 (II), 21 Oct. 1947.

³⁵. For more information see: R. Frazier, Anglo-American Relations with Greece: The Coming of the Cold War, 1942-47, (Macmillan, London, 1991), p. 1-3.

The movement known as the National Liberation Front (EAM, whose military arm was ELAS, the National People's Liberation Army) fought the occupation under the leadership of the Communist Party (KKE) and, as the German occupation came to the end, the two rival groups formed a Government of National Unity in 1944. But later, at the beginning of December 1944, civil war broke out in Athens between government forces and ELAS units because EAM ministers were concerned at the surrender of arms by ELAS, and British troops were ordered to fight ELAS.³⁶

In January 1946 the Soviet Union submitted a complaint concerning Greece to the Security Council stating that Britain supported the Greek government and had troops in the country thereby interfering in Greek internal affairs.³⁷ Britain's claim that they were in Greece at the Government's request were rejected by the Soviet Union.³⁸

On 24 August 1946 the government of the Ukrainian SSR brought the Greece's problem, especially violent incidents on the border between Greece and Albania, before the Security Council.³⁹ There were several proposals before the Security Council. The United States suggested that an investigative commission be established to look into incidents along the whole northern border of Greece, but its proposal failed to be carried because of the Soviet veto.⁴⁰

On 3 December 1946 Greece requested the Security Council to consider the situation existing between Greece and its neighbours and asked the Security Council to arrange for an on-the-spot investigation.⁴¹ Although Albania, Bulgaria and Yugoslavia denied that they had assisted the insurgents in Greece and stated that the civil war in Greece

36- *Ibid*, pp. 58-74, see also H. Vlavianos, Greece, 1941-49: From Resistance to Civil War, (Macmillan, London, 1992) and R. Higgins, United Nations Peacekeeping, Vol. IV, (Oxford University Press, 1981), pp. 5-7.

37- SCOR, 1st yr, 1st ser., 1946, p.74.

38- R. Higgins, op. cit., p. 7.

39- S/137, 24 Aug. 1946.

40- SCOR, 1st yr, 2nd ser., 68th mtg, 17 Sep. 1946, pp. 366-8.

41- SCOR, 1st yr, 2nd ser., suppl. 10, Annex 16, pp. 169-72 (S/203), 1946.

arose from the repressive policies of its government, the Security Council established a Commission of Investigation.⁴²

The Security Council in Resolution 339 established the Commission of Investigation under Article 34 of the Charter. The Commission carried out its function and reported that Greek guerrillas were receiving support from the three Communist governments.⁴³ However, the USSR disagreed with the report and vetoed any Security Council resolutions. On 15 September 1947 the Greek question was removed from the agenda of the Security Council, enabling the General Assembly to deal with the matter.⁴⁴ It is thought that the United States was instrumental in removing the issue from the Council's agenda and placing it before the General Assembly, where the West was in firm control.⁴⁵

The General Assembly, with the report of the Commission of Investigation, decided to set up the United Nations Special Committee on the Balkans (UNSCOB).⁴⁶ The function of UNSCOB was to observe the compliance by the four Governments concerned with the General Assembly recommendations and to assist them in the implementations of such recommendations.⁴⁷ When the Committee (UNSCOB) interpreted its mandate, it decided to concentrate on its observation function.⁴⁸

The General Assembly made no reference to any specific article of the UN Charter in the resolution establishing UNSCOB. However, the origins of UNSCOB was in the report of the Commission of Investigation established under Article 34 by the Security

42. SC Res. 339, 19 Dec. 1946. This commission was composed of nationals from Australia, Belgium, Brazil, China, Colombia, France, Poland, Syria, the USSR, the United Kingdom and the United States. The USSR changed its previous position.

43. *UN Yearbook*, (1947-48), pp. 338-9.

44. *Ibid.*, pp. 348-350.

45. Alan James, *The Politics of Peace-Keeping*, (Chatto & Windus for the Institute for Strategic Studies, London, 1969), p. 211.

46. This committee consisted of the representatives of Australia, Brazil, China, France, Mexico, the Netherlands, Pakistan, Poland, the United Kingdom, the USSR and the United States.

47. GA Res. 109 (II), 21 Oct. 1947

48. A/521, (1948).

Council.⁴⁹ The authority granted to the General Assembly was under Articles 10,11(2),14 and 22. It is believed that, as long as the Charter powers do not overtly conflict with Articles 12 or 2(7), they potentially encompass all the recommendatory powers of the Security Council.⁵⁰ If an observation function is categorised as a provisional measure under Article 40 only the Security Council can decide on its implementation. Otherwise the General Assembly has the power to recommend provisional measures under Articles 10,11, 14 and 22.

After the establishment of UNSCOB, Albania, Bulgaria and Yugoslavia contended that UNSCOB had been constituted illegally and its establishment was an infringement of their sovereignty.⁵¹ They argued that while under Chapter VII the Council could order measures to be taken without the consent of the parties, under Chapter VI the Council could merely make recommendations, which could be accepted or rejected by the parties concerned. The establishment of the proposed commission (UNSCOB) was more than a recommendation and involved a decision imposed regardless of the parties' consent.⁵²

Higgins believes that these contentions confuse the *establishment* of UNSCOB with its *operation*. She says "[t]he General Assembly acknowledged that UNSCOB could not operate in the territory of any State without that State's consent; but its establishment was nonetheless clearly within the terms of Articles 10, 11, 14 and 22 of the Charter".⁵³

In fact, the observers' role was simply to investigate and report and not to impose a solution.⁵⁴ It makes sense that the General Assembly with its recommendatory role

⁴⁹- GA Res. 109 (II), 21 Oct. 1947, para. 2.

⁵⁰- N. D. White, The United Nations and the Maintenance of International Peace and Security, (Manchester University Press, Manchester, 1990), p. 183.

⁵¹- UN Yearbook (1947-48), p.341.

⁵²- Id.

⁵³- R. Higgins, op. cit., p. 32.

⁵⁴- I. J. Rikhye et al, op. cit., p. 146.

could establish an observation force. The presence of forces should however be based on States' consent.

United Nations Truce Supervision Organisation (UNTSO)

The Palestine problem has a deep root in history. Before the British mandate in 1922, Palestine was under the rule of the Ottoman Empire from 1517 until 1917. Although for four centuries Palestine was an integral part of Turkey, Palestinians were not a subject people and were citizens of a sovereign and independent country with full civil and political rights.⁵⁵ After the First World War, the concept of mandate was laid down in Article 22 of the League of Nations and Palestine was established as a mandate of the "A" class, a class which applied to certain communities belonging to the Turkish Empire. Palestinians attempted to establish an independent state during World War I and were pledged to independence by the British government and its allies which were at war with Turkey.⁵⁶ However, the pledges and mandate never led to an independent Palestine.

On the other hand, political Zionism, with the aim of creating a national home for Jews, was founded by Theodor Herzl at the first Zionist Congress in Basle, Switzerland, in 1897.⁵⁷ Herzl expected that the German government, as a first step, would make appropriate arrangements to create a Jewish land, but Germans rejected this proposal as did the Ottoman Empire.⁵⁸ Great Britain provided effective support for Zionism and later the British mandate contained provision for the establishment in Palestine of a national home for the Jews.⁵⁹ The pledge given to Zionist Jews on 2

⁵⁵. For more information see: S. N. Fisher, The Middle East, (Routledge and Kegan Paul, London, 1960), pp. 320- 322, and, Henry Cattar, The Palestine Question, (Croom Helm, U.K., 1988), pp. 7-8.

⁵⁶. British Government's Report, Cmd. , 5974, 16 March 1939.

⁵⁷. W. T. Mallison and S. V. Mallison, The Palestine Problem in International Law and World Order, (Longman, England, 1986), pp. 7,12.

⁵⁸. Ibid., pp. 20-21.

⁵⁹. Rosalyn Higgins, United Nations Peacekeeping, Vol. I, (Oxford University Press, Oxford, 1969), p. 5.

November 1917 by Arthur James Balfour, British Foreign Secretary, known as the Balfour Declaration, contained the statement that the British Government would "view with favour the establishment in Palestine of a national home for the Jewish people" and would use its "best endeavours to facilitate the achievement of this object".⁶⁰

During the mandate, the immigration of Jewish people increased and violence in Palestine started.⁶¹ A Jewish group killed 91 British senior officials in the King David Hotel in Jerusalem. They also captured and hanged British officers and troops. The British army became increasingly engaged in fighting with members of various Jewish military organisations.⁶² On 2 April 1947, the British government placed the issue before the General Assembly of the United Nations with a request to set up a special commission for considering the future of Palestine. The General Assembly established a Special Committee on Palestine (UNSCOP)⁶³ on 15 May 1947 to examine the Palestine problem and submit proposals to the General Assembly.⁶⁴

The majority of UNSCOP supported the partition of Palestine into separate Jewish and Arab states joined by an economic union, with Jerusalem under an international regime administered by the UN. A minority of the Committee's members favoured establishment of a single, binational state.⁶⁵

⁶⁰- W. T. Mallison and S. V. Mallison, *op. cit.*, p. 427.

⁶¹- The chief Zionist underground military organisation, the Haganah, became very active in Palestine in smuggling in illegal immigrants and forcibly releasing illegal immigrants who were held by the British. *Id.*

⁶²- G. Kirk, *The Middle East, 1945-1950*, (Oxford University Press, London, 1954), pp. 209-13.

⁶³- GA Res. 106, 15 May 1947.

⁶⁴- UNSCOP included representatives from Australia, Canada Czechoslovakia, Guatemala, India, Iran, the Netherlands, Peru, Sweden, Uruguay and Yugoslavia.

⁶⁵- UNSCOP Report A/364, 21 Sep 1947. Those countries in favour of a single state were Yugoslavia, Iran and India.

Although the competence of the UN for the implementation of the partition plan was doubtful,⁶⁶ on 29 November 1947 the General Assembly passed Resolution 181(II) adopting the partition plan and establishing a UN Palestine Commission to implement the resolution⁶⁷. Besides, Resolution 181(II) stated that the British mandate over Palestine should be terminated and British armed forces should leave the country by 1 August 1948.⁶⁸ Brownlie believes that "[I]t is doubtful if the United Nations has a 'capacity to convey title', in part because the Organisation cannot assume the role of territorial sovereign: in spite of the principle of implied powers the Organisation is not a state and the General Assembly only has a power of recommendation. Thus the resolution of 1947 containing a partition plan for Palestine was probably *ultra vires*, and, if it was not, was not binding on member states in any case."⁶⁹

Hostilities between armed Jewish and Palestinian elements intensified. On 10 April 1948, the Palestine Commission reported to the Secretary General that "the armed hostility of both Palestinian and non-Palestinian Arab elements, the lack of co-operation from the mandatory Power, the disintegrating security situation in Palestine, and the fact that the Security Council did not furnish the Commission with the necessary armed assistance, are the factors which have made it impossible for the Commission to implement the Assembly's resolution".⁷⁰

⁶⁶- According to the UN Charter the purposes of the United Nations does not include the partition of territory of a state and creating a new state. Article 10 of the Charter also contains the power given to the General Assembly to discuss any question or matter within the scope of the Charter not more than that to divide the territorial integrity of a state. Furthermore Article 2(7) has provided that the United Nations is not authorised to intervene in matters which are essentially within the domestic jurisdiction of any state. For more information see: Quincy Wright, *The Middle East Problem*, 64 *A. J. I. L.*, (1970), p. 277; I. Brownlie, *Principles of Public International Law*, 4th ed., (Clarendon Press, Oxford, 1995), pp. 172-173; Hans Kelsen, *The Law of the United Nations*, (Stevens and Sons, London, 1950), p. 97.

⁶⁷- The Commission included a representative from Bolivia, Czechoslovakia, Denmark, Panama and the Philippines.

⁶⁸- GA Res. 181(II), 29 Nov. 1947.

⁶⁹- I. Brownlie, *op. cit.*, p. 172.

⁷⁰- GA Report A/532, 10 Apr. 1948.

On 16 April 1948, the Security Council passed a resolution establishing a Truce Commission (UNTSO)⁷¹ to assist the Council in securing a truce in Palestine.⁷² On 15 May 1948, the British mandate came to an end and the Jews immediately proclaimed the establishment of the state of Israel. The reaction of the Arab states was that their armed forces crossed the frontier and intense fighting broke out. The Security Council called for an immediate cease-fire and on 29 May 1948 succeeded in arranging a four-week truce.⁷³ The Security Council resolution on 29 May 1948 instructed the Mediator and the Truce Commission to dispatch a sufficient number of observers.⁷⁴ According to Higgins, this point marked the birth of a body for UN Truce Supervision.⁷⁵ In the meanwhile, Count Bernadott of Sweden had been appointed mediator to act in concert with the commission in supervising the truce.⁷⁶ Bernadott negotiated a four week truce but the lack of resolve led him to write: "[t]he United Nations showed itself from the worst side. It was depressing to have to recognize the fact that even the most trivial decisions with regard to measures designed to lend force to its words were dependent on the political calculations of the Great Powers".⁷⁷

On 17 September 1948, Count Bernadott and a senior French observer were assassinated in Jerusalem by the Stern gang, a Jewish terrorist organisation.⁷⁸ Dr. Ralph Bunche, as a new Mediator, continued the work to effect a permanent truce. After passing the armistice agreements between Israel and the Arab states, the Security Council, by its resolution of 11 August 1949, terminated the role of the Mediator and referred to the continued use of the Truce Supervision Organisation.⁷⁹

71- The Commission was composed of representative from those members of the Security Council having career consular offices in Jerusalem (the United States, France, Belgium and Syria with the latter declining to participate.

72- SC Res. 723, 16 Apr. 1948.

73- R. Higgins, *op. cit.*, Vol. I, p. 14-15.

74- SC Res. S/801, 29 May 1948.

75- R. Higgins, *op. cit.*, p. 16.

76- GA Res. 186 (ES-11), 14 May 1948.

77- D. W. Wainhouse, *International Peacekeeping at the Crossroads*, (The John Hopkins University Press, Baltimore, 1973), p. 27.

78- Mona Ghali, "United Nations Truce Supervision Organisation 1948-present", in, W. J. Durch, *op. cit.*, p. 88.

79- S/ 1376 (II), 11 Aug. 1949.

The Truce Commission became known as the Truce Supervision Organisation for the first time in this resolution. "This step really achieved a separation between the function of conciliation, which was surrendered by the Acting Mediator to the Conciliation Commission (General Assembly body established by the Assembly on 11 December 1948), and that of observation and supervision of the Armistice Agreements. ... Hence, UNTSO, whilst organised and developed by the Mediator, acting in consultation with the Secretary-General, became a separate organ of the Security Council based essentially on Article 40 of the Charter."⁸⁰

The UNTSO, as its former Chief of Staff General Burns observed, "was no longer subordinated to the Mediator, but became a subsidiary organ of the United Nations with its own well-defined functions. Its machinery for supervising the cease-fire and the truce, established under previous Security Council resolutions, was made available for assisting the supervision of the General Armistice Agreements through the Mixed Armistice Commissions set up therein. The Chief of Staff was made responsible for reporting to the Security Council on the observance of the cease-fire order of July 15, 1948, which remained in force."⁸¹

UNTSO was created under the auspices of the Security Council to secure cease-fire as a provisional measure under Articles 39 and 40, as stated in Resolution 54. Besides, in the armistice agreements it had been given the specific function of observing the armistice lines and reporting to the Security Council, which was then recognised by the Council in 1949.⁸² Its duties have ranged from observation of the 1949 truce and subsequent armistice agreements, with specific roles being granted to it after the 1956, 1967 and 1973 conflicts.⁸³

⁸⁰- D. W. Bowett, United Nations Forces, (Stevens & Sons, London, 1964), p. 63.

⁸¹- E. L. M. Burns, Between Arab and Israeli, (George G. Harrap, London, 1962), p. 27.

⁸²- SC Res. 72, 11 Aug. 1949.

⁸³- N. D. White, op. cit., p. 184.

Consequently, UNTSO was an observation team which had a mandatory role to call for provisional measures. UNTSO was not created for settlement of the dispute, and its effectiveness was only in observation and reporting as the provisional measures for keeping the *status quo*.

UN Military Observer Group in India and Pakistan (UNMOGIP)

The origin of the dispute between India and Pakistan dates from 15 August 1947, the date the Indian Independence Act came into effect, partitioning the Indo-Pakistan subcontinent along Hindu-Muslim lines. In addition, the Act technically and legally required independent (princely) states to accede either to Pakistan or India.⁸⁴ Most of the princely states in fact decided to join either Pakistan or India, though three states did not join the two new dominions: Hyderabad, Junagadh and Kashmir.

Hyderabad was invaded by India in 1948 and was forced into the Union of India. In 1947 Junagadh was invaded by the Indian army and, in a subsequent plebiscite, the population voted to join India. Hyderabad and Junagadh were predominantly Hindu and ruled by a Muslim government. The state of Jammu and Kashmir (hereafter referred to as Kashmir) was in a different situation. Kashmir, the largest state, had a population in the region of four million (now 8 million), was predominantly Muslim and ruled by a Hindu, Maharaja Sir Hari Singh. It possessed borders with India, Pakistan, China and Afghanistan.⁸⁵

The government of the Hindu ruler was unpopular and faced strong domestic opposition from Muslim leaders. He was also under pressure from the British Viceroy

⁸⁴- *Ibid*, p. 316.

⁸⁵- For more information see: A. Lamb, *Crisis in Kashmir 1947 to 1966*, (Routledge & Kegan Paul, London, 1966); J. Korbil, *Danger in Kashmir*, (Princeton University Press, Princeton, New Jersey, 1954); Thomas M. Franck, *Nation Against Nation*, (Oxford University Press, Oxford and New York, 1985), pp. 47-50.

of India, Lord Mountbatten, to join one of the two states.⁸⁶ Finally, in August 1947, when a revolt in the town of Poonch was suppressed by the state forces, the Muslim soldiers of the ruler organised the Azad (free) Kashmir movement. The Muslim tribesmen of the North-West Frontier Province invaded Kashmir. The Maharaja appealed to India for help which was given in return for his state's accession to India; and on 24 October he signed an instrument of Accession to India.⁸⁷ On 27 October 1947 the Indian army was dispatched to Srinagar. Pakistan complained to the Security Council regarding the Muslims' right of self-determination in Kashmir which was being denied by India. In response, India said that the question was purely a domestic one.⁸⁸ Although Nehru (of India) and Mohammed Ali Jinnah (of Pakistan) had agreed on holding a referendum in Kashmir under international auspices, nothing of the sort ever took place.

Diplomatic attempts by both sides at first failed to bring the issue to the United Nations, but on 20 January 1948 the two governments agreed to the establishment of the United Nations Commission on India and Pakistan (UNCIP).⁸⁹

UNCIP's function was "to investigate the facts pursuant to Article 34 of the Charter of the United Nations ... to exercise ... mediatory influence likely to smooth away difficulties...and to report how far the advice and directions, if any, of the Security Council have been carried out".⁹⁰ UNCIP consisted of the United States, Belgium and Colombia (nominated by the Secretary General), Czechoslovakia (nominated by India), and Argentina (nominated by Pakistan). A Security Council resolution of 21 April set out the mechanism for conducting a referendum under UNCIP auspices⁹¹;

⁸⁶- S.D. Bailey, How Wars End: The United Nations and the Termination of Armed Conflict 1946-1964, Vol. II, (Clarendon Press, Oxford, 1982), p. 61.

⁸⁷- R. Higgins, op. cit., p. 316.

⁸⁸- T. M. Franck, op. cit., p. 51.

⁸⁹- SC Res. 39, 20 Jan. 1948.

⁹⁰- Id.

⁹¹- SC Res. 47, 21 Apr. 1948.

and in paragraph 17, this Commission was authorised to establish United Nations observers in Kashmir.

However, fighting intensified between Indian and Pakistani forces, preventing the holding of a referendum. Instead, the Commission concentrated on arranging a cease-fire, which came about on 1 January 1949. On 5 January the Commission received the Governments of India and Pakistan acceptance of the Commission's plebiscite proposals and adopted a plan for an UNCIP-supervised plebiscite.⁹² Disagreements between Pakistan and India over how to implement that plan left UNCIP to concentrate on demarcating the cease-fire line and positioning observers along it. Although the plebiscite was never held, UN observers stayed on. The cease-fire line became the permanent boundary, though modified by sporadic renewal of fighting.⁹³ UNCIP was later augmented by a United Nations Mission Observers Group for India and Pakistan (UNMOGIP) which was not operational until after a cease-fire agreement between India and Pakistan was reached at Karachi on 27 July 1949.⁹⁴

Another UN mission was dispatched to the area between 1965-66, following the report by UNMOGIP of violations of the Karachi Agreement.⁹⁵ The Security Council in its Resolution 211 asked the Secretary-General to "provide the necessary assistance to ensure supervision of the cease-fire and withdrawal of all armed personnel".⁹⁶ With reference to the requirements of Resolution 211, the Secretary-General created UN India-Pakistan Observation Mission (UNIPOM).⁹⁷ Although UNMOGIP and UNIPOM's functions were similar, their creation were quite different. In fact UNMOGIP "was created by agreement between the parties and sanctioned by the Security Council. UNIPOM was created by the Council - or more correctly a

92- SCOR, 4th year, Special Supp. No. 7(S/1430), 1949, pp. 25-27.

93- T. M. Franck, op. cit., p. 52.

94- The Karachi Agreement, SCOR, 4th year, Special Supp. No. 7 (S/1430), Ann. 26, 1949, pp. 126-9.

95- S/6651, (1965).

96- SC Res. 211, 20 Sep. 1965.

97- S/6738.

combination of the Council and the Secretary General - consented to by the parties, and later sanctioned by them."⁹⁸

To analyse the legal basis of UN forces in this case it should be said that UNCIP was created within the provisions of Chapter VI by Council Resolution 39 to investigate the facts and exercise a mediatory influence. UNMOGIP's functions were defined by a bilateral (Karachi) accord which embodied an agreement on provisional measures (cease-fire and withdrawals) made between the parties. In fact, the constitutional basis of UNMOGIP is Article 40, as stated in Council resolution 47. It seems however that the observer group could not be established without the agreement of the two parties at Karachi in July 1949. The terms of this agreement were approved by the Security Council later which was necessary for establishing this force.

It is difficult to assess the extent of UNMOGIP's achievements. It might have prevented a serious deterioration of the situation, but preserving the *status quo* would not be considered as a settlement of dispute. UNMOGIP has in fact fulfilled its function as determined by the bilateral agreement; it may however be argued that the final settlement of dispute could have been reached under the UN-held plebiscite.

United Nations Observation Group in Lebanon (UNOGIL)

With Arab nationalism and political consciousness rising among the Muslim community in the 1950s, political pressures intensified within Lebanon. The country's population was divided between Muslims and Christians. The latter had political power at the time. In February 1958 Egypt and Syria united, forming the United Arab Republic (UAR) and this prompted the pro-Western governments of Jordan and Iraq to form a federation (Arab Union).⁹⁹ The government of Lebanon, which had

⁹⁸- N. D. White, The United Nations and the maintenance of international peace and security, (Manchester University Press, Manchester, 1990), p. 189.

⁹⁹- The Annual Register of World Events, (1958), pp. 309-12.

officially accepted the Eisenhower Doctrine¹⁰⁰ and had refused to break relations with Britain and France to support Nasser of Egypt in the Suez crisis, faced increasing dissension among Lebanese political leaders.¹⁰¹

In early May 1958, following the murder of a newspaper editor, considerable disturbances occurred in the Lebanon. The government of President Chamoun asked Washington for US military intervention. Because of the conditions laid down by the United States¹⁰², Chamoun made no formal request for aid to the US. On 22 May 1958, the government of Lebanon complained to the United Nations about alleged massive intervention and indirect aggression by the UAR.¹⁰³ The UAR denied the accusations made by Lebanon and noted that Lebanon was trying to internationalise what was essentially a domestic issue in order to persuade the West to intervene.¹⁰⁴ The Soviet Union supported the position of the UAR, whereas Lebanon was supported by Iraq, Jordan, the United Kingdom, the United States and France.¹⁰⁵

The Security Council delayed action until the Arab League considered the issue, but the League was unable to reach an agreement. On 10th June, the Swedish delegate submitted a draft resolution calling for the establishment of an observation group in Lebanon.¹⁰⁶ His draft was adopted the following day as Resolution 128 and the United Nations Observer Group in Lebanon (UNOGIL) was established "to ensure that there

¹⁰⁰- According to this doctrine, approved by Congress in 1957, the United States was authorised to give economic and military assistance to any nation in the Middle East that asked for it, against armed aggression from any nation controlled by international Communism. Dwight D. Eisenhower, The White House Years: Waging Peace, (Doubleday & Co., Garden City, New York, 1965)pp. 176-83.

¹⁰¹- For more information see: Roger Owen, The Crisis in Lebanon, (Ithaca Press, London, 1976).

¹⁰²- President Eisenhower replied that US intervention would not be for the purpose of supporting a second Chamoun term of office and; another Arab state should agree to US intervention. D. D. Eisenhower, op. cit., p. 267.

¹⁰³- S/4007.

¹⁰⁴- SCOR, 13th yr, 823rd mtg, 6 June 1958, pp. 23-25.

¹⁰⁵- SCOR, 13th yr, 824th mtg, 10 June 1958, pp. 26-50.

¹⁰⁶- S/4022

is no illegal infiltration of personnel or supply of arms or other material across the Lebanese border."¹⁰⁷

UNOGIL, in its first report to the Security Council on 3 July 1958, stated that there had been no major infiltration occurring from the UAR.¹⁰⁸ Lebanon, supported by the United States and Britain, criticised this report and stated that massive intervention was continuing in Lebanon by UAR.¹⁰⁹

In mid July, pro-Western King Faisal of Iraq and his prime minister were assassinated in a military coup and Iraq was proclaimed a republic. Fearing that events in Iraq would have consequences in Lebanon and Jordan, the latter two turned to the West for protection, and finally the United States landed troops in Lebanon and British forces did likewise in Jordan.¹¹⁰ Lebanon stated that its request for aid from the United States was under its right to self-defence.¹¹¹ The United States and Britain each declared that they were acting under Article 51 of the Charter, helping a legitimate government at its own request to defend its country against external aggression.¹¹² On the other hand, the Soviet Union and Arab States contended that the right of self-defence no longer applied, as the Security Council had already acted by taking a decision which allowed for the resolution of the situation inside the country (domestic issue), and by the establishment of UNOGIL.¹¹³ Besides, the Soviet Union introduced a resolution which would have condemned the US intervention in Lebanon as contrary to Article 2(7) of the Charter and as a serious threat to international peace and security.¹¹⁴

107. SC Res. 128, 11 June 1958.

108. S/4040

109. S/4043

110. The New York Times, 18 July 1958.

111. SCOR, 13th yr, 836th mtg., 22 July 1958, p. 3.

112. R. Higgins, op. cit., p. 538.

113. SCOR, op. cit., p. 5.

114. S/4047

Secretary-General Hammarskjold in his statement to the Security Council implied that the US intervention in Lebanon had prejudiced the ability of UNOGIL to fulfil its role.¹¹⁵ The Swedish delegate to the United Nations stated that "one of the conditions for Article 51 to be applicable ... [is] ... that an armed attack has occurred against a Member-State. The Swedish Government does not consider that this condition has been fulfilled in the present case, nor does my Government consider that there is an international conflict in terms of Article 51".¹¹⁶

The issue was taken up in the General Assembly. By that time the situation in Lebanon had calmed by itself and, on 21 August, the Assembly requested Secretary-General Hammarskjold to make practical arrangements to "facilitate the early withdrawal of foreign troops" from Lebanon and Jordan.¹¹⁷ In fact, the practice of "Leave it to Dag" had at that time reached its height, and confidence in the Secretary-General was so great that he pursued a course of action which the Security Council had a month previously failed to agree upon.¹¹⁸ The United States withdrew from Lebanon on 25 October and Britain did likewise from Jordan on 2 November. On 16 November, the Lebanese representative to the United Nations informed the Security Council of the existing friendly relations between the UAR and Lebanon and asked for deletion of the Lebanese complaint from the agenda of the Security Council.¹¹⁹ The request was followed by a report of the Secretary-General that UNOGIL had completed its task, and it finally left Lebanon on 9 December 1958.

As already explained, UNOGIL was established by Security Council's Resolution 128, which had determined to despatch an observation group to Lebanon to ensure that there was no illegal infiltration across the Lebanese border and, to that end, authorised the Secretary-General to take the necessary steps.

115. *Ibid*, 827th mtg, 15 July 1958, pp. 11-12.

116. *Ibid*, 830th mtg, 16 July 1958, p. 9.

117. GA Res. 1237 (ES-III), 21 Aug. 1958.

118. R. Higgins, *op. cit.*, p. 546.

119. S/4113.

It is not clear from the word "ensure" whether the Security Council meant to imply that the observation group should forcibly prevent intervention, or whether its mission was that of observation, fact finding and investigation. Although Lebanon insisted that the United Nations should act forcibly to seal the borders, and the United States stated that UNOGIL should act to stop indirect aggression, the Secretary-General believed that use of force by the United Nations would have come under Chapter VII of the Charter and could not be performed by a small non-fighting group, 100 in number, such as UNOGIL.¹²⁰ He emphasised that UNOGIL's role was strictly limited to observing whether illegal infiltration occurred.¹²¹ The Secretary-General later mentioned that "the Council acted entirely within the limits of Chapter VI of the Charter".¹²²

UNOGIL was therefore given no power to stop infiltration or the supply of arms. In fact, the observation group was "requested" to keep the Security Council informed through the Secretary-General. The functions of UNOGIL can be considered as investigation and observation under Article 34 in order to ascertain the facts before a United Nations' decision to adopt necessary measures; this observation is different to the provisional measures being performed under Article 40.

UN Temporary Executive Authority (UNTEA) /

UN Observers and Security Force in West Irian (UNSF)

Although the main dispute between Indonesia and the Netherlands over the independence of Indonesia was resolved in 1949, both parties had not yet agreed over the territory of New Guinea (West Irian) which remained under Dutch control.

120. SCOR, 13th yr, 827th mtg, 15 July 1958, para. 64.

121. *Ibid.*, 825th mtg, 11 June 1958, para 63.

122. Report of the Secretary-General, A/3943.

The Charter of Transfer of Sovereignty concluded between the parties at the Hague had envisaged the end of Dutch control over Indonesia. After discussions in 1949 about sovereignty over West Irian, it was agreed that the *status quo* should be maintained in West Irian for a year and the future of this territory would be settled in negotiations between the two parties.¹²³ Failed negotiations led Indonesia in 1950 to ask for the incorporation of West Irian into Indonesia. Finally, in 1954, Indonesia brought the matter before the United Nations.¹²⁴

Negotiations over the future of West Irian took place at the General Assembly's sessions between 1954 and 1961. However, no progress was made. In 1961 the Netherlands, in a memorandum, approved the General Assembly Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹²⁵ In response, the Indonesian government declared that the Netherlands' policy "was not decolonization, but, on the contrary, merely a tactic to strike at Indonesia", and the Dutch were trying "to use the right of self-determination as a means to cut off a part of the territory of the Indonesian Republic".¹²⁶

In December 1961, when increasing violence between the Indonesian and Dutch governments made the prospect of a negotiated settlement elusive, U Thant, who had been appointed Acting Secretary General following the death of Dag Hammarskjöld, undertook to resolve the dispute through his good offices.¹²⁷ The United States was encouraging a negotiated settlement.¹²⁸ Consequently, secret negotiations began on 12

123. For the parties' arguments on the Netherlands right of administration (Indonesian interpretation) or sovereignty (the Netherlands interpretation) see: GAOR, 9th sess., 1st Cttee., 726th mtg.

124. A/2694.

125. A/4954 and A/4915.

126. A/4944.

127. The Blue Helmets: A Review of United Nations Peacekeeping, (United Nations Department of Public Information, 1990), p. 264.

128. There is a view that the US did not wish to see another war in South-East Asia (other than the wars in Laos and Vietnam) nor did it wish to see the Netherlands, an important NATO ally, engaged in a colonial war that it could not win but into which the US might be drawn. William J. Durch, "UN Temporary Executive Authority", in: William J. Durch (ed.), The Evolution of UN Peacekeeping, (St. Martin's Press, New York, 1993), p. 286.

March 1962 in the presence of retired United States Ambassador Ellsworth Bunker, who officially represented U Thant and unofficially represented the US government.¹²⁹

However, during negotiations tensions occurred between the two parties. The Netherlands charged that Indonesia committed an act of aggression.¹³⁰ Indonesia responded that "Indonesians who have entered and who in the future will continue to enter West Irian are Indonesian nationals who move into Indonesia's own territory now dominated by the Dutch by force".¹³¹

U Thant was requested by the Netherlands to send United Nations observers to the scene. U Thant declined this request and stated that "I could consider such a move only if requests were made by both the Netherlands and Indonesian governments".¹³²

The Acting Secretary-General was eventually able to announce on 31 July 1962 that a preliminary agreement had been reached.¹³³ Final negotiations were held at the United Nations Headquarters under the chairmanship of U Thant, with Ambassador Bunker as a mediator, and an agreement was signed by Indonesia and the Netherlands on 15 August 1962.¹³⁴

The agreement provided for the administration of West New Guinea (West Irian) to be transferred by the Netherlands to a United Nations Temporary Executive Authority (UNTEA), to be established by and under the jurisdiction of the Secretary-General and to be assisted by a UN Security Force (UNSF) headed by a United Nations Administrator who would be acceptable to both parties and who would be appointed

129. Christopher J. McMullen, *Mediation of the West New Guinea Dispute*, (Institute for the Study of Diplomacy, Georgetown University, Washington D.C., 1981), pp. 10-13.

130. S/5123, 21 May 1962.

131. S/ 5128, 25 May 1962.

132. S/ 5124, 23 May 1962.

133. *The Blue Helmets*, *op. cit.*, p. 265.

134. Text in, 9 *U.N. Review* (Sep. 1962), and in, A/5170, Ann. C.

by the Secretary-General.¹³⁵ When the General Assembly unanimously approved the Agreement, on 21 September 1962, the UN undertook for the first time direct executive authority over a territory.¹³⁶ The Secretary-General was authorised to carry out the tasks entrusted to him therein.¹³⁷

Provided in the Agreement was the UNSF's function with two different aspects. One aspect related to the provisional measures which were essential for the establishment of UNTEA in the territory. The other aspect of its function related to maintaining law and order after the transfer of administration to UNTEA. Under the Secretary-General's jurisdiction, UNTEA would have full authority to administer the territory to maintain law and order to protect the rights of the inhabitants until 1 May 1963 when the administration of the territory was to be transferred to Indonesia.

Neither the agreement between the two parties nor General Assembly Resolution 1752 had referred to the constitutional basis of UNTEA and UNSF. The General Assembly may recommend measures for peaceful adjustment of any situation regardless of its origin under Article 14. Also the Assembly may establish a subsidiary organ as it deems necessary for performance of its function (Article 22), and UNTEA could be observed as such subsidiary organ.

The substantial role of the Secretary-General merits consideration. According to Higgins "after approving the Agreement, the Assembly played no further role, and full discretion was left to the Secretary-General, operating in consultation with Indonesia and the Netherlands."¹³⁸ The Agreement between these two states approved by the General Assembly authorised the Secretary-General to carry out the tasks entrusted to

135- *Ibid.*

136- GA Res. 1752, 21 Sep. 1962.

137- *Ibid.*

138- R. Higgins, *op. cit.*, p.122.

him under Article 98. His rights regarding the observers would fall within his general powers, so long as his actions are compatible with the purposes of the Charter.

United Nations Yemen Observation Mission (UNYOM)

Following a coup in Yemen in September 1962, the royalist regime was overthrown by the republicans, and throughout the next few months conflicts between the royalists and the republicans escalated into civil war. The new government was supported by the United Arab Republic, whereas the royalists received arms and supplies from Saudi Arabia. The republican government was recognised by the UAR and the Soviet Union on 29th and 30th of September respectively. However, the US and the British governments, as well as the pro-Western governments in the region, did not recognise the new government.¹³⁹

Close relations between the UAR and the republicans and other "disturbing elements into the rich-oil and reactionary Arabian peninsula" were not acceptable to the West, and it was desired to get the UAR out of the Yemen.¹⁴⁰ The US president, John Kennedy, proposed a plan to end Egyptian and Saudi support for the parties, and recognition of the new government by the United States. Egypt and Saudi Arabia continued to support the parties of the dispute; however, the United States recognised the republican government on 19 December 1962.

The Yemeni question came before the United Nations when its permanent mission in the UN was still staffed by the royalists. On 27 November 1962 they (royalists) wrote a letter to the Secretary-General, U Thant, to ask for the establishment of an enquiry to investigate whether the coup in Yemen had been fostered from Cairo. However,

¹³⁹- See generally: Dana Adams Schmidt, Yemen, the Unknown War, (Holt, Rinehart and Winston, New York, 1968).

¹⁴⁰- Alan James, The Politics of Peace-Keeping, (Chatto & Windus for the Institute for Strategic Studies, London, 1969), p. 86.

this request was not put on the Security Council's agenda, and on 20 December the General Assembly accepted the credentials submitted by the President of the Yemen Arab Republic. The Secretary-General started to take diplomatic initiatives before the issue was placed on the Security Council's agenda. Dr Ralph Bunche was sent to Yemen on a fact-finding mission by the Secretary-General in March 1963. The United States did likewise by sending Ellsworth Bunker to Riyadh and Cairo.

Negotiations between the Secretary-General and the governments of UAR, Saudi Arabia and Yemen led to an UAR and Saudi Arabia agreement on terms of disengagement in Yemen and on a UN presence which U Thant reported to the Security Council on 29 April.¹⁴¹

On 11 June 1963, the Security Council approved the Secretary-General's initiative, and requested the Secretary-General to establish of a United Nations observer group, as defined by him, in Yemen (UNYOM).¹⁴² The Secretary-General in his definition stated that: "[b]y the provisions of the agreement on disengagement, UNYOM's functions are limited to observing, certifying and reporting. This operation has no peace-keeping role beyond this ... [T]he agreement on disengagement involves only Saudi Arabia and the United Arab Republic ... UNYOM, therefore, is not concerned with Yemen's internal affairs generally, with actions of the Government of Yemen, or with that Government's relations with other Governments and bordering territories".¹⁴³ He further stated "I do not, however, believe that the solution of the problem, or even the fundamental steps which must be taken to resolve it, can never be within the potential of UNYOM alone - and most certainly not under its existing limited mandate".¹⁴⁴ On the role of the UN he said: "[t]he implementation of the disengagement agreement ... is the primary concern of the two parties to the

¹⁴¹- Report of the Secretary-General to the Security Council, S/5298, 29 Apr. 1963.

¹⁴²- SC Res. 179, 11 June 1963.

¹⁴³- Report of the Secretary-General on the functioning to date of the Yemen Observation Mission, S/5412, 4 Sep. 1963, pp. 153-4, 156.

¹⁴⁴- S/5447.

disengagement agreement. The terms of that agreement give the United Nations no role beyond observation and reporting with regard to its implementation."¹⁴⁵

UNYOM started its mission on 4 July 1963 with its headquarters in Sana. Although the parties were responsible for fulfilling the terms of the disengagement, UNYOM did not get the full co-operation of the parties. Finally, in September 1964, it withdrew from the area at the request of all three parties.¹⁴⁶

The Secretary-General had an important role in the disengagement agreement. The establishment of UNYOM was by a Security Council decision. However, the Council did not determine the Charter basis of UNYOM. Although observing and reporting could be either under Chapter VI or Chapter VII, the function of investigation (Article 34) was not requested of UNYOM, nor were provisional measures (Article 40). Furthermore, the fundamental steps which should have been taken to resolve the crisis in Yemen were not within the potential of UNYOM, since it had a limited mandate.

The role of the Secretary-General in this case, before the issue was placed on the Council's agenda, was substantial since there is no Charter basis to allow the Secretary-General to initiate his diplomatic efforts before the matter is on the Council's agenda. According to Article 99 of the Charter, the Secretary-General can only bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. Consequently, the initiations of the Secretary-General can be important in cases that the Security Council is not willing to take steps to consider a dispute.

¹⁴⁵. S/5794.

¹⁴⁶. Report by the Secretary-General to the Security Council on the termination of the United Nations Observation Mission in Yemen, S/5959, 11 Oct. 1964.

UN Good Offices Mission in Afghanistan and Pakistan (UNGOMAP)

When the communist leadership of Afghanistan seized power in 1978, it faced strong resistance throughout the country. Noor Mohammed Taraki and his Prime Minister, Hafizullah Amin, introduced reform programmes that were thought to threaten social and religious (Islamic) institutions. Islamic and tribal leaders tried to resist Kabul's efforts to extend its control over the country. By the autumn of 1979, the government had lost control of the major part of the country. Consequently, the Soviet Union, which had signed a Treaty of Friendship and Cooperation with Taraki, began to expand its military aid.¹⁴⁷

By 27 December 1979, Soviet forces, in response to a request from the Afghan government, occupied the country and installed Babrak Karmal from the People's Democratic Party of Afghanistan (PDPA) as prime minister. Fighting between Afghan resistance or Mujahideen and the new regime and the 100,000 Soviet troops was intense.

The Security Council debated the issue in January 1980 but failed to agree on a resolution. The issue was referred to the General Assembly under the "Uniting for Peace" procedure.¹⁴⁸ The General Assembly on 14 January 1980 approved a resolution strongly condemning the armed intervention and called for the "immediate, unconditional and total withdrawal of the foreign troops from Afghanistan".¹⁴⁹

¹⁴⁷. For more information see: Robert O. Freedman, *Moscow and the Middle East*, (Cambridge University Press, Cambridge, 1991), pp. 71-74; and see *N. Y. Times*, 4 May 1979, and 13 April 1979.

¹⁴⁸. By adoption of the General Assembly Resolution 377(V) of 1950, when the Security Council is unable to act because of a veto, the Assembly may hold "emergency special session" within 24 hours in a peace and security crisis, or establish a Peace Observation Commission or a Collective Measures Committee.

¹⁴⁹. GA Res. ES-612, 14 Jan. 1980.

Following the General Assembly's session, the issue was discussed in the Organisation of the Islamic Conference (OIC). The first OIC resolution called for the immediate and unconditional withdrawal of the Soviet troops from Afghanistan.¹⁵⁰ This resolution did not contain any provision on a negotiated settlement to achieve the above objective. "A lasting legacy of the first OIC resolution was its call for non-recognition of the Karmal government".¹⁵¹

However, the General Assembly approved the credentials of the delegation of the Karmal regime. It is believed that such a recognition "shaped the character of subsequent negotiations over Afghanistan"¹⁵². On 14 May 1980, the government in Kabul issued a statement directed to the governments of Iran and Pakistan, outlining a programme for a political solution to the "tension that has come about in this region".¹⁵³ The programme contained four points: the withdrawal of the foreign troops, non-interference in the internal affairs of states, international guarantees, and the voluntary return of the refugees to their homes.¹⁵⁴ However, Kabul's proposals were rejected by the governments of Iran and Pakistan which were reluctant to take any step which might be seen as a diplomatic recognition of Kabul's regime. This difficulty was overcome when on 11 February 1981 Secretary-General Kurt Waldheim appointed Javier Perez de Cuellar, under-Secretary-General for Special Political Affairs, as his personal Representative on the Situation Relating to Afghanistan.¹⁵⁵ Perez de Cuellar visited the region in April and August 1981 and, after extensive discussions, got acceptance of the governments of Afghanistan and

¹⁵⁰- OIC Declarations and Resolutions of Heads of State and Ministers of Foreign Affairs Conferences 1389-1400 H, 1969-1981, (OIC Secretariat Publication, Jeddah), p. 594.

¹⁵¹- Riaz Mohammad Khan, Untying the Afghan Knot, (Duke University Press, Durham and London, 1991), p. 17.

¹⁵²- William Maley, "The Geneva Accords of April 1988", in, Amin Saikal and William Maley (ed.), The Soviet withdrawal from Afghanistan, (Cambridge University Press, Cambridge, 1989), pp. 13-14.

¹⁵³- A/35/238-S/13951, 19 May 1980.

¹⁵⁴- Id.

¹⁵⁵- The Blue Helmets, op. cit., p. 316.

Pakistan to a four-point agenda. But the Mujahideen were excluded from the negotiations, in which in sympathy Iran declined to participate directly.¹⁵⁶

By the end of 1981 Perez de Cuellar was elected as the new Secretary-General. He appointed Diego Cordovez from Ecuador as his successor in the Afghanistan negotiations. During six years (1982-1988), Cordovez acted as intermediary in negotiations between the governments of Afghanistan and Pakistan in Geneva and in the area.¹⁵⁷ The Geneva Accords were signed finally on 14 April 1988. The Accords, known formally as the Agreement on the Settlement of the Situation Relating to Afghanistan, contained four instruments: a bilateral agreement between Afghanistan and Pakistan on mutual non-intervention and non-interference; a declaration on international guarantees by the USSR and the USA not to interfere or intervene in the internal affairs of Afghanistan or Pakistan; an agreement on the phased withdrawal of Soviet troops; a bilateral agreement between Afghanistan and Pakistan on the voluntary return of refugees. There was also an annexed memorandum of understanding which provided that the Secretary-General would send an inspection team at the request of the parties to report on the withdrawal of foreign troops and on any violation of the Accords.¹⁵⁸

After several months the Security Council, on 31 October 1988, in Resolution 622, formally confirmed its agreement to the measures envisaged and executed by the Secretary-General.¹⁵⁹ The Secretary-General immediately established the United Nations Good Offices Mission in Afghanistan and Pakistan (UNGOMAP). UNGOMAP was created by the parties with confirmation by the Security Council to

^{156.} W. Maley, *op. cit.*, p. 14.

^{157.} The Blue Helmets, *op. cit.*, p. 316. Pakistan kept in close touch with Iran and encouraged Cordovez to do the same. The first progress with Iran was achieved by Cordovez during April 1984. Iran maintained a strong declaratory policy demanding Soviet withdrawal and supported the legitimate interests of the Afghan people. R. M. Khan, *op. cit.*, pp. 164-5.

^{158.} For the text of Accords see: UN Press Release SG/1860, 14 April 1988. On 14 April 1988 the Secretary-General informed the Security Council that he intended to dispatch military observers to the area. S/19834.

^{159.} S/19835, S/19836.

provide neutral information. Indeed, it was created by parties to an agreement to monitor the withdrawal of Soviet troops, non-intervention and non-interference by the two countries in one another's internal affairs, and the return of refugees from Pakistan to Afghanistan.¹⁶⁰

UNGOMAP was concerned with provisional measures as envisaged in the Accords. It completed its task successfully on the withdrawal of Soviet troops from Afghanistan. UNGOMAP received full co-operation from the parties, including all freedom of movement within their respective territories required for effective investigation. Its mandate was to facilitate the measures for settlement of disputes which the parties had agreed in 1988.¹⁶¹

UN Angola Verification Mission (UNAVEM)

In the endeavours that lead to the independence of Angola from Portuguese colonial rule in the 1950s, three parties were active with conflicting interests. Fighting however broke out and MPLA (Popular Movement for the Liberation of Angola), with Cuban support, took control of the major part of the country including Luanda.¹⁶²

As the United States began funding the FNLA and UNITA through the CIA in 1974 to prevent Soviet influence in the region, Cuban forces arrived in Angola to support the MPLA. At the same time, South African troops intervened to back the FNLA and UNITA. After the recognition of the MPLA as the Angolan government, war escalated between the government (supported by Cuba) and UNITA (supported by

¹⁶⁰- S/19834, 26 Apr. 1988.

¹⁶¹- UNGOMAP's mandate ended on 15 March 1990, and upon the termination of UNGOMAP the UN Secretary-General established the Office of the Secretary-General in Afghanistan and Pakistan (OSGAP) in order to continue pursuit of a political settlement in the internal conflict of Afghanistan. *The Blue Helmets*, *op. cit.*, p. 322.

¹⁶²- For more information see: Robert Jaster, *The 1988 Peace Accords and the Future of South-Western Africa*, Adelphi Paper 253 (International Institute for Strategic Studies, London, 1990).

South Africa).¹⁶³ The United States and the Soviet Union continued their military aid to the disputants until 1986.

After intensive acts of aggression by South Africa, the Security Council in Resolution 602 of 25 November 1987, condemned South Africa and demanded unconditional withdrawal of South African forces from Angolan territory, to be monitored by the Secretary-General. The Secretary-General sent a mission to Angola to monitor the South African troops' withdrawal. The mission reported to the Secretary-General that South Africa still had military activities in Angola.¹⁶⁴ In 1988, Angola, Cuba and South Africa reached an agreement on a *de facto* cease-fire, and by the end August, South Africa withdrew its forces.¹⁶⁵

In December 1988, the parties undertook to sign two documents, a trilateral agreement between Angola, Cuba and South Africa about Namibian independence and a bilateral agreement between Cuba and Angola for the withdrawal of the Cuban troops from Angola.^{166 167}

On 17 December 1988, Cuba and Angola requested the Secretary-General to recommend to the Security Council the establishment of a United Nations military observer group.¹⁶⁸ The Secretary-General issued a report on recommendations to the Security Council for carrying out his tasks. The Security Council, in its Resolution 626 of 20 December 1988, approved the Secretary-General's report and decided to establish the United Nations Angola Verification Mission (UNAVEM). UNITA had

163. *Africa South of the Sahara*, (European Publications Ltd, London, 1991), p. 235.

164. S/19359.

165. R. Jaster, *op. cit.*, pp. 25-26.

166. S/20345, 22 Dec. 1988; S/20346, 22 Dec. 1988.

167. Although the linkage between independence of Namibia and the withdrawal of Cuban troops from Angola was opposed both by the General Assembly and the Security Council, the United States government pursued its efforts to relate both issues. The Blue Helmets, *op. cit.*, p. 335.

168. S/20336, 17 Dec. 1988; S/20337, 17 Dec. 1988.

not been part of the negotiations and its actions halted the Cuban withdrawal temporarily. However, the rebels wanted the withdrawal to be completed.¹⁶⁹

With the co-operation of Angola and Cuba, UNAVEM is considered as a successful mission. The Secretary-General commented "what can be achieved by a United Nations peace-keeping operation when it receives the full co-operation of the parties concerned".¹⁷⁰ The constitutional basis of UNAVEM lies in the agreements signed by the parties complying with provisional measures.

The Cuban forces left Angola by 25 May 1991, and the Security Council in its Resolution 696 extended the mission as UNAVEM II to cover Angola's internal peace plan.¹⁷¹

Conclusion

Similar to peace-keeping forces, UN observer missions are successful only where consent and co-operation of the parties exist. In the dispute between Indonesia and the Netherlands in 1947, peace observers were given a broad mandate which, without the co-operation of the two parties, could not achieve its objectives. UNAVEM also has been considered as a successful mission and, as the Secretary-General said, its success was because it received the full co-operation of Angola and Cuba.

The cases of UNTSO in the Middle East and UNMOGIP in Kashmir demonstrate that although these peace observers had a limited function which is being fulfilled, their presence has lasted for many years without leading to a final solution to the disputes.

169. Virginia Page Fontna, "United Nations Angola Verification Mission I", in: William J. Durch (ed.), The Evolution of UN Peace-Keeping, (St. Martin's Press, New York, 1993), p. 379.

170. S/20783.

171. S C Res. 696, 30 May 1991.

In the case of UNYOM, although it had a limited function, the parties themselves were totally responsible for fulfilling the terms of the disengagement.

UNGOMAP was created to facilitate measures, i.e. withdrawal of Soviet forces from Afghanistan, by providing neutral information on compliance with the Geneva Accords. It was one of the most successful observation missions, since it was created by an agreement by both parties which later was sanctioned by the Security Council. In fact, the Soviet's determination to abide by the Geneva Accords was the key element of success of UNGOMAP, though one might say that the Soviets would have withdrawn their forces with or without UNGOMAP.

The establishment of UNIIMOG, which was an observation mission to monitor the cease-fire between Iran and Iraq, will be discussed in Chapter Six. It should however be mentioned here that this mission was another successful example of observers for the similar reason as with UNGOMAP, i.e. the parties were determined to keep the truce.

Observer missions, similar to peace-keeping forces, could be established either by the General Assembly or the Security Council. UNSCOB was established by the General Assembly to investigate and report receiving arms by armed groups in Greece. The authority granted to the General Assembly was under Articles 10, 11, 14 and 22 of the Charter. UNOGIL and UNCIP were given an investigatory and mediatory role by the Security Council. These mandates are under Article 34 of Chapter VI. It can be concluded that either the General Assembly or the Security Council may establish an observer mission under Chapter VI. Further discussion on the constitutional basis of establishment of the UN forces to monitor, observe or supervise provisional measures has been made in Chapters Two and Three of this thesis.

CHAPTER FIVE

UNITED NATIONS HUMANITARIAN FORCES

In recent years, the United Nations has increasingly been involved in situations of intrastate conflicts for humanitarian purposes, often without the consent of the parties concerned. In the Security Council resolutions relating to these cases, Chapter VII has been invoked in order to apply sanctions and use force, while Chapter VI, which provides a range of means for peaceful settlement of disputes, has not been referred to.

In cases where ethnic cleansing, genocide, mass starvation, famine and drought would move millions of people out on the roads and create a disaster, effective action is required to end the situation threatening the lives of humans. However, as *An Agenda for Peace* considers, the new mandate of protecting humanitarian aid has led peace-keeping operations "to forfeit the consent of the parties, to behave in a way that was perceived to be partial and/or to use force other than in self-defence".¹

The recent practice of the United Nations in its attempts regarding humanitarian purposes will be discussed in this chapter by considering the important facts and the legal basis of the UN response to the crises in former Yugoslavia, Somalia, and Rwanda. In light of assessing the degree of success or failure of these attempts, and the underlying reasons, the author's view will be stated.

¹- Boutros Boutros-Ghali, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, 3 Jan. 1995, A/50/60-S/1995/1, para. 34.

UN Protection Force (UNPROFOR)

Background

The state of Yugoslavia consisted of six republics (Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Montenegro, and Macedonia) and two regions (Kosovo and Vojvodina). By the end of the Cold War, a new situation emerged. Four of the six republics declared independence unilaterally during 1991. The Serbians wanted centralised control over Yugoslavia and strongly disapproved of the declarations of independence.²

The maintenance of the territorial integrity of the Yugoslav federation was supported by the United States, the European Community (EC), and the Conference on Security and Co-operation in Europe (CSCE),³ which undoubtedly strengthened the Serbians.⁴

The conflict escalated into a full-scale civil war during June 1991, and subsequently the European Community involved itself in the crisis, though Yugoslavia was not a member of the EC. The EC and other European institutions, namely CSCE and WEU (Western European Union), began to initiate a cease-fire. These initiatives, which were started by several declarations, included the dispatch of a Ministerial Troika to work out a cease-fire, the dispatch of a mission to monitor the implementation of a cease-fire and a three months suspension of the declarations of independence, and the application of an embargo on armaments and military equipment to the whole of Yugoslavia.⁵

2- UN Yearbook (1991), p. 214.

3- For more information about this organisation see: 14 ILM 1292 (1975).

4- Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia", 86 A.J.I.L., 1992, p. 570.

5- UN Yearbook (1991), p. 214, S/22775 (1991).

However, serious fighting began in Croatia by the Serbs living there, supported by the JNA (Yugoslav People's Army).⁶ The European authorities considered dispatching military interposition forces, not to defend the *status quo*, but to isolate the sources of conflict.⁷

The Soviet Union considered the EC operation as an act of intervention that would spread the conflict over Europe.⁸ However, the EC did not obtain the consent of the Serbian side and the plan was not put into action.⁹

The United Nations involvement

On 1 September 1991, the delegate of Australia informed the Secretary-General that the Security Council should consider the situation in Yugoslavia as a matter of urgency.¹⁰ On 25 September 1991, the Security Council, after three months of the crisis, convened in response to requests from Australia¹¹, Canada¹², and Hungary¹³, as they feared the crisis could endanger international peace and security.

Yugoslavia, at its request, was invited to participate in the Council's meetings without the right to vote in accordance with rule 37a of the Council's Provisional Rules of Procedure.¹⁴ Yugoslavia asked in its arguments for a complete embargo on all deliveries of weapons and military equipment to all parties.¹⁵

6- United Nations Peace-Keeping Operations, United Nations Department of Public Information, <http://ralph.gmu.edu/cfpa/peace/unprofor.html>

7- Helm and Tanner, "EC Force for Yugoslavia Closer", *Independent*, 3 Aug. 1991, p. 1.

8- Gardner and Dempsey, "Soviets Warn over Yugoslavia", *Fin. Times*, 7 Aug. 1991, p. 1.

9- Brook & Trevisan, "Hurd Halts EC Troops Plan for Yugoslavia", *The Times*, 20 Sep. 1991, p. 1.

10- S/23047.

11- S/22903.

12- S/23053.

13- S/23247.

14- *UN Yearbook* (1991), p. 214-5.

15- S/PV. 3009, 25 Sep. 1991, p. 17.

The Security Council in its resolution expressed deep concern about the fighting in Yugoslavia and its consequences for the countries of the region, in particular in the border areas of neighbouring countries.¹⁶ The Council considered the continuation of this situation "a threat to international peace and security". Although the Council did not refer to Article 39 of the Charter and used the words "continuation of the situation", its finding fulfilled the requirement of Article 39.¹⁷

The Security Council in its resolution noted, under Chapter VIII, the efforts undertaken by the EC and CSCE as regional arrangements to restore peace through, *inter alia*, the implementation of a cease-fire, including the sending of "observers", the convening of a conference on Yugoslavia, and the suspension of the delivery of all weapons and military equipment to Yugoslavia.

In Resolution 713, any territorial gains or changes within Yugoslavia brought about by violence were considered unacceptable. This resolution supported the collective efforts by the EC and the CSCE and also supported all arrangements and measures resulting from such collective efforts, and invited the Secretary-General to offer his assistance without delay. The Council in its decision referred to Chapter VII of the Charter to implement a general and "complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia".

On 8 October 1991, Secretary-General Javier Perez De Cuellar announced that Cyrus Vance from the United States had agreed to be his Personal Envoy.¹⁸ On 25 October, the Envoy reported that the *de facto* authority of the central government in Yugoslavia had been seriously impaired and, as a result, JNA no longer had political direction

¹⁶- SC Res. 713, 25 Sep. 1991.

¹⁷- M. Weller, *op. cit.*, p. 579.

¹⁸- UN Yearbook (1991), p. 216.

from a civilian authority that enjoyed the support of all of the Yugoslav republics and communities.¹⁹ With regard to the humanitarian aspects, he stated that 300,000 persons were displaced and this figure could increase to 400,000.²⁰

At the same time, five republics of Yugoslavia agreed to continue working on a draft paper prepared by Lord Carrington, Chairman of the Peace Conference on Yugoslavia, but Serbia did not agree.²¹

Establishment of United Nations Protection Force (UNPROFOR)

International attempts to restore peace were not successful and the situation deteriorated. However, the Security Council did not make a further decision at that time, and on 27 November 1991 the Council adopted Resolution 721 noting again that the continuation of the situation in Yugoslavia constituted a threat to international peace and security.²² The Council noted that the disputant parties wanted to see the deployment of a United Nations peace-keeping operation and confirmed that the Secretary-General could present early recommendations to the Security Council including the possible establishment of a UN peace-keeping operation. The resolution endorsed the statement made by the Personal Envoy that the deployment of a UN peace-keeping operation could not be envisaged without , *inter alia*, full compliance by all parties with the agreement signed in Geneva on 23 November 1991.²³

The Secretary-General, on 11 December 1991, reported that, despite wide-spread support in Yugoslavia for a UN peace-keeping operation, the necessary conditions for

19. S/23169, Paras. 21,31.

20. *Ibid*, Paras. 15-19.

21. *Ibid*, Para. 23.

22. The Yugoslav delegation again , at his request, was invited to participate without the right to vote.

23. The agreement of 23 November provided for the immediate lifting by Croatia of its blockade of Yugoslav army barracks in Croatia of personnel and military equipment, and a cease-fire with effect from 24 November. UN Yearbook (1991), p. 217.

its establishment still did not exist.²⁴ The Security Council in Resolution 724 of 15 December approved the Secretary-General's report, and states were requested to report on the measures they had taken to implement the complete arms embargo against Yugoslavia; and a committee was set up to gather information on the embargo.²⁵ In another resolution, the Council finally authorised the dispatch of 50 military liaison officers to promote the maintenance of the cease-fire.²⁶

By Resolution 743 of 21 February 1992 the Security Council established a United Nations Protection Force (UNPROFOR) which was recommended by the Secretary-General on 15 February; and this was consequently deployed in March 1992.²⁷

The Security Council in its resolutions referred to Chapters VII and VIII of the Charter. It supported, with reference to the latter, collective actions of the European institutions to restore peace in Yugoslavia. It implicitly referred to Article 39 and also used its authority to impose economic sanctions stipulated in Article 41. However, the Security Council in Resolution 743 did not refer to the UN Charter to create UNPROFOR. It was stated in this resolution that UNPROFOR should "be an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis". UNPROFOR was an intra-state peace-keeping force, though the Security Council did not refer to the suffering of peoples within Yugoslavia but rather referred to the danger to the neighbouring states.²⁸ In fact, UNPROFOR was not deployed to resolve the crisis in Yugoslavia and its function was merely to implement provisional measures under Article 40 for a final solution of the problem.

24- S/23280.

25- SC Res. 724, 15 Dec. 1991.

26- SC Res. 727, 8 Jan. 1992.

27- S/23777.

28- SC Res. 713, 25 Sep. 1991.

By a referendum in March 1992, 63% of the population voted for independence of Bosnia Hercegovina (hereinafter Bosnia).²⁹ The three ethnic groups in Bosnia released a Statement of Principles for New Constitutional Arrangements which declared that the new state would maintain its existing boundaries and would recognise the rights of all of the Muslim, Croat and Serb citizens.³⁰ However, shortly after this statement, the Bosnian Serb leader disavowed the statement.³¹ EC recognised Bosnia in April 1992, and in May 1992 Bosnia was admitted as a member of the United Nations.³²

However, Serbia intensified attacks in Bosnia and occupied about seventy percent of this country.³³ Civilians became targets of Serb forces, being killed or terrorised by every method; their only crime was being of a different ethnic group.³⁴ Various other human rights violations, including concentration camps, rape, torture, destruction of entire towns, deliberate targeting of individuals and hospitals were frequently used as a part of the war, the worst in Europe since World War II.³⁵ In fact, the Serbs started ethnic cleansing to uproot the Muslim and Croat populations to create a country with a pure Serb population.³⁶

The United Nations seemed powerless to find a peaceful solution to the dispute and stop the killing. Efforts at humanitarian relief were no more successful and, although convoys were directed toward Muslim areas, Serbian forces did not stop shelling around Sarajevo and other cities, and humanitarian relief could not get through.³⁷ In May 1992, Serbia purported to renounce authority over units of the JNA which remained in Bosnia without the consent of the Bosnian Government, and thereafter,

29. M. Weller, *op. cit.*, p. 593.

30. *Ibid*, p. 589.

31. *Ibid*, p. 597.

32. SC Res. 755, 20 May 1992.

33. *N.Y. Times*, 27 Dec. 1993, p. 6.

34. *N.Y. Times*, 5 June 1993, p. 1.

35. Paul F. Diehl, *International Peacekeeping*, (The John Hopkins University Press, Baltimore and London, 1993), p. 191; Jane Olson et al, "Bosnia, War Crimes and Humanitarian Intervention", 15 *Whittier L. Rev.*, 1994, p. 446.

36. *Time*, 24 Aug. 1992, p. 46.

37. P. F. Diehl, *op. cit.*, p. 191.

the Security Council, which recognised the ongoing interference by JNA units, by its Resolution 752 demanded that Bosnia's neighbours immediately cease all forms of interference in Bosnia, including by JNA units, and that those units of the JNA and the Croatian army within Bosnia be withdrawn, placed under the control of the Bosnian Government, or disbanded and disarmed.³⁸

The peace talks co-ordinated by Cyrus Vance and David Owen were not effective since their plan did not attempt to maintain Bosnia as a single, unified state. Instead the plan divided Bosnia into three ethnic provinces.³⁹ Although Serbian and Croat leaders were willing to sign the plan, which granted them everything they wanted, the Muslim leader was not willing to accept it because it left the Muslims with thirty-one percent of the territory and no access to the Adriatic Sea, while granting the Serbs and Croats the territories they had taken by force.⁴⁰ The Bosnian leader, Alija Izetbegovic described the proposed settlement as a choice between "just war" and "unjust peace".⁴¹

Bosnia sued Serbia both for acts of Serbian forces in Bosnia and for Serbian support of genocide carried out by Bosnian Serb forces.⁴² Because of the urgency of the situation, Bosnia sought provisional measures from the ICJ twice in 1993. In response to the first application, the ICJ ruled in Bosnia's favour, ordering that Serbia should cease and desist from all genocidal actions.⁴³ In response to the second application, in which Bosnia claimed that Serbia was not complying with the first order,⁴⁴ the Court again ruled in Bosnia's favour.⁴⁵

38. SC Res. 752, 15 May 1992.

39. *L.A. Times*, 20 Sept. 1993, p. 4.

40. *Ibid.*, 30 Sept. 1993, p. 1.

41. *Id.*

42. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), *I.C.J. Rep.*, 1993.

43. *Id.*

44. *Id.*

45. *Ibid.*, p. 325.

Legality of arms embargo against Bosnia

It is clear from Security Council's Resolution 752 that Bosnia as an independent state had been interfered with and attacked by its neighbours including the Serbs. These attacks were directly and indirectly carried out and encouraged by providing planes, weapons and even manpower.⁴⁶ Bosnia's admission to the United Nations means that it enjoys the rights which all other Members of the UN do under the United Nations Charter. Among these rights is the "inherent right to self-defence" under Article 51 of the Charter. Although the Security Council in the case of Kuwait had affirmed the right of self-defence⁴⁷ for the victim state, this right was not recognised for Bosnia against aggression. "What the Security Council must not do is impose measures (such as the arms embargo) which seriously impair the ability of a state to defend itself from an armed attack, without also undertaking effective measures to defend the state itself."⁴⁸

In 1993, Bosnia succeeded in having included in one of the three drafts of General Assembly resolutions a request for an advisory opinion on the issue of the legal status and effects of the arms embargo resolutions. However, later, Bosnia asked that the clause requesting the advisory opinion be dropped.⁴⁹ The Bosnian Government decided that the best course of action was to secure a Court judgement that Serbia violated the Genocide Convention and not to include any arguments pertaining to the controversial and jurisdictionally uncertain issue of the arms embargo.⁵⁰

In the second Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia) in 1993 Judge Lauterpacht in

⁴⁶- N.Y. Times, 6 June 1992, p. 1.

⁴⁷- SC Res. 661, 6 Aug. 1990.

⁴⁸- Craig Scott et al, "A Memorial for Bosnia. Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nation's Security Council's Arms Embargo on Bosnia and Herzegovina", 16 *Mich. J. Int'l L.*, (1994), p. 70.

⁴⁹- GAOR, 48th Sess., 84th plen. mtg., and, 85th plen. mtg.

⁵⁰- Craig Scott et al, *op. cit.*, p. 13.

his separate opinion stated that "[t]he duty to 'prevent' genocide is a duty that rests upon all parties The applicant obviously has here in mind ... the embargo placed by Security Council Resolution 713 (1991) [I]t is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* or requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded On this basis, the inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*."⁵¹

It should be borne in mind that the primary responsibility for maintaining international peace and security was granted by the UN members to the Security Council. The members do not expect that a UN member be left in a defenceless state against an act of aggression and the Council call on them to become "unknowingly" and "unwillingly" supporters of the genocidal activities.

It is not understood why the Security Council did not change its decision⁵² on the embargo to allow Bosnia to defend itself, while in 1992 the Council had recognised that there was interference with, violence towards and forcible change in the ethnic composition of the population of Bosnia.⁵³ The JNA units provided the Bosnian Serbs

⁵¹- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia), *I.C.J. Rep.* 1993. pp. 436-41, (separate opinion of Judge Lauterpacht).

⁵²- SC Res. 713, 25 Sep. 1991.

⁵³- SC Res. 752, 15 May 1992.

with an ongoing supply of arms and other supports in direct contravention of the arms embargo, an embargo which was rigorously enforced against Bosnia.⁵⁴ The one-sided impact of the arms embargo made Serbia's flagrant violations of it all the more serious and Bosnian Serbs received an advantage from Serbia which could not be balanced by the Bosnian forces. This was consequently a decisive factor in the success of Bosnian Serb military and its genocidal activities.⁵⁵

The question of lawfulness of Resolution 713 primarily relates to its effects on the right of self-defence and its treatment of the aggression. There is an argument that "[t]he Security Council resolutions that purport to apply and maintain an arms embargo against Bosnia have fettered Bosnia's right of self-defence in a manner *ultra vires* the Security Council's powers under the UN Charter".⁵⁶ It may be argued that a Council resolution which would fetter a member state's right of self-defence contravenes the rules of *jus cogens* and Article 51 of the Charter.

Authorisation of use of force and establishment of no-fly zones and safe areas

The Security Council by Resolution 770, acting under Chapter VII of the Charter, called upon states to take nationally or through regional agencies all measures necessary to facilitate, in co-ordination with the United Nations, the delivery by relevant UN humanitarian organisations and others of humanitarian assistance to Sarajevo and other parts of Bosnia.⁵⁷ In further discussions, however, it was decided that that task should be entrusted to UNPROFOR.⁵⁸

⁵⁴- Craig Scott et al, *op. cit.*, p. 47.

⁵⁵- *Id.*

⁵⁶- C. Scott et al, *op. cit.*, p. 140.

⁵⁷- SC Res. 770, 13 Aug. 1992.

⁵⁸- United Nations Peace-keeping, Information Notes, (United Nations, 1995), p. 70.

The Council on 9 October 1992 passed Resolution 781 to impose a no-fly zone over Bosnia.⁵⁹ The Council in establishing "a ban on military flights in the airspace of Bosnia" did not refer to Chapter VII of the UN Charter. Serbian aircraft violated the no-fly zone immediately after its imposition.⁶⁰ To enforce this no-fly zone the Council in Resolution 816 of 31 March 1993 authorised Member States to act nationally or through regional organisations or arrangements to take, under the authority of the Security Council and subject to close co-ordination with the Secretary-General and UNPROFOR, all necessary measures in the airspace of Bosnia in the event of further violations of the no-fly zone.

The Security Council did not expressly refer to any specific regional organisation but implicitly envisaged that NATO would enforce the no-fly zone. Although NATO accepted the enforcement authority, it was unwilling to support the use of military force. Some European states feared that air strikes would prompt Serbian retaliation against those troops.⁶¹ The first serious action taken under UN resolutions was on 28 February 1994 when NATO jets shot down Bosnian Serbs war planes over Bosnia.⁶²

It is believed that the Security Council implicitly, under Article 24 of the Charter, is allowed to decide on imposing and enforcing no-fly zones.⁶³ In performing its primary responsibility for the maintenance of international peace and security, the Security Council must abide by the principles of the United Nations which are stipulated in Articles 1 and 2 of the Charter.⁶⁴

Resolution 816 authorised the enforcement of no-fly zones by "Member States, nationally or through regional organisations". Indeed, non-NATO states could also

⁵⁹- SC Res. 781, 9 Oct. 1992.

⁶⁰- N.Y. Times, 11 Oct. 1992, p. 10.

⁶¹- P. F. Diehl, op.cit., p. 191.

⁶²- N. D. White, "The Legitimacy of Nato Action in Bosnia", 144 New L.J., (13 May 1994), p. 650.

⁶³- Timothy P. McIlmail, "No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq", 17 Loy. L.A. Int'l and Comp. L.J., (1994), p. 38.

⁶⁴- Id.

participate in the enforcement of no-fly zones. NATO did not act under Article 51 as collective self-defence since Bosnia did not fall within NATO's regional jurisdiction. The Security Council used NATO as a regional arrangement for enforcement purposes under Article 53,⁶⁵ authorising it, within its limits, to enforce the peace beyond the NATO area.⁶⁶ Although this allows NATO to go beyond its original aims of simply acting in response to armed attacks against one of its members, it does not allow NATO to operate without UN authority.⁶⁷

The Security Council, in its Resolution 836 of 4 June 1993, authorised UNPROFOR to perform its duties in the safe areas, to act in self-defence by taking the necessary measures, including the use of force, and to reply to bombardments against the safe areas by any of the parties. Member States were also authorised to take, under the authority of the Security Council and subject to close co-ordination under the Secretary-General and UNPROFOR, all necessary measures through the use of air power in and around the safe areas. It should be noted that the safe areas were established under Resolutions 819⁶⁸, 824⁶⁹, 836⁷⁰ and 844⁷¹.

The Secretary-General stated that he would not hesitate to initiate the use of close air support if UNPROFOR were attacked.⁷² At the same time, he distinguished between "close air support" of UN personnel, involving the use of air power for self-defence, and "air strikes" for pre-emptive or punitive purposes to protect safe areas, in

⁶⁵- Article 53(1) says: "The Security Council shall, where appropriate, utilise such regional arrangements ... for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements ... without the authorisation of the Security Council ... "

⁶⁶- N. D. White, *Ibid.*

⁶⁷- *Id.*

⁶⁸- SC Res. 819, 16 Apr. 1993.

⁶⁹- SC Res. 824, 6 May 1993.

⁷⁰- SC Res. 836, 4 June 1993.

⁷¹- SC Res. 844, 22 June 1993.

⁷²- United Nations peace-keeping. Information Notes, (United Nations, 1994), p. 85.

accordance with Resolution 836.⁷³ NATO forces were not authorised to launch air strikes without a decision of the North Atlantic Council (NAC).⁷⁴

Until February 1994 no military action had been taken either by the UN or by Member States or other organisations. In February 1994 Serb forces killed 68 civilians in Sarajevo that led to NATO threatening to use air strikes against Serb forces. However, neither UNPROFOR nor NATO acted effectively with regard to violations of no-fly zone. Moreover, the Security Council did not take any measure to lift the embargo and allow Bosnia to defend itself. The inaction of both regional and world organisations, though authorised by Resolutions 770, 816 and 836 to use force to enforce no-fly zones and to facilitate the delivery of humanitarian assistance, left Bosnia as a defenceless state, while continuing the embargo worsened its situation.

The Rapid Reaction Force

By increasing the hostage-taking of UN personnel and the use of them as human shield when the NATO aircraft were deployed, it became clear that UNPROFOR should be provided with a military capacity to respond rapidly.

Secretary-General Boutros-Ghali put four options for the future of UNPROFOR in Bosnia. He rejected the withdrawal of UNPROFOR and the maintenance of the *status quo*.⁷⁵ He suggested the use of force as a means of carrying out the UNPROFOR mandate, and in this case to be replaced by a multinational armed force which could operate under the command of the countries supplying the troops, with the permission of the Security Council.⁷⁶

⁷³- *Ibid*, pp. 85-6.

⁷⁴- *Id.*

⁷⁵- Report of the Secretary-General Pursuant to Security Council Resolutions 982 and 987 (1995), S/1995/444, 30 May 1995.

⁷⁶- *Id.*

The Secretary-General in his fourth option suggested a revision of the mandate itself and that UNPROFOR would restrict itself to those tasks which it could actually carry out as a peace-keeping force, i.e. supervising compliance of the agreements reached through the United Nations, and it would refrain from the use of force to protect safe areas.⁷⁷ In this case the UN forces would support humanitarian missions and would only use force in self-defence. Following the consultations and an agreement in Paris on the creation of "Rapid Reaction Force", France, the Netherlands and the United Kingdom proposed the creation of this force to the Security Council in June 1995.⁷⁸

On 16 June the Security Council in Resolution 998 authorised increasing UN forces in Bosnia in order to establish a "rapid reaction capacity" to enable UNPROFOR to carry out its mandate.⁷⁹ The Council demanded that the Bosnian Serb forces release all detained UNPROFOR personnel. Stressing that there could be "no military solution to the conflict", the Council reiterated its demand that the Bosnian Serb party accept the peace plan as a "starting point".⁸⁰

The RRF would form an integral part of UNPROFOR, operate within its mandate, and come under the command structure of the UN. The RRF would provide the UN Commander with an extra operational capacity between "strong protest and air strikes".⁸¹

The RRF was intended to strengthen UNPROFOR with its greater military means than UNPROFOR, that might act within the guidelines that were traditionally applied to peacekeeping operations. Therefore, as far as its mandate is concerned, it may be

⁷⁷- Id.

⁷⁸- Dick A. Leurdijk, "The Rapid Reaction Force", 21 International Peacekeeping, No. 6, (1995), p. 133.

⁷⁹- SC Res. 998, 16 June 1995. In adopting this resolution China and Russian Federation abstained from voting. China argued that it believed that such a force would bring about a de facto change to the peace-keeping status of UNPROFOR which would then be bound to become a party to the conflict. UN Chronicle, (1995), p. 30.

⁸⁰- SC Res. 998, 16 June 1995.

⁸¹- D. A. Leurdijk, op. cit., p. 133.

concluded that RRF was not intended to introduce a fighting unit to bring the hostilities to a quick resolution, rather it was intended without offensive or occupying intentions, and to guarantee the security of UN personnel and the implementation of the UN mandate.⁸²

The Dayton Agreement and establishment of the multinational Implementation Force (IFOR)

On 21 November 1995 the Balkan leaders at Dayton (Ohio) agreed on a settlement to end the war in Bosnia. They agreed on a NATO military operation in Bosnia for reinforcing the peace deal.⁸³ A NATO force of 60,000 troops would have the fire-power to enforce peace, act in self-defence, and carry out the accords.⁸⁴ Under the peace agreement most Serbian-held territories around the Bosnian capital would fall under the rule of the Muslim-Croatian Federation in March 1996.⁸⁵ The Balkan leaders also signed a peace agreement on 14 December 1995 in Paris, by which 60,000 NATO peacekeeping troops, in its largest ever operation, would try to rebuild the country and make peace.⁸⁶ On 20 December 1995 the UN peacekeeping mission ended formally and, as the UN flags at Sarajevo were taken down, NATO took control of UN military bases throughout Bosnia.⁸⁷

The Security Council on 21 December 1995 passed Resolution 1035 in which it decided to establish, for a period of one year from the transfer of authority from the United Nations Protection Force (UNPROFOR) to the multinational Implementation Force (IFOR), a United Nations police force to be known as the International Police

⁸²- *Id.*, Leurdijk believes that "[t]he use of force thus becomes a function of the UN mandate. The ultimate aim of this is to get the parties around the negotiating table and to arrive at a political solution to the conflict". *Id.*

⁸³- *Int. Herald Tribune*, 22 Nov. 1995, p.1.

⁸⁴- *Ibid.*, 29 Nov. 1995, p. 1.

⁸⁵- *Ibid.*, 30 Nov. 1995, p. 1.

⁸⁶- *Ibid.*, 15 Dec. 1995, p. 1.

⁸⁷- *Ibid.*, 21 Dec. 1995, p. 1.

Task Force (IPTF) to be entrusted with the tasks set out in the Peace Agreement, and a United Nations civilian office with the responsibilities set out in the report of the Secretary-General. The Council noted that the IPTF and the United Nations civilian office will be under the authority of the Secretary-General. IFOR's mandate has been determined by the peace accord; its soldiers have fire-power for self-defence, peace enforcement, and implementation of the accord provisions.

According to Article VI of the Agreement on Military Aspects, IFOR would have, *inter alia*, the right to monitor and help ensure compliance with the agreement to help create secure conditions for the conduct by others of other tasks and to observe and prevent interference with the movement of civilian populations and to respond appropriately to deliberate violence to life and persons.⁸⁸ Its commander would have the authority, without interference or permission of any party, to do all that the commander judges necessary and proper, including the use of military force to carry out the responsibilities of the force.⁸⁹ In fact, the United Nations and in particular the Security Council have no function in the direction of the operations of IFOR. "Although the whole scheme is established by a treaty which involves all the parties concerned, it was felt necessary that in addition to this treaty the military aspects should be legitimised by an authorisation of the Security Council."⁹⁰

However, the Dayton Agreement does not refer to the necessity of authorisation by the Council for using force. Nevertheless, the consent of the parties to such operations was obtained when they agreed to comply in all respects with the IFOR requirements, explicitly, on the use of military force when deemed necessary by the IFOR Commander to protect IFOR and carry out the responsibilities of IFOR.⁹¹

⁸⁸- Text of Dayton Peace Agreement; Agreement on the Military Aspects of the Peace Settlement. Article VI, quoted in: *International Peacekeeping*, Vol. 2, No. 6, 1995, pp. 138-68.

⁸⁹- *Id.*

⁹⁰- Michael Bothe, "Bosnia and Herzegovina: farewell to UN peacekeepers - farewell to UN peacekeeping?", in: *International Peacekeeping*, *ibid.*, p. 130.

⁹¹- Text of Dayton Peace Agreement, in: *op. cit.*, Article VI(5)

Nonetheless, the Security Council should have control over the use of force by States, and IFOR should in general act with the authorisation of the Council, though not for detailed operations for practical reasons.

Discussion

The conflict in Yugoslavia initially appeared to be a "civil war". By recognition of the former republics of Yugoslavia, the conflict resembled a mixed, civil and international, conflict.⁹² In this case, the United Nations and regional organisations adopted several roles of mediation, sanction, peace-keeping, peace-supporting and peace-enforcing.

UNPROFOR was initially deployed as a classic peace-keeping force whose task was to be an interim arrangement to create the conditions for the negotiations leading to the settlement of dispute.⁹³ This mandate was clearly under Article 40 of the Charter to create provisional measures. Later, UNPROFOR was given a new mandate to supervise the delivery of humanitarian assistance in Bosnia.⁹⁴

Furthermore, the Council in Resolution 836 authorised UNPROFOR to carry out its mandate, i.e. to deter attacks against the safe areas, to monitor cease-fire and withdrawal of military and paramilitary forces other than Bosnian governmental forces, and delivery of humanitarian relief to the population, acting in self-defence and use force in reply to bombardments against safe areas.⁹⁵

In fact, the new generation of peace-keeping forces were dispatched for supporting humanitarian relief and protecting safe areas. They could use force to perform the

⁹²- A. C. Arend and R. J. Beck, International Law and the Use of Force, Beyond the UN Charter Paradigm, (Rutledge, 1993), p. 37.

⁹³- SC Res. 743, 21 Feb. 1992.

⁹⁴- SC Res. 770, 13 Aug. 1992.

⁹⁵- SC Res. 836, 4 June 1993.

mandate other than self-defence. During the Cold War, in case of Congo, UN peace-keeping forces (ONUC) were authorised to use force other than in self-defence in the last resort to perform their mandate.

The constitutional basis of mandate of multifunctional peace-keeping forces to use force should be considered out of Article 42. Even the creation of Rapid Reaction Force as part of UNPROFOR to engage force to enable the peace-keeping mission to carry out its tasks, cannot be considered as enforcement measures under Article 42, since UN forces had not been deployed to use force to settle the dispute. Governments of Bosnia and Croatia initially adopted the position that the RRF did not come under the "Status of Forces Agreements" as applied to other troops in the area.⁹⁶ The Council was in agreement with the Secretary-General's interpretation that "[o]nce a peace-keeping operation has been established, the Council may reduce or expand it, depending on operational needs, without concluding any additional agreements to the relevant Status of Forces Agreement".⁹⁷

It seems that military support for peace-keeping humanitarian operation and opening the way to an enforcement element within peace-keeping operations was not acceptable even to those parties most affected by the conflict. The reason was that there was a fear that by the presence of UN forces with the multiple function of peace-keeping and peace-enforcement the war would extend rather than settle.

The Secretary-General Boutros-Ghali, with regard to combination of peace-keeping and peace-enforcement, has stated that "... nothing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. The logic of peace-keeping flows from political and military premises that are quite distinct from those of

⁹⁶- UN Press Release, SC/6087, 19 Aug. 1995.

⁹⁷- Id.

enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate."⁹⁸

The Secretary-General further states: "Conflicts the United Nations is asked to resolve usually have deep roots and have defied the peacemaking efforts of others. Their resolution requires patient diplomacy and the establishment of a political process that permits, over a period of time, the building of confidence and negotiated solutions to long-standing differences. Such processes often encounter frustrations and set-backs and almost invariably take longer than hoped. It is necessary to resist the temptation to use military power to speed them up. Peace-keeping and the use of force (other than in self-defence) should be seen as alternative techniques and not as adjacent points on a continuum, permitting easy transition from one to the other."⁹⁹

The Secretary-General proposed that the UN needed to give serious thought to the idea of a rapid reaction force.¹⁰⁰ In this respect the Special Committee on Peace-Keeping Operations reported that some of its members expressed caution, arguing that the use of such a force in internal conflicts would be unacceptable since that would erode the principle of state sovereignty.¹⁰¹ The report also pointed out that the efficacy of an operation was not so much related to the speed of deployment, but more to its political capacity.¹⁰² Further, the establishment of such a force would duplicate the capabilities of member states and give the UN an undesirable military image.¹⁰³

The Bosnia experience shows that using military power to protect and support peace-keeping operations was not fully successful. In this case, the United Nations preferred

⁹⁸- Boutros Boutros-Ghali, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, (1995), A/50/60 - S/1995/1, para. 35.

⁹⁹- Ibid, para. 36.

¹⁰⁰- Ibid, para. 44.

¹⁰¹- A/50/230, (1995).

¹⁰²- Id.

¹⁰³- Id.

not to use force under Articles 42-48 to enforce peace and resolve the dispute, rather it gave complicating mandates to the peace-keeping forces and the regional arrangement (NATO) to deal with the violence.

In Higgins's view while it is "lamentable that states have failed to seize the opportunity offered by the end of the Cold War, so far as effective UN enforcement is concerned, the lessons that the United Nations itself seems to draw from the Bosnia debacle (and indeed from the very different lessons of the failure in Somalia) are disturbing".¹⁰⁴

In the case of Bosnia, there was no agreement on cease-fire and while hostilities were in progress UN peace-keeping forces were engaged to perform humanitarian tasks. However, UN forces frequently were prevented to perform their mandate by Bosnian Serbs. Later, the Security Council authorised member states acting nationally or through regional arrangements to use force to ensure compliance with its ban on military flights in Bosnia's air space, to support the UN forces and to deter attacks against safe areas.¹⁰⁵ NATO was chosen to perform these tasks.

With regard to the legal basis for NATO action in Bosnia, reference should be made to Article 53 by which the Council can utilise regional arrangements for enforcement action under its authority; no enforcement action can be taken under these agencies without authorisation by the Council. However, it should be noted that NATO has been considered as a self-defence pact rather than a regional organisation, covering Western Europe and North America with a defensive function. Unlike regional organisations, NATO has no economic and social capacity, its main function being collective self-defence in case of an armed attack against one of the members of the pact under Article 51 of the Charter.¹⁰⁶

104. Rosalyn Higgins, "Second-Generation Peacekeeping", *ASIL Proc.*, (1995), p. 278.

105. Resolutions 816, 819, 824, 836 and 844.

106. The North Atlantic Treaty, Article 5.

In the case of Bosnia, there was no formal treaty amendment to allow NATO either to act in circumstances when no member had been attacked or beyond the NATO area. In fact, NATO adopted a new role, that of a peace support operation for the United Nations.¹⁰⁷ The commitment is not a generalised commitment to the UN, but governed by NATO's own procedures and with an acknowledgement that the Security Council has the primary responsibility.¹⁰⁸ In fact, NATO is not allowed to operate when there is a threat to the international peace and security unless authorised by the United Nations. White believes that redrafting the NATO treaty would enable NATO to be categorised as a regional arrangement under Chapter VIII of the UN Charter as well as being a traditional defence pact so as to facilitate the use of NATO for military enforcement action by the Council under Chapters VII and VIII.¹⁰⁹

In the case of Bosnia, NATO was authorised to take four separate missions: to monitor the no-fly zone, to enforce the no-fly zone, to offer "close air support" of UN personnel, and to engage in "air strikes" for protection of safe areas.¹¹⁰ At that time, there was an explicit distinction between "air strikes" (air attacks intended to secure safe areas) and "close air support" (air attacks intended to protect UN personnel).¹¹¹

In fact, in the case of Bosnia two organisations with different mandates and approaches to the maintenance of peace and security were given varying authorities to use all necessary measures for their purposes. However, there was not even an agreement on what might constitute a "combat situation", let alone a unified

107- R. Higgins, *op. cit.*, p.277.

108- Rosalyn Higgins, "The United Nations Role in Maintaining International Peace: The lessons of the first fifty years", 16 *N. Y. L. Sch. J. Int'l & Comp. L.*, (1996), p.144.

109- N. D. White, *op. cit.*, p. 650.

110- For close air support see Resolution 816. Air strikes might arise in relation to the safe areas established by Resolutions 819, 824, 836 and 844. For more discussion see: R. Higgins, "Second-Generation peacekeeping", *op. cit.*, p. 277.

111- For more information see: Dick A. Leurdijk, *The UN and NATO in Former Yugoslavia: Partners in International Cooperation*, (The Hague: Netherlands Atlantic Commission/Netherlands Institute of International Relations, Clingendael, 1994).

command, clear rules of engagement, or a joint understanding on the use of air power.¹¹²

Regarding decision making on use of force for both "air strikes" and "close air support", there was a complex chain of command that made it militarily almost inoperable.¹¹³ "Close air support" required a request by those on the ground. However, neither the UN commander nor the Secretary-General's Special Representative would allow it if the attack was not still in progress, and the final decision to request it lied not even with the military commander but with the Special Representative of the Secretary-General.¹¹⁴

For "air strikes" a "dual request/dual key" system was performed meaning that both NATO and the UN could request "air strikes", and both had to agree, hence there was a veto on the use of "air strikes" on both sides.¹¹⁵ Even when "air strikes" were authorised, there was the question of targets, because the tactical air control teams on the ground were entirely under UN control, while the aircraft were under NATO command.¹¹⁶

As a result of such confused and complex procedures regarding military action by NATO and the UN in Bosnia, the forces remained inactive. The declared safe areas, such as Serbrenica, Zepa, Gorazde, Tuzla, Bihac and Sarajevo, were frequently targeted by Bosnian Serbs and suffered from severe violations of human rights. Furthermore, in some occasions the inaction of peace-keeping forces was because forces believed that they should remain impartial. Impartiality of peace-keeping forces required that they strictly and actively perform their mandate; the inaction of these

112. Rosemary Righter, "A Marriage Made in Hell", in: Ben Cohen and George Stamkoski, With no Peace to Keep. United Nations Peacekeeping and the War in the former Yugoslavia, (Grainpress Ltd., UK, 1995), p. 23.

113. Id.

114. R. Higgins, "Second-Generation Peacekeeping", op. cit., p. 277.

115. Id.

116. R. Righter, op. cit., pp. 22-3.

forces may be perceived as partiality in favour of the aggressor and against the victims. The reluctance to use force, even to ensure the delivery of aid where it was most needed, enabled Bosnian Serb forces to use the deprivation of essential supplies as a weapon of war.¹¹⁷

Although Bosnia-Herzegovina had been recognised by the international community as an independent state, and although the Security Council had recognised the interference by Bosnia's neighbours (Serbia and Croatia)¹¹⁸, the world organisation refused to act under Article 42 to use force to end military action against Bosnia. Monitoring safe areas and enforcing no-fly zones could not be considered as an efficient action against unlawful acts.

Furthermore, the Council did not take any action to lift the "general and complete embargo on all deliveries of weapons and military equipment" which had been imposed a month before the collapse of former Yugoslavia.¹¹⁹ The Security Council by Resolution 727 reaffirmed the embargo applied by Resolution 713.¹²⁰ However, the Council continued to apply the arms embargo imposed upon Yugoslavia, an entity that no longer existed which was entirely distinct from the successor states.¹²¹ It seems that by disintegration of former Yugoslavia and the existence of the right of self-defence for Bosnia as a Member State, the UN Member States were not obliged to apply embargo on Bosnia, and there is doubt that the Security Council resolution on embargo had any legal effect.

Higgins believes that the refusal to recognise the situation in the former Yugoslavia as violence across state lines, recognised by the international community and requiring

117. This action led Bihac, Sarajevo, Maglia and the eastern enclaves all come close to starvation. B. Cohen and G. Stamkoski, *op. cit.*, p. 9.

118. SC Res. 752, 15 May 1992.

119. SC Res. 713, 25 Sep. 1991.

120. SC Res. 727, 8 Jan. 1992.

121. SC Res. 777, 19 Sep. 1992.

military enforcement measures was willful.¹²² She concludes that it reflected a variety of factors: "a desire not rapidly to repeat the Gulf experience, a sense that on this occasion there was no national interest, and a despair about being able to 'impose a political solution'. Insisting that situations manifestly calling for enforcement are in fact situations calling for the new-style UN peacekeeping operations is simply a turning away from unpleasant realities."¹²³ The new style of peace-keeping/peace-enforcing is not what the Charter envisaged. The case of Bosnia shows that when peace-keepers have a prime mandate of delivering humanitarian aid, then all realistic prospect of enforcing the peace has gone.¹²⁴

Indeed, the function of peace-keeping is quite different from peace-enforcement and, generally, peace-keeping forces are much more welcomed by host states than peace-enforcers. In a case of aggression or breach of a cease-fire by one of the parties, the multiple function by peace-keepers as peace-enforcers may not be successful. In Bosnia, most of the efforts of peace-keepers/peace-enforcers were directed to protect themselves rather than humanitarian assistance or protection of civilians. Therefore, peace-keeping operations must be distinguished from peace-enforcement clearly by the Security Council in order that peace-keepers can perform their responsibilities properly.

UN Operation in Somalia (UNOSOM)

Background

Occupying the tip of the Horn of Africa, Somalia was a valuable strategic estate to the Superpowers during the Cold War. Since the Soviet Union and the United States

122. R. Higgins, "Second Generation Peacekeeping", *op. cit.*, p. 278.

123. *Id.*

124. R. Higgins, "The United Nations Role in Maintaining International Peace", *op. cit.*, p. 146.

bought the allegiance of Somalia's leader, Mohammed Siad Barre, with economic and military aid, Somalia was awash with weapons.¹²⁵

Clan clashes started in Somalia in 1988, and by the end of January 1991 Siad Barre was ousted after 21 years leadership of Somalia, and the country was embroiled in a civil war.¹²⁶

Although Ali Mahdi Mohammad of the United Somali Congress (USC) was sworn as the interim president, he soon faced opposition from the military leader of the USC, General Mohammad Farah Aidid.¹²⁷ In November 1991 the hostilities resulted in wide-spread death and destruction, forcing civilians to flee their homes.¹²⁸

By the deterioration of the situation in Somalia the UN Secretary-General, Javier Perez de Cuellar, in co-operation with the Organisation of the Islamic Conference (OIC), the Organisation of African Unity (OAU) and the League of Arab States (LAS), tried to bring the conflict to a peaceful solution. On 27 December 1991, he informed the Security Council that he intended to take an initiative in an attempt to restore peace in Somalia.¹²⁹

The United Nations involvement

The United Nations, which had already been involved in the crisis by its humanitarian efforts, was fully engaged in Somalia by January 1992. The Security Council in its resolution of 23 January urged all parties to cease hostilities and agree to a cease-fire. It also decided that, under Chapter VII of the UN Charter, all states should

125. William J. Durch, "Peacekeeping in Uncharted Territory", in W. J. Durch (ed.), *op. cit.*, p. 472.

126. *UN Yearbook*, (1992), p. 198.

127. W. J. Durch, *op. cit.*, p. 472.

128. United Nations Peace-Keeping Operations, United Nations Department of Public Information, <http://ralph.gmu.edu/cfpa/peace/unosom.html>

129. *Id.*

immediately implement a complete embargo on deliveries of weapons.¹³⁰ The Security Council, taking note of the appeals addressed to the parties by OIC, OAU, and LAS, asked the Secretary-General of the United Nations to seek the commitment of the disputants to the cease-fire to permit humanitarian assistance to be distributed.¹³¹

By early March a cease-fire was agreed by the two factions which eventually did take effect. The two leaders agreed to a UN "monitoring mechanism" to oversee the cease-fire and the distribution of food in the city of Mogadishu.¹³² However, after one month cease-fire, despite the two leaders' quick move, fighting resumed between those units of the two factions the elements of which were not under the control of either faction.¹³³

Establishment of United Nations Operation in Somalia (UNOSOM)

The Security Council in its Resolution 746 of 17 March 1992 supported the Secretary-General's decision to dispatch a UN technical team to Somalia to prepare a plan for a cease-fire monitoring mechanism.¹³⁴ The Secretary-General in his report of 20 March stated that he appointed a 15 member technical team including representatives of OIC, LAS and OAU which obtained the agreements of the leaders of the two factions on mechanisms for monitoring the cease-fire and effective distribution of humanitarian assistance.¹³⁵ They also agreed on deployment of observers to monitor the cease-fire and of security personnel to protect its staff and safeguard its humanitarian activities.¹³⁶

130. SC Res. 733, 23 Jan. 1992.

131. *Id.*

132. S/23696, Annexes. I and III, pp. 19-20, 24-25.

133. *UN Yearbook*, (1992), p. 199.

134. SC. Res. 746, 17 March 1992.

135. S/23829.

136. *Id.*

Boutros Boutros-Ghali, the Secretary-General, in his report recommended the monitoring of the cease-fire and delivering of humanitarian assistance, and the establishment of a United Nations Operation in Somalia (UNOSOM). The two factions also met to discuss the formation of a joint committee for relief assistance. and finally on 24 April 1992 the Security Council, by Resolution 751, established UNOSOM and requested the immediate deployment of 50 UN observers to monitor the cease-fire in Mogadishu.¹³⁷ The Council referred to the human suffering caused by the conflict and to the continuation of the situation in Somalia which constituted a threat to international peace and security.¹³⁸

The Secretary-General informed the Security Council of his intention to appoint Mohammed Sahoun from Algeria as his special Representative for Somalia.¹³⁹ However, as the Secretary-General considered on 22 July, the situation was not safe and the potential renewal of hostilities posed difficulties for an effective UN presence. Independent armed groups, factions and individuals possessed a large quantity of arms and they were the biggest threat.¹⁴⁰ The Secretary-General believed that the conflict in Somalia could be resolved only by the people of Somalia themselves in a process of national reconciliation.¹⁴¹ However, the energetic efforts of the international community was needed to break the cycle of violence and hunger.¹⁴²

On 12 August the Secretary-General reported that he obtained the agreement of the two factions to deploy a 500 strong UN security force as part of UNOSOM.¹⁴³ The Security Council in its resolution authorised the Secretary-General to increase the UN forces in Somalia.¹⁴⁴

137. SC. Res. 751, 24 Apr. 1992.

138. Id.

139. S/23851.

140. S/24343.

141. Id.

142. Id.

143. S/24451.

144. SC. Res. 775, 28 Aug. 1992.

By November 1992 the situation in Somalia deteriorated and the Secretary-General, in a letter to the Council, outlined the difficulties UNOSOM faced in implementing its mandate, such as the absence of a government, the failure of the various factions to co-operate with UNOSOM, looting of relief convoys, and the detention of expatriate personnel.¹⁴⁵

On 29 November the Secretary-General offered the Security Council five options on how to create conditions for the uninterrupted delivery of relief supplies to the starving people of Somalia.¹⁴⁶ The first option was a continued deployment of UNOSOM in accordance with its existing mandate under which force was to be used only in self-defence; this was believed by the Secretary-General to be inadequate. The second option was the withdrawal of UNOSOM's military elements and the retention of humanitarian agencies to negotiate arrangements with the leaders of clans and factions for the distribution of relief assistance. The other three options involved the possible use of force, either by UNOSOM undertaking a show of force to discourage attacks on relief efforts in Mogadishu, or by a country-wide enforcement operation. Such an operation could either be under UN command and control (the Secretary-General's explicit preference), or be undertaken by a group of member states authorised by the Security Council. With regard to the last, the Secretary-General noted an offer by the United States to organise and lead such an operation.¹⁴⁷

The Secretary-General stated that, since experience showed that a UN operation based on the accepted principles of peace-keeping would be successful, there was no alternative but to resort to the enforcement provisions under Chapter VII of the Charter, with parallel action to promote national reconciliation in order to remove the

¹⁴⁵- S/24859.

¹⁴⁶- S/24868.

¹⁴⁷- Id.

main factors that created the human emergency; such action would preferably be under UN command and control.

Canada and Pakistan announced that as troop contributors they wished to be consulted by the Council and the Secretary-General on any measure that might affect UNOSOM's mandate.¹⁴⁸

The Secretary-General's letter was considered by the Security Council. The Permanent Members moved a draft resolution on 3 December 1992 authorising the American operation. The Security Council in Resolution 794 recognised the unique character of the situation in Somalia and responded to the urgent calls from Somalia for the international community to take measures to ensure the delivery of humanitarian assistance in Somalia. It noted the reports of violations of international humanitarian law, such as violence against personnel participating lawfully in impartial humanitarian relief activities.¹⁴⁹ The Security Council authorised, under Chapter VII of the UN Charter, the Member States "to use all necessary means" to establish a secure environment for humanitarian relief operations in Somalia.¹⁵⁰

On 4 December 1992 the United States directed the execution of "Operation Restore Hope", and the Unified Task Force (UNITAF) led by US Marines arrived at Mogadishu on 9 December.¹⁵¹ The President of the United States believed that US objectives could and should be met in the short term.¹⁵² The Secretary-General in his letter to the Security Council proposed that, as soon as the immediate security problem was resolved the US force would be replaced by a UN peace-keeping operation.¹⁵³ However, by late February 1993 fighting among the Somali factions and

148. S/24867, S/24893.

149. SC Res. 794, 3 Dec. 1992.

150. *Id.*

151. *UN Yearbook*, (1992), p. 210.

152. John R. Bolton, "Wrong Turn in Somalia", 73 *Foreign Affairs*, No. 1, (1994), p. 60.

153. Elgin Clemons, "No Peace to Keep: Six and Three-Quarters Peacekeepers", 26 *J. Int'l. L. & Pol.*, (1993), p. 138.

the international force were the first signs that the original plan to be out within three or four months was over-optimistic.¹⁵⁴

On 26 March the Security Council passed Resolution 814 under which UNITAF handed over responsibility to UNOSOM II, which was a force under Chapter VII of the UN Charter and its mandate was expanded from the original UNOSOM.¹⁵⁵

Discussion

The Security Council's action in Somalia reflects new consensus on the circumstances which qualify as "threats to the peace", that now include mass starvation, justifying military intervention.¹⁵⁶ The Security Council, in its broad construction of Chapter VII, linked the internal humanitarian tragedy to a "threat to international peace and security".

The Security Council, as its first action, imposed an arms embargo on Somalia under Chapter VII (Article 41), and in its further action established UNOSOM to monitor the cease-fire and to deliver humanitarian assistance. In the past, "the United Nations has restricted its peacekeeping and relief efforts to those disputes where the parties have expressed at least some willingness to negotiate with one another and where the fighting has largely subsided."¹⁵⁷ UNOSOM was not created to monitor the cease-fire in an international conflict as had been the case in previous peace-keeping operations. Moreover, UNOSOM was not authorised to enforce a political solution.

In a final assessment, it might be concluded that UNOSOM could not meet its purposes because UN officials did not understand the true nature and intensity of the

154. J. R. Bolton, *op. cit.*, p. 62.

155. SC Res. 814, 26 Mar. 1993.

156. Mark R. Hutchinson, "Restoring Hope: U.N. Security Council Resolutions for Somalia and Expanded Doctrine of Humanitarian Intervention", 34 *Harv. Int'l L.J.*, (1993), p. 625.

157. E. Clemons, *op. cit.*, p. 137.

Somali conflict.¹⁵⁸ Indeed, in the absence of peace or any agreement on cease-fire, deploying small size and lightly armed peace-keepers would be a great mistake. Before dispatching peace-keeping forces, a secured environment should have taken place.

By continuation of the civil war in Somalia, the Security Council *authorised* member states, again under Chapter VII, "to use all necessary means" for humanitarian relief in Somalia. In other words, the Security Council in its decision utilised military means for humanitarian purposes.

UNITAF, a US led coalition, arrived in Somalia to perform Council Resolution 794 and to establish a secured environment. However, the United States denied a duty to disarm the elements that had created the problem in the first place and this assertion created great consternation among UN officials.¹⁵⁹ It might be said that Resolution 794 had not determined how a secured environment should be created and this vagueness caused a disagreement between the United States and the United Nations on the meaning of the term "secured environment".¹⁶⁰

Regarding the duration of the presence of UNITAF, the United States had no intention of subjecting its troops to an extended stay in Somalia, and placed great pressure on the Security Council to take over the security operations.¹⁶¹ As a result, UNITAF handed over responsibility to UNOSOM II in March 1993.

UNITAF was not a peace-keeping operation but an enforcement one. Constitutionally, the United Nations has a power to use force when illegal acts of aggression are used

158. Frank Crigler, "Peacekeeping Tasks Demands Strong Hand", *Christian Sci. monitor*, 8 Mar. 1993, p. 19.

159. Paul Lewis, "UN Chief Faults US Again on Disarming Somalis", *N.Y. Times*, 22 Dec. 1992, p. 15.

160. Rajendra Ramlogan, "Towards a New Vision of World Security: The United Nations Security Council and the Lessons of Somalia", 16 *Hous. J. Int'l L.*, (1993), p. 253.

161. Keith B. Richburg, "Top UN Officer in Somalia Says Tactics Were Apt-Pakistani Defends His Troops But Says They were Too Few", *Wash. Post*, 23 Jan. 1993, p. 12.

by one state against another state. It is not clear whether UNITAF was dispatched to enforce provisional measures (under Article 40) or to enforce peace (under Article 42). UNITAF was authorised to use arms far beyond peace-keeping operations used for self-defence.

UNOSOM II was not a traditional peace-keeping force. The force was responsible for preventing the resumption of hostilities, monitoring the 8 January 1993 cease-fire, controlling heavy weapons, disarming unauthorised holders of small arms and generally taking steps necessary for the creation of a secured environment.¹⁶² Although UNOSOM II was not restricted to use force in performing its mandate and other than for self-defence, it may not be considered an action under Article 42 of the Charter since its purpose was to create a secured environment as a first step to settle the crisis.

In each conflict, either international or internal, there should be an assessment of the nature and the extent of the conflict and then there should be an appropriate process for restoring peace. Preventive measures, especially in cases such as Somalia in which the structure of state authority had collapsed, should be taken either through the United Nations or regional organisations. However, OAU, OIC and LAS which were the regional organisations within the vicinity of the conflict, failed to assist the parties to settle the crisis.

Another point which should be discussed is that the United Nations should have control over operations which it would conduct. Uncontrolled mandates do not improve the image of the Organisation and may undermine the legitimacy of its operations. Furthermore, member states expect that their sovereignty should not be violated by an uncontrolled action by a particular state although the operation itself is

¹⁶²- Report of the Secretary-General, S/25354, (1993).

authorised by the UN.¹⁶³ It is necessary to ensure some level of UN control that is a concern expressed even by some permanent members of the Council. In the case of Somalia, the Chinese representative at the Security Council debate of Resolution 794 argued that strengthening of UN control was required before China would vote in favour of the resolution.¹⁶⁴

Secretary-General Boutros-Ghali has said that there must not be "any attempt by troop-contributing Governments to provide guidance, let alone give orders, to their contingents on operational matters. To do so creates division within the force, adds to the difficulties already inherent in a multinational operation and increase the risk of casualties. It can also create the impression amongst the parties that the operation is serving the policy objectives of the contributing Governments rather than the collective will of the United Nations as formulated by the Security Council. Such impressions inevitably undermine an operation's legitimacy and effectiveness"¹⁶⁵.

In internal conflicts such as Somalia, using a realistic process with due consideration of the facts of the dispute and the demands of the warring factions, to create a cease-fire and a secure environment might avoid a tragedy or even the necessity of multinational military intervention.

UN Assistance Mission for Rwanda (UNAMIR)

Background

Rwanda was administered by Belgium as a United Nations Trusteeship territory which became independent in 1962. Conflict arose following independence that had

¹⁶³- It has been asserted that some Third World countries are troubled by political implications of US command over Security Council missions. R. Ramlogan, *op. cit.*, p. 256.

¹⁶⁴- *Id.*

¹⁶⁵- An Agenda for peace (1995), *op. cit.*, para. 41.

its origin in the traditional tribal rivalry between the Hutu majority and the Tutsi minority.¹⁶⁶ In a military coup in 1973 a Hutu leader seized power, who set up a party two years later, and became the President of Rwanda after the 1988 elections, in which he was the only candidate. Since about ninety percent of Rwanda's export earnings came from coffee, it suffered an economic crisis following the collapse of the International Coffee Agreement in July 1989. Despite assistance from international organisations, the economic crisis weakened Rwandese government and resulted in a political crisis.¹⁶⁷

Fighting between the Government of Rwanda and the Rwandese Patriot Front (RPF) broke out in October 1990 along the border between Rwanda and its northern neighbour Uganda.¹⁶⁸ Belgium and France sent troops to protect their nationals in Rwanda.¹⁶⁹ The fighting resumed on 8 February 1993 in violation of the Cease-Fire Agreement signed in July 1992 in Tanzania.¹⁷⁰

The United Nations involvement

In support of the resumption of the comprehensive negotiations between the Government of Rwanda and the RPF (Tutsi-dominated Rwandan refugees), supported by the Organisation of African Unity (OAU) and Tanzania, Rwanda and Uganda in separate letters to the Security Council on 22 February 1993 requested the deployment of United Nations military observers along the common border to ensure that no

¹⁶⁶- It is believed that the arrival of European colonists, first the Germans and later the Belgians, served to accentuate rather than diminish divisions between the two social groups. The Tutsis received appointments to supervisory positions and were provided with access to education and social institutions from which Hutus were summarily excluded. However, during the intervening years of 1945-61, the Belgians began to support Hutus for a greater role in their country's affairs. For more information see: Martin Meier Wang, "The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact", 27 *Colum. Hum. Rts. L. Rev.*, (1995).

¹⁶⁷- For more details see: Yogesh K. Tyagi, "The Concept of Humanitarian Intervention", 16 *Mich. J. Int'l L.*, (1995), pp. 883-910.

¹⁶⁸- *The United Nations and the Situation in Rwanda*, (Department of Public Information, United Nations, 1994), p. 1, (hereinafter *The United Nations and Rwanda*).

¹⁶⁹- Y. K. Tyagi, *op. cit.*, p. 903.

¹⁷⁰- *The United Nations and Rwanda*, *op. cit.*, p.1.

military assistance reached Rwandese territory from Uganda.¹⁷¹ By these letters the Council was informed that the resumption of hostilities was by the RPF which was composed essentially of Rwandese refugees in Uganda.¹⁷²

Following consultations in the Security Council on 24 February, the Secretary-General sent a goodwill mission to Rwanda and Uganda.¹⁷³ The Council in its meeting of 12 March passed Resolution 812 by which it referred to the fighting in Rwanda and its consequences regarding international peace and security.¹⁷⁴

The Council noted that the army of the RPF would pull back to the positions it occupied before 7 February 1993 and the buffer zone between the forces would be considered as a neutral demilitarised zone used to monitor the implementation of the cease-fire by an international force.¹⁷⁵

The Security Council called on the Government of Rwanda and the RPF to respect the renewed cease-fire, to resume negotiations and to allow the delivery of humanitarian supplies and the return of displaced persons and to fulfil the obligations and commitments the parties had made in the past.¹⁷⁶

The Secretary-General was asked to examine the request of Rwanda and Uganda for the deployment of observers along their common border.¹⁷⁷

The Council urged the Government of Rwanda and the RPF to respect strictly the rules of international humanitarian law. All states were requested to refrain from any

171. S/25355, S/25356 respectively.

172. *Id.*

173. The United Nations and Rwanda, *op. cit.*, p.1.

174. SC Res. 812, 12 Mar. 1993.

175. *Id.*

176. *Id.*

177. *Id.*

action that could increase the tension in Rwanda and jeopardise respect for the cease-fire.¹⁷⁸

A company of French troops arrived in Rwanda to reinforce the French forces stationed there since 1990.¹⁷⁹ However, the RPF accused the French of intervening on the government's side in the conflict.¹⁸⁰

Establishment of United Nations Observer Mission Uganda-Rwanda (UNOMUR)

In May the Secretary-General reported to the Council that peace talks between the parties had resumed at Arusha (Tanzania) which focused on the composition and size of the new army, arrangements related to security services, demobilisation, international assistance and the establishment of an international neutral force.¹⁸¹ The report noted the requirements assessed by the technical mission which visited Rwanda and Uganda, for the deployment of a United Nations Observer Mission Uganda-Rwanda (UNOMUR).¹⁸² The Secretary-General recommended that the Security Council authorise the establishment of the Mission only on the Ugandan side.¹⁸³

On 22 June the Security Council, considering the Secretary-General's report, adopted Resolution 846 by which the Council decided to establish UNOMUR on the Uganda side.¹⁸⁴ UNOMUR was to focus primarily on transit or transport, by roads or tracks which could accommodate vehicles, of lethal weapons and ammunition across the border, as well as any other material which could be of military use.¹⁸⁵

178. *Id.*

179. Y. K. Tyagi, *op. cit.*, p. 903.

180. *Id.*

181. S/25810.

182. *Id.*

183. *Id.*

184. SC Res. 846, 22 June 1993.

185. *Id.*

In August the Secretary-General reported that the Government of Rwanda and the RPF had signed a peace agreement at Arusha on 4 August.¹⁸⁶ The two parties had agreed that the war had come to an end and that they would promote national reconciliation.¹⁸⁷ The Secretary-General indicated that the OAU Neutral Military Observer Group (NMOG I), which had been dispatched from July 1992 to July 1993 to monitor the cease-fire in Rwanda was, replaced by NMOG II in early August 1993.¹⁸⁸

Establishment of United Nations Assistance Mission for Rwanda (UNAMIR)

In September, the Secretary-General recommended that the Council authorise the establishment of a United Nations Assistance Mission for Rwanda (UNAMIR).¹⁸⁹ According to the Secretary-General, the principal functions of UNAMIR would be to assist in ensuring the security of the capital city of Kigali; monitor the cease-fire agreement including the establishment of an expanded demilitarised zone (DMZ) and demobilisation procedures; monitor the security situation during the final period of the transitional Government's mandate leading up to elections; and assist with mine clearance.¹⁹⁰

Finally, UNAMIR was established on 5 October 1993 by the Council Resolution 872. Approving the UNAMIR's mandate proposed in the Secretary-General's report, the Council stated that UNOMUR should be integrated within UNAMIR, and welcomed the integration of NMOG II within UNAMIR.¹⁹¹

186- S/26350.

187- *Id.*

188- *Id.*

189- S/26488

190- *Id.*

191- SC Res. 872, 5 Oct. 1993.

The Mission would also investigate alleged non-compliance with any provisions of the peace agreement and provide security for the repatriation of Rwandese refugees and displaced persons. It would also assist in the co-ordination of humanitarian assistance activities in conjunction with relief operations.¹⁹²

However, the situation in Rwanda did not improve. On 6 April 1994 its president, Habyarimana, died in an airplane crash which was caused by the firing of two rockets at Kigali airport.¹⁹³ This incident inflicted a fatal blow on the Rwandan peace process and a wave of violence caused killing of a large number of Tutsi people, the Prime Minister, several Belgian contingents in UNAMIR, and resulted in the flight of a huge population to the neighbouring countries.¹⁹⁴ Following attacks against UN personnel, the Security Council, being unable to cope with the violence, decided to withdraw most of the peace-keepers from Rwanda, and authorised a reduction in the size of UNAMIR.¹⁹⁵ The RPF launched a new operation from Uganda and achieved a victory in July 1994, and unilaterally declared a cease-fire on 18 July 1994.¹⁹⁶

Earlier, France, fearing a revenge massacre of Hutus by Tutsis had requested the UN and its allies to send peace-keeping forces to the area. This led to the adoption of Resolution 929 on 22 June 1994. The Security Council in its resolution, with reference to Chapter VII, authorised Member States, through the establishment of a temporary operation under national command, using all necessary means, to contribute to the security of refugees and civilians at risk in Rwanda.¹⁹⁷ The Council

¹⁹²- *Id.*

¹⁹³- Habyarimana ruled Rwanda for 21 years. *N. Y. Times*, 7 Apr. 1994, p. 10.

¹⁹⁴- It was reported that the incident sparked killings throughout the country that are estimated to have taken at least 500,000 lives and eventually led to a displacement of half of the country's population of six million. Commission of Experts Established in Accordance with Security Council Resolution 935, (1994), S/1994/1125.

¹⁹⁵- SC Res. 912, 21 Apr. 1994.

¹⁹⁶- Y. K. Tyagi, *op. cit.*, p. 904.

¹⁹⁷- SC Res. 929, 22 Jun. 1994.

agreed that a multinational operation might be set up until UNAMIR would be brought up to the necessary strength.¹⁹⁸

The French named Operation Turquoise was launched on 23 June to establish a "humanitarian protected zone" in south-western Rwanda.¹⁹⁹ However, after two months and having learned from US experience in Somalia, despite UN and other countries attempts to persuade France to refrain from withdrawal, it pulled its forces out of Rwanda on 21 August 1994.²⁰⁰

Earlier in late July the Under-Secretary-General for Humanitarian Affairs had met with senior officials of the new government in Rwanda to discuss how humanitarian aid could be delivered to all parts of Rwanda and the urgent steps required to re-establish a climate conducive to the return of refugees and displaced persons. The new government had indicated its commitment to encourage people to return to the country, to ensure their protection and to permit full access to all in need throughout the country.²⁰¹

Following the French withdrawal from Rwanda and expansion of UNAMIR by the Council and the installation of the Broad Based Government of National Unity (BBGNU) at Kigali on 19 July, the Rwandan peace process went back on its rails.²⁰²

The reports of military preparations and increasing incursions into Rwanda by elements of the former regime from neighbouring states, resulted in adopting Resolution 997 on 9 June 1995. Earlier, on 4 June 1995, the Secretary-General Boutros-Ghali had reported that despite the situation in Rwanda had changed radically

198. *Id.* It is believed that this was a French idea fiercely opposed by RPF, politely ignored by French allies, and half-heartedly endorsed by the Security Council. Y. K. Tyagi, *op. cit.*, p. 904.

199. The United Nations and Rwanda, *op. cit.*, p. 15.

200. Y. K. Tyagi, *op. cit.*, p. 905.

201. The United Nations and Rwanda, *op. cit.*, p. 18.

202. Y. K. Tyagi, *op. cit.*, p. 905.

since the civil war, the situation remained tense with a lack of significant advances in national reconciliation.²⁰³ He said that the UNAMIR mandate should include "shifting the focus from a peace-keeping to a confidence-building role"²⁰⁴.

The Council by Resolution 997 authorised UNAMIR to exercise its good offices to help achieve national reconciliation within the framework of the 1993 Arusha Peace Agreement.²⁰⁵ By undertaking monitoring tasks, UNAMIR would also support the Rwandese government's ongoing efforts to promote a climate of confidence and trust. The Secretary-General was asked to consult with the governments of neighbouring countries, including Zaire, on deployment of UN military observers on their territories. UNAMIR was also to help the government in facilitating the voluntary and safe return of refugees and their reintegration into their home communities.²⁰⁶ In addition, UNAMIR would assist humanitarian deliveries and would help to train a national police force.

The refugee problem, however, remained a matter which required careful considerations. In fact, returning refugees needed assistance of several parties: Rwandese government, the UN and the neighbouring states. Yet, it was believed that a military multinational force would help to resolve the refugee problem.²⁰⁷ Finally the United States agreed to send troops to Zaire as part of a multinational force under overall Canadian command with neither precise objectives nor rules of engagement clearly defined.²⁰⁸ Britain also prepared to play its part in respect of military contributions to help deal with the humanitarian aid, to get food and shelter to the refugees.²⁰⁹

203. S/1995/457

204. *Id.*

205. SC Res. 997, 9 June 1995.

206. *Id.*

207. *The Guardian*, 14 Nov. 1996, p. 1.

208. *Id.*

209. *Id.*

However, Rwanda's president, Pasteur Bizimungu, warned that if intervenors do not negotiate this with the rebels who were trying to drive Rwandan refugees back to their homeland, it would be declaring war and would be messy unless rebels in control of eastern Zaire were consulted.²¹⁰

Following the attack by Zairian rebels backed by Rwanda's government on the refugee camps in Zaire, the United Nations estimated that the vast majority of the 700,000 Rwandans who came around Goma in Zaire since 1994 were on the move and were persuaded that they were better off returning home.²¹¹

Furthermore, United Nations stated that Tanzanian troops drove nearly 200,000 Rwandese Hutu refugees back to their homeland.²¹² The president of Rwanda welcomed the reluctant returnees who feared persecution by the overwhelmingly Tutsi army in revenge for the 1994 genocide.²¹³ Yet, those refugees who were suspects of taking part in 1994 genocide of Tutsis and Hutu moderates were arrested and tried for their crimes.²¹⁴

Discussion

The Rwanda case was another experience which demonstrates that humanitarian intervention to create a secured environment in a civil war would not be successful. French forces during their two months presence in Rwanda found that they should avoid Somalia experience and withdraw from the area. Even most of the UN peace-keeping forces of UNAMIR, who had arrived for monitoring the cease-fire agreement.

210. While he raised concerns with the UN and international community, he said that it looked like the UN has not learned the lessons of the past. *Id.*

211. *Ibid.*, 16 Nov. 1996, p. 1.

212. *Ibid.*, 16 Dec. 1996, p. 1.

213. *Id.*

214. *Ibid.*, 4 Jan. 1997, p. 3.

were ordered to withdraw from Rwanda by increasing violence and inability to cope with the violence.

Initially, UNOMUR was established at the request of the Governments of Rwanda and Uganda. Taking note of the consent of the host states, UNOMUR and UNAMIR were not despatched to use enforcement measures. Their mandate was to verify that no military assistance reached Rwanda, to contribute to the security of Kigali, to monitor observance of the cease-fire agreement, and to assist in the co-ordination of humanitarian assistance activities.

The Council did not determine that, in case of breach of the cease-fire agreement or interruption of humanitarian assistance, whether UN forces were allowed to use force, or whether they could use force only for self-defence. It seems that UNAMIR's mandate was to perform peace-keeping tasks without having the ability to enforce the peace, and that is why, when violence increased in Rwanda, the Council authorised a reduction in the size of UNAMIR before it suffered heavy casualties.

In its next step, the Council in its Resolution 929 referred to Chapter VII and authorised member states to use all necessary means for humanitarian objectives.²¹⁵ France which initiated the operation could use force if it was necessary, but it could not use force to enforce peace. French forces established a "humanitarian protected zone", though the Council's resolution did not refer to such a protected zone. Despite the UN attempt to prevent French withdrawal, the latter pulled its forces out of Rwanda. Had France despatched its forces with UN authorisation, its withdrawal would have also needed the UN consent.

UNOMUR and UNAMIR had the mandate to increase security in Rwanda and monitor the cease-fire agreement. Even the authorisation of using all necessary means

²¹⁵. SC Res. 929, 22 June 1994.

by third states was only for humanitarian purposes. The legal basis of these operations might be found in Article 40 in which provisional measures are envisaged as a first step towards the ending of the crisis.

Peace-keepers and peace pacts are two elements of a security blanket and are not a final solution to the problem. The case of Rwanda has shown that they can be quickly pulled away with disastrous consequences. As it was in Somalia, there was a need to focus on preventive diplomacy and greater understanding of the personalities and underlying issues that could have led to diplomatic efforts to defuse tensions.²¹⁶

Furthermore, organised actions by Governments of Rwanda, Tanzania and Zaire demonstrate that determination of the parties concerned to solve the problem plays a key role to avoid any military operation by other states. It seems that more attempts should be made to use peaceful means envisaged in Chapter VI rather than invoking Chapter VII of the Charter where there is no clear act of aggression, breach of or threat to the peace.

Conclusion

By the end of the Cold War, conflicts have been concentrated in the realm of civil wars and internal crises. Besides, the Security Council has been involved in internal conflicts rather than international ones. In the past, the use of veto power might have prevented the Security Council from dealing with internal conflicts. The recent Council's practice shows that the veto power has not been used for decisions on this matter.

216. Shawn H. McCormick, "The Lessons of Intervention in Africa", 94 *Current History*, (1995), p. 164.

The Security Council, in its extended interpretation of the concept of "threat to the peace" in Article 39 (Chapter VII of the Charter), has recognised humanitarian situations within a state as a "threat to the peace". Furthermore, this recognition has been the basis of state authorisation to use force.

Yet, this matter created a fear in most countries as this practice might have special consequences such as infringing their sovereignty, particularly when no guidance has been given as to how the expanded doctrine of threat to the peace should be applied in the future. Generally, it might be said that nothing in the present era of international thinking supports a view allowing intervention in purely civil disputes where there is no actual threat to international peace and security.²¹⁷ Intervention might take place only where the conflict rises to the level of being considered a threat to the peace, at which time it arguably may not be deemed humanitarian intervention.²¹⁸ Otherwise, Article 2(7) of the Charter, as the drafters of the Charter intended, should be strictly interpreted to prohibit UN intervention in states' internal affairs.²¹⁹

In recent cases of humanitarian crisis there existed an inability of host governments alone to respond to the crisis or a situation of collapsed structure of state authority. In these crises, civilians are the main victims and often the main targets of internal wars; and the warring parties make humanitarian efforts difficult or impossible because the relief of a particular population is contrary to the war aims of one or other of the parties; and there is a tendency for the combatants to divert relief supplies for their own purposes.²²⁰

In such cases there is a need for an effective international response to break the cycle of violence and hunger. However, the cases which have been discussed earlier in this

217. Mary E. O'Connell. "Continuing Limits on UN Intervention in Civil War" 67 *Ind. L.J.*, p. 903.

218. R. Ramlogan, *op. cit.*, p. 243.

219. Article 2(7) has been discussed in Chapter Two of this thesis.

220. *An Agenda For Peace*, (1995), *op. cit.*, paras.12, 18.

chapter show that military intervention in civil wars for humanitarian purposes cannot be considered as the best solution for humanitarian crises, particularly when there is the absence of consent of either the host government or the warring factions for the presence of military forces. Military operation might even cause more problems, such as increasing casualties for both forces and the population which, in turn, would prompt further violence. In these situations, multinational forces which have been dispatched for peace-enforcement and monitoring humanitarian deliveries very soon become part of the conflict and their impartiality is undermined.

Furthermore, the costs of military operations are very high. A comparison of the costs of the humanitarian program has been made in the case of Somalia with the costs of the military program, and it turned out that the humanitarian program had a budget one-tenth the size of the military budget. This shows that, for every dollar of humanitarian assistance that the United Nations was able to provide, it paid ten dollars for military protection of the humanitarian relief.²²¹

It is believed that the United Nations should try to achieve a balanced presence from the very beginning; this means that the humanitarian strategy complements the peace-keeping and political strategies, and that the humanitarian strategy should be underpinned by a massive humanitarian, economic, and developmental effort.²²² Such a massive humanitarian effort would have not only enormously positive effects on the population, but also on *security* in the country.²²³ In fact, with proper implementation of political, humanitarian and peace-keeping tools, the necessity of a full-scale military presence can be reduced.

221- The comparison was made by Jan Eliasson from Sweden who had the responsibility for the humanitarian programs in Somalia. Jan Eliasson (interview), "The U. N. and Humanitarian Assistance", 48 *Journal of International Affairs*, No. 2, (1995), p. 498.

222- These efforts include building bridges, repairing roads, taking away mines and giving jobs to the potential warriors. *Ibid*, p. 494.

223- *Id.*

In recent years, the idea of having an enforcement element within peace-keeping operations and setting aside the long-standing distinction between enforcement and peace-keeping has grown. In this respect, Higgins argues that enforcement should remain clearly differentiated from peace-keeping, and peace-keeping mandates should not contain an enforcement function.²²⁴

In the case of Bosnia, the United Nations tried to separate peace-keeping from peace-enforcement by authorising NATO to use force to support peace-keeping forces and to protect safe areas. It seems that in the United Nations there is a tendency to entrust enforcement tasks to regional arrangements. However, this mechanism has created some concerns. In the Bosnia experience, two organisations with very different mandates and approaches to the maintenance of peace and security were asked to deal with security and humanitarian problems. They had no agreement on the combat situation. There did not have a unified command, clear rules of engagement or a joint understanding on the use of force.

Although in Bosnia the use of a regional arrangement to use military means for peace support was not encouraging, the useful role of regional organisations in different stages of conflict management cannot be ignored. It should be noted that NATO is considered as a self-defence pact with a defensive function rather than a regional organisation with economic and social capacity, and the Security Council under Article 53 utilised it for enforcement action under its authority in Bosnia.

Regional organisations in many cases possess a potential that can be employed in serving the functions of preventive diplomacy and mediation. Nevertheless, there might be the possibility of supporting warring parties by some members of the regional organisation, or the possibility that some interests lead these organisations to inaction. With regard to the role of the EU in the crisis of Bosnia, Higgins believes

²²⁴- R. Higgins, "Second-Generation Peacekeeping", *op. cit.*, p. 279.

that the EU blocked the UN from acting in Bosnia because the EU saw it as a prime opportunity to pursue several of its objectives: first, EU action would make the EU look decisive after looking weak in the Gulf War of 1991; second, EU management of the crisis would demonstrate the independence of the EU from Moscow and Washington; third, Bosnia would serve as the case on which the EU could finally devise a common foreign policy; fourth, the various countries involved directly in the crisis could, after the crisis was resolved, be brought into the EU under terms established by the successful intermediary, the EU.²²⁵ She also states that the EU was not structured to address the Bosnian crisis and only succeeded in buying time for the Serbs. When the EU finally realised that it could not manage the crisis, it allowed the UN to take up a considerably worsened crisis, at which point the Europeans used their power in the UN to block effective and forceful UN action.²²⁶

In the Somali conflict, the role of regional organisations regarding conflict management was brought into sharp focus. Although OAU, OIC and LAS were the regional organisations within the vicinity of the conflict, they did not play their role efficiently. In fact, regional organisations have a potential that, under the auspices of the United Nations, can address a crisis within their region. In such situations, they would act as localised versions of the United Nations, carrying forward the process of restoring peace in the spirit of the UN Charter.

225- Rosalyn Higgins, "The New United Nations and Former Yugoslavia", 69 *International Affairs*, No. 3, July 1993, pp. 473-475.

226- *Id.*

CHAPTER SIX

THE REDUCED ROLE OF THE SECURITY COUNCIL: THE EXAMPLE OF THE IRAQ-IRAN WAR

The preceding chapters included an analysis of conflict management by the United Nations regarding internal and international conflicts in various contexts that deemed to be threatening international peace and security. The Organisation has been delegated discretionary powers to maintain international peace and security through its organs, the Security Council being the competent organ for dealing with disputes and conflicts. The Council possesses recommendatory powers under Chapter VI and mandatory powers under Chapter VII.

However, these powers have not always been used to their full capacity, and as the Security Council's practice demonstrates, its potential has been hampered by some considerations. The present chapter will discuss a case in which, despite the existence of a prolonged international armed conflict and breach of the rules of use of force in inter-state relations (*jus ad bellum*) on one side and rules of the law of war (*jus in bello*) on the other, the Security Council played a reduced role to resolve the conflict. The next chapter will analyse a case in which, on the contrary, the Security Council used its powers to the full extent, both in imposing sanctions and in authorising enforcement action against the aggressor state as well as adopting measures to curtail its capabilities.

BACKGROUND

Following the unilateral denunciation of the border agreement by the Republic of Iraq (Iraq) on 17 September 1980, that it had signed with the government of Iran in June

1975¹, Iraq launched its massive invasion of Iran on 22 September 1980.² Iraq in its allegations accused the Islamic Republic of Iran (Iran) of violations of the 1975 Treaty's provisions.³ Because of these violations, in the Iraqi view, this Treaty with its Protocols and Annexes were null and void.⁴ Iraq contended that, since the Treaty was no longer effective, the Iraq-Iran border reverted to its location prior to the signing of the 1975 Treaty.⁵

Iran denied the Iraqi allegations and made clear that it never intended to admit the possibility of denunciation in the 1975 Treaty and such termination was prohibited and all agreements by Iraq were still in force and binding.⁶ Iran claimed that the Iraqi abrogation violated the principles of *pacta sunt servanda* as well as the Vienna Convention on the Law of Treaties, especially Article 62 which prohibited a state from invoking the doctrine of *rebus sic stantibus* in regard to boundary agreements.⁷ Iran pointed to Article 5 of the Treaty which had provided the land and water frontiers of the parties to be "inviolable, permanent and final".⁸ Iran argued that, even if Iraq had difficulty with the interpretation or application of the Treaty, it should have followed the procedures for the settlement of disputes specified in Article 6 of the Treaty.⁹

Another set of Iraqi allegations was that Iran violated the Iraqi air space sixty-nine times and attacked Iraqi targets 103 times before 22 September 1980.¹⁰ Iraq stated that the war started on 4 September 1980 when Iran used 175 millimetre cannons against

1. 14 ILM 1133 (1975), UNTS, Vol. 1017, No. 14903.

2. Douglas Williams, The United Nations and the Iran-Iraq War, A Ford Foundation Conference Report, (Ford Foundation, New York, 1987), p. 9, and, N. Y. Times, 14 July 1982, p. 14.

3. For Iraqi allegations see: S/14272 and S/14236.

4. Id.

5. S/14191.

6. S/14249.

7. R. K. Ramazani, "Who Started the Iraq-Iran War? A Commentary", 33 Va. J. Int'l L., (1992), p. 80.

8. S/14249.

9. Id.

10. For details of Iraqi allegations see: Iraq Ministry of Foreign Affairs, The Iraqi-Iranian Dispute: Facts v. Allegations, 1980; Iraq Ministry of Foreign Affairs, The Iraqi-Iranian Conflict: Documentary Dossier, 1981, (hereinafter Documentary).

Iraq. However, Iraq never reported these incidents and the case was brought to the attention of the United Nations by the Secretary-General after Iraq's massive invasion of Iran on 22 September 1980.¹¹

The Secretary-General Javier Perez de Cuellar, on 9 December 1991, in performing his mandate under paragraph six of Resolution 598, delivered a report in which he confirmed that on 22 September 1980 Iraq attacked Iran "which cannot be justified under the Charter of the United Nations, any recognised rules and principles of international law or any principles of international morality and entails responsibility for the conflict".¹² The Secretary-General specified that, to reach his conclusion, he relied on the sources such as the letters of Iraq and Iran of August and September 1991 respectively to the Secretary-General at his request, giving their views on paragraph six; consultation with the parties; information from independent experts; and official documents of the United Nations since the beginning of the conflict.¹³

In fact, 22 September 1980 has been universally recognised as the date that Iraq invaded Iran at which it "launched air raids on at least ten major Iranian military installations".¹⁴ The Minister for Foreign Affairs of Iraq justified Iraqi large-scale military action against Iran as an exercise of "the right of self-defence" necessitated by circumstance.¹⁵ The untenability of the Iraqi position was later realised when Iraq alleged that Iran started war on 4 September 1980 and Iraq "exercised preventive self-defence to defend its people and territories".¹⁶ These contradictory arguments, i.e. claiming preventive self-defence which followed the earlier observation that Iran had started the war, results from the fact that Iraq was unable to demonstrate that Iran had

¹¹- S/14191.

¹²- Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987), S/23273, (1991), para. 6.

¹³- *Ibid.*, para. 4.

¹⁴- Foreign Broadcast Information Service (F. B. I. S.), Daily Report, Middle East and Africa, 23 Sept. 1980, p. i.

¹⁵- S/14191, S/14192.

¹⁶- S/14236.

any military activity between 4 and 22 September 1980 to fulfil the requirements for exercising the right of self-defence.¹⁷

In considering Iraqi military action as preventive self-defence, "it is well-known that many authorities reject this doctrine as an admissible defence and do so for good reasons".¹⁸ A closer analysis of the literature and practice, e.g. the debate in the Security Council in June 1981 concerning the Israeli-claimed preventive military action against the nuclear reactor in Iraq, does not unequivocally support this view.¹⁹ Furthermore, Iraq, for its large-scale military action against Iran as preventive self-defence, did not refer to a concentration of Iranian troops on the frontier as a threat of attack neither in its communications to the United Nations nor in any other report.

Henkin argues against the right of anticipatory self-defence stating "[n]othing in ... its drafting ... suggests that the framers of the Charter intended something broader than the language implied ... It was that mild, old-fashioned Second World War which persuaded all nations that for the future national interests will have to be vindicated, or necessary change achieved, as well as can be by political means, but not by war and military self-help. They recognised the exception of self-defence in emergency, but limited to actual armed attack, which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication ... It is precisely in the age of the major deterrent that nations should not be encouraged to strike first under pretext of prevention or pre-emption."²⁰ In fact, the security or national interests cannot be invoked to justify preventive self-defence without an armed attack.

17- Ige F. Dekker, "Criminal Responsibility and the Gulf War of 1980-1988: The Crime of Aggression", in, Ige F. Dekker and Harry H. G. Post (ed.), The Gulf War of 1980-1988, (Martinus Nijhoff Publishers, The Netherlands, 1992), p. 257.

18- Peter Malanczuk, "Comments", in, *ibid.*, p. 275.

19- *Id.*

20- Henkin, How Nations Behave, (1979), pp. 141-2.

The Secretary-General in his report stated that "[e]ven if before the outbreak of the conflict there had been some encroachment by Iran on Iraqi territory, such encroachment did not justify Iraq's aggression against Iran - which was followed by Iraq's continuous occupation of Iranian territory during the conflict - in violation of the prohibition of the use of force, which is regarded as one of the rules of *jus cogens*."²¹

In the Secretary-General's report, Iraq was recognised as the state that committed an act of aggression as well as occupation of Iranian territory. Article 2(4) of the Charter states that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".²² The only well-known exception to this principle is embodied in Article 51 which provides that, in the case of armed attack against a member state, nothing in the Charter shall impair the inherent right of self-defence until the Security Council has taken measures necessary to maintain international peace and security.²³ The military measures taken by Iran in response to Iraqi attack and occupation to retake its occupied territories are considered as self-defence against Iraq's aggression, and it was entitled for self-defence until the Security Council took necessary measures.

During the Iraq-Iran war, Iraq accepted the Security Council's resolutions, but Iran rejected most of them as being ineffective to restore its territory. The dispute between the UK and Argentina in 1982 may be referred to as a recent example of the type of arguments arising about the Security Council's necessary measures to end the act of self-defence.

21. S/23273, para. 7.

22. Article 2(4) of the Charter.

23. Article 51 of the Charter.

The UK argued that the right of self-defence continued until the Security Council takes "measures which are actually effective to bring about the stated objective".²⁴ The United Kingdom, which saw the Council's resolution as ineffective, stated that the determination of whether a measure adopted by the Security Council under Article 51 must be an objective one, "reached in light of all the relevant circumstances", and in this case because of ineffective action by the Council, the UK's right of self-defence was "unimpaired".²⁵

Argentina also invoked the right of self-defence and asserted that "[t]he system of collective security set forth in the Charter cannot be interpreted in a way that would mean that provisions for legitimate defence would become inoperable The Charter has provided that Members of the United Nations, when complying with its principles and purposes, should not be left in a defenceless state against any act of aggression perpetrated against its territory or population".²⁶ The above arguments may be considered as a test for the measures adopted by the Security Council to bring to an end an act of self-defence.

With regard to the effective measures by the Security Council, its call to stop an aggression cannot be a sufficient alternative to the victim state's right to repulse the aggression. Also economic sanctions, specially on arms equipment, may be essential to end the aggression, but the right of victim state to self-defence would remain unimpaired. Even the authorisation or recommendation of the Security Council to use force against the aggressor might not impair the right of self-defence on the part of the victim state.

The author believes that there are three possibilities in responding to the call of the Security Council for use of force against aggression. First, none of the member states

²⁴- S/15016.

²⁵- S/PV. 2362 (1982).

²⁶- S/PV. 2345 (1982).

are willing to contribute to military actions. Secondly, a group of states may decide to contribute to enforcement action but have no political will to enforce the mandate, e.g. in the case of Bosnia. Thirdly, there may be political will, in which case two possibilities exist: enforcement action may be successful to end the aggression and to meet the victim's rights, or it may fail leaving the victim probably in a situation worse than the initial state of the conflict. It can therefore be concluded that only "effective" action by the United Nations can suspend the right of self-defence; and the right of self-defence for the victim state is reserved pending the outcome of the UN's action.

As mentioned in Chapter One, the drafters of the Charter believed that in the case of flagrant aggression imperiling the existence of a member of the Organisation enforcement measures should be taken without delay, and to full extent required by circumstances, except that the Council should at the same time endeavor to persuade the aggressor to abandon its venture, by the means contemplated in Chapter VI and by prescribing conservatory measures.²⁷ The next section will examine the Organisation's reaction to the conflict between Iraq and Iran, and consider whether this formula was applied to the case.

THE UNITED NATIONS' RESPONSE TO THE AGGRESSION

Following the continuation of war on the land, at the sea and in the air, the Secretary-General Kurt Waldheim, under Article 99 of the United Nations Charter, brought the matter to the attention of the Security Council on 23 September 1980.²⁸ The Security Council, six days later on 28 September, in its initial resolution merely called upon the parties to refrain from further use of force and settle their disputes peacefully.²⁹ The Council in its resolution did not clarify why it described this conflict the

²⁷- UNCIO, Report of Rapporteur on Chapter VIII, Section B, Vol. 12, Doc. 881, III/3/46, p. 507.

²⁸- S/14196.

²⁹- SC Res. 479, 28 Sep. 1980. Earlier on 23 September, the Security Council took a presidential declaration in form of a statement which is the weakest form of action the Council can take. S/14190.

"situation" between Iran and Iraq. The Council, under Article 39, did not state that the war would be a threat to international peace and security, nor did it identify the aggressor state.³⁰

The Council referred to Article 24 of the Charter, though there was no doubt that the Council had primary responsibility for the maintenance of the international peace and security. It should be noted that, while Articles 24-26 refer to functions and powers of the Security Council, the specific powers are granted to the Security Council in Chapter VII to determine the existence of threat to or breach of the peace, or act of aggression, and make recommendation or take measures to restore peace.³¹

Iran rejected Resolution 479 and stated that the Security Council "should condemn the premeditated act of aggression that has taken place, call for the immediate withdrawal of the Iraqi forces from Iranian territory and call upon Iraq to compensate Iran for damages. It should also condemn the Iraqi authorities for war crimes."³²

The Norwegian representative demanded withdrawal of all forces under international supervision to the internationally recognised boundaries as a precondition for a cease-fire, but Iraq rejected it.³³ Iraq argued that this was contrary to Resolution 479 which it had accepted before³⁴ and that its position was perfectly consistent with the spirit of Resolution 479.³⁵

In the Council's resolution, the Secretary-General was enjoined to offer his good offices for the resolution of the situation.³⁶ In October 1980, as a first step, he

30. The Security Council has recognised the aggressor state in several occasions such as in its Resolutions 455 of 1979, 475 of 1980, and 573 of 1985.

31. Article 39 of the Charter.

32. SCOR, 35th yr, 2252nd mtg, (1980), para. 87; UN Yearbook, (1980), p. 315.

33. Ibid, para. 77.

34. Id.

35. S/14203.

36. SC. Res. 479, 28 Sep. 1980.

appealed to both governments that all commercial vessels leave Shatt Al-Arab waterway with safe passage under the flag of the United Nations.³⁷ Iran accepted the Secretary-General's proposal³⁸, but Iraq did not accept it and stated that "these vessels must fly the Iraqi flag as long as they are in Shatt Al-Arab, which is an Iraqi river".³⁹

By the failure of the Security Council to stop the war, the Secretary-General, in the exercise of his good offices, appointed Olaf Palme of Sweden as his representative in the region.⁴⁰ As a result of Palme's efforts, a number of prisoners-of-war were released.⁴¹

In January 1981 the Islamic Conference Organisation, in response to the Secretary-General, presented a plan including several measures such as: a cease-fire; withdrawal of Iraq from Iranian territory; supervision of the cease-fire and withdrawal by Islamic 'military observers'; the establishment of a committee of Islamic countries to decide the sovereignty of the Shatt al-Arab waterway; pending the decision, administration of the waterway by an agency set up by the Islamic countries, and establishing an Islamic court to decide which side started the war.⁴²

However, the plan was rejected by the both parties.⁴³ These terms, especially the term about the sovereignty of the Shatt al-Arab waterway, was not acceptable to Iraq. Iran required that the cease-fire and withdrawal of Iraqi troops be carried out simultaneously, Iraq should be condemned as the aggressor, Iraq should agree to share sovereignty over Shatt al-Arab as provided in the 1975 Treaty, and Iraq should pay compensation for damages caused by its aggression.⁴⁴

37- S/14213.

38- S/14216.

39- S/14221.

40- S/14251.

41- The United Nations at Forty, A Foundation to Build On, (United Nations Department of Public Information, New York, 1985), p. 119.

42- N.Y. Times, 6 Mar. 1981, p. 9; and, 7. Apr. 1981, p. 4.

43- Ibid, 13 Mar. 1981, p. 10, and, 3 Mar. 1981, p. 6.

44- A/36/26.

The Security Council did not meet formally again to discuss the war for two years until July 1982, by which time the situation had changed greatly because of Iran's repeated success on the battlefield and it was able to push into Iraqi territory.⁴⁵ At Jordan's request, the Security Council convened on 12 July 1982 and adopted Resolution 514.⁴⁶ The Council in its resolution called for several actions which it had not mentioned in its previous resolution. It called for a cease-fire and withdrawal of forces to internationally recognised boundaries under the supervision of a team of United Nations observers.⁴⁷ The Council considered that the prolongation of the conflict endangered international peace and security. The Secretary-General was requested to continue his efforts to achieve a comprehensive, just and honourable settlement acceptable to both sides on the basis of the principles of the Charter including respect for sovereignty, independence, territorial integrity and non-interference in the internal affairs of states. All other states were requested to abstain from any action which could contribute to the continuation of the conflict.⁴⁸

Iraq accepted Resolution 594 while Iran argued that the Security Council was biased in favour of Iraq.⁴⁹ Iran stated that, while Iraq was in violation of specific articles of the Charter by resorting to armed aggression and occupation, the Council in its resolution of 1980 had deliberately failed to recognise that armed aggression and occupation had taken place, so the Council had disqualified itself by its support of aggression.⁵⁰ Iran noted that the Security Council had been silent for twenty-two months while the fighting continued on Iranian territory, but acted swiftly to protect Iraq once Iraqi territory was threatened. Nevertheless, Iran affirmed its readiness to

45- Brian D. Smith, "United Nations Iran-Iraq Military Observer Group", in: William J. Durch (ed.), The Evolution of UN Peacekeeping, (St. Martin's Press, New York, 1993), p. 239.

46- S/15141.

47- SC Res. 514, 12 July 1982.

48- Id.

49- S/15292.

50- Id.

co-operate with the Council when the latter took its responsibilities seriously by dealing with the realities of the conflict.⁵¹

On 4 October 1982, at Iraq's request,⁵² the Security Council convened and adopted Resolution 522. This resolution had similar provisions to Resolution 514. Iraq accepted the resolution but Iran rejected it for the same reasons it had rejected Resolution 514.⁵³ The General Assembly adopted a resolution on 22 October 1982 on the consequences of the prolongation of the armed conflict between Iran and Iraq.⁵⁴

It may be argued that the Council, having been disqualified in Iran's view, would have found itself ineffective in further attempts to end the war. However, the Council has the primary responsibility for maintaining peace and security among the states. A conflict, in such a scale, cannot be left to continue with the possibility of escalating.

Having intensified the attacks on cities, commercial vessels and oil tankers, Iran reported on 28 October that several parts of its populated residential areas had been bombarded by Iraqi war-planes.⁵⁵ Iran protested also the Iraqi attacks on Iranian offshore oil fields, causing two oil spillages which had polluted the marine environment.⁵⁶ Iraq responded that the spillage from Iran's Norouz 3 oil well occurred on 27 January when a merchant vessel collided with the platform and that the other spillage was the result of military action in a war zone.⁵⁷

In May 1983, in response to requests made by Iran and Iraq, the Secretary-General Perez de Cuellar dispatched a mission to the two countries to examine civilian areas

51- *Id.*

52- S/15443.

53- S/15448.

54- GA Res. 37/3, 22 Oct. 1982.

55- A/37/584, A/37/696.

56- A/38/163, S/15723.

57- A/38/187, S/15752.

damaged by the war.⁵⁸ The mission's report devoted 26 pages to 'heavy damage and intensive destruction' in eleven Iranian cities and 13 pages to 'light damage' in seven Iraqi locations.⁵⁹ The mission noted that the Iranian towns and cities close to the border⁶⁰ had been besieged or occupied by Iraq at the outbreak of hostilities and been retaken in 1982.⁶¹

Although Iraq criticised the report, Iran argued that the possibility of a negotiated settlement would depend on the Security Council's reaction to the report.⁶² During August and early September 1983 Iran reported attacks on mainly civilian targets and use of chemical weapons by Iraq in the war zone.⁶³ On 28 October again Iran invited the Secretary-General to dispatch his representative to the area for fact finding, stating that Iraqi forces unable to gain the upper hand in the battle front had resorted to inhuman surface-to-surface missile attack on civilians.⁶⁴

It took five months for the Security Council to adopt Resolution 540 of 31 October 1983 in response to the report, more than a year after its last resolution (Res. 522).⁶⁵ This resolution called for a comprehensive cease-fire, expressing its appreciation to the Secretary-General for presenting a "factual, balanced, and objective account".⁶⁶ The Council affirmed for the first time its desire for an objective examination of the causes of the war.⁶⁷

⁵⁸- UN Yearbook, (1983), p. 237.

⁵⁹- S/15834.

⁶⁰- Namely Musian, Dehloran, Abadan, Khorramshahr, Hoveyzeh, Susangerd, Sar-e-Pol-e-Zahab, and Qasr-e-Shirin.

⁶¹- S/15834.

⁶²- N.Y. Times, 22 June 1983, p. 12.

⁶³- S/15926, S/15932, S/15941.

⁶⁴- S/16104.

⁶⁵- The Iranian success in the battlefield in October 1983 is believed to be a contributing factor to the adoption of Resolution 540. A. Hedayati, The United Nations Security Council and the Iraqi-imposed War on the Islamic Republic of Iran, (The Institute for Political and International Studies, 1991), p. 95.

⁶⁶- SC Res. 540, 31 Oct. 1983.

⁶⁷- Id.

In Resolution 540 all violations of the provisions of the Geneva Conventions of 1949 were condemned. It called for cessation of all military operations against civilian targets, including city and residential areas.⁶⁸ By affirming the right of free navigation and commerce in international waters the parties were asked by the Council to cease all hostilities in the Persian Gulf region. The Secretary-General was requested to consult with the parties concerning ways to sustain and verify the cessation of hostilities including the possible dispatch of UN observers.⁶⁹

Pakistan, Nicaragua and Malta abstained from voting, asserting that the resolution lacked a guarantee of effectiveness and it could not engage parties in a process combining immediate containment of hostilities with prospects for a comprehensive peace settlement to follow.⁷⁰ They argued that the resolution would leave Iran as "disenchanted and aggrieved" as ever and would have no effect on the war because such resolutions already existed.⁷¹

Iraq accepted the resolution stating that no partial implementation would be accepted.⁷² However, Iran contended that Iraq should have been the party called upon to stop attacks on civilian targets, and the conflict should not be described in terms of 'hostilities' because Iran had engaged in a painful defensive war to reverse the consequences of the Iraqi aggression.⁷³ However, Iran stated that it remained ready to co-operate with the Secretary-General; and if the Security Council modified its biased position in favour of Iraq, the mediation would stand a much better chance of positive achievement.⁷⁴

68- *Id.*

69- *Id.*

70- S/PV. 2493, and, *UN Yearbook*, (1983), p. 240.

71- *Id.*

72- S/16120.

73- S/16213.

74- *Id.*

UN's response to the use of chemical weapons

The law of war, *jus in bello*, should govern the conduct of hostilities. The use of chemical weapons with severe effects on humans and environment led the international community to consider its prohibition seriously. This resulted in the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare (the 1925 Geneva Gas Protocol). The concern over the use of such weapons relates in part to the effect that it would have on escalating confrontation in the course of hostilities, and its provocation of other states to consider the use of these weapons, which potentially threatens the international peace and security. In such circumstances, it is vital that the United Nations take immediate and effective measures to prevent further employment of such methods.

In response to the repeated request of Iran to investigate the Iraqi use of chemical weapons in March 1984,⁷⁵ the Secretary-General Perez de Cuellar decided to send a team of experts to Iran.⁷⁶ According to the Secretary-General's report, submitted to both the Security Council and the General Assembly, the specialists unanimously concluded that chemical weapons had been used in the areas they inspected in Iran, but they did not refer to Iraq as a user of chemical weapons.⁷⁷ Subsequently, the Security Council, in a presidential declaration, strongly condemned the use of chemical weapons without naming Iraq.⁷⁸

In May 1984, Iran expressed appreciation for the Secretary-General's action for having dispatched a mission to investigate the use of chemical weapons, asserting that the Security Council had not taken action to stop Iraq from further use of these

⁷⁵- A/39/127, S/16397.

⁷⁶- UN Yearbook, (1984), pp. 231-2.

⁷⁷- S/16433.

⁷⁸- S/16454.

weapons and it demanded that specific steps be taken to stop delivery and sale of these weapons to Iraq.⁷⁹

No decisive action was taken by the United Nations from June 1984 until March 1985, except that in January 1985 the Secretary-General dispatched a mission to investigate the conditions in prisoner-of-war camps in both countries, and a medical specialist to hospitals in Europe to examine Iranian patients who were suffering from injuries caused by chemical weapons.⁸⁰

On 12 March Iran announced that Iraq was about to resume chemical attacks on a large scale and warned that, unless the United Nations prevented the recurrence of violations of international and humanitarian norms, the international body, along with Iraq, would be held responsible for the consequences.⁸¹

On 13 March Iran informed the United Nations of the Iraqi chemical attack as predicted, and urgently requested the Secretary-General to take steps to stop violations of the Geneva Protocol of 1925, and regretted that the UN had not agreed to the stationing of a permanent expert mission in Tehran to investigate the use of chemical weapons by Iraq.⁸²

The Security Council, in response to the medical specialist's report, in which chemical weapons had been confirmed as used against Iranian soldiers,⁸³ adopted a declaration that strongly condemned the use of chemical weapons without naming Iraq.⁸⁴ Iran stated that the declaration lacked the required explicitness in its condemnation of Iraq, and was not sufficient to end the continued use of chemical weapons by Iraq.⁸⁵ On the

⁷⁹- S/16498.

⁸⁰- *UN Yearbook*, (1985), p. 239.

⁸¹- S/16998.

⁸²- S/17028.

⁸³- S/17127.

⁸⁴- S/17130.

⁸⁵- S/17217.

other hand, Iraq criticised Iran in calling for the Security Council to prohibit the use of chemical weapons, while it had ignored Security Council resolutions.⁸⁶

On 14 February Iran had reported that, due to the apparent acquiescence of international organisations, Iraq had used chemical bombs against Abadan twice on 13 February.⁸⁷ Iran requested the Secretary-General to dispatch physicians either to several cities in Europe where some of the victims had been hospitalised or to Tehran.⁸⁸ Immediately on the adoption of Resolution 582 by the Security Council, the Secretary-General dispatched a third mission to Iran, visiting there from 26 February to 3 March.⁸⁹ The mission unanimously concluded that Iraq had used chemical weapons against Iran.⁹⁰ Both the United Nations and the US State Department stated that there was no evidence that Iran had used chemical weapons against Iraq.⁹¹ The Security Council on 21 March, with a presidential declaration, strongly condemned the use of chemical weapons and referred to Iraq as the guilty party for the first time.⁹² The Council stated that Iraq used chemical weapons against Iran in the course of the Iranian offensive into Iraqi territory.⁹³ Iraq criticised the declaration for its 'lack of balance'.⁹⁴ However, Iran welcomed the declaration and urged the Council to uphold its obligation to identify and condemn the aggressor that started the war.⁹⁵

Following several Iranian claims of Iraqi use of chemical weapons against Iranians in January, February, April, and May, on 8 May the Secretary-General reported the conclusion of the fourth mission which had investigated allegations of the use of chemical weapons. This mission had unanimously concluded that there had been

86- S/17225.

87- S/17833.

88- S/17836.

89- S/17911.

90- *Id.*

91- M. J. Ferretti, *op. cit.*, p. 222.

92- S/17932.

93- *Id.*

94- S/17934.

95- S/17949.

repeated use of chemical weapons such as mustard gas and nerve agents against Iranian forces by Iraqi forces, that civilians in Iran had also been injured by chemical weapons, and that Iraqi military personnel had sustained injuries from chemical warfare agents.⁹⁶

The Security Council in its declaration of 14 May expressed dismay at the Iraqi repeated use of chemical weapons against Iranian forces and civilians.⁹⁷ Iraq complained about the wording of both the Council's statement and the mission's report concerning the injury of Iraqi military personnel without affirming that Iran had used chemical weapons.⁹⁸

Following the dispatch of the fifth investigation mission on chemical weapons by the Secretary-General in April 1988,⁹⁹ the Security Council in Resolution 612 condemned vigorously the continued use of chemical weapons in the conflict.¹⁰⁰ Iran strongly criticised the resolution as it did not single out Iraq for using chemical weapons on civilians.¹⁰¹

In July 1988, following the requests from Iran to investigate the use of chemical weapons, the specialists sent to the area concluded that chemical weapons continued to be used by Iraqis against Iranian forces, and that their use had been intensified and become more frequent.¹⁰² In August another mission sent at Iran's request concluded that mustard gas had been used in the air attack, affecting Iranian civilians.¹⁰³ On 26 August the Council in Resolution 620 condemned the use of chemical weapons and

96. S/18852.

97. S/18863.

98. S/18870.

99. S/19823.

100. SC Res. 612, 9 May 1988.

101. S/19886.

102. S/20060.

103. S/20134.

called upon all states to apply strict control of the export of chemical products serving for the production of chemical weapons.¹⁰⁴

UN's response to attacks on civilians

Among the prohibited methods during the armed conflicts is the prohibition of attacks against the civilian population. Such prohibition has been reaffirmed in 1968 by the UN General Assembly which provided that "[t]hat is prohibited to launch attacks against the civilian population as such" and "that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".¹⁰⁵ Furthermore, Protocol I of 1977 elaborates the purposes of the principles and rules on protection of the civilian population against effects of hostilities.¹⁰⁶ However, despite the rules and restrictions on the use of methods and means of warfare, civilian population were repeatedly attacked by different warfare during Iraq-Iran war.¹⁰⁷

On 9 June 1984 the Secretary-General called upon both parties to make a solemn commitment to him to end and refrain from deliberate military attacks on purely civilian population centres.¹⁰⁸ He referred to the 5 June aerial attack on the Iranian town of Baneh which had been confirmed by ICRC.¹⁰⁹ Both parties accepted the Secretary-General's proposal and were informed that he instructed Diego Cordovez to contact them regarding verification measures.¹¹⁰

¹⁰⁴- SC Res. 620, 26 Aug. 1988.

¹⁰⁵- A/RES/2444 (XXIII)

¹⁰⁶- Two 1977 Protocols to the 1949 Conventions, 16 *ILM*, p. 1391, (1977).

¹⁰⁷- "Methods and means used have ranged from non-violent (though often vitriolic) rhetoric and propaganda, through all shapes of economic pressure to attacks with a great variety of more or less sophisticated weapons of war, including chemical weapons, and directed both against military and civilian targets." Frits Kalshoven, "Prohibitions or Restrictions on the Use of Methods and Means of Warfare", in, I. F. Dekker and H. H. G. Post, *op. cit.*, p. 97.

¹⁰⁸- S/16611.

¹⁰⁹- *Id.*

¹¹⁰- S/16614, S/16615.

By the end of June 1984 the Secretary-General, on his initiative and by informing the Security Council, dispatched United Nations observers to Iran and Iraq, including two teams each consisting of three military officers drawn from United Nations Truce Supervision Organisation (UNTSO) and one senior Secretariat official to monitor compliance with the agreement.¹¹¹ It was the first presence of the United Nations in the area during the conflict.

Although both parties had agreed to refrain from attacking cities, reciprocal attacks on civilian targets occurred in March 1985, nine months after their acceptance.¹¹² On 9 March the Secretary-General announced to both parties that such attacks must stop.¹¹³ This was followed in mid-March by a statement by the Security Council requesting an implementation of the moratorium regarding attacks against civilians.¹¹⁴

UN's response to attacks on commercial vessels

In 1984 the so-called tanker war began by Iraq to disrupt oil transportation, a disruption that in fact increased after the US forces began to escort the reflagged Kuwaiti ships.¹¹⁵ The reason of attacks against tankers carrying Iranian oil was that Iraq sought to achieve on the seas the military momentum it was then losing in the ground war and to deprive Iran of revenues from oil export.¹¹⁶ Because Iraq exported its oil through pipelines, not via tankers, Iran could not respond in kind against Iraqi shipping.¹¹⁷

111. S/16627, S/17017. The presence of these forces in the capitals four years later helped to expedite the establishment of peace-keeping forces in the area. The Blue Helmets. A Review of United Nations Peace-keeping, (The United Nations Department of Public Information, New York, 1990), p. 324.

112. Ibid, p. 240.

113. S/17018.

114. S/17036.

115. R. K. Ramazani, "Peace and Security in the Persian Gulf", in, Christopher C. Joyner (ed.), The Persian Gulf War, (Greenwood Press, USA, 1990), p. 237.

116. Case Concerning Oil Platforms, (I. R. Iran v. U. S. A.), Preliminary Objection, (1996), CR 96/12, p. 23.

117. Id.

With regard to attacking vessels belonging to other countries, on 11 May 1984, Iran stated that Iraq by its action intended to internationalise the war and that the United Nations should take immediate measures.¹¹⁸ Iran further stated that it had allocated considerable resources and manpower to guarantee the freedom and security of navigation in the Persian Gulf and would not permit the Gulf to be closed to it and be used by others against it.¹¹⁹ Iraq replied that Iran committed aggression against Kuwaiti and Saudi Arabian vessels far from the war zone, and Iraq struck against vessels entering or leaving Iranian ports as a preventive and defensive measure.¹²⁰

Earlier, on 22 September 1980, Iran had established a maritime "war zone" which was restricted to its territorial waters outside the Strait of Hormuz.¹²¹ It was not a "total exclusion zone" since Iran did not formally prohibit access to all vessels, regardless of their hostile nature, but only subjected passage of foreign vessels to previous authorisation for security reasons.¹²² Therefore, despite allegations to the contrary, Iran's "war zone" did not affect waters in the Strait of Hormuz.¹²³

Iraq also established a maritime "exclusion zone" on 12 August 1982¹²⁴ which was extended from Shatt-al-Arab into the high seas up to 65 km. from Kharg Island, on which was an important Iranian oil terminal, and announced that foreign shipping companies had only themselves to blame if their ships approached Kharg Island.¹²⁵

¹¹⁸- S/16567.

¹¹⁹- S/16585.

¹²⁰- S/16590.

¹²¹- D. Momtaz, "Commentary" in: Andrea De Guttry and Natalino Ronzitti (ed.), The Iran-Iraq War (1980-1988) and the Law of Naval Warfare, (Grotius Publications Limited, Cambridge, 1993), p. 20.

¹²²- Id. The United States expressed its willingness to exercise the right of innocent passage in Iran's territorial sea, and Iran referred to the works of the third United Nations Conference on the Law of the Sea, as well as to Article 19 of the 1982 United Nations Convention on the Law of the Sea in order to claim the right to subject innocent passage of warships through its territorial sea to previous authorisation. Ibid., p. 34.

¹²³- See the map published in: 87 Department of State Bulletin, (October 1987), p. 40.

¹²⁴- A. Gioia and N. Ronzitti, "The Law of Neutrality: Third States' Commercial Rights and Duties", in, I. F. Dekker and H. H. G. Post, op. cit., p. 236.

¹²⁵- 28 Keesing's Contemporary Archives, (1982), p. 31858.

Six Persian Gulf nations prepared a draft resolution to condemn Iran for its attacks on commercial ships to and from the ports of their countries.¹²⁶ Several countries objected to the unbalanced nature of the draft, as it did not mention the Iraqi attacks.¹²⁷ Resolution 552 of 1 June 1984, which referred to the letter from the representatives of the six countries, expressed concern about such attacks and condemned attacks on commercial ships en route to and from the ports of Kuwait and Saudi Arabia.¹²⁸ Although more than sixty ships, two-thirds of which were neutral commercial vessels, had been attacked up to that point in the war, the Security Council implicitly condemned Iranian attacks on Kuwaiti and Saudi Arabian ships.¹²⁹ The Council acted more strongly against Iran than it had ever done against Iraq, even in its responses to Iraq's aggression and use of chemical weapons.¹³⁰

Iran rejected Resolution 552 and protested that the Security Council by its one-sided resolution had given Iraq a licence for further aggression.¹³¹ It referred to Iraq's 5 June bombing of civilian targets killing 400 civilians, and warned the Council to share responsibility for the actions of Iraq perpetrated under its patronage.¹³²

SECRETARY-GENERAL'S ACTIVITIES

Secretary-General Prez de Cuellar's initiatives regarding the investigation of the use of chemical weapons have been described earlier in this chapter. His activities in respect of initiatives related to restoring peace and resolving the conflict are discussed herein.

126- S/16574.

127- S/PV. 2546, S/PV. 2545.

128- SC Res. 552, 1 June 1984.

129- Mathew J. Ferretti, "The Iran-Iraq War: United Nations Resolution of Armed Conflict", 35 *Vill. L. Rev.*, (1990), p. 216.

130- *Ibid.*, p. 217.

131- S/16604.

132- *Id.*

The Secretary-General travelled to Iran and Iraq in April 1985. He reported a wide gap between the positions of the parties.¹³³ However, he stated that he would try to continue his communication and maintain his position as "the only go-between trusted by both sides".¹³⁴ During the Secretary-General's visit, discussions had also been held in both capitals on an eight-point proposal which he had presented to the both parties in New York on 28 March.¹³⁵ The underlying premise of the proposals was that, as the Secretary-General was responsible under the Charter to seek an end to the conflict and until that was achieved he would try to mitigate its effects, both parties would enter into sustained discussion in all those respects with him.¹³⁶

In his report the Secretary-General stated that Iran believed that, since from the beginning of the conflict the Security Council had not acted impartially or justly, that in order to start a process towards peace, the Security Council should rectify its past actions.¹³⁷ He reported that he had communicated these views to Iraq.¹³⁸ Although the Secretary-General proceeded with his efforts to apply his proposals, having increasingly become more important than the other organs of the UN to mediate between the parties, the war continued.

In February 1986 Iran pushed its forces into the Iraqi Faw Peninsula. Iraq claimed that Radio Tehran announced the liberation of more than 700 square kilometres of Iraqi territory by Iranian forces.¹³⁹ This success had several benefits for Iran; first, it cut Iraq off from Persian Gulf; second, it positioned Iran to attack Basra from the South;

133. S/17097.

134. United Nations Press Release, IR/10/19, Aug. 1988, p. 6, and, N.Y. Times, 8 Apr. 1985, p. 9.

135. UN Yearbook, (1985), p. 242.

136. Id. Although Iraq did not accept the plan, the Secretary-General reported that both parties agreed that it could serve a basis for further discussion. S/17097.

137. Id.

138. Id.

139. S/17830, and, N.Y. Times, 22 Feb. 1986, p. 5.

and third, it positioned Iran to cut off Iraq's main lines of communication to Kuwait.¹⁴⁰

In response, the Security Council unanimously adopted Resolution 582 on 24 February, nearly two years after its last resolution (Res. 552).¹⁴¹ The Council emphasised the principle of the inadmissibility of the acquisition of territory by force, which had not been referred to in previous resolutions. The Council expressed its deep concern about the prolongation of the conflict for six years. It referred to the prohibition of the use of chemical weapons and attacks on civilians and neutral shipping. The Council deplored the initial acts which gave rise to the conflict.¹⁴² It called upon both parties to submit their conflict to mediation or other means of peaceful settlement of disputes. The Council for the first time referred to a comprehensive exchange of prisoners-of-war within a short period of the cessation of hostilities.¹⁴³

Iran in its comments on the resolution stated that, although unbalanced and inadequate on the whole issue of the war, the resolution was a positive step towards condemning Iraq as the aggressor and towards a just conclusion of the war.¹⁴⁴ Iran noted that it was prepared to continue its co-operation with the Secretary-General in matters relating to the rules of international law, and to prevent the expansion of the war and involvement of other countries in it. Iran observed that, while the Council was under obligation to condemn Iraq strongly by name for its repeated large-scale use of chemical weapons, the Council had taken a milder position on that point than in the

¹⁴⁰. Antony H. Cordesman, The Iran-Iraq War and Western Security 1984-87, (Jane's Publishing, London, 1987), p. 92.

¹⁴¹. SC Res. 582, 24 Feb. 1986. This resolution was adopted at the request of Iraq and seven other Arab countries after two weeks discussion in the Council where Iran did not participate.

¹⁴². Id.

¹⁴³. Id.

¹⁴⁴. S/17864.

past.¹⁴⁵ Iraq expressed its readiness to implement the resolution in good faith provided that Iran was ready to do the same.¹⁴⁶

At the request of seven Arab countries, the Security Council held five meetings between 3 and 8 October 1986 to consider the Iraq-Iran situation.¹⁴⁷ The states participating in the debate viewed with increasing concern widening of the Iraq-Iran war and its implications for the Persian Gulf region and the world at large.¹⁴⁸ The Secretary-General said that the current Council meetings had a special significance because of the sharp escalation in attacks on commercial vessels of third countries and the widening of area in which they occurred, with potential repercussions that could draw in Powers from beyond the region.¹⁴⁹ He referred to six Council resolutions that remained without satisfactory implementation for, while Iraq had been willing to comply with them, Iran had not, on the grounds that the Council had not dealt with its grievances. The Secretary-General said he had repeatedly urged Iran to present its case before the Council. He said his efforts, including his 1985 eight-point plan, had failed to achieve substantive progress towards ending the war.¹⁵⁰ Nonetheless, repeated requests from many quarters that he take new initiatives made it necessary for the Council to establish a basis on which both sides would find it possible to cooperate with the United Nations and promote the prospects for a settlement.¹⁵¹ By these words, the Secretary-General indirectly expressed his view that the Council's previous action was not sufficient to settle the dispute.

As a result of the Security Council's meetings, Resolution 588 was adopted on 8 October 1986. The resolution simply called upon Iran and Iraq to implement

145. *Id.*

146. S/17897. It is believed that despite the relative objectivity of Resolution 582, neither the United States nor Iraq's Arab allies were willing to acknowledge fully that even-handedness required an impartial evaluation of the conflict in light of antecedent events. M. J. Ferretti, *op. cit.*, p. 221.

147. S/18372.

148. *UN Yearbook*, (1986), p. 227.

149. UNIS/SG/2, 6 Oct. 1986, pp. 1-2.

150. *Id.*

151. *Id.*

Resolution 582.¹⁵² The Council decided to consider the Secretary-General's report and the conditions for establishment of a durable peace in conformity with the Charter and the principles of justice and international law.¹⁵³

It is an argument that the prolongation of war between Iraq and Iran had a cost also for the United Nations itself. It contributed to worsening tension and discouraged cooperation and progress in a highly sensitive area. It conspired against the strengthening and credibility of the system of international relations and coexistence that this organisation represents.¹⁵⁴ In fact, the Council was beginning to recognise that the war had ramifications extending far beyond Iran and Iraq, and, even to the United Nations itself.¹⁵⁵ After the Secretary-General's notes, the Council by adoption of Resolution 588 tried to start more efficient actions to end the war.

Iran transmitted on 29 May 1986 a confidential letter to the Secretary-General which was disclosed on 6 October, stating that the Iraqi war against Iran had reached a complex stage due to outside interference, which international fora were not prepared to confront. As it feared that a solution to the war was not soon to be attained, the immediate goal was to prevent it from widening.¹⁵⁶ Accordingly, Iran was committed to developing relations with countries of the region, despite the aid given by some to Iraq. It would consider the Secretary-General's suggestions for maintaining peace and security of the region on the basis of respect for territorial integrity and sovereignty and non-interference. Although confining the war might prove difficult because of the Iraqi provocations, an impartial representative on the scene would be useful in adjusting the situation.¹⁵⁷

152. SC Res. 588, 8 Oct. 1986.

153. *Id.*

154. S/PV. 2710, the notes by Mr. Delpech of Argentina.

155. *Id.*

156. S/18381.

157. *Id.*

Pursuant to Security Council Resolution 588, the Secretary-General, through his identical cables, requested Iran and Iraq's position on Resolution 582 and his eight-point plan.¹⁵⁸ Iraq in response referred to an immediate cease-fire, withdrawal of troops to the internationally recognised boundaries, exchange of prisoners of war, submission of the conflict to mediation or other means of settlement.¹⁵⁹ However, Iraq said that it did not consider the eight-point plan a balanced and practicable means for achieving a settlement.¹⁶⁰

Iran's position was that paragraphs 1 and 2 of Resolution 582 fell short of explicitly identifying Iraq as the aggressor or of measures to prevent Iraq from further using chemical weapons, attacking civilians and third-party vessels, threatening civil aviation, and violating international law.¹⁶¹ With respect to paragraph 3 Iran stated that it was inoperative because Iraq had abrogated the 1975 Treaty, invaded Iran and still sought to topple Iran's regime, therefore, Iran was determined not to sign any agreement with the current Iraqi regime.¹⁶² However, Iran was prepared to co-operate in preventing the spread of the war, exchanging prisoners, and conducting the war in accordance with international law. Regarding the eight-point plan, Iran considered that it could serve as a suitable basis for future efforts.¹⁶³

The Secretary-General in his report concluded that the positions showed no degree of coincidence that would provide a basis for giving effect to Resolution 582. He stated that the Council must persevere in establishing a basis for Iran and Iraq to co-operate in a peaceful settlement.¹⁶⁴

¹⁵⁸. Report of the Secretary-General, S/18480.

¹⁵⁹. Id.

¹⁶⁰. Id.

¹⁶¹. Id.

¹⁶². Id.

¹⁶³. Id.

¹⁶⁴. Id.

In December 1986, the Council called for the implementation of Resolutions 582 and 588 in a presidential declaration.¹⁶⁵ Iran in its reaction declared that, until the Security Council mustered the necessary political will to take a clear and unequivocal position on Iraq's responsibility for starting the war, the paragraphs of Resolution 582 about a cease-fire would remain inoperative.¹⁶⁶

The Council members held consultations on the intensified hostilities in January 1987. The Council in its presidential declaration reiterated its serious concern over the widening of the conflict.¹⁶⁷ It referred to the primary responsibility for the maintenance of international peace and security which was conferred to it by the Members of the United Nations.¹⁶⁸

Iran, which had repeatedly attacked Iraqi positions during 1982 to 1986, showed in its new attacks in 1987 that it was still fully committed to winning the war.¹⁶⁹ Most of these Iranian operations were in Iraqi territory and Iraq faced an increasing threat to Basra.¹⁷⁰ Iraq continued to strike at Iran's shuttle tankers and oil facilities. In February 1987 the United States renewed international pressure to bring Iran into negotiations. It had moved its naval forces to the Persian Gulf to underpin its commitment to its friends in the area.¹⁷¹ In response, Iran warned that the United States had heightened tension in the region by increasing its military presence and instability would increase if that presence continued.¹⁷²

165- S/18538.

166- S/18544.

167- S/18610.

168- *Id.* It is believed that the declaration was adopted by the Council as disclosures were made that American intelligence agencies had provided deliberately distorted or inaccurate intelligence data to both Iran and Iraq with the apparent goal of preventing either country from winning the war. *N. Y. Times*, 12 Jan. 1987, at A1, col. 6, quoted in, M. J. Ferretti, *op. cit.*, p. 224.

169- A. H. Cordesman, *op. cit.*, p. 122.

170- *Ibid.*, p. 140.

171- A/42/158, S/18727.

172- S/18794.

CEASE-FIRE AND ESTABLISHMENT OF UNIIMOG

On 20 July 1987 the Security Council adopted Resolution 598, expressing its determination to bring to an end the conflict between Iran and Iraq.¹⁷³ This resolution was not similar to the previous resolutions in the sense that its mandatory aspect was significant compared to the recommendatory nature of the previous ones; and, for the first time, the Council referred to the "conflict between Iran and Iraq".¹⁷⁴

The resolution explicitly referred to Articles 39 and 40 as the constitutional basis for the Council's actions. In fact, it took seven years for the Council to recognise the "situation" as the "conflict", and determine the existence of "a breach of the peace" and its effect as the 'threat to international peace and security'.

Resolution 598 in paragraph one demanded, as a first step, that Iran and Iraq observe an immediate cease-fire, discontinue all military actions on land, at sea and in the air, and withdraw all forces to the internationally recognised boundaries without delay.¹⁷⁵

In paragraph six of the resolution the Secretary-General was requested to explore the question of entrusting an impartial body with inquiring into responsibility for the conflict. The Council has, however, the authority to recognise the aggression and the responsibility of the aggressor, and it is arguably an important decision which should be made by the Council itself rather than an impartial body appointed by it. This paragraph also falls short of the next step to be undertaken once the aggressor has been recognised. The reasonable result of such inquiry should however be compensation by the responsible state towards the loss incurred on the victim state,

¹⁷³. SC Res. 598, 20 July 1987. The Council's commitment was emphasised by three top ranking officials participating in the meetings: Hans Dietrich Genscher (the West German Vice-Chancellor and Minister for Foreign Affairs), Sir Geoffery Howe (the British Foreign Secretary), and George Schultz (the American Secretary of State). S/PV. 2750.

¹⁷⁴. SC Res. 598, 20 July 1987.

¹⁷⁵. *Ibid*, para. 1.

which in turn would have a deterrent effect. It should be noted that in 1990 the Security Council not only determined the invasion of Kuwait by Iraq¹⁷⁶ but also determined that under "international law" Iraq was "liable for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq."¹⁷⁷

By Resolution 598 the Council called upon all other states to refrain from any act which may lead to further escalation and widening of the conflict.¹⁷⁸ The Secretary-General was requested to dispatch a team of United Nations observers to verify, confirm and supervise the cease-fire and withdrawal, and with co-operation of the two disputants implement the resolution to achieve a comprehensive, just and honourable settlement.¹⁷⁹ The Council urged that prisoners-of-war should be released in accordance with Geneva Convention.¹⁸⁰ The Secretary-General was requested to examine measures to enhance the security and stability of the Persian Gulf region.¹⁸¹ The resolution in paragraph ten left open the possibility of further steps to be considered for non-compliance with the resolution.¹⁸²

Following the vote on Resolution 598, the Secretary-General stated that, with adoption of the resolution, the work of achieving an Iran-Iraq settlement had just begun.¹⁸³ His view implies that in effect the previous resolutions did not entail practical effectiveness, while the latter resolution, due to its explicit nature, would be effective in resolution of the conflict.

176. SC Res. 660, 2 Aug. 1990.

177. SC Res. 674, 29 Oct. 1990.

178. SC Res. 598, 20 July 1987, para. 5.

179. *Ibid*, para. 2.

180. *Ibid*, para. 3.

181. *Ibid*, para. 8.

182. *Ibid*, para. 10.

183. *UN Yearbook*, (1987), p. 223.

Iraq accepted the resolution.¹⁸⁴ Although Iran did not reject the resolution, it stated that Resolution 598 suffered from fundamental defects and incongruities and lacked the minimum balance necessary for further constructive activities.¹⁸⁵ Iran charged the United States with preparing to widen regional turbulence by strengthening its military presence in the Persian Gulf, and asked the Secretary-General and the Council members to call on the United States to halt its expansionist policies. It also asked that France end its policy of arming Iraq.¹⁸⁶

The United States treated Iran's conditional acceptance of Resolution 598 as a rejection, and pushed for an arms embargo on Iran.¹⁸⁷ The Permanent Members of the Council agreed to postpone consideration of an arms embargo. In fact, France, China, and the Soviet Union were opposed to any sanctions.¹⁸⁸

On 31 July 1987 Iran reported two violations of its territory by the United States.¹⁸⁹ Between August and November Iran claimed that the United States forces violated Iranian territorial waters and airspace.¹⁹⁰

In October 1987 Secretary-General Perez de Cuellar tabled the implementation plan of the resolution which he had originally presented to the Council, and in the spring of 1988 he met repeatedly with representatives of both countries in an attempt to reach accord on the implementation of Resolution 598.¹⁹¹ Iran demanded a formal cease-fire linked with condemnation of Iraq for starting the war, though Iran was willing to

184. S/19045.

185. S/18993.

186. *Id.*

187. Dilip Hiro, The Longest War: The Iran-Iraq Military Conflict, (Grafton Books, London, 1989), pp. 228-9.

188. N. Y. Times, 24 Sep. 1987, p. 3.

189. S/19016.

190. S/19335, S/19369.

191. The Blue Helmets, *op. cit.*, p. 326.

observe an informal cease-fire once the impartial body was created to investigate how the war began.¹⁹²

In December 1987 the Security Council in a declaration gave the Secretary-General more flexibility by agreeing that the provisions of the resolution did not have to be implemented exactly in sequence, i.e. creating a relationship between paragraphs one and six, which was acceptable for Iran.¹⁹³

Meanwhile, the naval vessels of the countries escorting merchant shipping in the Persian Gulf were involved in incidents with the combatants. On 3 July 1988, the USS Vincennes, a United States cruiser, shot down an Iranian commercial airliner, killing all 290 civilian passengers and crew on board.¹⁹⁴

On 17 July 1988 Iran notified the Secretary-General of its formal acceptance of Resolution 598, expressing the need to save life and to establish justice and regional and international peace and security.¹⁹⁵ Immediately after Iran's acceptance of Resolution 598, the Secretary-General suggested that he would announce that he was arranging for the designation of an impartial body to determine responsibility for the hostilities. He also contemplated that such a body would start its work no later than twenty-one days after the day the cease-fire was to take effect, and would complete its work no later than ninety days after that day, and report to the Secretary-General.¹⁹⁶ Unfortunately, the Secretary-General's proposals were not acted upon.¹⁹⁷

The Secretary-General informed the Council that, as a result of his diplomatic efforts towards achieving implementation of its Resolution 598 of 1987, and in exercise of

192. M. J. Ferretti, *op. cit.*, p. 230.

193. S/19382.

194. The Blue Helmets, *op. cit.*, p. 326.

195. S/20020. .

196. R. K. Ramazani, "Who Started the Iraq-Iran War?", *op.cit.*, p. 76.

197. *Id.*

his mandate, he was calling on Iran and Iraq to observe a cease-fire and to discontinue all military actions. Both parties assured him that they would observe the cease-fire and agreed to the deployment of the United Nations forces at that time. He invited Iran and Iraq to direct talks under his auspices at Geneva.¹⁹⁸

As the peace negotiations between Iran and Iraq began at Geneva on 25 August 1988, having failed to achieve the control of the Shatt Al-Arab by invading Iran, Iraq sought to achieve some territorial gain through the peace negotiations.¹⁹⁹ Iran rejected the Iraqi claims of full sovereignty over the waterway and stated that no bargaining and no compromise; and drew what it called a "red line".²⁰⁰ At the second round of discussions which made little progress, the Secretary-General suggested that the question of sovereignty over Shatt Al-Arab be postponed until a formal treaty had been concluded.²⁰¹

In his report of 7 August 1988, the Secretary-General recommended that as soon as the cease-fire date had been set, the Council would establish an observer team to be known as the United Nations Iran-Iraq Military Observer Group (UNIIMOG), which would also assist the parties in implementing Resolution 598 as might be mutually agreed.²⁰² In another report,²⁰³ the Secretary-General referred to the mandate and provided more detailed terms of reference stating that UNIIMOG would establish cease-fire lines in co-operation with the parties; monitor compliance with the cease-fire; investigate violations; prevent, through negotiation, a change in the *status quo*; and supervise withdrawal to internationally recognised boundaries. The Security Council approved the report and decided to establish UNIIMOG for an initial period of six months,²⁰⁴ which was renewed later.²⁰⁵

198. S/20095.

199. R. K. Ramazani, "Peace and Security in the Persian Gulf War", *op. cit.*, p. 234.

200. *Id.*

201. *N.Y. Times*, 1 Oct. 1988, p.6.

202. S/20097.

203. S/20093.

204. SC Res. 619, 9 Aug. 1988.

CONCLUDING DISCUSSIONS

This section concludes the discussions made in the preceding sections of this chapter. Initially, the legal basis of the establishment of UNIIMOG is considered which was created as a result of the consent of the parties as they realised the need to end the conflict. Prior to its acceptance of Resolution 598, Iran pulled out from the lands it captured during the last few years of the war. Iraq expressed readiness to release the prisoners of war as Iran had in several occasions released Iraqi prisoners of war unilaterally. The parties were prepared to take effective action to end military hostilities in the light of realities of the conflict and the international situation.

The constitutional basis of UNIIMOG

Resolution 598 of 1987 was a mandatory call for a cease-fire within the context of Chapter VII, Articles 39 and 40.²⁰⁶ This mandatory call for a cease-fire and withdrawal of forces was made for the first time in the conflict by the Council.²⁰⁷ UNIIMOG was the first mission which was explicitly established under Articles 39 and 40. However, the mandatory call did not mean that UNIIMOG was authorised to enforce a cease-fire. It was dispatched to verify, confirm and supervise the cease-fire and withdrawal, as provisional measures.

It is believed that "in practice it can be expected that an attacked state which has conducted a successful defence will not easily comply with a mere call for a cease-fire. The Security Council will probably also hesitate in most cases to employ

205- SC Res. 631, 8 Feb. 1989.

206- N. D. White, The United Nations and the Maintenance of International Peace and Security, (Manchester University Press, Manchester, 1990), p. 191.

207- UN Chronicle, Vol. XXIV, No. 4, Nov. 1987, p. 20.

enforcement measures according to Articles 41 and 42 against the attacked state, even when this state disregards an order under Article 40".²⁰⁸

Although UNIIMOG was created to assist the parties to implement provisional measures, its presence without the consent of Iran and Iraq was impossible. Its presence depended upon the consent of the both parties and its mandate depended on an existing cease-fire. These facts make it clear that it was a typical consensual UN observation operation.²⁰⁹ Therefore, by removing the consent of host states, the peace-keeping forces should withdraw immediately.

As the Allied operations against Iraq began on 15 January 1991 the UNIIMOG personnel in Iraq were transferred to Iran.²¹⁰ From this date until 28 February 1991, which is the date of ending the mission, UNIIMOG acted only in Iran.²¹¹

The evaluation of the role of UN organs

In performing his mandate under paragraph six of Resolution 598 of 1987, Secretary-General Javier Perez de Cuellar, in one of his final acts as the United Nations Secretary-General, delivered one of his most important reports to the Security Council on 9 December 1991.²¹² Paragraph six requested the Secretary-General to "explore, in consultation with Iran and Iraq, the question of entrusting an impartial body with inquiring into responsibility for the conflict and to report to the Security Council as soon as possible".²¹³ The Secretary-General in his report noted that important

208. Bruno Simma (ed.), *The Charter of the United Nations. A Commentary*, (Oxford University Press, Oxford, 1994), p. 620.

209. N. D. White, *op. cit.*, p. 191.

210. S/22148, para. 19.

211. S/22263, para. 20.

212. S/23273.

213. SC Res. 598, 20 July 1987.

paragraphs of Resolution 598 regarding the cease-fire, withdrawal of forces to the international borders, and exchange of prisoners-of-war had been implemented.²¹⁴

The Secretary-General in his report clearly referred to Iraq's aggression against Iran in violation of the prohibition of the use of force which is regarded as one of the rules of *jus cogens*.²¹⁵ He explained that, to reach his conclusion, he relied on the sources such as: the letters of Iraq and Iran of August and September 1991 respectively to the Secretary-General at his request, giving their views on paragraph six; consultation with the parties; information from independent experts; and official documents of the United Nations since the beginning of the conflict.²¹⁶

With regard to the violations of humanitarian law and the use of chemical weapons on civilian population, the Secretary-General specified that he had to note with deep regret the experts' conclusion that "chemical weapons had been used against Iranian civilians in an area adjacent to an urban center - lacking any protection against that kind of attack".²¹⁷

However, the Secretary-General's opinion in performing paragraph six of Resolution 598 was that it would not seem to serve any useful purpose to pursue that paragraph.²¹⁸ In fact, he decided not to recommend to the Security Council to set up an impartial body to inquire into the question of who started the war because he believed that the events of the Iran-Iraq war were "well-known to the international community", and the position of the parties were "also public knowledge".²¹⁹ As mentioned earlier, the Secretary-General identified Iraq as the aggressor and the occupier of the Iranian territory.²²⁰

214. S/23273.

215. *Id.*, para. 7.

216. *Id.*, para. 4.

217. *Id.*, para. 8.

218. S/23273, para. 9.

219. *Id.*

220. *Ibid.*, paras. 6 and 7.

Iran, having been convinced that under international law Iraq was liable to pay reparations, frequently claimed as much as one trillion dollars for direct and indirect damage.²²¹ On 24 December 1991 the Secretary-General released a 191 page report which attempted to specify the direct non-military war damages to Iran at a lower 97.2 billion dollars.²²² However, the Secretary-General did not specifically call for Iraq to pay reparations; instead, he suggested a UN-convened "round table" to undertake international reconstruction aid to Iran.²²³ On the other hand, the Security Council did not make any attempt to put pressure on Iraq to compensate Iran.

By sharp contrast, the Security Council, in the case of Kuwait, determined that Iraq under international law was liable for any loss, damage or injury arising as a result of the invasion and illegal occupation of Kuwait and invited states to collect relevant information for restitution or financial compensation by Iraq.²²⁴ Moreover, Resolution 687 (paragraph 16) referred to liability of Iraq "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990".²²⁵ This was reaffirmed in Resolution 692, and furthermore, the Council decided to create a fund to pay compensation for claims that fall within paragraph 16.²²⁶ In addition, Resolution 706 provided that the full costs incurred by the United Nations in facilitating conditions for appropriate payments should be paid by Iraq to the United Nations Compensations Fund.²²⁷

The President of the International Court of Justice, Mohammed Bedjaoui, referring to the Kuwait crisis, stated that there is "absolutely no getting away from the comparison

221. R. K. Ramazani, "Who Started the Iraq-Iran War?", *op. cit.*, p. 82.

222. S/22863.

223. *Id.*

224. SC Res. 674, 29 Oct. 1990, paras. 8 and 9.

225. SC Res. 687, 8 Apr. 1991, para. 16.

226. SC Res. 692, 20 May 1991.

227. SC Res. 706, 15 Aug. 1991.

between the 1980-1988 Gulf War and the present crisis in the Gulf."²²⁸ While the Security Council in the case of Kuwait took effective measures to make Iraq compensate for damages as the result of its aggression, in the case of Iraqi aggression against Iran it did not take any measure in kind. Iraq remains liable for loss and damage as a result of its unlawful invasion and occupation of Iran.

In an evaluation of the Secretary-General's attempts during the Iraq-Iran war, it is necessary to refer to the authority given to him by the Charter to participate in attempts to end armed conflicts. Under Article 99 of the Charter, the Secretary-General may bring to the attention of the Security Council any matters that may threaten the maintenance of international peace and security. In a broad interpretation of Article 99 the Secretary-General is empowered not only to engage in fact-finding and investigation, but also is authorised to offer his good offices to engage disputants to negotiate.²²⁹ However, it seems that the Secretary-General may undertake such actions independently and outside of the formal institutional framework of the United Nations.

The Secretary-General's performance during the Iraq-Iran war included mediation efforts, fact-finding missions, efforts to end attacks on civilian populations by establishing observer mission, action for the merchant ships to leave Shatt Al-Arab safely, several reports with regard to the violation of humanitarian law and use of chemical weapons, initiation of the eight-point plan to end the war, and his initiation to prepare an operative plan to implement Resolution 598.

It is incumbent upon the Secretary-General to have a neutral role during conflicts.²³⁰ Indeed, his great impartiality was the main reason that Iran, while criticised the

228- Mohammed Bedjaoui, "The Gulf War of 1980-1988 and the Islamic Conception of International Law", in, *The Gulf War of 1980-1988*, *op. cit.*, p. 281.

229- Kaladharan Nayar, "Dag Hammarskjold and U Thant: The Evolution of Their Office", 36 *W. Res. J. Int'l. L.*, (1974), pp. 53-4.

230- Article 100 of the UN Charter.

Security Council for its bias toward Iraq, emphasised its co-operation with the Secretary-General.²³¹ It may be argued that, while the Security Council failed to perform its primary responsibility for maintenance of international peace and security, the Secretary-General, during the course of the conflict, acted independently in accordance with his duties under the Charter.

The General Assembly's performance was poor in relation to the Iraq-Iran war. Its most important action was the adoption of Resolution 37/3 in 1982.²³² The General Assembly in its resolution did not adopt any effective measures to settle the dispute peacefully, and the prolongation of war did not move the members of the General Assembly to take any initiative toward resolving the conflict or even adopt any further resolution.²³³

The Security Council failed to act decisively in the face of a blatant act of aggression, to identify the responsible state for the act of aggression and to force it to compensate the victim. The Council even failed to provide a basis on which both sides could co-operate with the United Nations and promote the prospects for a settlement as the Secretary-General emphasised on it in 1986.²³⁴ In fact, the Council in its actions played a reduced role to resolve the conflict.²³⁵

231. S/16213.

232. GA Res. 37/3, 22 Oct. 1982.

233. It should be noted that the General Assembly, according to Article 11 of the Charter, may discuss any questions relating to international peace and security brought before it by any Member of the UN or by the Security Council, or by a state which is not a Member of the UN. Iraq brought the matter to the attention of the General Assembly in 1982 resulting in adoption of Resolution 37/3. However, Iran was unwilling or unable to put the matter forward for discussion in the General Assembly. Iran may be criticised for not doing enough to explain its case in the international arena. Even though the policy of the Permanent Members of the Council was against Iran, it still had to pursue its objectives actively in the Council and Assembly.

234. UNIS/SG/2, 6 Oct. 1986, pp. 1-2.

235. M. J. Ferretti, *op. cit.*, p. 247. Some writers believe that the Council not only failed to act decisively in the face of a blatant act of aggression in fulfilment of Article 24 of the Charter, but it became a scene to exercise international revenge. R. K. Ramazani, "Who Started the Iran-Iraq War", *op. cit.*, p. 85.

The Permanent Members of the Security Council, although adopted an official attitude of neutrality, very soon increased their arms deliveries to Iraq.²³⁶ For instance, after the Iranian foray into Iraqi territory on 13 July 1982, Iraq received most of its arms from Moscow.²³⁷ The United States also had declared that it would not supply arms to either side either directly or indirectly.²³⁸ However, this US policy was applied against Iran only.²³⁹ US allowed the sale of transport planes and furnished intelligence assistance to Iraq, and from July 1987 US forces engaged in a controversial quasi-war with Iran in the Persian Gulf.²⁴⁰ France has been considered as the Iraq's biggest western arms supplier.²⁴¹

It is seen that, albeit the Security Council resolutions calling upon all states to refrain from any act which may lead to further escalation and widening of the conflict, the Council's Permanent Members, especially the Soviet Union, France and the United States, were the main Iraqi suppliers of arms and transport. This action is not only a breach of the law of war on neutrality, but also the breach of the resolutions which they themselves adopted in the Security Council.

The Security Council did not act under Chapter VII to determine the act of aggression and to enforce measures to end the aggression and occupation. Had the Council identified Iraq as the aggressor from the outset, as it did in the case of Kuwait, it would have been better able to stop a war that raged for nearly eight years and entailed nearly a million casualties. In fact, as the drafters of the Charter intended, in the case of flagrant aggression imperiling the existence of a member of the

236. A. Gioia and N. Ronzitti, "The Law of Neutrality", in, I. F. Dekker, H. H. G. Post, *op. cit.*, p. 230.

237. R. K. Ramazani, *ibid.*

238. See for example: 81 Department of State Bulletin (July 1981), p. 17; 82 Department of State Bulletin (July 1982), p. 45; 86 Department of State Bulletin (March 1986), p. 41.

239. US had imposed an embargo on 7 April 1980 in retaliation for the seizure of the US embassy staff in Tehran. Although the US staff were released and the European Communities' embargo was lifted in 1981, the United States continued its arms embargo, and from 1983 it adopted a policy to attempt to discourage arms supplies to Iran through bilateral consultations with other states (the so-called Operation Staunch). A. Gioia and N. Ronzitti, *op. cit.*, p. 229.

240. Case Concerning Oil Platforms, (I. R. Iran v. U. S. A.), Preliminary Objection, (1996), CR 96/12.

241. A. Gioia and N. Ronzitti, *op. cit.*, p. 228.

Organisation enforcement measures should be taken without delay and to full extent. The Council should at the same time endeavor to persuade the aggressor to abandon its venture, by the means contemplated in Chapter VI and by prescribing conservatory measures. Given the Iraqi triumph at the Security Council deliberations, it calculated that the Council would let the aggression stand. Otherwise, neighbouring states might have been saved from another act of aggression by Iraq.

CHAPTER SEVEN

SECURITY COUNCIL AUTHORISATION OF STATE ACTION: THE EXAMPLE OF THE KUWAIT CRISIS

In 1990 Iraq invaded Kuwait and the Security Council reacted with unusual speed and decisiveness. It imposed sanctions, naval embargo and finally authorised the use of force to liberate Kuwait. Furthermore, the Security Council undertook a humanitarian programme in Iraq to deal with the humanitarian crisis in the aftermath of the Iraqi defeat. Thus, the involvement of the UN in this case has had two dimensions: international and internal.

In this chapter a brief background to the case is presented, and the legal basis of imposing sanctions and naval embargo before and after UN authorisation is examined. The authorisation of use of force against Iraq is discussed following a review of two other cases of the Council authorisation of state action. The legality of individual states' intervention on humanitarian grounds after the cease-fire agreement is then investigated followed by an analysis of the legality of establishment of no-fly zones within Iraq.

BACKGROUND

Iraq's invasion of Kuwait in August 1990 raised a number of legal issues which could be considered from several points of view. Reference should be made to the background of the dispute between Iraq and Kuwait before dealing with these issues. The grievances may be traced to territorial claims of Iraq over Kuwait, economic and political problems which Iraq faced after its war with Iran, Kuwait's refusal to lease

two strategic islands to Iraq, Iraq's anger over Kuwait's pumping of huge quantities of oil from the Rumaila field lying underneath both countries, Kuwait's refusal to forgive Iraq's debt incurred during the Iran-Iraq war, and Iraq's accusations that Kuwait had waged economic warfare against it.¹

Part of Iraq lying between the two rivers of Tigris and Euphrates (known as Mesopotamia) was probably the earliest centre of human civilisation. It had been the site of a number of civilisations, including the Sumerians (with first city-states and inventors of writing), the Babylonians (with achievements in mathematics, astronomy and law), and the Assyrians (credited with developing literacy and art forms).² This history is perhaps a clue to the tendency of its present regime to seize what it imagined that it had in the past.

Iraq was conquered by the Arabs in the seventh century, came under Ottoman rule during the sixteenth century, and under direct Turkish administration in the nineteenth century.³ During World War I, Iraq was invaded by the British, and in 1924 the League of Nations adopted the Mandate Agreement whereby, recognising the provisions of the 1922 Treaty of Alliance which the British had concluded with the King of Iraq, the United Kingdom became the mandatory over Iraq.⁴ In October 1932, Iraq was admitted to the League of Nations and became an independent state under British protection. In fact, by a further Treaty of Alliance, signed in 1930 for a term of 25 years, Britain was granted certain military bases in Iraq, enabling Britain to lead Iraq into World War II as an enemy of the Axis. She then became a Member of the United Nations.⁵

¹- For more information see: Bishara A. Bahbah, "The Crisis in the Gulf - Why Iraq Invaded Kuwait", in, Phyllis Bennis and Michel Moushabeck (ed.), Beyond the Storm, (Canongate, Edinburgh, 1992), p. 50; and, Lawrence Freedman and Efraim Karsh, The Gulf Conflict 1990-1991, (Faber and Faber, London, 1993), pp. 42-50.

²- Michel Moushabeck, "Iraq: Years of Turbulence", in, ibid., p. 25.

³- L.C. Green, "Iraq, the UN and the Law", in, 29 Alta. L. Rev., No. 3, (1991), p. 562.

⁴- Id. Text in, 35 L. N. T. S., 14.

⁵- Id.

Similar to Iraq, Kuwait was under Ottoman rule. In the latter part of the nineteenth century, Britain developed its interest in the Persian Gulf since the proposed Baghdad railway scheme was much under discussion in the capitals of Europe.⁶ The early relationship between Britain and Kuwait which played a key part in these considerations was the secret agreement concluded between both entities in January 1899.⁷ By this agreement, the Sabah family could run internal affairs and Britain was responsible for Kuwait's defence and external relations.⁸ Under the agreement, the Sheikh of Kuwait bound himself not to receive the Agent or Representative of any Power or government at Kuwait without the previous sanction of the British Government, and not to cede, sell, lease, mortgage or give for occupation or any other purpose any portion of his territory to the other entities without the previous consent of Britain.⁹

In 1961 Britain and Kuwait terminated the 1899 Agreement and, by ending British protection, Kuwait became an independent state.¹⁰ However, when Kuwait declared its independence, Iraq laid claim to the whole of Kuwait and threatened to annex it by force.¹¹ Kuwait requested assistance from Britain which sent troops in 1961. These troops were later withdrawn and replaced by troops from member countries of the Arab League, which were in turn withdrawn in 1963 when Iraq formally recognised Kuwait as an independent state.¹²

6- E. Lauterpacht, C. J. Greenwood, M. Weller and D. Bethlehem (ed.), The Kuwait Crisis: Basic Documents, (Grotius Publications, Cambridge, 1991), p. 3.

7- Id.

8- C. U. Aitchison, A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries, (Government of India, Calcutta, 1933), p. 262.

9- Id.

10- Exchange of Notes, 19 June 1961, Royal Institute of International Affairs, Documents of International Affairs, 1961, (Oxford University Press, London, 1965), p. 771.

11- B. A. Bahbah, op. cit., p. 51.

12- The Central Office of Information, Britain and the Gulf Crisis, (HMSO, London, 1993), p. 3.

IRAQ'S VIOLATIONS OF INTERNATIONAL LEGAL RULES

In July 1990 Iraq and Kuwait became involved in a dispute over oil pricing and production levels and over Iraqi debts to Kuwait.¹³ Iraq felt that it had justifiable grievances against Kuwait to renew its territorial claims, and thus prepared itself for invading Kuwait. Although diplomatic efforts were made by members of the Arab League, and Iraq and Kuwait agreed to talks in Jeddah in August, and Iraq ensured Egypt and Saudi Arabia that it had no intention of invading Kuwait, it invaded and occupied Kuwait on 2 August 1990, announcing its annexation to Iraq on 8 August.¹⁴

The international reaction, especially that of the industrialised world, was as unanimous and strong as it was unusual. For most of the previous decade, for their own benefit, the Great Powers actively manipulated the war between Iraq and Iran,¹⁵ which was started by the invasion of the territories of the latter. In confrontation between Iraq and Kuwait, the United States to its credit decided to challenge the invasion of Kuwait, and turned to the United Nations to seek sanctions under Chapter VII of the Charter and to bring along much of the rest of the international community.¹⁶

Iraq's invasion of Kuwait

Within hours of Iraq's invasion of Kuwait on 2 August 1990, the Security Council held a meeting at the request of Kuwait and the United States.¹⁷ At this meeting most of the Members of the Security Council condemned Iraq's action as an obvious aggression and asked the Council to perform its responsibility to keep international

13- *Id.*

14- *Id.*

15- William J. Durch, "The Iraq-Kuwait Observation Mission", in, William J. Durch (ed.), The Evolution of UN Peacekeeping, (St. Martin's Press, New York, 1993), p. 258.

16- *Ibid.*, p. 259.

17- S/21423, S/21424.

peace and security.¹⁸ The British representative to the UN stated that Iraq's action was the breach of the UN Charter and the Charter of the Arab League.¹⁹ He added that this was not the first time that Iraq had invaded the territory of a neighbour.²⁰

The Security Council at the same meeting on 2 August adopted Resolution 660 in which it condemned the Iraqi invasion of Kuwait and determined that there existed a breach of international peace and security as regards the Iraqi invasion of Kuwait.²¹ The Council expressly referred to Articles 39 and 40 of the Charter as the legal bases for its action, and demanded Iraqi withdrawal from Kuwait.²²

In its resolution, the Security Council used the word "invasion" instead of "aggression". Two reasons may be considered for this wording: first, the fear of the Soviet veto on Resolution 660, and secondly, the legal consequences that international rules has envisaged for aggression.²³ It seems at that stage the Council preferred to leave room for negotiations.

Annexation of Kuwait

Following the invitation made by Saudi Arabia, on 7 August President Bush ordered US ground and naval forces to go to Saudi Arabia, and nearly 50 warships from the US, USSR, Britain and France converged on the Persian Gulf.²⁴ Iraq's President, Saddam Hussein, sent a message to President Mubarak of Egypt saying that Iraq

18. S/PV. 2932, 2 Aug. 1990, p. 19.

19. Id.

20. In fact, the British representative implicitly referred to the Iraq's attack on Iran in 1980, which has never been expressly stated as invasion during the war between Iraq and Iran.

21. SC Res. 660, 2 Aug. 1990.

22. Id.

23. For example Chapter VII of the Charter has provided that by the recognition of an aggressor, the Security Council should act to end the aggression. Also, Article 5(2) of the UN Definition of Aggression (GA Res. 3314 of 1974) has provided "[a] war of Aggression is a crime against international peace. Aggression gives rise to international responsibility".

24. P. Bennis and M. Mushabeck, op. cit., p. 365.

would withdraw its troops according to a timetable and asked Mubarak to prevent a foreign intervention which would obstruct such a withdrawal.²⁵

On 8 August 1990, when Iraq declared the annexation of Kuwait, the United States called on NATO members for a "multinational" force to join in the Persian Gulf to defend Saudi Arabia because independence of the latter was of "vital interest" to the US and that a disruption of Saudi oil supply represented a threat to US "economic independence".²⁶

The Security Council met on 9 August to discuss a draft resolution. That draft was adopted unanimously as Resolution 662 in which the Council described the annexation as "null and void" and called upon all states and international organisations "not to recognise that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of that annexation".²⁷

In a Council's meeting on 9 August, the Iraqi delegation quoted some passages from the Revolutionary Command Council's resolution in Iraq as follows: "[i]n the past, the Arab nation was one and indivisible. The colonisers re-drew the geopolitical map of the region in order to weaken the Arab States...They transformed the Arab nation into 22 Arab countries...In that way...Kuwait was separated from Iraq...[t]hat is why the Iraqi Revolutionary Command Council decided to restore to our country the portion taken away from it..."²⁸

At the same meeting the British delegation stated that on 4 October 1963 Iraq formally recognised Kuwait's sovereignty and independence, and Iraq should stand by that undertaking now.²⁹

25- *Id.*

26- *Id.*

27- SC Res. 662, 9 Aug. 1990, paras. 1 and 2.

28- S/PV. 2934, 9 Aug. 1990, pp. 42-47.

29- *Ibid.*, pp. 16-18.

Indeed, the annexation of Kuwait was a clear violation of the UN Charter and the basic norms of international law. The world has come a long way since the days when states tried to expand and annex other states around them. The Council tried to restore the sovereignty and territorial integrity of Kuwait.

Foreign nationals and diplomatic missions

On 14 August, the five permanent members of the Security Council met to discuss the US unilateral decision to enforce its embargo.³⁰ At this meeting, the Soviet Union proposed that naval forces should be placed under a UN umbrella.³¹

On 16 August, UN Secretary-General Perez de Cuellar announced that authorisation for the use of force required a separate UN resolution because a military action to enforce the embargo could breach the UN Charter.³² Meanwhile many foreign nationals particularly from western countries were barred from leaving Iraq and Kuwait. Some of these foreign nationals under Iraqi control were taken from Iraqi-occupied Kuwait to Iraq and some were placed at strategic sites as human shields against possible attack by the forces ranged against Iraq.³³

On 18 August, the Iraqi representative stated that the departure of all foreign nationals depended on the cessation of armed actions by the United States and the United Kingdom and on the unhindered delivery of food and medicine to Iraq.³⁴

³⁰- P. Bennis and M. Moushabeck, *op. cit.*, p. 365.

³¹- *Id.*

³²- *Id.*

³³- The Central Office of Information, *op. cit.*, p.10.

³⁴- S/PV. 2937, 18 Aug. 1990, pp. 42-51.

The Security Council, in Resolution 664 of 18 August, demanded that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries and grant immediate and continuing access of consular officials to them.³⁵

Following the reported violations of diplomatic premises in Kuwait, the Security Council held a meeting on 16 September. Iraq stated that "[t]he actual instructions given to the local authorities in the province of Kuwait are very clear. These instructions stipulate that these residences should not be entered, although they no longer have diplomatic immunity".³⁶ Iraq, by reference to the historical claims, stressed that Kuwait was part of its territory and thus in a single territory two diplomatic missions from one foreign country were unacceptable.³⁷

In Resolution 664, the Council had demanded that Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel, and strongly condemned aggressive acts perpetrated by Iraq against diplomatic premises and personnel including the abduction of foreign nationals in Resolution 667 of 16 September. The Security Council referred to the Vienna Conventions of 1961 on Diplomatic Relations and 1963 on Consular Relations; Iraq was a party to both.³⁸

The Council considered Iraq's action as contrary to the Council's decisions, the international conventions mentioned above and international law.³⁹ Resolution 667 recalled that Iraq was fully responsible for any violence against foreign nationals and demanded that Iraq fully comply with its international obligations.⁴⁰

³⁵- SC Res. 664, 18 Aug. 1990.

³⁶- S/PV. 2940, 16 Sep. 1990, pp. 38-40.

³⁷- Id.

³⁸- SC Res. 667, 16 Aug. 1990.

³⁹- Id.

⁴⁰- Id.

On 17 September, the European Community, in response to Iraq's violations of diplomatic privilege, agreed to expel all Iraqi military attaches.⁴¹ Iraq in retaliation took measures against diplomatic representatives from western countries in Baghdad.⁴²

The Security Council adopted Resolution 674 on 29 October by which it condemned hostage-taking by Iraq and the mistreatment of Kuwaitis and foreign nationals, destruction of Kuwaiti demographic records, forced departure of Kuwaitis and relocation of the population in Kuwait, and unlawful destruction of properties in Kuwait.⁴³ States were invited to supply the Council with information regarding the violations of the legal rules by Iraq against their nationals.⁴⁴

Resolution 674 stated that Iraq was liable under international law for any loss, damage or injury arising in regard to Kuwait and foreign nationals and corporations as a result of the invasion and occupation of Kuwait.⁴⁵ States were invited to collect information regarding such claims, with a view to establishing arrangements for restitution or financial compensation.⁴⁶

Although women and children and some of the sick and elderly were allowed to leave. Iraq continued to detain foreign nationals as hostages until December.⁴⁷ On 6 December 1990 the Iraqi President announced that all foreign nationals held in Iraq and Kuwait would be unconditionally released.⁴⁸

41- The Central Office of Information, *op. cit.*, p. 12.

42- *Id.*

43- SC Res. 674, 29 Oct. 1990.

44- *Id.*

45- *Id.*

46- *Id.*

47- The Central Office of Information, *op. cit.*, p. 10.

48- *Id.*

LEGAL BASIS OF UN ACTIONS PRIOR TO RESOLUTION 678

Imposition of sanctions

On 6 August, four days after the invasion of Kuwait, the Security Council met to consider a draft resolution which had been substantially prepared by the United States,⁴⁹ and in a swift action determined that Iraq failed to comply with Resolution 660 for immediate withdrawal.⁵⁰ As a consequence, the Council adopted Resolution 661 and decided to impose a trade and financial embargo on Iraq with effect from the same date, i.e. 6 August 1990.

Resolution 661 provided that all States should prevent import from Iraq or Kuwait of exported goods therefrom after the invasion, and export or trans-shipment of any commodities or products to Iraq or Kuwait.⁵¹ The Council also decided that all States should not make available to Iraq any funds or other financial resources.⁵² Paragraph 9 of the resolution determined that the resolution should not prohibit assistance to the Government of Kuwait, and did not recognise any regime set up by the occupying power.⁵³ The exceptions to the sanctions were payments exclusively for strictly medical or humanitarian purposes in humanitarian circumstances and foodstuffs.⁵⁴

Although the Security Council had imposed sanctions on several countries, the sanctions it imposed on Iraq were unique in the United Nations' history. The Council in its previous actions had imposed sanctions on specific products such as oil and military equipment.⁵⁵ This can be compared with the total sanctions imposed by the Council on Iraq of all products and economic, financial and military relationship with

⁴⁹- S/21441.

⁵⁰- SC Res. 661, 6 Aug. 1990.

⁵¹- *Id.*, para. 3.

⁵²- *Id.*, para. 4.

⁵³- *Id.*, para. 9.

⁵⁴- *Id.*, para. 4.

⁵⁵- SC Res. 181, 7 Aug. 1963; SC Res. 418, 4 Nov. 1977.

Iraq except for medicine and foodstuff in humanitarian circumstances. The European Community however had frozen Iraqi and Kuwaiti assets and had imposed an embargo on imports of Iraqi oil two days before the UN authorisation.⁵⁶

At the Council meeting, during the discussion on the draft resolution, the Iraq delegation stated that his Government on 3 August announced that it intended to start the withdrawal of its forces on 5 August, and in fact they had started to withdraw.⁵⁷ He believed that the draft resolution did not help to resolve the crisis nor did it help the Iraqi troops to withdraw.⁵⁸ The US delegation stated that Iraq through its actions rejected Security Council Resolution 660 and the calls from the region and from the non-allied states; its response to the world community had been scorn.⁵⁹

The Canadian delegation expressed the view that the draft resolution once adopted by the Council would nevertheless impose one of the broadest set of sanctions ever put in place against a State Member of the United Nations, covering all aspects of military, economic and financial relations.⁶⁰

The Cuban and Yemeni delegations who abstained from voting believed that the draft would impede efforts of the Arab States to find a solution to the conflict.⁶¹ The Cuban delegate stated that the draft resolution would facilitate the interventionist actions taking place in the region and it was far from contributing to progress in the settlement of the conflict. The imposition of the sanctions, he said, at that time would instead tend to complicate the situation.⁶²

56- P. Bennis and M. Moushabeck, *op. cit.*, p. 364.

57- S/PV. 2933, 6 Aug. 1990, pp. 11-15.

58- *Id.* The Iraqi delegation referred to the second paragraph of the preamble to the resolution regarding "the invasion by Iraq" and said that this term was not used during the US invasion of Panama or Grenada, nor was it used when Israel invaded its neighbours. He believed that the embargo draft resolution was prepared by a single state with pressure on the others which made the draft resolution null and void.

59- *Ibid.*, p. 16.

60- *Ibid.*, p. 23.

61- *Ibid.*, pp. 37-53.

62- *Ibid.*, pp. 37-48.

Legal basis of sanctions

Although Article 41 of the UN Charter was not mentioned in Resolution 661, it is clear from this Article that the Council is empowered to take measures not involving the use of force to give effect to its decisions. The Members of the United Nations should apply such measures since any decision adopted by the Security Council was legally binding under Article 25. Before the crisis in the Persian Gulf, and during the Cold War period, the Security Council had imposed mandatory measures under Article 41 only twice, following an expressed or implied finding under Article 39. These sanctions were imposed against Southern Rhodesia between 1966 and 1979 and against South Africa in 1977.⁶³ By the end of the Cold War, the use of economic sanctions increased. Since 1990, economic sanctions have been used against Iraq, Yugoslavia, Somalia, Liberia, Libya, Haiti and parts of Angola.

In 1990, the Security Council imposed the widest set of sanctions, the implementation of which had to be monitored by the Council. Excluded in Resolution 661 were the sale or supplies intended strictly for medical purposes and in humanitarian circumstances, foodstuffs, and payments for the above purposes. However, the Council did not determine how supplies for civilians would be sent to Iraq and, also, the phrase "in humanitarian circumstances" added to the ambiguity. The Security Council removed the ambiguities of Paragraphs 3 and 4 of Resolution 661 as will be discussed later.

⁶³- For more information about the Council's resolutions in these cases see: 34 UN SCOR Resolutions 15, (1979), and, 41 UN SCOR Resolutions 17, (1986).

Air embargo

Included in Article 41 of the UN Charter, among the measures not involving the use of force, is the interruption of air communications to give effect to the decisions made by the Security Council.⁶⁴ As a precedent for an embargo, on 6 November 1962, the General Assembly adopted Resolution 1761 by which States were asked to prevent landing of the aircraft belonging to or registered in South Africa. This decision by the General Assembly had a recommendatory impact. Also, the Security Council on 16 December 1966 by adopting Resolution 232, took the first mandatory enforcement action in the organisation's history against Southern Rhodesia in accordance with Articles 39 and 41.⁶⁵ These actions included an air embargo against Southern Rhodesia.

On 25 September 1990, an air embargo was instituted by the Security Council against Iraq and Kuwait. By tightening the sanctions regime, the Council extended the existing embargo on trade and financial dealing with Iraq and Kuwait to air traffic.⁶⁶ To ensure respect for its decisions, the Council referred to Articles 25 and 48 of the Charter.

Resolution 670, by reference to Article 103 of the Charter, determined that, despite the existence of any obligations conferred or imposed by any international agreement or permission granted before the date of the resolution, all States should deny permission to any aircraft to take off from their territory for Iraq or Kuwait, except to carry food in humanitarian circumstances, subject to authorisation by the Council or

⁶⁴- Article 41 of the Charter.

⁶⁵- Joseph Murphy, "De Jure War in the Gulf, *Lex Specialis* of Chapter VII Actions Prior to, During, and in the Aftermath of the United Nations War Against Iraq", *N. Y. Int'l L. Rev.*, (1992) Summer, p. 74.

⁶⁶- SC Res. 670, 25 Sep. 1990.

the Committee established by Resolution 661 and in accordance with Resolution 666, or supplies intended strictly for medical purposes or solely for UNIIMOG.⁶⁷

Resolution 670 provided that all States should notify in a timely fashion the Committee established by Resolution 661 of any flight between its territory and Iraq or Kuwait to which the requirement to land in Paragraph 4 does not apply.⁶⁸ The Council in its resolution emphasised that, under Article 103, obligations of the Members under the Charter should prevail on obligations under any other international agreement. The Council implicitly notified that the provisions of the resolution on air embargo prevail over the Chicago Convention on Civil Aviation of 1944.

The Security Council also called upon all States to detain any Iraqi ships entering their ports, except as necessary to safeguard human life. Resolution 670 affirmed that the United Nations, Specialised Agencies and other international organisations in the UN system were required to take measures as may be necessary to give effect to the Council's decisions.

However, Paragraph 7 of the resolution stated that such measures should be consistent with international law, including the Chicago Convention. It seems that the Council implicitly determined that, in implementing the air embargo, force should not be used. The Chicago Convention in Article 3 (amended in 1984) has provided that States should not use military equipment against civil flights. It was not clear whether passenger aircraft were included in the provisions on the air embargo. Because of the existence of danger for such aircraft, and the Council's determination to implement air embargo, States preferred to prevent such aircraft landing in Iraq and Kuwait.

⁶⁷- *Id.*, para. 3.

⁶⁸- *Id.*, para. 6.

Blockade and enforcement of sanctions

A blockade is applied by a belligerent's warships preventing access to the enemy's coasts, or part of them, for the purpose of preventing entry and exit of vessels and aircraft of all states.⁶⁹ The Declaration of Paris of 1856 laid down that for a blockade to be legally operative, it should be effective. However, the Declaration of London of 1908 severely restricted rights of blockade, but was not ratified.⁷⁰ The League Covenant did not envisage blockade as a measure to enforce economic sanctions.

The United Nations Charter, in Article 42, has provided that the Security Council may take actions such as blockade to maintain or restore international peace and security. In 1966 the first mandatory sanctions measures were established against Rhodesia by Resolution 221 of 9 April 1966.⁷¹ This resolution determined that the situation constituted a threat to the peace, and called upon Portugal not to allow passage of oil to Southern Rhodesia. Moreover, the United Kingdom was directed "to prevent, by use of force if necessary, oil destined for Southern Rhodesia".⁷²

A few weeks after the embargo resolution (Resolution 661 of 6 August 1990), the Council found that Iraqi vessels were still being used to export oil and adopted Resolution 665 on 25 August which aimed at ensuring stricter compliance with the economic sanctions against Iraq. The Security Council called upon those Member States co-operating with the Government of Kuwait which were deploying maritime forces in the Persian Gulf area to use such measures commensurate to with specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes

⁶⁹- Robert L. Bledsoe and Boleslaw A. Boczek, The International Law Dictionary, (ABC-Clio Inc., USA, 1987), p. 355.

⁷⁰- David M. Walker, The Oxford Companion to Law, (Clarendon Press, Oxford, 1980), p. 137.

⁷¹- SC Res. 221, 9 Apr. 1966.

⁷²- Id.

and destinations and to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661.⁷³

Although the Council referred to several states taking measures to halt shipping, later Resolution 670 of 25 September called upon all states to detain any ships of Iraqi registry which enter their ports and which were being or had been used in violation of Resolution 661, or to deny such ships entrance to their ports except in circumstances recognised under international law as necessary to safeguard human life.

Resolution 665 also requested those states referred to in paragraph 1 to use as appropriate mechanisms of the Military Staff Committee and, after consultations with the Secretary-General, to submit reports to the Security Council and its committee established under Resolution 661, to facilitate the monitoring of the implementation of this resolution.

Resolution 665 was different from the embargo resolution (661) since it authorised the use of force to halt shipping in the area. As mentioned earlier, the only example of authorising use of force to enforce sanctions was a specific authorisation calling on the United Kingdom to use naval force to block a particular vessel from delivery of oil to Mozambique that was destined for Southern Rhodesia.⁷⁴

The legal basis of Resolution 665

In an analytical discussion of the use of force authorised by Resolution 665, it is first necessary to consider the arguments presented by several countries to the draft resolution⁷⁵. The US delegation, as one of the sponsoring governments of the draft resolution, believed that "[t]he authority granted in this resolution is sufficiently broad

⁷³- SC Res. 665, 25 Aug. 1990.

⁷⁴- SC Res. 221, 9 Apr. 1966.

⁷⁵- S/21640.

to use armed force - indeed, minimum force - depending upon the circumstances which might require it".⁷⁶ The French delegation, by stating that "an embargo without sanctions would be a fiction", emphasised that the resolution must not be understood as a blanket authorisation for the indiscriminate use of force.⁷⁷ The British delegation reminded the Council that sufficient legal authority to take action existed under Article 51 of the Charter.⁷⁸

There were several objections to Resolution 665. The Chinese delegation stated that "we are in principle against military involvement by big powers and are not in favour of using force in the name of the United Nations and therefore measures must be taken within the framework of Resolution 661 which did not provide for the use of force."⁷⁹ He stated that the Chinese delegation had proposed a deletion of the reference to "minimum use of force" from the previous draft resolution. The present draft resolution, he continued, was amended and its reference to using "such measures commensurate to the specific circumstances as may be necessary" did not contain the concept of using force.⁸⁰ Although China, Colombia and Malaysia had objections to the resolution, their votes were affirmative.

The delegate of Yemen, who abstained from voting, explained that Resolution 665 moved too quickly towards the use of force to impose the embargo. He thought that, according to paragraphs 6 and 10 of Resolution 661, the Security Council should wait for the report of the Secretary-General on the progress of the implementation of Resolution 661 (the first report should have been submitted within thirty days), and the report of the Committee, established by the Council, with its observations and recommendations.⁸¹

⁷⁶- S/PV. 2938, 25 Aug. 1990, p. 26.

⁷⁷- *Ibid.*, p. 31.

⁷⁸- *Ibid.*, p. 47.

⁷⁹- *Ibid.*, p. 52.

⁸⁰- *Id.*

⁸¹- *Ibid.*, p. 7.

The Cuban delegation pointed out the ambiguity of the resolution with regard to the unknown members of those forces imposing the blockade.⁸² In Resolution 221 of 9 April 1966, the Security Council expressly determined that the United Kingdom could use naval force to enforce the blockade against Southern Rhodesia.

Another question which arose in adopting Resolution 665 was whether the air and land forces could use force to implement Resolution 661. However, Resolution 665 did not determine that naval, air and land forces could work together.

The Security Council in Resolution 665 did not refer to specific articles of the Charter and it provided that States co-operating with the Government of Kuwait could use force to enforce the blockade. This resolution did recall Resolutions 660 and 661 which contained references to Chapter VII and Article 51. However, these recalls in previous resolutions do not make clear the legal basis of Resolution 665.

In fact, adopting this resolution was the first in the UN's 45-year history by which such sweeping military authority had been conferred without a UN flag or command.⁸³ The United States and the United Kingdom invoked Article 51 to contribute forces to a multinational effort to institute embargo or blockade.⁸⁴ However, the Soviet representative cautioned that it was against reliance on force and against unilateral decisions, and that the wisest way to act in conflict situations is to make collective efforts and to make full use of the machinery of the UN, and declared himself prepared to undertake consultations immediately in the Security Council's Military Staff Committee.⁸⁵ The Soviet representative implicitly referred to Articles 42 and 43 of the Charter.

⁸²- *Ibid*, p. 11.

⁸³- Sciolino, "Putting Teeth in an Embargo: How US Convinced the UN", *N. Y. Times*, 30 Aug. 1990, p. 1.

⁸⁴- S/PV 2934, pp. 7, 18.

⁸⁵- *Ibid*, p. 12.

During the discussions on Resolution 665, upon insistence by the Soviet Union, supported by China, the US accepted two modifications to the draft resolution. It was agreed that the "use of minimum force" be substituted by "measures commensurate to the specific circumstances", and other states were invited to cooperate to ensure compliance "with maximum use of political and diplomatic measures".⁸⁶ However, the legal basis of the blockade remained unclear.

The establishment of a blockade by the Council should be under Article 42. However, a blockade established under Article 42 by the Security Council has direct relevance to Article 43. This article has provided for special agreements between the Council and groups of member states contributing force necessary for the maintenance of international peace and security. Such agreement has never been concluded in the history of the United Nations, and thus, arguably, the preconditions for Article 42 have never been satisfied.

Retrospectively, the blockade in Resolution 665 should have been under Chapter VII, though none of its articles, in particular Articles 42 and 51 (which are the only exceptions to use of force) was referred to in this resolution. As mentioned earlier, applying collective self-defence needs to meet certain conditions, and there is doubt that all those conditions have been met in the case of Kuwait.

States' practice

Within a few weeks of adopting the embargo resolution (661) the United States ground, naval and air forces were present in the Persian Gulf, and on 16 August 1990 the United States formally informed the Security Council that, under Article 51 of the Charter, at the request of the Government of Kuwait, the US military forces joined

⁸⁶- Sciolino, *op. cit.*, p. 1.

this government in taking action to intercept vessels seeking to engage in trade with Iraq or Kuwait in violation of the mandatory sanctions imposed by Council Resolution 661. The US declared that its military forces would use force only if necessary.⁸⁷

There were countries which had objections to the US action in the Persian Gulf. Libya, in a letter to the Secretary-General stating its concern, argued that US actions to intercept and inspect shipping in the Persian Gulf and the neighbouring maritime areas were legally void and constituted a flagrant violation of the UN Charter, as no state was entitled to act alone in such a situation, and orders should be issued by the Security Council.⁸⁸ France and Italy, despite their naval presence, stated that they would not take part in the naval blockade unless its implementation was authorised by the Council.

The legality of the blockade prior to Resolution 665

The United States, on 16 August, in its formal declaration of use of force to prevent vessels from violating trade sanctions contained in Resolution 661, expressly referred to Article 51 and the exercise of the inherent right of individual and collective self-defence, in response to the Iraqi armed attack on Kuwait.⁸⁹ In effect, the United States announced a blockade against Iraq just two weeks after the invasion of Kuwait and before authorisation by the Security Council, although the Council had provided in Resolution 661 that the Secretary-General should report to the Council the progress of the implementation of this resolution within thirty days.

⁸ 21537.

⁸⁸ 21560.

⁸⁹ 21537.

The UN Secretary-General argued that a "blockade" as such required the approval of the Security Council since it fell under Article 42.⁹⁰ In response to the press, he said "I understand that the word 'blockade' from a United Nations point of view is not the right one. What we are seeing is that in agreement with the Governments of Saudi Arabia and Kuwait, some decisions have been taken by the United States, France, Britain and other countries - and even Arab countries - but not in the context of the United Nations resolution. Only the United Nations, through its Security Council resolutions, can really decide about a blockade. That's why I think we have to avoid the word 'blockade'"⁹¹

In order to consider the legality of the blockade in the context of self-defence prior to Resolution 665, the conditions of self-defence should first be explained. According to Article 51 of the Charter, if "an armed attack" occurs, the victim state may exercise its right to self-defence. To limit the use of force by states, because of its serious consequences, the justification of self-defence must be carefully investigated and its conditions fully examined. Article 51 says "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Member States in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." In the case of Kuwait, except an armed attack which had occurred, other conditions for the existence of the right to self-defence need to be discussed with reference to previous law and practice.

⁹⁰- United Nations Press Release, 16 Aug. 1990.

⁹¹- Id.

In the *Caroline* case, where an American ship, used by Canadian rebels to harass the authorities in Canada, was attacked and destroyed by the British, questions were raised about the legality of the British action. The Webster formulation is regarded as the *locus classicus* of customary self-defence. He stated that Britain should show a necessity of self-defence "instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁹² In the case of the *Corfu Channel* the International Court of Justice emphasised necessity and proportionality.⁹³ The International Court of Justice in the *Nicaragua* case also referred to specific conditions which have to be met for the exercise of collective self-defence such as necessity and proportionality.⁹⁴

To justify the inherent right of self-defence in the case of Kuwait the existence of all conditions should have been established. Perhaps the use of force to inspect ships with military cargo constituted the condition of necessity, while the use of force to inspect trade ships or vessels carrying food stuffs and medicine lacked the condition of necessity required for self-defence, although it may be argued that without inspection of a cargo its category as military, food or medicine cannot be established. In fact, in the middle of August, the US spokesman had stated that "it appears far too early to consider any food stuffs as being in the humanitarian need category".⁹⁵ Thus, in the view of US authorities, both supply of military and food stuff cargoes would imply the condition of "necessity" to apply the right of self-defence.

The embargo resolution (661) referred to economic sanctions which are provided for in Article 41. This article allows measures "not involving the use of armed force" which might be decided upon by the Council. Therefore, the blockade imposed on Iraq after Resolution 661 would come under Article 42. However, this resolution did not provide that States could use force for a blockade under Article 42.

⁹²- 29 *BFSP* 1132-1138; 30 *BFSP* 195-196.

⁹³- *Corfu Channel Case*, ICJ Rep. (1949), pp. 4-35.

⁹⁴- Case Concerning Military and Paramilitary Activities in and against Nicaragua, *ICJ Rep.*, (1986), para. 194.

⁹⁵- *The Times*, 14 Aug. 1990.

Supervision and limitation of blockade

Under paragraph 1 of Resolution 661, Member States co-operating with the Government of Kuwait which were deploying maritime forces to the area were called upon to use such measures under the authority of the Security Council to impose a blockade.

Several countries, including Yemen, Cuba, Colombia and Malaysia, had objections to the mechanism by which the blockade should be applied. The Cuban delegation asked which Member State should use force, who should command them, and against whom these forces should operate.⁹⁶ The delegation stated that, if the Security Council was really acting responsibly and seriously, then it should have drawn on those articles of Chapter VII that clearly spell out how this responsibility and authority should be exercised.⁹⁷

The Colombian delegation stated that the Security Council must implement Article 43 and be prepared to deal with situations of this kind.⁹⁸ The Malaysian delegation, with reference to the realities of the world community, believed that an international force would be under a blue flag enforcing United Nations injunctions.⁹⁹

Paragraph 4 of Resolution 665 had envisaged using, as appropriate, mechanisms of the Military Staff Committee. The Soviet delegation had earlier announced that its country would co-operate with other countries using the machinery of the Military Staff Committee.¹⁰⁰ However, such a committee did not play an effective role in the course of the blockade because the powers involved were unwilling to surrender their

⁹⁶- S/PV. 2938, 25 Aug. 1990, p. 11.

⁹⁷- *Id.*

⁹⁸- *Ibid.*, p. 21.

⁹⁹- *Ibid.*, p. 32.

¹⁰⁰- *Ibid.*, p. 41.

individual right of action in this way, and their forces remained under their individual commands. They co-ordinated their efforts primarily by dividing the area to be controlled in accordance with the advice of the United States fleet commander.¹⁰¹ It would have been more appropriate if the Security Council had provided special measures to control the blockade under its supervision.

The limitation of the area in which the enforcement of the blockade had to be exercised was not clarified in Resolution 665. Although in the case of Southern Rhodesia the United Kingdom was authorised to use force to impose blockade on a specific port, the Council in the Kuwait crisis did not determine the limitation of imposing the blockade. It is therefore understood that maritime forces could use force to inspect and verify the cargoes even out of the Persian Gulf. It seems that the Security Council preferred to implement the blockade rather universally, while in the only precedent, namely the case of Rhodesia, the United Nations restricted the blockade to one port.

AUTHORISATION OF THE USE OF FORCE

Before an analytical discussion of Resolution 678, it is necessary to discuss initially the instances of the Security Council's permission to use force in its history. The first instance of use of force by the United Nations was the case of Korea in 1950. The case of Kuwait is the second instance of the use of force by the United Nations. The third and the last instance of authorisation of use of force by the UN is the case of Haiti. The cases of Korea and Haiti are explained first, and then the case of Kuwait will be discussed in more detail.

¹⁰¹- L. C. Green, *op. cit.*, p. 568.

First instance of use of force by UN: Korea

On 25 June 1950 by a letter from the United States and a cablegram from the United Nations Commission on Korea, the Secretary-General was informed of the 25 June invasion by North Korean forces of the territory of the Republic of Korea.¹⁰² On the same day the Security Council convened a meeting at the request of the United States. At this meeting the Secretary-General declared that the actions of the North Korean forces were in direct violation of the General Assembly Resolution 293(IV) of 21 October 1949. He characterised the situation as a "threat to international peace" and called on the Council to take steps necessary to re-establish peace in the area.¹⁰³ The Security Council in Resolution 82 of 25 June noted that the armed attack on the Republic of Korea constituted a breach of the peace and called for the immediate cessation of hostilities.¹⁰⁴ In this resolution the Council requested the UN Commission on Korea to observe the withdrawal of the North Korean forces to the 38th parallel.¹⁰⁵

On 27 June, US President Truman in an official statement stated that invading forces from North Korea had not withdrawn to the 38th parallel and also that he had ordered the United States air and sea forces to give the (South) Korean Government troops cover and support.¹⁰⁶ On the same day, the United States proposed a draft resolution which was adopted by the Security Council.¹⁰⁷ The Council in Resolution 83 of 27 June, with reference to the appeal from South Korea to the United Nations for

¹⁰². S/1495, S/1496.

¹⁰³. SCOR, 5th Sess., No. 15, 473rd Mtg., p. 3. By Resolution 293(IV) the General Assembly had authorised the United Nations Commission on Korea to appoint observers and to utilise the services of good offices to observe and report any developments that might lead to military conflict in Korea and to assist in bringing about the unification of Korea. GA Res. 293(IV), 1 Oct. 1949.

¹⁰⁴. SC Res. 82, 25 June 1950.

¹⁰⁵. Id.

¹⁰⁶. 1950 Pub. Papers, p. 492. It is believed that the US President used military force in Korea without congressional authority necessary under both the US Constitution and the UN Participation Act of 1945. for more information see: Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?", 89 A.J.L.L., (1995).

¹⁰⁷. S/1508/Rev. 1.

immediate and effective steps to secure peace and security, "recommended" that the Members of the UN furnish military measures to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.¹⁰⁸ Seven states voted in favour, while Yugoslavia voted against, and Egypt and India abstained from voting. The Soviet Union which was absent from the Council at the time of voting, contested the legal validity of Resolution 83, contending that such an important decision could be made only with the concurring votes of all five permanent members of the Security Council.¹⁰⁹

By adopting Resolution 83, for the first time in the history of the United Nations, the Security Council recommended the use of force. At the 475th meeting of the Council, on 30 June, the representative of Egypt stated that, for two reasons, he abstained from voting. He stated that the conflict was a new phase in the series of the divergences between West and East which threatened world peace and security; and several acts of aggression against peoples and violations of the sovereignty of member states had been submitted to the Security Council, which had not taken any action to end those aggressions and violations as it was doing in the case of Korea.¹¹⁰ At the same meeting the US representative informed the Council that the US President authorised the US Air Force to conduct missions on specific military targets in North Korea and had ordered a naval blockade of the entire Korean coast.¹¹¹

On 7 July, the Council adopted Resolution 84 with three abstention (Egypt, India, Yugoslavia) and one absence (the Soviet Union). It recommended that the nations providing military forces and other assistance to this action make them available to a unified command under the United States.¹¹² The Unified Command was authorised to use at its discretion the UN flag in the course of operations against the North

108. SC Res. 83, 27 June 1950.

109. S/1517, 29 June 1950.

110. UN Yearbook, (1950), p. 224.

111. Id.

112. SC. Res. 84, 7 July 1950.

Korean forces concurrently with the flags of the various nations participating.¹¹³ General Douglas MacArthur was designated by President Truman on 8 July 1950 as Commander-in-Chief of the United Nations forces in Korea.¹¹⁴

It might be said that the military action in the case of Korea was an enforcement action by the Security Council. However, the Council made no reference in Resolution 83 to a specific article of the Charter in its "recommendation" to use force. At the 476th meeting of the Security Council, the representative of the United Kingdom stated that Article 39, standing on its own, was a sufficient basis for establishment of this force.¹¹⁵ Article 39 permits the Security Council to make "recommendations" to maintain or restore international peace and security after determining the existence of a threat to the peace, a breach of the peace or an act of aggression. It is not clear that the provisions of Chapter VI and VII of the Charter may be enforced by such recommendations. Some lawyers, including western jurists, believe that "recommendations" under Article 39 are limited to those pacific measures to settle disputes in Chapter VI, since enforcement measures in Chapter VII were meant to be the result of binding "decisions".¹¹⁶

As discussed in Chapter One, the drafters of the UN Charter intended that a "recommendation" of the Council, so far as it relates to the peaceful settlement of dispute or to situations giving rise to a threat of war, breach of the peace, or aggression, should be considered as governed by the provisions contained in Chapter VI.¹¹⁷

¹¹³- *Id.*

¹¹⁴- *UN Yearbook*, (1950), p. 230.

¹¹⁵- *SCOR*, 5th Yr., 476th Mtg., pp. 3-4.

¹¹⁶- Rosalyn Higgins, *United Nations Peacekeeping*, Vol. II, (Oxford University Press, London, 1970), p. 177.

¹¹⁷- *UNCIO*, Vol. 12, Doc. 881, p. 507.

Consequently, it is difficult to accept that the Security Council may "recommend" enforcement measures. "Recommendation" or "authorisation" of enforcement action does not mean that these are mandatory decisions of the Security Council. It seems that it does not make sense to require a mandatory decision where a recommendation or authorisation would suffice to achieve the desired action.¹¹⁸

However, it should be noted that there are two parties in an enforcement action, the enforcing and the party against whom enforcement action is taken. For those who are enforcing, a recommendation will suffice as far as they voluntarily cooperate with it. But those who are enforced against, have no legal obligation to tolerate the recommended action which lacks binding force toward them.¹¹⁹

Higgins believes that, the action directed *against* North Korea, might be deemed enforcement action, even though taken by means of recommendation, since in the Advisory Opinion on *Certain Expenses of the United Nations*, the criteria adopted for enforcement action by the Court were that it should be directed *against* a state, and not based on its consent; and the Court did not make the concept turn on whether it was authorised by a decision or recommendation.¹²⁰ In her conclusion, Higgins states that action against Korea was an enforcement action taken under Articles 39 and 42, although the latter was not specifically mentioned in the resolutions.¹²¹

There is another view that the Council did not use the language of "decision" which would have activated Article 25 and the resolutions simply recommended states to furnish assistance to the Republic of Korea as may be necessary.¹²² According to this

118. Oscar Schachter, "United Nations Law in the Gulf Conflict", 85 *A. J. I. L.*, (1991), p. 462.

119. Yoshiro Matsui, "The Gulf War and the United Nations Security Council", in, Ronald St John MacDonald (ed.), *Essays in Honour of Wang Tieya*, (Martinus Nijhoff Publishers, London, 1994), p. 523.

120. *Id.*

121. *Id.*

122. E. V. Rostow, "The Gulf Crisis in International and Foreign Relations Law", 85 *A. J. I. L.*, (1991), p. 508.

view, the forces dispatched to Korea were national forces carrying out a mission of collective self-defence under American direction, not a Security Council enforcement action.¹²³ In response, it is believed that, in spite of the predominance of the American role, the participating nations did regard their action as falling within an authorisation by the Security Council, and not as merely an individual action or self-defence.¹²⁴

The Soviet Union argued that action in Korea was not a UN action, but it was an action by the United States which was seeking to secure a cloak of legality.¹²⁵ According to this view, which had some support in the western world,¹²⁶ the UN was not legally entitled to authorise the use of its flag, based on this belief that nothing is lawful unless expressly authorised by the Charter.¹²⁷ On the other hand, there are some lawyers who prefer the view that implied powers are lawful so long as they are consistent with the general and express powers conferred upon particular organs by the Charter.¹²⁸

However, the Security Council could "recommend" the use of force, in the absence of the Soviet Union. According to White, this absence enabled the United States to use the Security Council to confer legitimacy on its policy of containing communism wherever it threatened to expand.¹²⁹ Article 27(3) of the UN Charter states: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members..."

123. *Id.*

124. R. Higgins, *op. cit.*, p.178.

125. *Id.*

126. e.g. Kelsen, quoted in *Id.*

127. *Id.*

128. e.g. Bowett, quoted in *Id.*

129. N. D. White, The United Nations and the maintenance of international peace and security, (Manchester University Press, Manchester 1990), p. 86.

There is a question of the legality of adopting a resolution in the absence of a Permanent Member; *prima facie* and in accordance with the precise wording of Article 27(3), this should have meant that the resolution failed in validity. There is room for debate here, but it should be noted that in 1962 the International Court of Justice in its Advisory Opinion on the *Certain Expenses* case stated that "abstaining" or "being absent" of one of the permanent members from voting would be considered as implicit consent.¹³⁰ Therefore, a permanent member could not negate a resolution by abstaining or being absent from the vote.

With the return of the Soviet representative to the Security Council on 1 August 1950, it became clear that the Council would be prevented by the use of the veto from acting in connection with measures in Korea. The United States proposed that the General Assembly assume the responsibility of dealing with threats to the peace, breach of the peace and acts of aggression when the Council was paralysed by the veto.¹³¹ This proposal was finally adopted in a modified form by the General Assembly as the "Uniting for Peace" Resolution of 3 November 1950.¹³² This resolution provided that, in case the Security Council is prevented from exercising its primary responsibility by failure of the permanent members to agree, the General Assembly shall consider the matter with a view to making appropriate recommendations for collective measures including the use of armed forces.¹³³

In fact, by the adoption of the "Uniting for Peace" Resolution, some power was transferred from the Security Council to the General Assembly. It was clear that, in the presence of the Soviet Union in the Security Council, the Council could not pass resolutions recommending military assistance to South Korea. The Council's call for military assistance was a recommendatory call and it was not obligatory for the

¹³⁰. *Certain Expenses of the United Nations Case*, ICJ Rep. 1962, p. 291.

¹³¹. Leland M. Goodrich, *The United Nations*, (Stevens and Sons Limited, London, 1960), pp. 122, 123, 178.

¹³². GA Res. 377(V), 3 Nov. 1950.

¹³³. *Id.*

member states. Sixteen states provided armed forces and military facilities to assist South Korea in response to a recommendation and no legal argument was made by any government that a mandatory decision was necessary.¹³⁴ Although nations contributed to the United Nations' force and although the force used the United Nations flag, the action was essentially directed by the United States and US General MacArthur took his orders from Washington, not the United Nations.¹³⁵ The United Nations flag was only a decor for the forces.¹³⁶

Third and last instance of use of force by UN: Haiti

A military coup on 30 September 1991 ousted Jean-Bertrand Aristide, Haiti's president who had taken office in an election which its validity was upheld by the United Nations, the Organisation of American States (OAS), and the Caribbean community.¹³⁷ On the day of the coup, the Security Council met but it declined to convene formally. The president of the Security Council in response to Haitian officials, who had described the Council's reaction as "unfair and a denial of Haitian rights", stated that a majority of the delegations felt there should not be a meeting on what was seen as "an internal matter".¹³⁸

It was stated that the Council did not "formally" convene because a majority of the members felt that the situation in Haiti was entirely a domestic matter and therefore beyond the competence of the Security Council to consider, since the coup was not thought to constitute a "threat to the peace".¹³⁹

¹³⁴. Oscar Schachter, "United Nations Law in the Gulf Conflict", 85 *A. J. I. L.*, (1991), p. 464.

¹³⁵. N. D. White, *op. cit.*, p. 86.

¹³⁶. Ernest Van den Haag and John P. Conrad, *The U.N. in or out?* (Plenum Press, New York, 1987), p. 176.

¹³⁷. *The United Nations and the Situation in Haiti*, (Department of Public Information, New York, 1995), p. 1. (hereinafter the UN and the situation in Haiti)

¹³⁸. Thomas L. Friedman, "U.S. Suspends Assistance to Haiti and Refuses to Recognise Junta", *N.Y. Times*, 2 Oct. 1991, p. 1.

¹³⁹. Andrew Deutz, "Intervention in the Post-Cold War Era: International Organisations' Responses to Kurdistan, Yugoslavia and Haiti" (28 Apr. 1992) p. 27, quoted in, Anthony Clark Arend, "The United Nations and the New World Order", 81 *Geo. L. J.* (1993), p. 501.

However, OAS on 2 October 1991 at its ad hoc meeting adopted Resolution 1/91 condemning the coup and recommended that OAS members impose economic and diplomatic sanctions on Haiti.¹⁴⁰ The Council in its meeting of 3 October, made a statement supporting the OAS action and called for the immediate reversal of the situation.¹⁴¹ The Council did not adopt a formal resolution dealing with the situation in Haiti. It has been stated that the United States and other Western supporters of a resolution were unable to convince China and certain Non-Aligned states to support a resolution because these states were worried that the Council, at the urging of Western nations, was becoming increasingly involved in domestic issues that are the private affairs of member states.¹⁴²

On 11 October, the General Assembly adopted Resolution 46/7, in which it condemned the illegal replacement of the constitutional president of Haiti, the use of violence, military coercion and the violation of human rights in Haiti.¹⁴³ Furthermore, the Assembly demanded the immediate restoration of the legitimate government of Jean-Bertrand Aristide and the application of the Constitution and the full observance of human rights in Haiti.¹⁴⁴

The UN Secretary-General actively supported the intensive efforts by OAS and its mediator, aimed at finding a political solution to the Haitian crisis.¹⁴⁵ On 15 July 1992, newly elected Secretary-General Boutros Boutros-Ghali, informed the Security Council that he had accepted the offer of the Secretary-General of OAS to include a UN participation in a mission to Haiti.¹⁴⁶ On 3 November, the Secretary-General, in a

140. UN Doc. S/23109, p. 3.

141. S/PV. 3011

142. Paul Lewis, "UN Stops Short of Haiti Resolution", *N. Y. Times*, 4 Oct. 1991, p. 8

143. GA Res. 46/7, 11 Oct. 1991.

144. *Id.*

145. The UN and the situation in Haiti, *op. cit.*, p. 2.

146. *Id.*

report to the General Assembly cited a pattern of gross and widespread human rights abuses during the year since the coup in Haiti.¹⁴⁷

Following further diplomatic efforts by both the United Nations and OAS, on 16 June 1993, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 841 by which it decided to impose an oil and arms embargo against Haiti as part of the continuing international effort to restore constitutional rule to that country.¹⁴⁸ The Council decided that the sanctions would enter into force on 23 June 1993 unless the Secretary-General reported to the Council that in the light of the results of negotiations, the measures were no longer warranted.¹⁴⁹

On 21 June, the Commander-in-Chief of the Haitian Armed Forces, Cedras, accepted the Special Envoy's earlier invitation to him to initiate a dialogue with former president Aristide with a view to resolving the Haitian crisis.¹⁵⁰ Following an agreement (Governor Island Agreement) between two parties to appoint a new Commander for military forces and early retirement of Cedras and other arrangements regarding Haitian parliament and nominating a Prime Minister, the Security Council, on the Secretary-General's recommendation, decided to suspend the oil and arms embargo against Haiti.¹⁵¹ However, since the Secretary-General noted that both sides continued to be divided by deep mistrust and suspicion and also continued existence of violence in Haiti, the Council by Resolution 867, authorised the establishment of United Nations Mission in Haiti (UNMIH).¹⁵²

After a number of setbacks, such as continued obstruction of the arrival of UNMIH, breach of the Governors Island Agreement, and the assassination of the Minister of

147. *Id.*

148. SC Res. 841, 16 June 1993.

149. *Id.*

150. The UN and the situation in Hiti, *op. cit.*, p. 5.

151. SC Res. 861, 27 Aug. 1993.

152. SC Res. 867, 23 Sep. 1993.

Justice, and following a request¹⁵³ by Aristide to the Security Council to call on member states to take the necessary measures to strengthen the embargo, the Council decided to reimpose its embargo against Haiti.¹⁵⁴ In addition, the Council adopted Resolution 875 by which under Chapter VII, called upon member states acting nationally or through regional arrangements to use measures under its authority to ensure strict implementation of embargo.¹⁵⁵

Yet, since proper environment for the deployment of UNMIH and the departure of military leaders could not be provided, the Secretary-General presented three options to the Security Council in mid-July 1994.¹⁵⁶ The first option was the expansion of UNMIH with a revised mandate under Chapter VII.¹⁵⁷ The second option was authorisation of a group of member states under Chapter VII to establish a stable and secure environment throughout Haiti in order to facilitate the restoration of the legitimate authorities (phase one) and to "modernise" and professionalise the armed forces and the police (phase two). The third option was the authorisation of a group of member states, under Chapter VII, to carry out phase one, and of UNMIH, under Chapter VI, to undertake phase two.¹⁵⁸

The Security Council chose the third option, and on 31 July 1994, adopted Resolution 940 with 12 votes and 2 abstentions (China and Brazil; Rwanda did not participate in the meeting). The Council by this resolution *authorised* member states to form a multinational force under unified command and control, and in this framework *to use all necessary means* to facilitate the departure from Haiti of the military leadership, the prompt return of the legitimately elected president and the restoration of the legitimate authorities of the government of Haiti, and to establish and maintain a

153. S/26587

154. SC Res. 873, 13 Oct. 1993.

155. SC Res. 875, 16 Oct. 1993.

156. S/1994/828

157. *Id.*

158. *Id.*

secure and stable environment that will permit the implementation of the Governors Island Agreement.¹⁵⁹

On 15 September 1994, the president of the United States announced that all diplomatic efforts had been exhausted and force might be used to remove the military leadership from power in Haiti.¹⁶⁰ Two days later, he sent a mission to Haiti, headed by Jimmy Carter, for a final diplomatic effort, and after two days of talks, the Haitian military leaders agreed to resign.¹⁶¹ The first multinational military forces, spearheaded by US troops arrived in Haiti without opposition, and after the departure of the military leadership, the former president returned to Haiti.¹⁶²

The Security Council on 30 January 1995 authorised the Secretary-General to take steps for the full transfer of responsibility from multinational force to UNMIH.¹⁶³ The multinational forces handed over its responsibility to UNMIH on 31 March 1995.¹⁶⁴ This capped more than five years of UN involvement in Haiti, including overseeing the country's first election in 1990, the negotiations after the coup in 1991, human rights verification, provision of humanitarian aid, imposition of sanctions, and dispatching of a multinational force in 1994.

In the case of Haiti the sanctions not only were imposed, but also were enforced. This is similar to the case of Kuwait where sanctions against Iraq were imposed, and then enforced. Resolution 875 in the case of Haiti was modelled after Resolution 665 in the case of Kuwait, calling upon member states to use measures to enforce sanctions. Although imposing sanctions might have an effect on the non-elected military leadership in Haiti, it is the population of the country that would suffer the most, and

159. SC Res. 940, 31 Jul. 1994.

160. The UN and the situation in Haiti, *op. cit.*, p. 14.

161. *Id.*

162. *Id.*

163. SC Res. 975, 30 Jan. 1995.

164. UN Chronicle, June 1995, p. 4.

as Leigh states, the sanctions would depoil the poor and fail to unseat dictatorial regimes.¹⁶⁵

A consequence of imposing and rigorously enforcing sanctions was increasing the waves of desperate Haitian boat people who sought asylum in the United States.¹⁶⁶ This would lead to creating a refugee problem that has come in the recent cases, namely Yugoslavia and Iraq, to be considered as a threat to the peace to qualify for international action. Therefore, care should be taken of the consequences of imposing sanctions before any decision on the matter. Boutros-Ghali has said that the purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish or otherwise exact retribution.¹⁶⁷ He further states, sanctions "raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects. Sanctions also always have unintended or unwanted effects".¹⁶⁸

The case of Haiti is significant in that Chapter VI was referred to as the basis for the establishment of a UN peace-keeping mission.¹⁶⁹ UNMIH did not have any traditional peace-keeping or observation component and was authorised to undertake the functions of modernisation and professionalisation of the armed forces and the creation of a separate police force in Haiti.¹⁷⁰

165. Monroe Leigh, "The Political Consequences of Economic Embargoes", 89 *A. J. I. L.*, (1995), p. 74.

166. *Ibid.*, p. 77.

167. Boutros Boutros-Ghali, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, 3 Jan. 1995, A/50/60-S/1995/1, para. 66.

168. *Ibid.*, para. 70.

169. Reference was made by the Secretary-General in proposing the third of his three options to the Security Council on 15 July 1994 which was subsequently accepted by the Council. S/1994/828.

170. SC Res. 867, 23 Sep. 1993.

The case of Haiti is also the first case where Chapter VII was invoked to use all necessary means to facilitate the departure of a leadership that took office by coup, with no reference to possible implications of such situation for the international peace. Basically, an act of aggression, a breach of or a threat to the peace is characterised by some violation of sovereignty or cross-border intervention causing armed conflict, that would imply a matter of international concern. Whether the situation in Haiti comes under the provisions of Chapter VII is doubtful.

However, as discussed in Chapter Two of this thesis, in the post-Cold War period the boundaries of what constitutes a threat to international peace has been extended. The cases of Yugoslavia, Somalia, and Rwanda demonstrate that, for instance, humanitarian feature of the crisis within a country has been the basis for states authorisation to use force. Yet, the case of Haiti is unique in that the states were authorised to use all necessary means not for protection of humanitarian assistance, but for facilitating the restoration of an elected president which would traditionally be considered as an internal matter and not within the scope of UN action.¹⁷¹

The legal basis of use of force by UN in Kuwait

Almost four months after Iraq invaded and annexed Kuwait, on 29 November 1990, the Security Council approved Resolution 678 by which it authorised the use of military force against Iraq if its forces were not withdrawn from Kuwait by 15 January 1991.¹⁷² This resolution offered Iraq one final opportunity as a pause of "good will" to comply with the Council's resolutions. If Iraq did not do so by 15

¹⁷¹- Glennon states: "Of the 185 governments in the world, at least 50 could be fairly described as undemocratic.... In the Philippines, Chile and Iran, brutal dictatorships that floated community values were left alone by the world community.... however, much international law may have disfavoured the breach of international agreements, breach of an agreement has never been seen as grounds for the use of force. Yet breach of the Governors Island Accords was also relied upon by the administration to justify the use of force against Haiti." Michael J. Glennon, "Sovereignty and Community after Haiti: Rethinking the Collective Use of Force", 89 *A. J. I. L.*, (1995), pp. 71-74.

¹⁷²- SC Res. 678, 29 Nov. 1990.

January, the resolution authorised UN member states co-operating with the Government of Kuwait to "use all necessary means to uphold and implement Security Council Resolution 660(1990) and all subsequent relevant resolutions and to restore international peace and security in the area".¹⁷³

This was the first resolution since the beginning of the Kuwait crisis that did not receive the unanimous support of the Permanent Members of the Security Council. It was opposed by Yemen and Cuba with China abstaining. As discussed in the Korea case, regarding the Soviet absence from voting, the "abstaining" or "being absent" of one of the permanent members would be considered as an "implicit consent". It has become clear in the practice of the United Nations developed over some 40 years that a permanent member is presumed to have "concurred" in a resolution unless it expressly casts a negative vote.¹⁷⁴

The Chinese delegate in the Security Council's meeting on 29 November stated that the United Nations, as an international organisation for the maintenance of peace and security, was responsible both to international security and to history and that it should act with great caution and avoid taking hasty action on such a major question as authorising some Member States to take military action against another member.¹⁷⁵ Emphasising the need for a peaceful solution to the Persian Gulf crisis, he stated that it might take longer but the cost would be lower and the outcome less serious, whereas a solution through the use of force would lead to serious consequences.¹⁷⁶

The Cuban delegate expressed his great concern over the enormous concentration of military forces from the United States and its allies in the Persian Gulf, and over the danger of the outbreak of a war which, even if conventional, would bring enormous

173. *Id.*, para. 2.

174. L. C. Green, *op. cit.*, p. 575.

175. S/PV. 2963, 29 Nov. 1990, p. 61.

176. *Id.*

destruction to the countries of the region.¹⁷⁷ He stated that it would not be advisable to adopt a resolution which was a virtual declaration of war.¹⁷⁸

The delegate of Yemen considered Resolution 678 as a "war resolution", stating that in addition to a strict sanctions regime, a peaceful approach to the crisis should, by necessity, involve active diplomatic engagement.¹⁷⁹ He added that "[t]he war option would deprive humanity of a historic opportunity to make a smooth transition to a new world order, one that is not characterised by the military victory of one country or group of countries over others".¹⁸⁰

It is believed that, since a variety of states had doubts as to the legality of the use of force without Security Council authorisation, the Council at the urging of the United States adopted Resolution 678.¹⁸¹

The Security Council in its "final opportunity" resolution did not mention the legal basis of its "authorisation" to use force. The word "authorisation" is not used in the Charter and it is not clear whether it should be considered as a "decision" or "recommendation". The Security Council in its previous resolutions had unambiguously referred to Articles 39, 40 and 51, though in Resolution 678 it generally stated "[a]cting under Chapter VII of the Charter of the United Nations". It was important at this stage, being a matter of life and death, that the Council clearly determine the article of the Charter under which it authorised member states to use force.

177- *Ibid*, p. 52.

178- *Id.*

179- *Ibid*, p. 31.

180- *Id.*

181- L. C. Green, *op. cit.*, p. 575.

The Iraqi delegation, stated on 29 November with regard to the legal requirement for the Council's use of force, stated that under the Charter any use of force was deemed to be an act of aggression, except in three cases, under Articles 51, 42 and 106.¹⁸²

Finally, on 16 January 1991, the war in the Persian Gulf broke out as the US forces launched a massive air bombardment of Iraq and Kuwait. In this operation British, Saudi and Kuwaiti air forces took part.¹⁸³ On 17 January, Israel imposed a total 24 hour curfew on the entire West Bank and Gaza Strip, and Iraq launched four scud missiles that landed in Israel. On the same day, US bombers destroyed an Iraqi nuclear research centre near Baghdad.¹⁸⁴ Coalition forces with the total number of 700,000 (including 500,000 US troops) announced that by 23 January they had flown more than 12,000 bombing missions over Iraq and Kuwait. Meanwhile, the Soviet Foreign Minister and later President Gorbachev expressed concern that the US was exceeding the UN mandate, warning that US should not destroy Iraq.¹⁸⁵

By 28 January, according to the Saudi Oil Minister, Iraqi troops had dumped more than 11 million barrels of crude oil into the Persian Gulf, creating the most serious pollution of the Persian Gulf waters in history.¹⁸⁶

Iran and Pakistan separately proposed a five point peace plan for solving the crisis.¹⁸⁷ On 14 February, the UN Security Council met in a closed door formal session without any result. At this meeting, China put forward a proposal for a peaceful settlement of the crisis, and Yemen and Cuba circulated a cease-fire plan for an Iraqi withdrawal.¹⁸⁸ By 21 February the Soviet plan, which involved a timetable for Iraqi withdrawal from

182- S/PV. 2963, 29 Nov. 1990, pp. 19-20.

183- Wang Lishan, "Backgrounder: Chronology of Gulf War up to March 1", The Xinhua General Overseas News Service, Lexis, News Library.

184- P. Bennis and M. Moushabeck, *op. cit.*, p. 371.

185- *Id.*

186- W. Lishan, *op. cit.*

187- *Id.*

188- *Id.*

Kuwait, was accepted by Iraq. However, the US rejected the conditions and demanded a shorter period for withdrawal.¹⁸⁹ On 23 February, despite the Soviet announcement at the UN that Iraq had agreed to US demands and while the UN Security Council was to discuss integrating US and Soviet proposals to prevent a ground war, the US launched a large scale ground, air and sea war against Iraqi troops in Kuwait and Iraq.¹⁹⁰

On 24 February, the Security Council held a meeting without any result. On 25 February, Iraq announced it had begun withdrawal from Kuwait early in the morning, but the US President said that a cease-fire would only come after Iraq laid down its arms and left military equipment behind.¹⁹¹ Iraq announced that the coalition forces stepped up air raids against Iraqi cities, the most fierce since the eruption of the Persian Gulf war.¹⁹² Meanwhile, the Kuwaiti Government spokesman declared the Kuwaiti capital liberated.¹⁹³

On 27 February, the date on which Kuwait was liberated, Iraq informed the President of the Security Council and the Secretary-General that all Iraqi forces had withdrawn from Kuwait but the United States and other forces continued to attack the withdrawing Iraqi forces.¹⁹⁴

Two main possibilities may be considered as the legal bases for the use of force against Iraq. First, collective action by the Security Council under Article 42, and secondly, collective self-defence under Article 51. These possibilities are discussed in the following sections.

189- P. Bennis and M. Moushabeck, *op. cit.*, p. 371.

190- *Id.*

191- *Id.* However, by attacks on Iraqi forces leaving Kuwait more than 100,000 Iraqi forces were killed and wounded on the roads. *Ibid*, p. 372.

192- W. Lishan, *op. cit.*

193- *Id.*

194- S/22274, S/22288.

Collective action by the Security Council

It has been argued that the authority of the Security Council to apply armed force under Chapter VII can only be found in Article 42: this article is the only provision in the Charter that empowers the United Nations to take action by air, sea or land forces as may be necessary to maintain or restore international peace and security.

However, the Security Council must first determine the existence of a threat to the peace, breach of the peace or act of aggression under Article 39. The Council might recommend or decide on measures in accordance with Articles 41 and 42. Although there is no evidence that Article 39 has been claimed as the basis for Resolution 678, it has to be noted that, "recommendations" in Article 39, as the Charter drafters had in mind, were understood to refer to Chapter VI provisions to call for peaceful settlement of disputes, to be pursued either alone or in tandem with economic and/or military decisions taken in accordance with Article 41 and 42.¹⁹⁵ Consequently, the "authorisation" in Resolution 678 could not be a "recommendation" under Article 39.

Article 42 in its first part states that the Security Council should consider that the "measures provided for in Article 41 would be inadequate or have proved to be inadequate", before deciding on the use of force. There was a view that, with the comprehensive sanctions regime which the Security Council had imposed on Iraq, it would not take long for sanctions to hurt seriously and eventually Iraqi forces would comply with the resolutions and withdraw from Kuwait.¹⁹⁶

¹⁹⁵. Burns H. Weston, "Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy", 85 *A.J.I.L.*, (1991), p. 521.

¹⁹⁶. Delegation of Yemen. S/PV. 2963, 29 Nov. 1990, p. 31. He criticised those states that had not the patience to see the result of sanctions since it was an alternative to a catastrophic military operation in an inflammable region of the world.

However, several states emphasised that by 15 January the military option should be used.¹⁹⁷ Some authorities believed that it was wrong "to negotiate with a burglar".¹⁹⁸ But it was also said that when the burglar was armed and the fate of millions was at stake it seemed as a irresponsibility and self-destructive manner to refuse to negotiate peace unambiguously and respectfully.¹⁹⁹ It was also reported that the sanctions were having an increasingly useful bite²⁰⁰ and Iraq was not far from taking practical steps towards withdrawing troops from Kuwait.²⁰¹

Although there were comments on the prematurity of the US decision to forego primary reliance on Article 41 in favour of the military option, it is not clear how long the sanctions would have to continue to force Iraq to withdraw from Kuwait. However, in the case of South Africa, the United Nations and the United States had been extremely patient about UN sanctions. Nevertheless, according to Article 42, it is at the Security Council's discretion to decide on the effectiveness of the sanctions and whether and when to take enforcement action subsequently.²⁰²

Another requirement to apply Article 42 is that the force should be used in accordance with a mechanism provided for in Article 43. Under Article 43 "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and

197. *Ibid.*, pp. 5,78.

198. Douglas Hurd, *The Times* (London), 31 Aug. 1990, p. 3, quoted in Weston, *op. cit.*, p. 530.

199. *Ibid.*, p. 531.

200. *Ibid.*, p. 528.

201. S/PV. 2963, 29 Nov. 1990, p. 61.

202. It should be noted that the comprehensive sanctions regime which the Council imposed against Iraq made it isolated and land-locked such that, in some writers' view, it might not have taken long for Iraq to withdraw from Kuwait. Bethlehem writes: "Iraq appeared to be uniquely placed to be influenced by sanctions; it was a one-product economy; the movement of its principal export commodity, oil, was relatively easy to track and interdict; Iraq imported between 60-70 percent of its basic food requirements; it could not count on support from any of its immediate neighbours; virtually the entire international community had condemned the Iraqi action; in short, if sanctions as means of enforcing international law were not to succeed here, they would be unlikely to succeed elsewhere." D. L. Bethlehem, (ed.), *The Kuwait Crisis: Sanctions and their Economic Consequences*, Part I, (Grotius Publications, Cambridge, 1991), p. XILII.

facilities, ...". Although there is no reference in Chapter VII that such agreements are a condition precedent to implementation of Article 42, Article 106 clearly states that "pending the coming into force of such special agreements referred to in article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, ...".²⁰³

Nevertheless, the Soviets believed that, as a result of the non-implementation of Article 43, the Security Council was not able to establish United Nations forces and it denied the Council's ability to establish a UN force by recommendation under Article 39.²⁰⁴ However, Bowett argues that "[w]hile the wording of Article 39 does not seem to necessitate that recommendations thereunder refer to Articles 41 or 42 it equally seems untenable to argue that Article 42 can only be applied on the basis of agreements concluded under Article 43".²⁰⁵ With regard to Article 106, he believes that it is generally accepted that Article 106 was intended to be of a temporary nature and failure to implement Article 43 cannot be said to have extended indefinitely its application.²⁰⁶

In its advisory opinion, the International Court of Justice in the *Certain Expenses* case, rejected the argument that the Security Council could not take action in a situation threatening the peace without agreements having been concluded according to Article 43.²⁰⁷ Consequently, Article 42 does not require troops to have been placed at the disposal of the Security Council under Article 43. It is believed that, although Article 43 is drafted in obligatory language, it has never been applied and it has become a dead letter.²⁰⁸ Without such agreements between the Security Council and

203. Article 106 of the Charter.

204. D. W. Bowett, *United Nations Forces*, (Stevens and Sons, London, 1964), p. 276.

205. *Ibid*, p. 277. He argues that "although the Council can utilise control, it would be *ultra vires* to confer total discretion to a state or states to act on behalf of the Council." Derek W. Bowett, "The Impact of Security Council Decisions on Dispute Settlement Procedures", *Eur. J. Int'l L.*, 1994, p. 93.

206. *Id.*

207. *Certain Expenses of the United Nations Case*, ICJ Rep. (1962), p. 167.

208. O. Schachter, *op. cit.*, p. 464.

member states, problems may arise when the Council, in performing its function, needs armed forces and facilities; no country would provide appropriate force and assistance as there is no obligation to do so.

Collective self-defence

Following the invasion by Iraq, the concept of collective self-defence was invoked by both the Security Council²⁰⁹ and countries such as the United States and the United Kingdom which were asked for aid by Kuwait.²¹⁰ It was the first time that the Security Council affirmed "the inherent right of individual or collective self-defence",²¹¹ in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter.²¹² However, in Resolution 678 the Council declared that it was acting under Chapter VII, but did not specify which article of the chapter. One possibility is that the Council acted under Article 42 as discussed earlier. Another possibility is that military action against Iraq was authorised under Article 51. Both these articles are included in Chapter VII. The Security Council in Resolution 678 only authorised the member states co-operating with the Government of Kuwait to use all necessary measures, and requested the states concerned to keep the Council regularly informed of the progress of action. However, the Council did not determine that military actions should be under its control. Perhaps this omission is evidence of the Security Council's intent to leave the choice of means, timing, command and control to the participating states.²¹³

It may be argued that, if the right of self-defence is an "inherent right", it does not legally require the Council's approval. As mentioned earlier in the case of Korea, the participating states preferred to regard their action as falling within the authorisation

209. e.g. Resolution 661 confirmed by the next Council resolutions.

210. S/21492, 10 Aug. 1990.

211. SC Res. 661, 6 Aug. 1990.

212. *Id.*

213. O. Schachter, *op. cit.*, p. 460.

by the Security Council and not as a mere individual action or self-defence.²¹⁴ In the case of Kuwait, those states supporting military action against Iraq believed that it was important to have UN authorisation for domestic political reasons.²¹⁵

Before adopting Resolution 678, the two countries with the largest military contribution in the area, the United States and the United Kingdom, had contended that the resolutions already adopted by the Council, together with the right of self-defence recognised by Article 51, were sufficient authority to resort to military force to expel Iraq from Kuwait or to defend Saudi Arabia or any other country threatened by Iraq.²¹⁶

If the Allies' action in the Persian Gulf is to be considered within the framework of "collective self-defence", rather than a United Nations action, it merits further comments. Article 51 and general international law have provided that the right of self-defence would be applied in certain conditions. In fact, the principle of non-use of force governs international relations, the exception being the use of force in self-defence by a country or a group of countries. Even such a use of force does not imply the matter as being at the discretion of the co-operating states, nor does it mean that the Council lacks authority to place limits on the military action. Article 51 expressly recognises that, in case of self-defence, the Council retains the authority and responsibility to take such action as it deems necessary to restore international peace and security. "This language makes it clear that the Council may decide on the limits and objectives of the military action authorised as collective self-defence".²¹⁷

214. R. Higgins, *op. cit.*, p. 178.

215. T. Friedman, "Allies Tell Baker Use of Force Needs UN Backing", *N. Y. Times*, 8 Nov., 1990, p. 14.

216. L. C. Green, *op. cit.*, p. 574.

217. O. Schachter, *op. cit.*, p. 460.

Armed attack

Article 51 has provided that, if an armed attack occurs against a Member of the United Nations, the inherent right of individual or collective self-defence may be applied. Kelsen believes that it is hardly possible to consider the right of a non-attacked state to assist an attacked state as an "inherent right". He argues that the use of the expression "collective self-defence" in Article 51 of the Charter is not quite correct, and it is certainly collective "defence" not collective "self-defence".²¹⁸ In the opinion of Kunz, collective self-defence is not really self-defence but defence of another state.²¹⁹

Countries might conclude treaties to protect their territories against external aggression. However, the consent of states, either being parties to such treaties or not, is necessary in case of attack to exercise collective self-defence by other states. The International Court of Justice in the *Nicaragua* case stated that there was no rule of customary international law that permitted another state to exercise the right of self-defence on the basis of its own assessment of the situation. When collective self-defence is invoked, it is to be expected that the state for whose benefit the right is used will have declared itself to be the victim of an armed attack and there is no rule permitting the exercise of collective self-defence in the absence of a request by that state. The Court expressly said that under international law in force today - whether customary international law or that of the United Nations system - states do not have the right of collective armed response to acts which do not constitute an armed attack.²²⁰

218. H. Kelsen, *The Law of the United Nations*, (Stevens & Sons, London, 1951), p. 797.

219. Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations", 41 *A. J. I. L.*, (1947), p. 875.

220. *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep., (1986), pp. 103-5, 110.

The Security Council, by affirming the applicability of collective self-defence in the Kuwait crisis, recognised implicitly that third states had the right to use force to aid Kuwait, even though those states themselves had not been attacked and had no treaty or special links with Kuwait, an opinion which was rejected earlier by scholars such as Bowett and Kelsen.²²¹ However, one of the conditions of self-defence, i.e. the consent of the attacked state, existed in this case, since Kuwait had requested third states' assistance.

Another question is whether the right of self-defence could extend to action to defend Saudi Arabia. Did sufficient authority exist to resort to military force to defend Saudi Arabia or any other country threatened by Iraq? An armed attack against Kuwait had occurred which was an important condition for the applicability of self-defence. But in the case of Saudi Arabia, the legality of resort to self-defence to counter an anticipated attack would be doubtful.

Fawcett in his examination of the conditions for self-defence writes, there is some evidence that the drafters of the Charter used the precise and restrictive notion of 'armed attack' in case of 'aggression' or 'threat to the peace', because they wished to avoid giving too much latitude within the Charter system to the recognised right of self-defence.²²²

Judge Nagendra Singh and E. McWhinney have concluded that "the right of self-defence as such is recognised both in customary and conventional law, though its exercise according to the latter, which overrides the former, is permissible only in the event of an armed attack".²²³

221. Both quoted in: O. Schachter, *op. cit.*, p. 457.

222. Quoted in: M. M. Whiteman, *Digest of International Law*, Vol. 12, (Department of State Publication, Washington, 1971), p. 44.

223. N. Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, (1989), p. 91. quoted in : Josef Mrazek, "Prohibition of the Use and Threat of Force", *Can. Y. B Int'l L.*, (1989), p. 92.

Although some authors interpret Article 51 as confirming anticipatory self-defence, the majority of international lawyers believe that Article 51 has to be interpreted narrowly as containing a prohibition of anticipatory self-defence.²²⁴ Consequently, Article 51 could not be invoked for anticipatory self-defence and thus defending Saudi Arabia.

Necessity, immediacy, and proportionality

Article 51 has not expressly referred to the limits of the right of self-defence. The limits and conditions of self-defence were affirmed in the *Caroline case* where it is provided that the situation must be an overwhelming situation, "leaving no choice of means and no moment for deliberation".²²⁵ The International Court of Justice in the *Nicaragua case* expressly stated that, other than an armed attack, additional requirements would be the conditions imposed by general international law such as necessity and proportionality.²²⁶

It is important that any action of self-defence is taken within a very short time of the first attack and it is vital that self-defence is proportionate to the initial act.²²⁷ Thus, an immediate reaction to the first attack is necessary in order to establish the act of self-defence. That is why the Secretary-General of the United Nations, Javier Perez de Cuellar, announced that Kuwait's right of individual and collective self-defence had expired because of the delay - ultimately of more than five months - in fighting back.²²⁸

224. See: I. Brownlie, *International law and the use of force by states*, (Clarendon Press, Oxford, 1963), p. 278, and, Y. Dinstein, *War, Aggression and Self-Defence*, (Grotius Publications, Cambridge, 1988), p. 168.

225. *The Caroline Case*, 29 BFSP, (1837), p. 1137.

226. *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Rep., (1986), p. 103, para 194.

227. Ingrid Detter, *The International Legal Order*, (Dartmouth, England, 1994), p. 266.

228. *Wash. Post*, 9 Nov. 1990, p. 30.

Although Rostow believes that, as a matter of customary international law the right of self-defence should be exercised as quickly as is reasonable under the circumstances, and to the extent necessary to curb the breach of international law, he has criticised the Secretary-General's statement.²²⁹ He states that, in Korea, the United States was able to move a few troops from Japan immediately after the North Korean attack; but in the Persian Gulf, it took months to bring American and European forces to the area, and the United States should not have lost its right to fight back.²³⁰ It may be argued that, even though the presence of the American Rapid Reaction Force and the increasing military build up during and after Iraq-Iran war is ignored, the technological progress since the Korean war, as became evident to some extent in the Persian Gulf war, would have provided appropriate means of deploying such forces without delay.

The necessity and immediacy of action in self-defence has a special relation to the measures taken by the Security Council. If the Council did not act in the case of armed attack or was slow to act as it was in Iraq-Iran war, at least temporary right of action might revert to the member states.²³¹ In such cases the United Nations has shown lack of decision and leadership, which enables member states to take action by themselves.²³²

The Security Council and the inherent right of self-defence

Article 51 has provided the right of self-defence would be applicable if an armed attack occurs, "until the Security Council has taken measures necessary to maintain international peace and security". According to the Charter, the first action in the case

229- E. V. Rostow, *op. cit.*, p. 268.

230- *Id.*

231- I. Detter, *op. cit.*, p. 268.

232- *Id.*

of an armed attack would be by the aggrieved state. In fact, the Charter has implicitly affirmed this point that, since the consideration of the Security Council might take time and since the victim state should defend itself immediately, it is not acceptable that states should wait and lose their rights to defend themselves "until" the Security Council takes action. Thus, when an armed attack occurs, the victim state can resort to self-defence without prior permission by the Security Council. Furthermore, the right of veto by the Permanent Members would jeopardise permission for self-defence.

In the case of the Iraq-Iran war, Iran resorted to the right of self-defence because it was faced with an overwhelming situation and had "no choice of means", "no moment for deliberation" or authorisation from the Security Council.

Resolution 661 contained provisions both affirming self-defence by "states" and imposing mandatory economic sanctions by the "Security Council". While the Council in Resolution 661 adopted mandatory economic sanctions to bring about the withdrawal of Iraq from Kuwait, it affirmed the inherent right of self-defence.²³³ It was an ambiguous decision because, if the Council wanted to terminate the right of self-defence by adopting economic sanctions, why did it affirm the right of self-defence in the same resolution?

In the meeting of the Security Council to adopt Resolution 661, the British delegation referred to the military action and stated that economic sanctions were designed to avoid the circumstances in which military action might otherwise arise.²³⁴ It has been said that some participating states made it clear that the failure of economic sanctions would automatically involve permission to use force as self-defence without further authorisation by the Council.²³⁵

233. SC Res. 661, 6 Aug. 1990.

234. S/PV. 2933, 6 Aug. 1990, p. 26.

235. O. Schachter, *op. cit.*, p. 459.

It seems that, although the Council affirmed Article 51 (which was not necessary), it desired to control action taken against Iraq, and the discussions in the Council show that its members desired the use of economic sanctions in lieu of military measures.²³⁶ Article 51 states that self-defence should be terminated by necessary measures taken by the Security Council to maintain international peace and security. The question is what the "necessary measures" would mean, and what their limitations would be.

The necessary measures could be defined as a consideration of a situation, seeking peaceful means, or taking practical action by the Security Council. Some international lawyers believe that the right of self-defence no longer applies when the Security Council has adopted measures it considers necessary to repel the armed attack.²³⁷ Schachter believes that a Council's decision to call on an invader to withdraw and to cease hostilities is certainly a necessary measure, but it does not deprive the victim state of its right of self-defence.²³⁸ He believes, as Resolution 661 contained, even economic sanctions under Article 41 did not terminate the right of self-defence.²³⁹

In this respect, Mullerson has stated when the Security Council puts a conflict on its agenda to determine whether it constitutes a threat to the peace, a breach of the peace, or an act of aggression, the inherent right of self-defence becomes "dormant", to be revived later in the unlikely event that the Security Council votes that it has failed to resolve the conflict.²⁴⁰

Franck also says that the Charter, in creating the new police power, intended to establish an exclusive alternative to the old war system. He believes that the old way is licensed only until the new way begins, when the Security Council accepts

236. *Ibid.*, pp. 458-9.

237. P. Lewis, "US preparing draft on claims against Baghdad", *N.Y. Times*, 1 Nov. 1990, p. 12, quoted in *Ibid.*, p.458.

238. *Id.*

239. *Id.*

240. E. V. Rostow, *op. cit.*, p. 511.

jurisdiction of a conflict, i.e. when the new system is activated, the injured party's right of self-defence is "suspended" until the Council affirmatively decides it cannot deal effectively with the problem.²⁴¹

However, it is not acceptable that, by acceptance of jurisdiction of a conflict, the injured party's right to self-defence is "suspended". Bowett also rejects the view that the Security Council's consideration of a conflict can be deemed to suspend the injured party's right of self-defence. He even concludes that the aggrieved state may act in conflict with the Security Council.²⁴² In fact, a mere call to negotiate does not terminate the right of self-defence since the consideration of the situation by the Security Council takes time which, by the existence of an overwhelming situation for the victim state and its loss of rights during that time, self-defence is the only way to react to the aggression. Furthermore, the possibility of Permanent Members' veto is another fact that should be considered by the injured party. Although the right of self-defence should not be impaired by the Charter, the Security Council can, through military action, restore peace, or pass a resolution determining a self-defence as an aggression, to end self-defence.

In the Kuwait crisis, the Security Council adopted economic sanctions under Article 41 and a blockade to enforce sanctions.²⁴³ Adopting Resolution 678 would be the end of the right of self-defence, since the Security Council "authorised" the use of "all necessary means". It might be concluded that the authorisation of the use of force in Resolution 665 was sufficient, and the adoption of Resolution 678 was not necessary.

It should be noted that the Security Council in Resolution 678 allowed Iraq a final opportunity which meant the right of self-defence during that period was "suspended".

241. Thomas M. Franck and Faiza Patel, "UN Police Action in Lieu of War: The Old Order Change", in, Agora, "The Gulf Crisis in International and Foreign Relations Law", 85 *A.J.I.L.*, (1991), p. 63.

242. D. W. Bowett, *Self-Defence in International Law*, (Manchester, 1958), pp. 195-7.

243. It should be noted that under Article 42 the Security Council might apply blockade as an enforcement action.

If the Security Council "decided" to use force, and in "obligatory" language ordered the use of force, there would be no doubt that the action taken against Iraq should be considered as a United Nations action and not self-defence. However, it is not clear that the "authorisation" of the use of force should be deemed as a "necessary measure" taken by the Security Council under Article 51 to end the self-defence.

Another point is that, if the coalition forces claimed that they had the right of self-defence, why did they wait for the Security Council to enforce economic sanctions through blockade and until the deadline for use of force envisaged by Resolution 678 expired? Weston in his discussion has concluded that the Security Council created a precedent, seemingly on the basis of some assumed penumbra of powers available to the Council under Chapter VII, an "Article 42 1/2" authorisation as some UN watchers have called it.²⁴⁴ He believes that when human life (specially innocents) and other fundamental values are at stake, as was the case when Resolution 678 was adopted, "it seems not inappropriate to insist upon unambiguously articulated war-making authority as a *de minimus* requirement of 'right process'", and that "the Security Council did not choose such a course ...".²⁴⁵

In fact, the Security Council had neither applied a control as a UN action, nor limited the coalition's actions as self-defence by monitoring the requirements envisaged in the Charter and general international law. Thus, the "authorisation" of the use of force should be considered as an unlimited permission to use force which does not comply with the spirit of the Charter.

²⁴⁴- Weston, *op. cit.*, p. 522.

²⁴⁵- *Id.* He added "... a Council majority motivated more by the special political and geostrategic interests of the principal drafters of Resolution 678 (the United Kingdom and the United States) than it was by a world constitutive instrument created in important part to establish conditions under which justice and respect for obligations arising from treaties [e.g. the UN Charter] and other sources of international law [e.g. Security Council resolutions] can be maintained".

Limitation and supervision

Resolution 678 had an "unrestricted character".²⁴⁶ The precise source of its authority was unstated, and it neglected to restrict the destructive weaponry and other means of accounting to or guidance from the Security Council, the Military Staff Committee or any other UN institution that might have been appropriate, and it set no time limits on the use of "all necessary means".²⁴⁷

The Yemeni delegation at the Security Council meeting stated that the resolution was "so broad and vague", and added that the Security Council had no control over those forces, and nations were allowed to make war independently which was a classic example of "authority without accountability".²⁴⁸

In fact, during the war in the Persian Gulf, no part of the United Nations had even minimum control over military operations. Any attempt by the Security Council to limit or end the war against Iraq would almost certainly be vetoed by some of the Permanent Members involved in the war.²⁴⁹ Secretary of State John Foster Dulles, before the Committee on Foreign Relations of the United States Senate on the Mutual Defence Treaty with Korea, when asked in the case of self-defence who would decide when the Council had taken the "necessary measures", said: "the determination as to that adequacy ... would be ours to make".²⁵⁰ According to commentators of the Charter, "it is not clear whether he meant that every nation had that right, or that as a practical matter, the veto power would not permit the Security Council to take a decision with which the United States disagreed".²⁵¹

246. *Ibid.*, p. 526.

247. *Id.*

248. S/PV. 2963, 29 Nov. 1990.

249. L. C. Green, *op. cit.*, p. 566.

250. *Id.*

251. L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations*, (Columbia University Press, USA, 1969), p. 352.

On 10 February 1991, Secretary-General Javier Perez de Cuellar reported that the United Nations war in the Persian Gulf was not "a classic United Nations war in the sense that there is no United Nations control of the operations, no United Nations flag, blue helmets, or any engagement of the Military Staff Committee".²⁵² He added "what we know about the war...is what we hear from the three members of the Security Council which were involved - Britain, France, and the United States - which every two or three days report to the Council, after the actions have taken place. The Council, which has authorised all this, is informed only after the military actions have taken place."²⁵³ He said, "[a]s I am not a military expert, I cannot evaluate how necessary are the military actions taking place now ... I consider myself head of an organisation which is first of all a peaceful organisation and secondly a humanitarian organisation".²⁵⁴ These statements further emphasise that the war in the Persian Gulf was not a United Nations war, but the coalition's war against Iraq.²⁵⁵

The International Committee of Red Cross, in its outline of legal aspects of the conflict in the case of Kuwait, considered Article 2 of Geneva Convention of 1949. It stated that "[t]he fact that military action has been authorised by Security Council Resolution 678 does not affect this definition or the application of the laws of armed conflict. The fact that there has been no formal declaration of war does not affect this definition either. In this respect, it may be pointed out that the Geneva Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them' (Article 2)."²⁵⁶

252- UN Observer & Int'l Rep., No. 3, March 1991, p. 14.

253- Id.

254- Id.

255- Iraq as an organised and mechanised society, had most of its means of modern life destroyed, and it was relegated to a pre-industrial age with conditions that affected the whole population of Iraq as well as vulnerable groups. Report to the Secretary-General on humanitarian needs in Kuwait and Iraq in the immediate post-crisis environment. S/22366, 20 Mar. 1990, Annex, esp. p. 5.

256- Marc Weller (ed.), Iraq and Kuwait: The Hostilities and Their Aftermath, (Grotius Publications, Cambridge, 1993), p. 332.

However, it is the Security Council's responsibility in any kind of military confrontation to order the termination of war and take appropriate measures. Furthermore, it should be noted that the United Nations was established pre-eminently, as proclaimed in the Preamble of the Charter, "to save succeeding generations from the scourge of war".

Another point which should be discussed is the application of the laws of war and the principle of proportionality on the coalition's war against Iraq, since the most tragic aspect of war in the Persian Gulf was the extensive destruction of civilian lives and property resulting from the coalition's aerial bombing and long-distance missiles. Should the army and inhabitants of the aggressor states be denied the protection of laws of war? Although there has been a suggestion that armed forces resisting aggressors were not fully bound by the requirements of the *jus in bello*, the Institut de Droit International concluded in 1971, after several years of study, that UN forces engaged in hostilities even against an aggressor must comply in all circumstances with humanitarian rules of armed conflict including the rules for protection of civilian persons and properties.²⁵⁷ "While this conclusion concerned UN forces, it would surely apply equally to national forces opposing an aggressor".²⁵⁸

In the Persian Gulf war, the principles of proportionality and the distinction between military objectives and civilian did not have practical effect. The bombing by the coalition forces of Iraqi civilians and what the UN survey²⁵⁹ found as destroying most means of modern life support including food supply, water purification and other essentials were not compatible with the humanitarian legal rules of war.²⁶⁰ Starvation of civilians as a method of warfare is prohibited by Article 54(1) of Protocol I of

257. 54 *Institut de Droit International*, Annuaire 465-70 (1971 II), quoted in, Schachter, *op. cit.*, p. 465.

258. *Id.*

259. Report of the Secretary-General's mission to assess humanitarian needs, S/22366, 20 March 1991.

260. The military leaders of the coalition acknowledged not only military objectives were targeted, but also heavy "collateral damage" affecting civilians. *Id.*

1977.²⁶¹ Under this Protocol it is also prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.²⁶²

LEGAL BASIS OF UN ACTIONS AFTER THE CEASE-FIRE

The continuation of sanctions

The Security Council in its Resolution 687 (paragraph 20) allowed for some sanctions on Iraq to be lifted. However, the Council in paragraph 21 decided to review sanctions every sixty days "in the light of the policies and practices of the government of Iraq".²⁶³ It should be noted that sanctions should be applied on the target state with a specific aim. When this aim (which should be clarified by the Council) was achieved, the sanctions should be lifted.

The Security Council in Resolution 661 had clarified that it imposed comprehensive sanction to secure the Iraqi withdrawal from Kuwait. It is not clear what objective the Security Council was pursuing by continuing economic sanctions after the withdrawal of Iraq from Kuwait. Certainly, the suffering of civilians in Iraq is unlikely to affect the policy of the political leaders. The imposing of economic sanctions as a punishment, even if it led to removal of the Iraqi government, has a long-term effect on the infrastructure of the country. Such comprehensive sanctions, accompanied by tight control and destruction of armaments, would result in a weak, poor and defenceless country after the present regime.

²⁶¹- Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, (International Committee of Red Cross, Geneva, p. 651. This method has continuously been used to encourage the presumptive uprising of masses in Iraq since the imposition of the sanctions.

²⁶²- Article 54(2), Id.

²⁶³- SC Res. 687, 3 Apr. 1991.

Article 41 of the Charter provides that measures not involving the use of armed force are to maintain or restore international peace and security. Secretary-General Boutros-Ghali has said that "... the purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish ... while recognising that the Council is a political body rather than a judicial organ, it is of great importance that when it decides to impose sanctions it should at the same time define objective criteria for determining that their purpose has been achieved".²⁶⁴

The Secretary-General referred to sanctions as raising "ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders whose behaviour is unlikely to be affected by the plight of their subjects... They [sanctions] can complicate the work of humanitarian agencies ... They can conflict with the development objectives of the Organisation and do long-term damage to the productive capacity of the target country. They can have a severe effect on other countries that are neighbours or major economic partners of the target country. They can also defeat their own purpose by provoking a patriotic response against the international community, symbolised by the United Nations, and by rallying the population behind the leaders whose behaviour the sanctions are intended to modify."²⁶⁵

In the case of Iraq the Security Council should have clarified its objectives after the Iraqi withdrawal. If the purpose is modification of political behaviour, suffering of vulnerable groups should be avoided. This suffering has not so far led to a change in the policies of Iraqi government; rather it has resulted in some internal support for the present regime. Where the objectives of the Council's measures are not clarified, it may even be implied that the *status quo* is what the Council had intended.

264. An Agenda for Peace, Suppl., *op. cit.*, paras. 66 and 68.

265. *Ibid.*, paras. 70 and 73.

Furthermore, sanctions with their long-term damage to the economy and industrial development of Iraq as a member of the UN is not compatible with the UN's programmes for economic and social development. Therefore, measures taken by the Council should have maximum influence on the behaviour of a government and minimum effect on the basic life of ordinary people and the infrastructure of a nation. That is why the author believes that monitoring and assessment of the effects of sanctions are crucial for the follow up decisions by the Security Council.

In fact, the Security Council by Resolution 687, involved itself in the internal affairs of Iraq. This is in contrast with its decision in the first case of enforcement measures by the UN, as it did not attempt to regulate internal affairs in North Korea when peace terms were reached with North Korea in the Armistice Agreement of 1953.

Establishment of United Nations Iraq-Kuwait Observation Mission (UNIKOM)

A few weeks after the declaration of cease-fire by the United States, the Security Council passed Resolution 687 which mandated the destruction of all Iraqi chemical, biological and nuclear weapons, materials and production facilities as well as all ballistic missiles with a range greater than 150 kilometres.²⁶⁶ The Security Council by its resolution established a Special Commission to deal with inspection and destruction of the non-nuclear weapons and facilities and delegated responsibility for nuclear elements to the International Atomic Energy Agency.²⁶⁷ Resolution 687 reaffirmed that Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990 which would be addressed through the normal mechanisms, was liable under international law for any direct loss and damage including environmental damage and the depletion of natural resources, or injury to foreign governments and corporations.²⁶⁸ It also decided to create a fund to pay compensation for claims that

²⁶⁶. SC Res. 687, 3 Apr. 1991.

²⁶⁷. *Id.*

²⁶⁸. *Id.*

fall within the above debts and obligations, and established a commission that would administer the fund.²⁶⁹

The Security Council by Resolution 687 reaffirmed economic sanctions against Iraq, including an arms embargo.²⁷⁰ By this resolution the Secretary-General was requested to submit a plan for the immediate deployment of a United Nations observer unit to monitor a buffer zone along the Iraq-Kuwait border. In fact, Resolution 687 was deemed as a formal cease-fire which Iraq had accepted on 6 April.²⁷¹

Pursuant to the Council's request in Resolution 687 for a plan for the immediate deployment of a United Nations observer unit to the demilitarised zone (DMZ) along the boundary between Iraq and Kuwait, the Secretary-General proposed a plan for a unit to be called the United Nations Iraq-Kuwait Observation Mission (UNIKOM) to monitor the DMZ, to deter DMZ violations through surveillance and to observe hostile or potentially hostile action mounted from the territory of one State to the other.²⁷² Furthermore, the Secretary-General clarified that UNIKOM would "be required to monitor and observe and would not be expected and, indeed, would not be authorised to take physical action to prevent the entry of military personnel or equipment into the demilitarized zone".²⁷³ Iraq and Kuwait accepted the plan.²⁷⁴ Approving the Secretary-General's proposal, the Council referred to Chapter VII of the Charter in Resolution 689 of 9 April.

269. *Id.*

270. *Id.*

271. S/22456.

272. S/22454/Add. 2.

273. *Id.*

274. S/22454/Add. 3.

The constitutional basis of UNIKOM

In fact, UNIKOM is unique as part of a package developed by the Council to end a war. The Security Council in Resolution 689 affirmed that the observer mission was not a peace-keeping operation in the traditional sense, as it can only be terminated by a decision of the conflict, i.e. its existence is not exclusively dependent on the consent of the host state.²⁷⁵ UNIKOM is a non-enforcement force and should remain neutral. It is believed that Iraq had little choice, not only because of its defeat, but formally because Resolution 687 appeared to be adopted under Chapter VII and Iraq had to agree to all its terms.²⁷⁶ It seems that, although the termination of UNIKOM's mandate should be by the decision of the Security Council, in the absence of consent and co-operation of Iraq with UNIKOM, UNIKOM would not have an effective function and therefore the Security Council should decide to withdraw UNIKOM. In fact, the most important element of peace-keeping forces has always been considered to be the consent of host state; otherwise, the force cannot be deemed as a peace-keeping force.

UNIKOM, like other peacekeeping operations, is authorised to use force in self-defence and without infringing the sovereignty of any state. Since UNIKOM was established by a Chapter VII resolution to monitor the DMZ, its constitutional basis would be Article 40 to create provisional measures for further steps towards peace between Iraq and Kuwait.

Resolution 688 and humanitarian assistance

Following the withdrawal of the Iraqi army from Kuwait, uprisings took place in the north and the south of Iraq to overthrow the Iraqi regime, and by early March 1991

²⁷⁵- M. Weller, *op. cit.*, p. 483.

²⁷⁶- N. D. White, *Keeping the Peace*, (Manchester University Press, Manchester, 1995), p. 230.

fighting broke out in the Iraqi cities between anti-government and pro-government troops.²⁷⁷ In the north, the memories and fear of mass slaughter among Kurds were strong, especially as chemical weapons had been used against civilians in Halabja in 1988. The severity of the Iraqi repression led to panic and a mass exodus of up to two million Kurds who fled via the mountains towards the Turkish and Iranian borders.²⁷⁸

At the request of Turkey and France, the Security Council met on 5 April 1991 to discuss the serious situation arising from abuses committed against the population in several parts of Iraq, particularly in those inhabited by Kurds.²⁷⁹ At this meeting Turkey stated that Iraq's armed forces caused more than 200,000 Kurds, Arabs and Turkomans to flee to the north near the border with Iran and Turkey. However, Turkey objected to the landing of shells on its territory and did not allow its border provinces to be overwhelmed by such a flood of displaced persons.²⁸⁰

Iran stated that it was providing refuge to some 110,000 Iraqi civilians who had crossed into the country. Iran added that the implications of the situation for Iran and other neighbouring countries made it urgent for the Council to take steps to put an early end to the Iraqi people's suffering.²⁸¹

However, Iraq stated that some neighbouring states were trying to destabilise the country and even to partition it into mini-states. It announced that all Iraqi citizens

²⁷⁷- P. Bennis and M. Moushabeck, *op. cit.*, p. 372.

²⁷⁸- Kurdish Nationalism was active since 1885. In 1970, following a decade of conflict at a cost of 60,000 casualties and 300,000 displaced, an agreement was signed with Ba'th regime which provided for Kurdish autonomy. However, in 1974 Iraq promulgated an Act which weakened the 1970 agreement and left critical disputes over oil revenues and the boundaries of the autonomous region unresolved. Barzani, the Kurdish leader, turned to Israel for support, the Soviet support having previously been withdrawn, and a new rebellion began. The revolt was put down in 1975 at a cost of 50,000 killed and 600,000 displaced. Guerrilla war resumed in 1979, however, towards the end of Iraq-Iran war poison gas was used against Halabja population and killed thousands of Kurds. For more information see: Howard Adelman, "Humanitarian Intervention: The Case of the Kurds", *International Journal of Refugee Law*, Vol. 4, No. 1, (1992), pp. 4-10.

²⁷⁹- S/22435, S/22442.

²⁸⁰- *UN Yearbook*, (1991), p. 204.

²⁸¹- *Id.*

could return home at any time. It also welcomed the dispatch to Iraq of an international mission.²⁸²

At the same meeting on 5 April, the Council adopted Resolution 688 which in its preamble referred to its responsibilities under UN Charter for maintaining international peace and security.²⁸³ It referred to Article 2(7) of the Charter the significance of which will be considered later in this chapter.

Resolution 688 reaffirmed the commitment of all member states to respect the sovereignty, territorial integrity and political independence of Iraq and of all states in the area.²⁸⁴ It also condemned the repression of the Iraqi civilians including Kurds, "the consequences of which threatened international peace and security", and demanded that Iraq end this repression.²⁸⁵ The Council in its resolution insisted that Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations.²⁸⁶

The Secretary-General was requested to pursue his humanitarian efforts in Iraq and also to use all the resources at his disposal to address urgently the critical needs of the refugees and displaced Iraqi population.²⁸⁷ All member states and all humanitarian organisations were appealed to contribute to these humanitarian relief efforts.²⁸⁸

282. *Id.*

283. SC Res. 688, 5 April 1991, The Preamble.

284. *Id.*

285. *Ibid.*, para. 1.

286. *Ibid.*, para. 3.

287. *Ibid.*, paras. 4,5.

288. *Ibid.*, para. 6.

The jurisdictional competence of the Council on human rights questions

Normally, the General Assembly and other organs related to it (such as the Economic and Social Council and the Commission on Human Rights) have exclusive competence in the human rights or humanitarian fields and the Security Council is thereby excluded from all involvement in these fields.²⁸⁹ However, increasing awareness in recent years of the victims of non-international armed conflicts who are internally displaced in their country, and the tendency of the Council to intervene in such situations, raised several issues concerning the legality of the Security Council's decisions on humanitarian intervention.

In the Council's debate over Resolution 688 some member states questioned the Council's decisions on humanitarian grounds. The Cuban delegation argued that the Council was disregarding its obligations to act strictly in accordance with the functions granted to it by the Organisation and not for the interests of a transitory majority.²⁹⁰ The delegations of Ecuador and Yemen had similar arguments.²⁹¹ The former stated that if human rights' related measures were the only issue at stake, no matter how grave the violation, the Security Council would not be the competent body to take them, given that Chapter IX of the Charter says that it is the General Assembly or the Economic and Social Council which would be the competent bodies in such situations.²⁹²

Another point which was considered by the member states in the Council's meeting on 5 April was the content of Article 2(7) prohibiting the United Nations from intervening in matters essentially within the domestic jurisdiction of any state, which has been seen as equally applicable to relations between states. In this respect, the

289- Philip Alston, "The Security Council and Human Rights: Lessons to be Learned from the Iraq-Kuwait Crisis and its Aftermath", 13 *Austl. Y. B. Int'l L.*, (1992), p. 135.

290- S/PV. 2982, 5 Apr. 1991, p. 52.

291- *Ibid*, p. 27.

292- *Ibid*, p. 36.

delegation of the United Kingdom stated that Article 2(7), while being "an essential part of the Charter, does not apply to matters which, under the Charter, are not essentially domestic" such as human rights.²⁹³ Germany asserted that it is the legitimate right of the international community to call for respect for human rights.²⁹⁴

Several states expressed their anxiety that the human rights-based decisions led the Council to interfere in domestic affairs of states. Romania asserted that "[q]uestions pertaining to the situation of various segments or components of populations from the ethnic, linguistic or religious points of view are matters of the national jurisdiction of states. In this respect no one can disregard the imperative nature of Article 2, paragraph 7 ... We are indeed very happy to see this fundamental provision of the Charter well reflected in the draft resolution [688] ..." ²⁹⁵ Turkey stated that Article 2(7) "should be scrupulously observed".²⁹⁶

Pakistan argued that as a matter of principle it was opposed to "any form of interference in the internal affairs of any country, and this is especially so in the case of a brotherly, Muslim country".²⁹⁷ Both China and India abstained in the voting and rejected the proposals contained in Resolution 688 on the grounds that they clearly transgressed the prohibition laid down in Article 2(7).²⁹⁸ Yemen objected that references to "political developments within Iraq" and to the need for "internal dialogue" were in violation of Article 2(7).²⁹⁹

The arguments concerning the Council's competence to consider human rights issues also took place on 10 August 1992 when a Special Rapporteur of the Commission on

²⁹³- *Ibid.*, pp. 64-65.

²⁹⁴- *Ibid.*, p. 72.

²⁹⁵- *Ibid.*, p. 23.

²⁹⁶- *Ibid.*, p. 8.

²⁹⁷- *Ibid.*, p. 9.

²⁹⁸- *Ibid.*, pp. 54-55 (China) and pp. 62-63 (India).

²⁹⁹- *Ibid.*, p. 27.

Human Rights³⁰⁰ concluded in his report (up to August 1992) that human rights situation in Iraq amounted to a violation of Resolution 688, immediate steps needed to be taken, and a credible mechanism to monitor compliance needed to be put into place urgently.³⁰¹ The Security Council was asked by Belgium, France, the United Kingdom and the United States to invite the Special Rapporteur to appear before it.³⁰²

This request caused considerable debate and there was an argument that the Council was completely lacking in the competence to consider human rights issues. The Chinese delegate asserted that the competence of the Security Council was to deal with matters bearing upon international peace and security; questions of human rights ought to be dealt with by the Commission on Human Rights.³⁰³ The delegate of Ecuador stated that the Council could neither examine the report of the Special Rapporteur nor take a stand on it.³⁰⁴

However, an exception was accepted by some countries. For example, India stated that "[t]he Council can focus its legitimate attention on the threat or likely threat to peace and stability in the region but it cannot discuss human rights situations *per se* or make recommendations on matters outside its competence".³⁰⁵ India considered such action as a deviation from the Charter in relation to the different organs which could erode confidence in the United Nations and have grave consequences for the future of the organisation as a whole.³⁰⁶ The delegation of Zimbabwe warned that, if the tendency of the Security Council to encroach on the mandates of other organs was permitted to continue, it would lead to a serious institutional crisis.³⁰⁷

300. He was appointed by the Commission to investigate alleged human rights violations in Iraq by Commission Resolutions 1991/74 and 1992/71.

301. A/47/367, 10 Aug. 1992, paras 5, 27 and 28.

302. S/24393, S/24394, S/24395 and S/24396.

303. S/PV. 3105, p. 12.

304. *Ibid.*, p. 8.

305. *Ibid.*, p. 6.

306. *Id.*

307. *Ibid.*, p. 12.

The delegations of Australia, Belgium, France, Japan, the Russian Federation and the United Kingdom supported the view that the Council was fully entitled to consider human rights violations whenever it considered it appropriate in the circumstances.³⁰⁸ The proposal was eventually adopted by the Security Council.³⁰⁹

In August 1992, the Non-Aligned Movement in its final Declaration adopted by the Heads of State and Government in Jakarta, "emphasised the importance of ensuring that the role of the Security Council conforms to its mandate as defined in the United Nations Charter, so that there is no encroachment on the jurisdiction and prerogatives of the General Assembly and its subsidiary bodies".³¹⁰

In an analytical consideration of Resolution 688 and the disputed issues regarding the competence of the Security Council to deal with human rights issues and the prohibition of the UN to intervene in internal affairs of states, Articles 2(1), 2(7), and 39 of the UN Charter should be discussed together.

Article 2(1) refers to the principle of the sovereign equality of all UN Member States while in Article 2(7) a guarantee is envisaged so that the United Nations is not authorised to intervene in matters which are essentially within the domestic jurisdiction of a state except for enforcement measures under Chapter VII. According to Chapter VII, when the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression, it would decide on measures to restore or maintain international peace and security.³¹¹

Although Resolution 660 had referred to Articles 39 and 40 and Chapter VII was invoked by the Council in its further resolutions, e.g. Resolution 687 (cease-fire

308- *Ibid*, pp. 47, 41, 51, 46, 42 and 54.

309- *Ibid*, p. 12.

310- Non-Aligned Movement document NAC 10/Doc. 1/Rev. 1(1992), para. 31.

311- Article 39 of the UN Charter.

resolution), the Security Council in Resolution 688 referred to Article 2(7) and "reaffirmed" the commitment of all Member States to the sovereignty, territorial integrity and political independence of all states in the area.³¹² In fact, by these references the Council recalled the obligations of both the United Nations and individual states. Furthermore, the Council "insisted" that Iraq allow access to international organisations. This language does not specifically contemplate forcible action. In fact, prior to Resolution 688 Iraq had permitted some humanitarian organisations to operate within its territory.³¹³

It might be said that the United Nations may intervene in situations of humanitarian need of subjects of a sovereign state in certain conditions. It is believed that "threat to the peace" and "consent" are two legal bases which allow forcible intervention by the United Nations.³¹⁴ With regard to the latter condition, it should be noted that intervention is an act much stronger than mediation or diplomatic suggestion, and in opposition to the will of the particular state that would impair the political independence of that state.³¹⁵

During the Cold War, UN policy was to secure the consent of a target state before intervening as a peacekeeping force, as it did in the Congo case for instance.³¹⁶ However, the United Nations bypassed the consent of the host state or the parties to a conflict for the first time in Somalia. Council Resolution 794 justified the use of all necessary means by claiming that there was no government in Somalia, because the country was in a civil war between several warlord factions.³¹⁷ By contrast, the United

312. SC Res. 688, 5 Apr. 1991.

313. S/22460, para. 5.

314. Bruce Pruitt-Hamm, "Humanitarian Intervention in South East Asia in the Post-Cold War World: Dilemmas in the Definition and Design of International Law", Pacific Rim Law and Policy Journal, June 1994, p. 201.

315. J. G. Starke, Introduction to International Law, (Butterworths, 1994), 11th ed., Chapter 18.

316. B. Pruitt-Hamm, op. cit., p. 203.

317. SC Res. 794, 3 Dec. 1992.

Nations received the consent of the warring factions in the former Yugoslavia in 1992.

With regard to the other condition for UN intervention on humanitarian grounds, namely threat to the peace, the Security Council would act to restore the peace where a breach of or threat to the peace or act of aggression has taken place.³¹⁸ The application of Article 39 in the cases of civil war or violation of human rights depends on the narrow or expanded interpretation of what constitutes a "threat to the peace".³¹⁹ White believes that the finding of a "threat to the peace" is to a large degree a political decision on the part of the Council and such a finding as regards a wholly internal situation is not precluded.³²⁰ He further says that "however, the permanent members are not going to exercise this discretion unless the situation has potential international repercussions which could affect their interests, or even involve them in an escalating conflict".³²¹

It should be said that the Security Council must act in conformity with the overall objectives of the Charter, even though it is not obliged formally by the Charter to act in conformity with the principles of justice and international law.³²² However, since the Council's permanent members' interests may not be necessarily in line with the principles of justice and international law, the Security Council should act strictly within the powers and limitations which the Charter expressly conferred upon it.

318- Article 39 of the Charter.

319- France was the only country that sought to establish the principle that human rights violations in and of themselves warranted a response by the Security Council. S/PV. 2982, (1991), p. 92. However, Resolution 688 did not endorse the French proposal.

320- N. D. White, *op. cit.*, p. 36.

321- *Id.*

322- P. Alston, *op. cit.*, p. 139. As described in Chapter One of this thesis, a proposal to obligate the Council to act on the basis of principles of justice and international law were rejected during the drafting of the Charter at the San Francisco Conference.

The establishment of safe areas (no-fly zones)

The response of individual states to help the refugees was different. As mentioned earlier, Turkey was unwilling to host the refugees or grant them asylum.³²³ The Turkish government was concerned that the massive influx of Kurds from Iraq might stir unrest in the country.³²⁴ In these circumstances the Kurds were facing serious insecurity and widespread grievances.

"Iran, a country already host to about two million Afghans and several hundred thousands Iraqi Shiites, was more open to allowing the Kurds to cross the border for temporary relief, a response which initially received minimal support from the west. As Roger Winter, Director of the US Committee for Refugees, remarked to the US House of Representatives Committee on Foreign Affairs on 23 April 1991, 'Iran is the only one of the countries bordering Iraq that has - to date - acted in a consistent, admirable humanitarian fashion'."³²⁵

On 10 April 1991 the United States announced that France and the United Kingdom would join in the imposition of a no-fly zone over Iraqi territory north of the 36th parallel³²⁶ and on 19 August 1992 the United States announced the imposition of a second no-fly zone over Iraqi territory south of the 32nd parallel.³²⁷

Another plan by the United Nations was to cover all of Iraq for humanitarian assistance. On 18 April 1991, a Memorandum of Understanding was signed by the Secretary-General's Executive Delegate Sadruddin Aga Khan and the Iraqi Minister of Foreign Affairs, by which both sides formally recognised "the importance and

323. Lawyers. Committee for Human Rights, *Asylum under Attack: A Report on the Protection of Iraqi Refugees and Displaced Persons One Year after the Humanitarian Emergency in Iraq*, 3, (1992).

324. *Ibid*, p. 15.

325. H. Adelman, *op. cit.*, p. 9.

326. *N. Y. Times*, 11 Apr. 1991, p. 10.

327. *Ibid*, 19 Aug. 1992, p. 1.

urgency of adequate measures, including the provision of humanitarian assistance, to alleviate the suffering of the affected Iraqi civilian population".³²⁸

According to the Memorandum, a basic framework for United Nations humanitarian action was intended to facilitate the task of co-ordination, effective implementation and monitoring of humanitarian assistance and relief operations.³²⁹ Iraq welcomed UN efforts to promote the voluntary return home of Iraqi displaced persons and to take humanitarian measures to avert new flows.³³⁰

According to the Memorandum, all measures of implementation were to be "without prejudice to the sovereignty, territorial integrity, political independence, security and non-interference in the internal affairs of the Republic of Iraq".³³¹ By the agreement of the government of Iraq, the UN was permitted to have a humanitarian presence, wherever such presence may be needed.³³² The Iraqi authorities denounced the American-led plan as an illegal infringement on Iraqi sovereign authority.³³³ However, President Bush of the United States announced the initiative to establish safe havens for the refugees and stated that it was consistent with Resolution 688.³³⁴

The legality of no-fly zones

On 15 April in a parliamentary statement, Douglas Hurd, the Foreign Secretary of the United Kingdom, stated that the aim of Britain's proposal for safe havens in Iraq was not to create a territorial enclave or a separate Kurdistan or a permanent UN

328. Iraq-United Nations Memorandum of Understanding of 18 April 1991, S/22663 (1991), reprinted in 30 *ILM* (1991), pp. 860-2, para. 1.

329. *Ibid*, para. 10.

330. *Ibid*, para. 2.

331. *Ibid*, paras. 11, 16 and 20.

332. *Ibid*, para. 4. By this agreement UN sub-offices and Humanitarian Centres (UNHUCs) should be established for humanitarian purposes.

333. *N. Y. Times*, 10 Apr. 1991, p. 8.

334. P. Alston, *op. cit.*, p. 150.

presence.³³⁵ Earlier, on 8 April 1991, Britain had proposed a plan under Resolution 687 and 688 to establish a safe haven in northern Iraq under UN control.³³⁶

By 18 April 1991, two major plans, different in a number of respects, were created to help the refugees in Iraq. It is not clear whether UN authorities were totally unaware of the American-led plan and whether the West were totally unaware of the negotiations between UN representative and Iraqi authorities. Two possibilities could be considered. The first is that the two plans were intended to be complementary, and the second that the UN Secretary-General disagreed with the intrusion on Iraqi sovereignty entailed by the American-led plan.³³⁷

The legality of the Secretary-General's initiative could be found in Resolution 688. According to paragraph 5 of the resolution, he was requested by the Council to use all the resources at his disposal, to address urgently the critical needs of the refugees and the displaced Iraqi population. However, although Resolution 688 condemned Iraqi action as a threat to the peace, it did not call for intervention or the use of force to protect the Kurds. Even this resolution did not establish any flight bans as the Council imposed in Bosnia. In fact, the Security Council by adoption of Resolution 781 established "a ban on military flights in the air space of Bosnia".³³⁸

In the Iraq case by contrast, the Security Council did not itself establish any flight ban by adoption of Resolution 688. The Council appealed for states "to contribute to ... humanitarian relief efforts".³³⁹ This language "almost certainly contemplates material and financial assistance, rather than state action to enforce a demand to cease civilian repression".³⁴⁰ Furthermore, Resolution 688, with reference to the Council's

335. Central Office of Information, *op. cit.*, p. 44.

336. *Ibid.*, p. 43.

337. H. Adelman, *op. cit.*, pp. 20-21.

338. SC Res. 781, 9 Oct. 1992.

339. Res. 688.

340. Timothy P. McIlmail, "No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq", 17 *Loy. L. A. Int'l and Comp. L. J.*, (1994), p. 50.

responsibility for maintaining international peace and security, referred to Article 2(7) of the Charter. Consequently, Resolution 688 does not justify the Allied intervention in Iraq.³⁴¹ It should be referred to the statement of the Secretary-General's Legal Counsel's which emphasised that Resolution 688 "was not adopted under Chapter VII" and therefore "the Secretary-General ... could not legally undertake or participate in humanitarian intervention and/or send to Iraq United Nations 'Blue Helmets' to protect the Kurdish population without Iraqi consent or explicit Security Council authorisation".³⁴²

Another resolution which might be invoked for the legal basis of safe-havens is Resolution 678. It could be said that since the coalition (US, UK and France) had the authority to use force to liberate Kuwait under Resolution 678, such authority could be used to enforce Resolution 688 for humanitarian intervention. Three points should be considered regarding this argument.

The first point regards the language of Resolution 678, particularly the terms "subsequent relevant resolutions" and "to restore international peace and security". Although Resolution 688 follows Resolution 660 and 678 in numerical terms, "Resolution 688 does not pertain to Resolution 660 within the meaning of Resolution 678".³⁴³ In fact, the "relevant resolutions" addressed the "breach of international peace

³⁴¹- In August 1996, hostilities between Kurdish groups were resumed. As the Iraqi government dispatched considerable troops and equipment in support of a fraction of the Kurds, the United States considered this action as a violation of no-fly zones, and attacked, with the assistance of the UK, a number of targets in the south of Iraq where civilians were reported to have been killed. This attack was justified under Resolution 688; yet there is no mention of authorisation of use of force in the resolution. As discussed earlier, the no-fly zones themselves were not created by a decision of the Security Council. However, there was no Iraqi flights over the area, and the US reaction seems unjustified as the Iraqi government was moving ground forces in its own territory. Furthermore, the selected targets were stated to be anti-aircraft sites in the south implying no relation to the activities on the ground in the north. Finally, there is a question whether the US reaction was proportionate to the Iraqi action.

³⁴²- This statement quoted in: Thomas M. Franck, "The Security Council and "Threat to the Peace": Some Remarks on Remarkable Recent Developments", in, Rene-Jean Dupuy (ed.), The Development of the Role of the Security Council, (Martinus Nijhoff Publishers, Dordrecht, 1993), p. 103.

³⁴³- T. P. McIlmail, op. cit., p. 51.

and security as regards the Iraqi invasion of Kuwait",³⁴⁴ and the need to "restore the sovereignty, independence and territorial integrity of Kuwait";³⁴⁵ in these resolutions there was no concern for Iraqi civilians or condemnation of Iraq's repression of its civilians.³⁴⁶ The Council adopted Resolution 678 "to restore" the peace which had been breached by the invasion of Kuwait, but Resolution 688 only determined that Iraqi actions "threatened" international peace and security, and since these determinations are distinct, the chosen action must be distinct as well.³⁴⁷ Consequently, Resolution 678 which authorised force to "restore international peace" does not justify use of force to "maintain international peace".³⁴⁸

The second point is that Resolution 686 demanded that Iraq "[c]ease hostile or provocative actions by its forces against all Member States, including missile attacks and flights of combat aircraft."³⁴⁹ It seems that this demand by the Security Council was about attacks against coalition forces and not against Iraqi civilians. Moreover, a ban on Iraqi attacks on coalition aircraft flying in Iraqi airspace was only effective until the formal end of hostilities, i.e. until 3 April 1991; by that time the Council adopted Resolution 687 which set conditions for a formal cease-fire.³⁵⁰

The third point in consideration of the legality of Allied action in Iraq relates to the general principles of international law. It should be noted that, generally, international law treats civil wars and conflicts as purely internal matters. Articles 2(1) and 2(4) refer to the sovereignty of individual states and the prohibition of threat or use of force in international relations. Furthermore, the General Assembly's Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty of 1965 has special legal significance on this

344. SC Res. 660.

345. SC Res. 661.

346. T. P. McIlmail, *op. cit.*, p. 52.

347. *Id.*

348. *Id.*

349. SC Res. 686.

350. For more discussion see: T. P. McIlmail, *op. cit.*, pp. 53-6.

matter. The Declaration provides that "no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned".³⁵¹

Nonetheless, Lillich argues that despite the doctrine of absolute sovereignty of states, a decent respect for human dignity permits intervention on humanitarian grounds.³⁵² However, as Lillich points out: "two provisions make it very doubtful ... whether forcible self-help to protect human rights is still permissible under international law. In the first place, all states by Article 2(4) renounce 'the threat of use of force against the territorial integrity or political independence of any state', subject of course to the self-defence provision contained in Article 51. Secondly, Article 2(7) prevents intervention by the United Nations 'in matters which are essentially within the domestic jurisdiction of any state, except for the application of enforcement measures under Chapter VII'."³⁵³

Thornberry has argued that "humanitarian intervention by individual states could hardly serve as a model for the future. It is something of a blind alley, dangerously destabilising the international society, and ultimately counter-productive for its intended beneficiaries. International law could hardly afford such a doctrine in the age of advanced technological wars".³⁵⁴

³⁵¹. GA Res. 2131, A/6014 (1966). The exceptions to the principle of non-use of force and non-intervention in the view of some states have included interventions to support self-determination, socialism (Brezhnev Doctrine), democracy (Reagan Doctrine) and humanitarian intervention. Jon. E. Fink, "From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security", 19 *Md. J. Int'l L. & Trade*, No. 1, (1995), p. 7.

³⁵². R. Lillich, "Forcible Self-Help by States to Protect Human Rights", *Iowa Law Report* 53, (1967-8), p. 325.

³⁵³. R. Lillich, "Intervention to Protect Human Rights", 15 *McGill L. Rev.*, pp. 210-211.

³⁵⁴. P. Thornberry, *International Law and the Rights of Minorities*, (Clarendon Press, 1991), p. 37.

The International Court of Justice expressed the view that non-intervention is a rule of customary international law and that intervention without state consent would be illegal.³⁵⁵ The Court in the *Nicaragua* case considered and rejected the idea that there was a right of intervention by the use of force to support the "political or moral values" of a rebellion.³⁵⁶

In fact, "genuine instances of humanitarian intervention have been rare, if they have occurred at all".³⁵⁷ In this respect, reference should be made to the intervenor's non-humanitarian interest or motives, or other political or economic considerations involved, in addition to the fact that no intervening state has used the pure rationale of humanitarian intervention to justify its use of force.³⁵⁸ By involving one of the Council's Permanent Members in unilateral intervention, the veto power would prevent the Security Council to take any action to end the intervention and to restore the sovereignty and territorial integrity of the target state.

Although the unlawful acts of the Iraqi government against its population were not acceptable, it was not expected that the coalition would respond with unauthorised action against Iraq. As discussed earlier, none of the Security Council's resolutions authorised military intervention and the creation of a Kurdish quasi-state within Iraqi territory. Also, no rule of the international law permitted such actions by a group of states within another state.

The Bosnian no-fly zone was legally established since not only it was based on the consent of the Bosnian government, but also the Security Council Resolution 781 which clearly authorised "a ban on military flights in the air space of Bosnia".³⁵⁹ As a

355. Case Concerning Military and Paramilitary Activities in and against Nicaragua, *ICJ Rep.* (1986), p. 263.

356. *Ibid.*, para. 206.

357. A. C. Arend and R. J. Beck, *International Law and the Use of Force, Beyond the UN Charter Paradigm*, (Rutledge, 1993), p. 135.

358. *Id.*

359. SC Res. 781, 9 Oct. 1992.

commentator concludes, the Bosnian no-fly zone was an example of the ineffective enforcement of a legally imposed air exclusion regime, while the Iraqi zones represent the effective enforcement of illegally imposed air exclusion zones.³⁶⁰

This United Nations actions regarding Iraq-Kuwait crisis had two different parts. The first was in the context of an international conflict where the Security Council adopted various resolutions to deal with it. The other part was UN involvement in an internal conflict, i.e. offering humanitarian programme to deal with the humanitarian crisis. This case demonstrates that humanitarian assistance (not intervention) should be followed by a proper and clear mechanism through the United Nations. The model of Memorandum signed by the UN and Iraq and acceptance of its arrangements by a government which is prepared to abide by international legal rules would secure access for humanitarian organisations.

³⁶⁰. Timothy P. McIlmail, "No-Fly Zones: The Imposition and Enforcement of Air Exclusion Regimes over Bosnia and Iraq", 17 *Loy. L. A. Int'l & Comp. L. J.*, 1994, p. 36.

CHAPTER EIGHT

CONCLUSIONS

The idea of a new international organisation for maintaining and restoring international peace and security found its first expression almost from the beginning of World War II. It was thought necessary to create an international organisation, more effective than the League of Nations, based on the principle of sovereign equality of all peace-loving states. The initial planners of the new organisation were opposed to an international organisation with the characteristics of a world government or a supranational organisation. Therefore, the new organisation was to be structurally in many respects like the League of Nations, with more powers regarding world peace, and with a permanent dominant position of five nations in its council.

The United Nations was created following the ratification of its Charter by signatories participated at the San Francisco Conference. Participating delegates made tremendous efforts to amend the original proposals to minimise the differentiation between the Security Council and the General Assembly and to include principles of justice and international law as an assurance for peace. The original proposals prepared at the Dumbarton Oaks Conference were adopted with minimal change. Yet, the United Nations Charter contains important provisions regarding the functions of the Security Council, the General Assembly, the Secretary-General and the regional arrangements in dealing with conflicts. The efficient implementation of these provisions could prevent or end the hostilities among nations.

The UN Charter has provided ways in which action relating to international peace and security can be initiated. The Security Council has supremacy over other organs of the United Nations on matters coming within Chapters VI and VII of the Charter and has

primary responsibility for maintaining peace and security. The Security Council may call upon the parties to settle their disputes, and may investigate any dispute or situation the continuance of which is likely to endanger the international peace and security. The General Assembly may discuss any questions relating to the maintenance of international peace and security but, if action is required, the Assembly should refer the matter to the Security Council. The Secretary-General has the right to draw the attention of the Security Council to any matter which in his opinion may threaten the international peace and security. The Secretary-General may act independently regarding a fact-finding operation, and establishing good offices through conciliation and mediation within the framework of the UN Charter. Regional arrangements or agencies can also deal with matters relating to international peace and security. If the parties to a dispute failed to use peaceful means in order to settle their differences, the Security Council, according to its determination of an act of aggression, breach of or threat to the peace, could use enforcement measures, including military and non-military measures, for restoring peace.

However, the division between two Permanent Members of the Security Council and the defensive measures taken by them within the first few years of the establishment of the Organisation put an obstacle in the way of the Organisation to undertake its tasks mainly in relation to Chapter VII of the Charter. Consequently, the institution of "peace-keeping" emerged which had not been envisaged in the Charter, and became the most concerted effort by the United Nations in the area of the international peace and security.

Peace-keeping forces and observer groups have carried out missions of varying scope, duration and degree of success. Their mandate has differed according to the nature of the conflict concerned. The basic principles essential to their success are the consent of the parties, impartiality and non-use of force except in self-defence.

The constitutional basis of peace-keeping and observer missions might be investigated within the context of either Chapter VI or Chapter VII. Regarding Chapter VI it can be said that this chapter deals with peaceful *settlement* of disputes, while *peace-keeping* is a technique that normally does not lead to a settlement or solution of a dispute *per se*. Besides, peace-keeping was created as a result of Council's failure to take action under Chapter VII rather than Chapter VI. However, there have been peace-keeping and observer missions such as UNOGIL and UNCIP with a mandate of investigation, derived from Article 34 of Chapter VI.

The reference to Article 42 as a constitutional basis of peace-keeping is also questionable, since, as discussed in Chapter Two, it was agreed at the San Francisco Conference that the application of Article 42 should be dependent on the entry into force of the special agreements provided for in Article 43. The link between Articles 42 and 43 is specifically indicated in Article 106. Since the forces which carry out the peace-keeping operations are not established under Article 43, they cannot be considered to apply enforcement measures under Article 42.

Furthermore, the International Court of Justice in its advisory opinion in *Certain Expenses* case confirmed that peace-keeping operations are not enforcement measures within the compass of Chapter VII, and the General Assembly, which could make recommendations regarding peace and security, could establish a peace-keeping force for this purpose. Therefore, Article 42 may not provide the constitutional basis for peace-keeping operations. Indeed, the opinion of the World Court removed any doubts about the legality of peace-keeping and it became a supportive basis for developing this institution.

Peace-keeping forces are usually only deployed *following* a cease-fire agreement by the disputant parties to supervise and monitor provisional measures, such as cease-fire or withdrawal of forces. On the other hand, the *consensual* nature of these forces

would imply that they are not categorised as enforcement measures. Therefore, Article 40 may provide the constitutional basis for peace-keeping. This Article requires that the Security Council may, before making a recommendation or deciding on measures provided for in Article 39, call upon the parties concerned to comply with provisional measures as it deems necessary; such provisional measures should be without prejudice to the rights or claims of the parties. However, the Council may take account of a party's failure to comply with provisional measures.

Although provisional measures are not considered as enforcement actions, and should be applied without prejudice to the rights of the parties; non-compliance with them may be taken into account by the Council. This proves that provisional measures should be taken more seriously than a mere recommendation. The Council in few cases, such as the Palestine case, stated that the failure to comply would demonstrate the existence of a breach of the peace. In the case of ONUC, the Council took strong action to obtain compliance with its measures. However, the provisional nature of these measures to prevent the worsening of a situation demonstrates that they must not prejudice the rights and claims or positions of the parties concerned. It seems that a mandatory call for provisional measures would be inconsistent with the "without prejudice" clause. In fact, the recommendatory or mandatory nature of the call for provisional measures depends on the Council's determination of the consequences of states' failure to comply with such measures. However, in most cases the Council has not determined the consequence of failure to comply with provisional measures.

Provisional measures can include measures such as cessation of military hostilities. Since Article 40 relates to measures that prevent an aggravation of the situation before making the recommendations or deciding upon measures under Article 39, the creation of peace-keeping forces in relation to provisional measures is compatible with Article 40. Peace-keeping forces are not dispatched for enforcement measures to end the hostilities and often have limited functions regarding provisional measures,

and their constitutional basis can be derived from Article 40. Peace-keeping operations may of themselves constitute provisional measures under Article 40. In this case, they might be complementary to and conditional on the existence of other provisional measures, and should be organised under the same conditions which are set forth in Article 40 for provisional measures.

In evaluating peace-keeping operations, it has to be said that normally they are dispatched to keep order which has been created by a cease-fire, but long-lasting peace-keeping operations without leading to a final and definite settlement of disputes are contrary to these purposes. The cases of UNFICYP in Cyprus, UNMOGIP in Kashmir, UNIFIL, UNDOF and UNTSO in the Middle East are instances of such operations. These peace-keeping forces were set up originally with a limited mandate and for a short period, but they have lasted for a long time. There is a feeling that peace-keeping operations in these cases tended to sanctify the *status quo* and give the impression after a number of years that their deployment is permanent.

There should be a combination of peace-keeping to maintain order and, at the same time, active steps taken to establish a just settlement of disputes. In fact, open-ended peace-keeping operations, apart from being expensive, would not only be ineffective, but also in some circumstances counterproductive and harmful to the overall settlement process. If peace-keeping forces are given precise and achievable mandates, they can be used as an effective tool for settlement of disputes. Among the peace-keeping and observing missions, UNEF I, UNGOMAP, UNIIMOG and UNAVEM have been considered as successful missions because of the parties' co-operation, clear and achievable mandates and favourable political conditions.

Until the 1980s, most United Nations peace-keeping operations were concerned with inter-state conflicts. In recent years, and particularly after the Cold War, the Organisation has been involved in intra-state conflicts for humanitarian purposes. The

basic principles of peace-keeping have evolved in the post-Cold War era as conflicts concentrated in the realm of civil crises, and the Security Council has increasingly become involved in internal conflicts rather than international disputes, partly because the veto power no longer prevented it from dealing with internal crises.

The Security Council has extended its interpretation of the concept of "threat to the peace" to internal matters such as humanitarian problems and human rights concerns. This interpretation has been, in cases such as Somalia, Rwanda, Haiti and Libya, the basis of economic sanctions or authorisation to use force. The Security Council in its resolutions has recognised that the refugee problem, the non-action *per se* by a state, the existence of a dictatorship regime, constituted a "threat to the peace", and therefore qualified for international action.

It has been explained in Chapter Two that there is a tendency to consider even non-military sources of instability in the economic, social and ecological fields as a "threat to the peace". An imminent outcome of this idea would be the demise of Article 2(7) regarding the limits of the United Nations' delegated powers, which is the touchstone of the Organisation's legitimacy. In fact, the United Nations has been prohibited from all forms of intervention in matters which are essentially within the domestic jurisdiction of any state, except in case of enforcement measures under Chapter VII.

When a bona fide "threat to the peace, breach of the peace, or act of aggression" is discovered by the Security Council, the Charter empowers the Council to take action. There must be an explosive situation which constitutes an actual and persistent threat to the peace to be considered under Article 39 of the Charter. Otherwise, as *An Agenda for Peace* suggests, preventive diplomacy may be utilised through the Security Council or the Secretary-General, and by regional organisations in

cooperation with the UN. Although such attempts in inter-state conflicts are fully within the Charter, they must be reconciled with Article 2(7) in internal conflicts.¹

United Nations action on the ground of human rights violations is questionable, since any situation within a given state which is injurious to human dignity, from adoption of particular social and economic policies to gross violations of human rights during civil wars, could become subject to UN action, whether or not there has been violation of any international obligation threatening the world peace. It should be noted that human rights rules would differ according to the cultural practices within different nations and, accordingly, careful consideration should be given to any suggestion of UN action in this regard.

Yet in cases such as Somalia, where there was a humanitarian crisis and a collapsed structure of state's authority, something had to be done to break the cycle of violence and hunger. The United Nations considered military intervention as the best solution for a humanitarian crisis. In the absence of the consent of warring factions, the military operation not only did not resolve the problem, but also undermined the credibility of the United Nations and resulted in a high cost for the Organisation.

The cases of Somalia and Rwanda demonstrated that a mixed operation of peace-keeping and peace-enforcement might not be successful. The United Nations tried to separate peace-keeping from peace-enforcement by authorising NATO, United States and France to use force in supporting UNPROFOR, UNOSOM and UNAMIR respectively. However, in cases where there is no peace to keep, the United Nations should try to achieve a secure environment and then deploy peace-keeping forces.

¹- Boutros Boutros-Ghali, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, (United Nations, New York, 1995), A/50/60 - S/1995/1, para. 27.

The Security Council failed to seize the opportunity created by the end of the Cold War to implement Chapters VI and VII effectively. In the case of Bosnia, the Security Council refused to act under Articles 42 to 48 to recognise the situation as a breach of the peace and an act of aggression against an independent state, requiring military enforcement measures, to end the hostilities. Instead, the UN and NATO undertook different mandates with confused and complex procedures, without a unified command, clear rules of engagement or a joint understanding on the use of force. These led them to remain inactive, and most of the efforts of peace-keepers/peace-enforcers were directed to protecting themselves rather than humanitarian assistance or protection of civilians.

Imposition of sanctions by the Security Council, in the absence of a clear objective, would cause serious consequences for states and their population. The legitimacy of sanctions may be questioned if they deprive a state of capacity to defend itself in case of aggression. Moreover, sanctions can be applied to modify the behaviour of a government, but they may cause long-term damage to the productive capacity of the target country. *An Agenda for Peace* stressed that "the purpose of sanctions is to modify the behaviour of a party that is threatening international peace and security and not to punish ... while recognising that the Council is a political body rather than a judicial organ, it is of great importance that when it decides to impose sanctions it should at the same time define objective criteria for determining that their purpose has been achieved".²

In the case of Kuwait, because of political will and national interests, the Security Council acted rapidly to use its full potential to respond to Iraq's aggression. In the absence of forces at the disposal of the United Nations, the enforcement task was delegated to a coalition of states. However, after authorising use of military force, the Security Council lost its control and supervision over the events subsequent to the

²- *Ibid*, paras. 66-68.

main enforcement action. This matter has increased doubt among nations regarding the authorisation of a multinational force to act on behalf of the Organisation. *An Agenda for Peace* has rightly stated that entrusting enforcement tasks to groups of member states not only can have a negative impact on the Organisation's stature and credibility, but also there is the danger that the states concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Council when it gave them its authorisation.³

In retrospect, it is very important that operations authorised by the Security Council to restore peace be thoroughly discussed, analysed and controlled by the Council. Concluding agreements under Article 43 and re-establishing Military Staff Committee would be necessary for institutionalised enforcement action in case of aggression and to prevent unilateral actions by states or moving back towards the conduct as a traditional exercise of the right of collective self-defence.

By sharp contrast to the UN action in Kuwait, during the Iraq-Iran war, the United Nations played a reduced role regarding Iraq's aggression and its use of prohibited weapons. During eight years of war between the two countries, the Security Council neither sought to identify and condemn the aggressor, nor did it show its determination to end the hostility either by peaceful means under Chapter VI or forceful means under Chapter VII. The only reference by the Council to Chapter VII was when both parties became exhausted and Iran had recovered most of its occupied territories. As discussed in Chapter One, the drafters of the Charter determined that in case of flagrant aggression imperiling the existence of a member of the Organisation, enforcement measures should be taken without delay, and to the full extent required by the circumstances, except that the Council should at the same time endeavour to persuade the aggressor to abandon its venture, by the means contemplated in Chapter VI.

³- *Ibid.*, para. 80.

Although the Security Council, except in the cases of Korea and Kuwait, did not take effective action concerning clear acts of aggression, it has taken significant decisions in respect of internal crises. The Council has focused on Chapter VII in dealing with internal crises and has authorised the use of force on humanitarian grounds in recent years. This practice has created a fear in most countries as it might have special consequences, particularly when no guidance has been given as to how the expanded doctrine of threat to the peace should be applied in the future.

In case of disputes among nations, preventive measures are preferable to enforcement measures, as *An Agenda for Peace* emphasised⁴, and fact finding missions and good offices should be used increasingly by the Organisation. The means envisaged in Chapter VI has to be utilised before any use of force in both inter-state and intra-state crises. Where an explosive humanitarian crisis exists, attention should be paid to humanitarian assistance rather than humanitarian intervention with the United Nations having a balanced humanitarian, political and peace-keeping presence.

The new technique of establishing safe areas or protected zones has been used in the cases of Bosnia, Iraq and Rwanda. This technique was not envisaged in the UN Charter and was utilised to protect the population from outside aggression and to supply them with humanitarian aid. In establishing safe areas, not only the authorisation of the Security Council is required, but also the consent of the parties is necessary for their effectiveness. The Bosnian no-fly zone was an example of an ineffective but legal exclusion zone, while the Iraqi zones represent effective but unauthorised exclusion zones. The protected zone established by France in Rwanda was also without the Security Council's authorisation. In fact, since obtaining consent for establishment of these areas, especially in intra-states conflicts, is unlikely, and controlling these areas has caused problems, it seems that establishing safe areas may not be the best solution.

⁴- *Ibid*, para. 26.

Regional organisations, as localised forms of the United Nations, may deal more efficiently with a dispute within their region than the United Nations. *An Agenda for Peace* has regarded regional organisations as a matter of decentralisation and co-operation with UN efforts to contribute to a deeper sense of participation, consensus and democratisation in international affairs.⁵

The idea of a supranational role for the United Nations is not compatible with the structure, principles and purposes of the Organisation. The main drafters intended that the UN should be founded on the same basis as the League. It would be a great mistake to recognise the UN as a supranational government with supranational jurisdiction on the basis of the rules and principles of international law. Since international law governs the relations of sovereign states, while the idea of supranational government needs an ultimate unity of the legal systems of the world.

Considering the role of the Security Council in maintaining and restoring peace, it should be noted that, although the Security Council is considered as a political organ of the United Nations, it is necessary that it put the legal basis for its decisions as the prime objective, and political considerations should fall within the framework drawn by legal considerations. It is primarily essential that the legal basis of Security Council decisions is clearly identified in its resolutions. In fact, the Organisation, as a creature of a treaty which is a legal instrument, is obliged to deal with disputes "in conformity with the principles of justice and international law". The significance of the law is undeniable in the quasi-judicial role of the Council. Indeed, respect for the law not only does not affect the efficacy of the Council inversely, but also it will provide the basis of a long-term interest in maintaining and restoring international peace and security.

⁵- Boutros Boutros-Ghali, *An Agenda for Peace. Preventive Diplomacy, Peacemaking and Peace-keeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, (United Nations, New York, 1992), para. 64.

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