

SOME INTERNATIONAL CONSTITUTIONAL ASPECTS OF THE PALESTINE CASE

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I

RELEVANT THEORIES OF THE CHARTER

The early Palestine case in the United Nations demonstrated the inadequacy of the prevailing theory as to how the Organization would deal with disputes and situations as part of its major function of maintaining peace and security. The case practically forced upon world attention the outline of another approach believed to have greater potential for the development of law, and actually more in keeping with the Charter as written, than the predominant theory. Subsequent developments in the U.N. handling of the case did not, however, on the whole, contribute to the development of this theory or, indeed, any consistent theory, but rather contributed to the present state of confusion as to the true nature of the powers of the world Organization in respect to the handling of disputes and situations.

The predominant theory of the Charter was sometimes expressed as embodying the combination of power with responsibility for the preservation of peace. It was thought that the desired combination could be achieved by giving permanent seats on the Security Council to the five major wartime allies, and by placing primary responsibility upon that organ for the maintenance of peace and security. The requirement of unanimity among the five, written into the Charter, was a manifestation of the fact, obvious enough in retrospect, that they regarded themselves as continuing to be fully sovereign in the traditional sense, and, consequently, of the essentially political approach, as distinguished from what might be called a legal or constitutional approach, upon which the predominant theory of the Charter was based.

This theory was also manifested by the intention that "enforcement measures" would be the principal power of the Organization for the maintenance of peace and security. This was the power given to the Council to apply sanctions—military measures or measures short of force—to the extent necessary for the maintenance of peace and security. As thus defined, the enforcement power could include the right to decide substantive issues in dispute and to enforce such decisions, with the effect

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of forcing changes in the relationships of states, internal and external, without their consent.

The predominant theory of the Charter thus carried the possibility that the Organization might impinge upon the proposition, basic since the beginning of the modern state system, that there is no higher law-making authority than the states themselves.

This potential collision of basic concepts was treated rather ambivalently during discussions leading to the Charter.¹ The prevailing view of the enforcement function was that this was the essential power which was to enable the Organization to deal with aggressions such as had led to the Second World War. From this point of view, the question of resolving substantive issues in dispute between states was not directly relevant. It was regarded, as it always had been, as being primarily the responsibility of the parties to the disputes. With respect to the power of the Organization to contribute to the peaceful settlement of disputes, the Dumbarton Oaks Proposals advocated that it should have power to recommend procedures of settlement when the parties had failed to settle a case by means of their own choice.² When it was proposed by the British Delegation at San Francisco that the Council should be empowered to recommend actual terms of settlement,³ there was a reluctance due to traditional fears of wrongful interference, intensified by recent memories of Munich. As to this British proposal, Mr. Dulles is reported as stating, in effect, in a United States Delegation meeting:⁴

[U]nder the Dumbarton Oaks Proposals it had been generally understood that the Security Council would act only as a policeman and would not itself have the function of settling disputes on the basis of merit. The British proposal goes very much farther by making the Security Council the arbiter of the world.

In a Four-Power Consultative Meeting, a United States spokesman, after indicating opposition to the British proposal, went on to say: "As matters now stand the Council can in any case take enforcement action if the dispute is not settled."⁵ That the satisfactory handling of a dispute might require the solution of the substantive issue was indicated as follows by an advisor in a United States Delegation meeting, speaking of what was to become Chapter VII of the Charter defining the enforcement function:⁶

¹ See, e.g., Minutes of the Eighteenth Meeting of the United States Delegation, San Francisco, April 26, 1945, [1945] 1 FOREIGN REL. U.S. 418-26 (1967).

² Ch. VIII, sec. A, para. 5. The text of the Proposals may be found in [1944] 1 FOREIGN REL. U.S. 890, 896 (1966).

³ Minutes of the Second Four-Power Consultative Meeting on Charter Proposals, San Francisco, May 3, 1945, [1945] 1 FOREIGN REL. U.S. 565 (1967).

⁴ Minutes of the Twenty-Eighth Meeting of the United States Delegation, San Francisco, May 3, 1945, *id.* at 577.

⁵ Minutes of the Third Four-Power Consultative Meeting, *supra* note 3, at 586.

⁶ Minutes of the Eighteenth Meeting of the United States Delegation, *supra* note 1, at 418.

[U]nder paragraph 1, Section B of Chapter VIII [of the Dumbarton Oaks Proposals] the authority to recommend procedures and terms of settlement would lie in the Security Council if it was determined that a threat to the peace exists. The Security Council under this paragraph would have unlimited powers to avert a threat to international peace and security and could even impose the terms of settlement. Perhaps this provision goes too far, but this is a possible interpretation.

A United States Delegate pointed out in the same meeting:⁷

[T]he matter had been discussed endlessly in the State Department, and then the question had been taken to Dumbarton Oaks and the controversy had raged again there. It was his belief that the problem would still come up in the Organization if it were not clarified in the Charter.

The matter was, in fact, clarified in the Charter through the adoption of the proposal, which became Article 37, authorizing the Council to recommend terms of settlement of disputes. It was emphasized at the time that this power was limited to that of recommendation, and would have no binding force.⁸

As to the enforcement function, language had been proposed at Dumbarton Oaks, and was carried into the Charter as Article 1, paragraph 1, which can readily be read either as including or excluding the power to enforce decisions on the merits. Article 1, paragraph 1, provides:

The Purposes of the United Nations are:

1. 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 for the suppression of acts of aggression or other breaches of the peace

In Chapter VII, the introductory provision is consistent with this definition, authorizing the Council to determine the existence of threats to peace, breaches of peace and acts of aggression, and, in the event of such finding, to make recommendations for settlement, and, if necessary, decide upon measures of force or measures less than force to deal with the situation.

The limitation of the Organization's peaceful settlement function to the power of recommending terms of settlement meant, of course, that it could not make legally binding decisions. The collective measures function should have been correspondingly interpreted as excluding the power to enforce such decisions.

However, the adoption of this language did not, in fact, suffice to change the prevalent thinking. The problem did come up in the Organization, and notably in the Palestine case.

That case came into the United Nations when Great Britain decided to give up

⁷ *Id.* at 423.

⁸ Report of Rapporteur of Committee III/2 to Commission III, Doc. 1027, III/2/31 (1), 12 U.N.C.I.O. Docs. 159, 162 (1945), reprinted in UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS 756, 759 (1946).

the Mandate of Palestine with which it had been entrusted by the League of Nations, and called upon the United Nations to provide for the future government of that country.⁹ The General Assembly, by resolution of November 29, 1947,¹⁰ undertook to fulfill this request by recommending the Plan of Partition with Economic Union of Palestine. Under this Plan, Palestine was to be divided into three parts: an Arab state, a Jewish state, and the Jerusalem area which was to be placed under an international regime administered by the United Nations. The whole of Palestine was to constitute an economic union.

As a result of indications that the Arabs of Palestine and the surrounding Arab states would reject any plan envisioning partition of Palestine, the Assembly majority proceeded to incorporate in its resolution the requests that

(b) The Security Council consider, if circumstances during the transitional period require such consideration, whether the situation in Palestine constitutes a threat to the peace. If it decides that such a threat exists, and in order to maintain international peace and security, the Security Council should supplement the authorization of the General Assembly by taking measures, under Articles 39 and 41 of the Charter, to empower the United Nations Commission, as provided in this resolution, to exercise in Palestine the functions which are assigned to it by this resolution;

(c) The Security Council determine as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by this resolution

The Commission referred to was the U.N. Palestine Commission, which was given the function of implementing the Plan. Articles 39 and 41 of the Charter provide for the use of force to deal with threats to peace or breaches of peace. The above-quoted paragraphs thus tended to convey the impression that the United Nations might undertake enforcement of the Plan as such, provided that the situation was deemed to constitute a threat to international peace. Sponsors of the paragraphs made it clear that the purpose they had in mind was implementation of the Plan as such.¹¹ The United States Delegation insisted that the decision whether a threat to peace exists must, under the Charter, rest with the Security Council in the exercise of its independent judgment.¹² However, the language of paragraph (b), which that Delegation supported, indicates that, once a threat to peace had been found to exist, resulting action would have the purpose of enforcing the Plan as such. Arab delegations requested to have submitted for adjudication the question whether the

⁹ Letter from the United Kingdom Delegation . . . , U.N. GAOR, 1st Spec. Sess., vol. I, Annex I, at 183, U.N. Doc. A/286 (1947).

¹⁰ G.A. Res. 181, 2 U.N. GAOR Resolutions 131 (1947), U.N. Doc. A/519 (1948).

¹¹ 2 U.N. GAOR, Ad Hoc Comm. on the Palestinian Question 166 (1947) (New Zealand); *id.* at 170 (Denmark); *id.* at 221 (Canada). The Danish Delegation introduced the paragraphs in question. Annexes 20 and 20a, *id.* at 266-67, U.N. Docs. A/AC.14/43 and A/AC.14/43/Rev. 1 (1947).

¹² 2 U.N. GAOR, Ad Hoc Comm. on the Palestinian Question 221 (1947); 3 U.N. SCOR, 260th meeting 401 (1948).

Council had the power to enforce the Plan.¹³ This request was overridden with little discussion.¹⁴

Other statements tending to convey the impression that the Council had the power to enforce the Plan as such were made by the Secretary-General, in a statement to the first meeting of the Palestine Commission,¹⁵ and by that Commission in requesting the provision of force by the Council, so that it could carry out its task.¹⁶ This last request was made because of rising violence in Palestine as the end of the Mandate approached.

As a result of these pronouncements and others,¹⁷ there appears to have been a widespread expectation that the Plan would be enforced if necessary.¹⁸

However, the issue between Arabs and Jews finally went to the arbitrament of force and the Security Council did not undertake enforcement measures of any kind, for any purpose. The Plan of Partition with Economic Union collapsed.

The reason it was not enforced may well have been stated by the Indian Delegation to an ensuing special session of the General Assembly:¹⁹

It had been said that any solution would require force, but this ignored the difference between the temporary employment of force to maintain law and order and the perpetual use of force to uphold an arrangement unacceptable to the majority of the population. The only permanent solution could come through agreement.

Along the same line, certain members of the United States Department of State asked how it would be possible to enforce the economic union, which was an integral part of the Plan.²⁰

Recognition of the inadequacy of the "enforcement" function implied the inadequacy of the predominant theory of the Charter. A move toward a different theory is indicated in the following explanation of the United States Representative to the Security Council of his delegation's decision to abandon enforcement of the Plan as such:²¹

The recommendations of the General Assembly have great moral force which applies to all Members regardless of the views they hold or the votes they may have cast on any particular recommendation

. . . .
The Security Council is authorized to take forceful measures with respect to

¹³ Report of Subcommittee 2 to the Ad Hoc Comm. on the Palestinian Question, 2 U.N. GAOR, Ad Hoc Comm. on the Palestinian Question 270, 299-301, U.N. Doc. A/AC.14/32 (1947).

¹⁴ The principal discussion and only votes took place at the committee stage. 2 U.N. GAOR, Ad Hoc Comm. on the Palestinian Question 201-03 (1947).

¹⁵ U.N. Doc. A/AC.21/SR.1 (1948).

¹⁶ 3 U.N. SCOR, Spec. Supp. 2, at 10, 18-19, U.N. Doc. A/AC.21/9 (1948).

¹⁷ See, e.g., Soviet statement in 3 U.N. SCOR, 270th meeting 143 (1948).

¹⁸ See, e.g., N.Y. Times, Feb. 25, 1948, at 1, col. 6.

¹⁹ U.N. GAOR, 2d Spec. Sess., 1st Comm. 64 (1948).

²⁰ N.Y. Times, March 4, 1948, at 10, col. 4.

²¹ 3 U.N. SCOR, 253d meeting 265-67 (1948).

Palestine to remove a threat to international peace. The Charter of the United Nations does not empower the Security Council to enforce a political settlement whether it is pursuant to a recommendation of the General Assembly or of the Security Council itself.

What this means is this: The Security Council under the Charter can take action to prevent aggression against Palestine from outside. The Security Council, by these same powers, can take action to prevent a threat to international peace and security from inside Palestine. But this action must be directed solely to the maintenance of international peace. The Security Council's action, in other words, is directed to keeping the peace and not to enforcing partition.

It was argued that this distinction was unreal since, if force had been applied strictly for the purpose of restoring peace, it would have had to be directed against the Arabs, who were resisting partition, and thus would have enabled the Jewish state to be set up and would have amounted, in effect, to enforcement of this vital part of the Plan.²² Since this analysis was apparently correct, the question is suggested whether it would not have been the desirable course to state candidly that the real purpose of Security Council measures was to enforce the Plan as such.

II

A THEORY OF POSSIBLE POTENTIAL

The answer to this question, inherent in the main thesis of the present discussion, may take as its starting point the proposition that this phase of the Palestine case proved that the predominant theory of the Charter was inadequate. It did so in a way that resulted in the United States Representative moving over, at least temporarily, to a second theory which can be said to find its principal Charter statement in Article 37, authorizing the Council to recommend terms of settlement, and under which the central prerequisite becomes not enforcement through the collaboration of the major powers, but the willingness of parties to abide by United Nations recommendations for the substantive solutions of disputes.

By the time of the Palestine case there had already been strong indications in the German, Korean, Iranian and Greek cases, and in the Czech case which arose at this time, that the great power collaboration upon which the predominant theory of the Charter rested was not to be forthcoming. Also, the major powers had failed in negotiations on the agreements contemplated by Article 43 of the Charter, to be concluded between member states and the Security Council, concerning the troops and facilities to be provided to enable the Council to carry out its enforcement function. The Palestine case proved a point that still needed to be proved, namely that, at least in a case of this severity, the Council did not have the enforcement capability to fulfill its major purpose of maintaining peace and security even when the five permanent members were in accord. When, in these circumstances, the United States Representative stressed a moral obligation on the part of the Arab states

²² See, e.g., *id.* 261st meeting 12-13 (1948).

to accept the Assembly's recommendation of terms of settlement, he was pointing out what was, in fact, the essential requirement for the fulfillment of this major purpose. However, the requisite moral force to bring about acceptance of the resolution was in fact lacking. The Arab states regarded the Plan as immoral and wrongful, and considered themselves perfectly justified in rejecting and resisting it.

If the Assembly's recommendation had been complied with, notwithstanding Arab disapproval of it, such acceptance would have constituted strong evidence of the existence of the kind of moral force that the United States Representative said existed. The ability of the United Nations to gain acceptance for its recommendations in this and similarly serious disputes would also have signified the existence of real law. It is fruitless, in this area, to distinguish moral obligations from legal obligations. Law means moral force, and both entail the requisite consensus of public opinion as to the meaning of justice.

Thus, the Palestine case, in its early phase, provided considerable proof that the predominant theory of the Charter, based on the ideas of power combined with responsibility and of great-power collaboration, and which regarded the enforcement function as the essential power of the Organization, was inadequate. While reason was thus given for governments and peoples to look for a new theory which might lay the basis for the successful achievement of the Organization's principal objective, such a course was discouraged by the growing east-west struggle. Western states, which had the greatest interest in the success of the Organization, were forced to look to their defenses, thus reinforcing the traditional approach to international relations based on power and politics. This tendency has increased in ensuing years.

If governments and peoples had then undertaken, or should still undertake, the search for a new theory to enable the Organization to fulfill its major purpose, what might be the nature of such a theory?

Although emphasis has been placed above upon the necessity of gathering moral force behind the recommendations of the United Nations on substantive issues in dispute, this line of thought may have greater relevance to the question of means than to that of the goal itself. It is indeed difficult to foresee a time when states will be willing to accept recommendations requiring sacrifices of what they regard as their vital interests. What is required, rather, would seem to be a transformation of thinking on the part of all concerned—a growth of consensus as to the meaning of justice—to the point where such differences will no longer exist to the extent of being able to cause wars.

The actual content of recommendations and, more broadly, the mode of handling actual disputes and situations by the United Nations, is believed to have a potential contribution to make to the achievement of this objective because of the public attention focused upon such matters.

An ultimate objective of endeavors properly to use the United Nations in concrete cases is, from this point of view, the growth of confidence in the system. Of prac-

tically equal importance is the development in the public mind of a consistent and workable set of principles and procedures, forming an adequate system for handling disputes and situations. It is not to be expected, in many cases, that there will be agreement as to what the correct applicable principles and procedures are—particularly, substantive principles. It is for this reason that emphasis is placed upon the effort made to decide correctly, rather than upon the actual application of correct principles. Efforts made, and seen to be made, by competent authorities to cause the United Nations to do justice in accordance with identifiable principles dispassionately applied should be expected, in time, to develop confidence in the system, and contribute to the emergence of the general outline of the system's structure.

On the other hand, the goal would seem inevitably to be set back to the extent that public efforts to deal with an important case tend to cause confusion as to relevant principles and powers. In this connection, the original predominant theories which were carried into the United Nations were inherently confusing. On one hand, there was a deliberate continuance of the traditional refusal of states to recognize a higher law-making authority; on the other, it was considered that the Organization should have a power of enforcement enabling it to do whatever was necessary for the maintenance of peace and security.

It is submitted that what has been referred to above as a second, potential theory of the Charter furnishes a consistent and workable outline which can be built upon. As it was outlined in the statement of the United States Representative above quoted, which finds a basis in the Charter as written, it would include a peaceful settlement function embracing a power of persuasion on the part of the Organization; and a collective measures function authorizing the application of measures of force or less than force for dealing with aggressions, other breaches of peace and threats to peace, but not, of course, including the power to enforce decisions on the merits as such.

The Palestine case has furnished perhaps more opportunities than any other case to come before the United Nations for utilizing the Organization in such manner as to advance or set back the prospects of developing law and the Charter. Some aspects of the case bearing on such matters may be briefly considered, evaluating them against the theory of the Charter just referred to.

A. Peaceful Settlement Function

Attention may first be given to the peaceful settlement function of the United Nations. While, as has been indicated, the Charter specifically provides that this should be essentially a power of persuasion, an important aspect of the function in practice consists in continuing efforts to make it appear as embracing the power to decide substantive issues with legally binding effect. Notwithstanding the proof of its inadequacy given by the failure of the Plan of Partition with Economic Union,

as indicated above, parties to the Palestine dispute continued to assert the rule in question. Thus Israel claimed that the Assembly's resolution of November 29, 1947, recommending the Plan, was "the only internationally valid adjudication on the question of the future government of Palestine."²³ As to Jerusalem, however, which, under the same Plan, was to become an international city, the Israeli position was different. It was now holding the western part of the city, and claimed the right to continue to do so on the ground that the Arab attack on the city had invalidated that part of the Plan.²⁴ The Arabs, on the other hand, claimed that the part of the Plan calling for partition was a mere recommendation which they were entitled to reject;²⁵ however, the Israeli seizure of the western portion of Jerusalem was characterized by the Arabs as a violation of the Assembly resolution in question.²⁶

The next phase of the case relevant to the present discussion concerned the refusal of Egypt to allow passage of Israeli-connected ships and cargoes through the Suez Canal. By its resolution of September 1, 1951,²⁷ the Security Council "called upon" Egypt to terminate these restrictions. Whereas clarity as to United Nations powers being exercised would seem indispensable to building an effective set of principles and procedures with roots in public opinion, the phrase "calls upon" seems calculated to cause uncertainty as to whether the Council was purporting to decide with binding effect or merely to recommend that Egypt take the desired action. The body of the resolution was also ambivalent, indicating in part that the Egyptian restrictions were in violation of existing legal obligations, and in part that they were wrong on grounds of equity and justice. The accusation that the measures violated existing law could have been decided only by the International Court of Justice or other competent tribunal and only if the parties agreed to submit the question; the proper role of the Council on this point would have been to recommend such submission. If the purpose were, on the other hand, to propose that Egypt change its regulations on grounds of equity and justice, neither the Council nor any other organ has been empowered to make binding orders to such effect. The relevant power which has been agreed to by all members of the United Nations is that of recommendation.

Two years later Israel asserted that Egypt had "defied" the resolution of September 1, 1951, "in contravention of Article 25 of the Charter."²⁸ Article 25 provides that member states agree to carry out decisions of the Security Council. However, under the Charter as written, the provision could not be intended to apply to proposals for changing existing legal relationships because it is specifically provided else-

²³ 3 U.N. GAOR, Supp. 11, Annex I, at 24, U.N. Doc. A/648 (1948).

²⁴ 3 U.N. GAOR, pt. 1, 1st Comm. 644-45 (1948).

²⁵ U.N. GAOR, 2d Spec. Sess., 1st Comm. 22-23 (1948).

²⁶ 4 U.N. GAOR, Ad Hoc Political Comm. 269 (1949).

²⁷ S.C. Res. 95.

²⁸ Letter dated 9 September 1953 . . . , 8 U.N. SCOR, Supp. July-Sept. 1953, at 75, U.N. Doc. S/3093 (1953).

where in that instrument that the relevant power is that of recommendation.²⁹ Again in 1954 an Israeli spokesman asserted that Egypt was continuing to "defy" the "verdict" of the Council represented by the resolution of September 1, 1951.³⁰ Other states also, in these debates, indicated that they regarded that resolution as legally binding.³¹ In 1956 the Secretary-General referred to it as having "adjudicated" the controversy.³²

Such expressions no doubt encouraged later actions and expressions tending to convey the impression of a power on the part of the United Nations to enforce decisions on the merits, including even such a power on the part of the General Assembly.³³ Such indications tend to be confusing because they conflict with the general knowledge that no such power was incorporated in the Charter, and that states have not tacitly accepted any such power with a scope that would permit general application. The indications referred to on the part of the General Assembly, which probably derived in part from the handling of the early Palestine case, also conflict with the position maintained officially by the United Nations and others that that organ is without power to do more than make recommendations in the handling of disputes and situations. Finally, since the efforts in question have proved generally unavailing, they must have damaged the prestige of the Organization by creating the impression that the states or regimes in question were successfully defying binding decisions of the United Nations.

There has been, in fact, little or no evidence of willingness on the part of states to accept a power of binding decision on such substantive issues when directed against themselves. Indeed, when states direct their attention toward the procedure of peaceful settlement as such, they tend to emphasize that parties should have freedom of choice as to methods of solution.³⁴

The peaceful settlement function as written into the Charter, authorizing the Organization to attempt to persuade the parties to come to agreed solutions, lying between what might be called the two extreme positions just referred to, furnishes a solid starting point for development in that it is a power deliberately conferred

²⁹ L. GOODRICH & E. HAMBRO, *CHARTER OF THE UNITED NATIONS* 209 (2d rev. ed. 1949); R. RUSSELL & J. MÜTHER, *A HISTORY OF THE UNITED NATIONS CHARTER* 665 (1958); D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 32 (1963). *But cf.* McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Control*, 62 *AM. J. INT'L L.* 1, 11 (1968).

³⁰ 9 U.N. SCOR, 658th meeting 25 (1954).

³¹ A draft resolution which would have called upon Egypt "in accordance with its obligations under the Charter to comply" with the resolution of September 1, 1951, 9 U.N. SCOR, Supp. Jan.-March 1954, at 44, U.N. Doc. S/3188 and Corr. 1, would have passed except for a Soviet veto. 9 U.N. SCOR, 664th meeting 12 (1954). See remarks of delegations in *id.*, 663d meeting 3-4, 9.

³² 11 U.N. SCOR, Supp. April-June 1956, at 52-53, U.N. Doc. S/3596 (1956).

³³ G.A. Res. 1761, 17 U.N. GAOR, Supp. 17, at 9, U.N. Doc. A/5217 (1962); G.A. Res. 1807, *id.* at 39-40. The over-all tendency in the handling of such cases as those concerning *apartheid* in South Africa and Portuguese overseas territories (to which the resolutions just cited respectively pertained) and Rhodesia is indicated by the evident fact that the Security Council's sanctions in the latter case are widely regarded as having the purpose of enforcing substantive decisions.

³⁴ U.N. Doc. A/6799, September 26, 1967, at 165.

upon the United Nations, and is accepted as generally applicable by all concerned. After the adoption of the Plan of Partition, the Arab states relied to a considerable extent on the assertion that it was merely a recommendation which they were perfectly entitled to reject.³⁵ This is of course true, and is believed to represent a strength of the recommendatory power from the standpoint of developing law and the Charter in world opinion. It provides greater flexibility than would a decision-making power. The failure of the Plan of Partition was a setback for the United Nations in large part because the impression had been created that it would be enforced if necessary and that, therefore, it had been adopted with legally binding effect. The rejection of a recommendation should not involve any comparable loss of United Nations prestige, and it is herein considered that the effort should be made, in the handling of cases, to have the right of rejection fully understood and accepted. The potential of this procedure in developing moral force behind the actions of the United Nations is believed to lie in the impact made on public opinion as the result of efforts to use the power properly, in a dispassionate search for justice.

Pursuing the theory that correct applications of the peaceful settlement function to concrete disputes may contribute to the growth of law, it is when we turn from questions of procedure to those of substantive principle that it is necessary to emphasize the importance of the effort made, rather than the correctness of the principles applied, as the decisive factor. This is because it is frequently impossible to know with certainty what substantive principle or principles ought to be applied in a given situation.

The early Palestine case, in which the Organization recommended the partition of the country, is an example. It will be a long time, if ever, before dispassionate people are able to say with any certainty what was the course of true justice in that situation. While the Plan of Partition overrode the principle of self-determination, the force of Zionism at the time was such as would undoubtedly have brought about partition in any case; the Plan, if carried out, would have had the advantageous tendency of lessening tensions, by providing for an economic union, and for free access of all concerned to Jerusalem.

The case also illustrates that the principle applicable to a case may change with passage of time, not only from one case to another but even within the same case. Such a change occurred between the Balfour Declaration and the end of the Mandate due to increased Jewish immigration, the intensification of Arab nationalism and other, interrelated, factors.³⁶

The case also provides a corrective to undue optimism as to the possibility that competent authorities, however willing, will be able to embark upon the dispassionate search for justice without the intrusion of extraneous political factors. For example, during and after the Second World War, political factors extraneous to the Middle

³⁵ Cf. note 25 *supra* and accompanying text.

³⁶ See C. SYKES, *CROSSROADS TO ISRAEL* 19 (1965); R. CROSSMAN, *A NATION REBORN* 60-68 (1960).

East compelled British Governments to take different positions on the Palestine case from that represented by the Balfour Declaration of 1917 and the Mandate of 1922.³⁷

Despite the difficulties of the case from the standpoint of the substantive solution to be sought, it is believed that the debates did bring out the issues for the benefit of world opinion, and that the recommendation of Partition with Economic Union was not, per se, a setback to the prospect of developing an effective system based on law.

Perhaps the substantive principle most desired to be applied by the Arab states in the present Middle East crisis is the rule, implied in Article 2, paragraph 4, of the Charter, that for a state to gain territory through the use of force is wrongful. This provision is as follows:

All 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.

This rule, sometimes regarded as the most important of the Charter, has been upheld in some cases by the United Nations (*e.g.*, Greece, Korea, Hungary, and the Suez crisis of 1956); in other, and more recent, cases its application has been defeated, even by the votes of some states which now desire its application against Israel.

When, in December 1961, India used force to annex the Portuguese colonies of Goa, Damão, and Diu, a majority of the Security Council supported a draft resolution³⁸ which would have cited *inter alia* the above-quoted Article 2, paragraph 4, of the Charter, deplored the use of force by India, and called for a cessation of hostilities, the withdrawal of Indian forces and the search for a solution by peaceful means.³⁹ The resolution was defeated by the Soviet veto. The three other votes against it included that of the United Arab Republic.⁴⁰ The latter country co-sponsored another proposal⁴¹ which would have declared that the mere existence of the Portuguese colonies in question constituted a threat to international peace.⁴² It was defeated, receiving only the votes of the UAR, the USSR, and two other members.⁴³ While the proposed resolution was thus without direct impact, the attempted justification of the use of force by India would seem calculated to strengthen, in the eyes of world opinion, the claim of Israel in the 1967 crisis justifying its action as necessary to meet a threat to peace and to its security. On the basis of

³⁷ See, *e.g.*, C. SYKES, *supra* note 36, at 179-200, 307; G. KIRK, *SURVEY OF INTERNATIONAL AFFAIRS: THE MIDDLE EAST 1945-1960*, at 200 (1954); R. CROSSMAN, *PALESTINE MISSION: A PERSONAL RECORD* 54-58, 188-200 (1947).

³⁸ U.N. Doc. S/5033 (1961).

³⁹ 16 U.N. SCOR, 988th meeting 21-22 (1961).

⁴⁰ *Id.* at 26-27.

⁴¹ U.N. Doc. S/5032 (1961).

⁴² 16 U.N. SCOR, 988th meeting 22 (1961).

⁴³ *Id.* at 26.

evidence known to the world, the threat in this case—the blockading of a waterway deemed vital by Israel, and artillery fire from Syrian onto Israeli territory—was obviously of an altogether different order of magnitude than the alleged threat posed by the Portuguese colonies to India, in the earlier case.

In the West Irian case Indonesia threatened the use of force, if necessary, to take over the territory in question, which it claimed as its own.⁴⁴ This question of sovereignty was in dispute, however, and a proposal that it be referred for adjudication was rejected by Indonesia.⁴⁵ Among various proposals for settlement in the United Nations, the one which would have involved the peaceful settlement function of the United Nations as such, and which came to vote, had as its central issue the Charter principle of self-determination. The vote was thus not directly upon the issue concerning the use of force, as in the Goan case; the object of the resolution was, of course, both to avoid force and to solve the case through application of the correct substantive principle. The resolution failed for lack of the necessary two-thirds majority,⁴⁶ and the paragraph specifically recognizing the principle of self-determination was similarly defeated in a separate vote.⁴⁷ Voting against in both cases were the United Arab Republic, Syria, Iraq, Jordan, Lebanon and the USSR. Later, the West Irian case was settled by agreement handing the territory over to Indonesia prior to consultation of the wishes of the inhabitants.⁴⁸ This settlement (of which the United Nations was caused to express its appreciation⁴⁹) was said by some delegations to represent a yielding to Indonesia's threat of force.⁵⁰

Other uses of force and threats of force during the period since the adoption of the United Nations Charter could, of course, be mentioned. The Goan and West Irian cases have been discussed as illustrating a point relevant to the present discussion. This is that if the Arab states and the Soviet Union desired the existence of a stronger and more effective rule against the seizure of territory by force to apply against Israel in the 1967 Middle Eastern crisis, those voting in the Goan and West Irian cases could have contributed to that end by voting against the use and threat of force in those respective cases.

B. Collective Measures Function

Turning from the peaceful settlement function to that of collective measures, the concluding phase of the discussion will consider how the application of United Nations force in the Palestine case may have affected the prospects of developing an effective system based on law.

⁴⁴ 16 U.N. GAOR 848, 849 (1961).

⁴⁵ *Id.* at 848.

⁴⁶ *Id.* at 875.

⁴⁷ *Id.* at 873.

⁴⁸ 437 U.N.T.S. 273 (1962); 17 U.N. GAOR, Annexes, Agenda Item No. 89, at 2, U.N. Doc. A/5710 and Add. 1 (1962).

⁴⁹ G.A. Res. 1752, 17 U.N. GAOR, Supp. 17, at 70, U.N. Doc. A/5217 (1962).

⁵⁰ *See, e.g.*, 17 U.N. GAOR 51, 54, 57 (1962).

The theory of the Charter herein being pursued as having a potential with respect to the development of law would envision the endeavor to develop a United Nations collective measures function coming as close as possible to the ideal of a nonpolitical police function.

While it is not thought that this function has the potentiality of the peaceful settlement function, either as a part of an ultimate system or as contributing to its development, tangible pressures are sometimes applied by the United Nations, and they naturally attract considerable public attention. It is highly desirable that they be used within a framework that will encourage the growth of law. The idea of the police function is valuable for two reasons: first, because it is generally understood by all concerned; secondly, because a function of this general constitutional nature can be conceived as forming a component, useful part of an ultimate system based on law.

As noted above,⁵¹ there appears to be only one authorization to be found in the Charter, as written, for the application of such measures as direct means of handling international disputes and situations. It empowers the United Nations, in the event of an aggression, other breach of peace or threat to peace to apply measures of force or measures short of force (such as diplomatic and economic sanctions) for the purpose of maintaining peace and security. These provisions could theoretically form the basis of a comprehensive function comparable, in constitutional status, to the normal police function.

The United Nations Emergency Force (UNEF) initiated by the General Assembly to serve in the Suez crisis of 1956 conformed to these objective criteria; that is, it was an application of tangible pressure deployed by the United Nations to deal with a situation known to be a threat to peace—an actual breach of peace at the time it was deployed.⁵² As to whether it was actually an application of tangible pressure, it is to be observed that it was a military force deployed as such; it was not designated as falling within any non-military category such as that of an observer corps; it had the right to defend its assigned positions in some situations⁵³—a power going beyond the customary right of self-defense against wrongful attack; and it had the power of arrest in some situations.⁵⁴

UNEF was not, however, officially regarded as falling within the collective measures function. The reason can be said to have been the persistence of the original predominant theory which regards that function as being the monopoly of the Security Council and as having the purpose of dealing with aggressions such as

⁵¹ See p. 80 *supra*.

⁵² See, e.g., G.A. Res. 1000, U.N. GAOR, 1st Emer. Spec. Sess., Supp. I, at 2, 3, U.N. Doc. A/3354 (1956).

⁵³ Summary Study of the experience derived from the establishment and operation of the Force . . . , 13 U.N. GAOR, Annexes, Agenda Item No. 65, at 8, 31 (para. 179), U.N. Doc. A/3943 (1958); Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 165, 210 (1963-II).

⁵⁴ Summary Study, *supra* note 53, at 17 (para. 70).

gave rise to the Second World War and, therefore, as involving the probability of combat operations. One definition of the relevant Charter function, by the International Court of Justice in 1962, simply ignored the part of the Charter definition which authorizes measures of force for dealing with threats to peace.⁵⁵ The Secretary-General, in 1963, indicated that it had only been resorted to once by the United Nations, namely in the Korean case, and he likened it to war.⁵⁶

By reason of this predominant idea of the meaning of collective measures, it was evidently apprehended that to place operations like UNEF in this Charter category would give a misleading idea of their purpose, would have undesirable psychological consequences, and would, in particular, cause states to be reluctant to contribute troops for fear that they would become engaged in hostilities.⁵⁷

Consequently, operations like UNEF, which were designed for lesser applications of pressure having more similarity to the normal concept of the police function and less to outright war, were taken clear out of the collective measures function, placed in the peaceful settlement category of United Nations functions,⁵⁸ and given the sub-designation of "peace-keeping operations." A basic part of the concept is the proposition that such forces can operate only with the consent of the parties to the situations in which they are deployed.⁵⁹

Since the object of the concept is to reassure states that the forces in question are prevented by the Charter itself from engaging in hostilities, there is a corollary rule to the effect that once an operation is placed in this category, its status becomes fixed.⁶⁰

Among several objections herein conceived to exist in respect to the concept in question, the most intangible has to do with the fact that there has been demonstrated on the part of members of the United Nations a certain willingness to accept the risks of participation in collective action for the maintenance of peace. It seems a questionable policy to adopt Charter distinctions designed to encourage participation on the grounds that the participants will not be undertaking risks.

Turning to more concrete considerations, the existence of the kind of risks under consideration, and the practical impossibility of knowing in advance when they will arise, was demonstrated by the experience of the United Nations Force in the Congo, which was and still is regarded as a peace-keeping operation.⁶¹ It seems doubtful that governments ever were inclined to place great reliance upon the Charter

⁵⁵ Advisory Opinion on Certain Expenses of the United Nations, [1962] I.C.J. 151, 177.

⁵⁶ Address by Secretary-General, June 13, 1963, U.N. Press Release SG/1520, June 12, 1963.

⁵⁷ Schachter, *supra* note 53, at 220-22.

⁵⁸ Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1957—15 June 1958, 13 U.N. GAOR, Supp. 1A, at 2, U.N. Doc. A/3844/Add. 1 (1958).

⁵⁹ *Id.*; Advisory Opinion on Certain Expenses of the United Nations, *supra* note 55, at 164; Address by Secretary-General, *supra* note 56.

⁶⁰ Report of the Secretary-General on the withdrawal of the United Nations Emergency Force, U.N. Doc. A/6730/Add. 3, 26 June 1967, at 21; 4 U.N. MONTHLY CHRON., No. 7, at 135, 136 (July 1967).

⁶¹ See Address by Secretary-General, *supra* note 56.

designation given a United Nations operation, in estimating what might be required of it in a tense international situation; any such inclination must have ended when the Force referred to became engaged in hostilities with troops of the secessionist regime of Katanga Province,⁶² and was widely regarded as having suppressed that regime by force.

The inadequacy of the concept of the "peace-keeping operation" was again demonstrated when, in May 1967, the Secretary-General withdrew UNEF upon the demand of the United Arab Republic, explaining that this was a peace-keeping operation and consequently could not operate without the consent of the host state.⁶³

There were numerous expressions of dismay at this latter action, including one by the President of the United States.⁶⁴ What the protestors appear to have wanted was a force that would have had at least the constitutional power of remaining in the United Arab Republic, notwithstanding the withdrawal of that country's consent. Under the Charter as written, such a force would have had to be a collective measure.

There was, of course, no denial that the United Nations had the right to deploy a force designated as a collective, or enforcement, measure in appropriate situations. However, the rule was de-emphasized and attention focused on UNEF which, it was said, was not intended to be such a force.⁶⁵

The Secretary-General did explain, in addition to the constitutional justification for the withdrawal of the Force, that withdrawal was the only *practical* possibility in the circumstances, when demanded by the United Arab Republic.⁶⁶ It would have been equally impractical, after withdrawing UNEF, to have sent it in again properly designated as a collective measure, or to have deployed a new force with that designation, and the possibility of doing so was not mentioned. Also applicable was the rule mentioned above that the designation of a measure as a "peace-keeping operation" is to be regarded as permanent.

As a result of these different considerations, the only reason based on the Charter firmly brought before the people of the world in explanation of the withdrawal of UNEF was that consent of the United Arab Republic was a constitutional prerequisite to the functioning of the Force and that, once this was withdrawn, there was no alternative but to remove the Force. Consequently, the impression must have been conveyed that the rights of the United Nations to deal with the situation were

⁶² See, e.g., Annual Report of the Secretary-General on the Work of the Organization 16 June 1962—15 June 1963, 18 U.N. GAOR, Supp. 1, at 8-9, U.N. Doc. A/5501 (1963).

⁶³ See U.N. Doc. A/6669, 18 May 1967, at 9. The rule, as a general rule applicable to all "peace-keeping operations," was rather less strongly emphasized in the Secretary-General's later and definitive memorandum of June 26, 1967, *supra* note 60. However, it seems doubtful that a trend away from the rule was intended. See the subsequent Introduction to the Annual Report of the Secretary-General on the Work of the Organization 16 June 1966—15 June 1967, 22 U.N. GAOR, Supp. 1A, at 4, U.N. Doc. A/6701/Add. 1 (1967).

⁶⁴ 56 DEP'T STATE BULL. 870 (1967).

⁶⁵ Cf. references cited note 63 *supra*.

⁶⁶ U.N. Doc. A/6730, *supra* note 60, at 17-18; 4 U.N. MONTHLY CHRON., *supra* note 60, at 147-49.

subordinated to a kind of contractual relationship between the Organization and the host state.

It would seem detrimental to the development of law, on a Charter basis, thus to convey the impressions that the United Nations is legally unable to act in some situations in which action is evidently required for the maintenance of peace, and that the right of the Organization to act in some cases is even subordinated to the consent of one or more states concerned in the respective situations. On the basis of the theory being pursued in this discussion, it would be preferable to strive for a comprehensive and generally understood capability corresponding to the Charter definition of collective measures. The mission of a particular operation could then be defined by the competent organ in light of practical circumstances without giving rise to confusion as to what was permitted under the Charter.

The suggested course of recognizing a single, basic, comprehensive collective measures function, with the scope indicated in the relevant language of the Charter, gives rise to the corollary question whether governments and peoples would have adequate confidence in the judgment and responsibility of the competent organs of the United Nations in defining the missions of such forces. It is believed impossible to escape the proposition, clearly recognized by the framers of the Charter, that competent and responsible decision-making organs are essential prerequisites if the Organization is to fulfill its major purpose.⁶⁷ This aspect of the over-all task is especially relevant to the necessity of developing confidence in the system.

It is submitted that the concept of the "peace-keeping operation" might be recognized as a sub-category of the collective measures, or police function. In this way its value might be realized to the appropriate extent, while, at the same time, it is placed in proper relationship to the overriding value believed to inhere in developing an appropriate police function.

The United Nations moved in this direction in the Congolese case when, in 1961, in the Matadi incident, the Congolese Government informed the United Nations that it was placing certain restrictions on the operations of the United Nations Force in that country.⁶⁸ The Secretary-General, in reply, while recognizing that the operation had been undertaken with the consent of the Congolese Government, insisted that the resulting relationship was not merely a contractual one in which the host state may determine the circumstances under which the United Nations operates. The role of the Force was rather determined by the responsibilities of the Council with respect to the maintenance of peace and security and it was that organ, alone, it was said, which could determine the discontinuance of the operation.⁶⁹

⁶⁷ Report of Rapporteur of Committee III/3 to Commission III on Chapter VIII, Section B, Doc. 881, III/3/46, 12 U.N.C.I.O. Docs. 502, 505-506 (1945), reprinted in UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS: SELECTED DOCUMENTS 761, 763-64 (1946).

⁶⁸ Report dated 8 March 1961 16 U.N. SCOR, Supp. Jan.-March 1961, at 239, U.N. Doc. S/4761 (1961).

⁶⁹ *Id.* at 262-63.

At least under the Charter as written, a force operating under authority of the United Nations, irrespective of consent of the host state, would have to be a collective measure. UNEF was, in fact, initiated by the General Assembly, and for the Secretary-General to have followed the Matadi precedent in the crisis of May 1967, it would have been necessary to give some recognition to a power on the part of the General Assembly to initiate such measures.

The need for at least a residual power on the part of that organ to apply collective measures is inherent in the thesis of the present discussion, which relates to the necessity of formulating a new and more adequate theory than that originally entertained as to the handling of disputes and situations under the Charter, and the subsidiary view that the Organization should endeavor to develop a comprehensive collective measures function comparable to the normal concept of the police function. The inadequacy of the originally predominant theory in according to the Security Council a monopoly of power with respect to collective measures was recognized in 1950, in connection with the Korean case, and led to the General Assembly's Uniting for Peace Resolution of that year which asserted the right of that organ to initiate measures when the Council was prevented by the unanimity rule from taking action deemed necessary.⁷⁰ This resolution can be interpreted as outlining the theory that the Security Council has the primary authority to apply necessary measures for the maintenance of peace and security, and that the Assembly has a residual authority enabling it to act when the Council is prevented from doing so. This line of thought leads to the logical conclusion that the Assembly has a residual power to apply collective measures; however, the interpretation given the resolution by the Secretary-General, and the great majority of members, has stopped short of this last step.

A trend in the direction of recognizing at least a residual power of collective measures on the part of the Assembly would, it is believed, be constructive in terms of the development of law.

It is not intended to suggest that once such a power were recognized, that organ would immediately begin to apply such measures in an effective manner. There are various problems underlying a widespread doubt as to the General Assembly's present capability of participating responsibly in a system of collective security.⁷¹ However, the option of waiting, before dealing with the questions of its power pertaining to collective measures, does not seem to exist. The fact is that the Assembly has already on various occasions initiated measures of tangible pressure, or at least has given the appearance of doing so.⁷² At the same time, of course, its power to initiate collective measures has been consistently denied, and the explanations, or lack thereof,

⁷⁰ G.A. Res. 377, 5 U.N. GAOR, Supp. 20, at 10, U.N. Doc. A/1775 (1950).

⁷¹ See, e.g., Murphy, *The Trend Towards Anarchy in the United Nations*, 54 A.B.A.J. 267, 269-70 (1968).

⁷² In addition to UNEF itself, see particularly G.A. Res. 498, 5 U.N. GAOR, Supp. 20A, at 1, U.N. Doc. A/1775/Add. 1 (1951); also Assembly resolutions cited *supra* note 33. See generally, J. HALDERMAN, *THE UNITED NATIONS AND THE RULE OF LAW 150-51* (1966).

for the measures in question have been such as to contribute to public confusion as to the true powers of the Organization. Proper objectives, in the view of this discussion, are, first, to bring all such actions within a coherent, workable theory and then gradually, through continuous efforts, to translate the theory into actuality. Such efforts, it is believed, can contribute to the development of the Assembly, along with other United Nations organs, as component parts of an effective Organization.

The necessity of such a theory is illustrated by the problem under discussion. The designation given UNEF as a peace-keeping operation proved at least arguably unsatisfactory in the crisis of May 1967. If, in consequence, there should be an important trend of thought toward classifying such operations as collective measures, it would become necessary to consider the power of the General Assembly to initiate such measures. The validity of the particular theory herein advocated is of course arguable. What can be insisted upon is the necessity of some basic rethinking of the Charter to the end of formulating a coherent theory, upon which may be developed a system capable of maintaining peace and security.