

Regional Enforcement Action under the United Nations Charter and Constraints upon States Not Members

John H. McNeill

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

McNeill, John H. (1975) "Regional Enforcement Action under the United Nations Charter and Constraints upon States Not Members," *Cornell International Law Journal*: Vol. 9: Iss. 1, Article 1.
Available at: <http://scholarship.law.cornell.edu/cilj/vol9/iss1/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CORNELL INTERNATIONAL LAW JOURNAL

Volume 9

December 1975

Number 1

Regional Enforcement Action Under the United Nations Charter and Constraints Upon States Not Members

JOHN H. McNEILL*

The *maxim pacta tertiis nec nocent nec prosunt* has long formed a norm of classical international law. It is with the former of this rule's dual proscriptions, applied in the context of regional arrangements and agencies under Chapter VIII of the United Nations Charter, that this article is concerned. The article will review international practice under the League of Nations and the Permanent Court of International Justice, examine the United Nations Charter, and discuss relevant international practice in an attempt to extract the rules of international law which govern the obligations and responsibilities of third party States under enforcement action by regional arrangements.

* Attorney Adviser, United States Arms Control and Disarmament Agency. B.A. 1962, University of Notre Dame; J.D. 1965, Villanova University; LL.M. 1971, Ph.D. 1974, London School of Economics and Political Science, University of London; Diploma 1973, the Hague Academy of International Law. The views expressed in this paper are presented as solely those of the author and are not necessarily shared by the Government of the United States of America.

This paper was prepared under the auspices of the Hague Academy of International Law in conjunction with the 1974 session of the Academy's Centre for Studies and Research in International Law and International Relations. The author gratefully acknowledges the encouragement and suggestions of his Centre colleagues in the preparation of this paper, especially those of Professor Remigiusz Bierzanek of Warsaw University.

I

PRACTICE OF THE LEAGUE OF NATIONS AND THE
PERMANENT COURT OF INTERNATIONAL JUSTICE

During this century, the rule that States cannot be obligated by treaties to which they are not parties has been judicially applied on numerous occasions, perhaps most significantly by the Permanent Court of International Justice. In its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court employed the rule when it declared that Switzerland, not a party to the Treaty of Versailles, was not bound by this treaty except to the extent it had itself otherwise accepted it.¹ Similarly, the Permanent Court found in the case relating to the *Territorial Jurisdiction of the International Commission of the River Oder* that the Barcelona Convention of 20 April 1921, relating to the Regime of Navigable Waterways of International Concern, could not be invoked against Poland, a State not a party to that treaty.²

These conclusions, as well as the first proscription of the *pacta tertiis* maxim, are founded upon a principle endorsed by the Permanent Court in its judgment in the case of the S.S. "*Lotus*."³ The Permanent Court therein determined that, since international law governed relations between independent States on the basis of rules of law which have emanated from the free will of these subjects, restrictions upon the independence of such States could not be presumed.⁴

The *pacta tertiis* rule was manifestly incorporated by the Covenant of the League of Nations. Article 17 of the Covenant required that in the event of a dispute between a League member and a State not a member of the League, the League must issue an invitation to the nonmember State to accept the obligations of League membership for the purposes of settling the dispute.⁵ The nonmember State, however, was free to

1. [1929] P.C.I.J., ser. A, No. 22, at 17.

2. [1929] P.C.I.J., ser. A, No. 23, at 19-22.

3. [1927] P.C.I.J., ser. A, No. 10.

4. *Id.* at 18.

5. Article 17 of the Covenant stated:

In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

ignore the League's request. Only when the nonmember resorted to war against a League member after refusing a request to accept the obligations of League membership was the League empowered to authorize the invocation of sanctions under Covenant Article 16 against the nonmember. Somewhat curiously, Article 17 of the Covenant also provided that nonmember parties to a dispute wholly among themselves were still subject to League actions to prevent hostilities, even if they had ignored invitations to accept the obligations of League membership for purposes of their dispute. The League never attempted to exercise this power, however. This rather inconsistent ascription of interest to the League by its Covenant, empowering it to interfere more broadly in disputes wholly between nonmembers than in disputes between members and nonmembers, has been found remarkable by some commentators.⁶ But this disparity seems more properly attributed to what appears in retrospect to have been a refreshingly innocent equation by the framers of the Covenant of the terms "war" and "hostilities."

In the course of its well-known Advisory Opinion concerning the *Status of Eastern Carelia*,⁷ the Permanent Court was obliged to pass upon a number of these fundamental issues. The question came before the Court through a reference from the Council of the League. Finland had alleged that the Russian Socialist Federated Soviet Republic, a nonmember of the League at that time, had failed to observe certain provisions of the 1920 Treaty and Declaration of Dorpat.⁸ Tchitcherin, Russian People's Commissar for Foreign Affairs, advised the Court by telegram that

. . . any attempt on the part of any power to apply to Russia the article of the Covenant of the League relating to disputes between one of its Members and a non-participating State would be regarded by the Russian Government as an act of hostility to the Russian State: the Russian Government categorically refuses to take any part in the examination of this question by the League of Nations or the Permanent Court.⁹

If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

LEAGUE OF NATIONS COVENANT art. 17.

6. See, e.g., R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 194 (1970).

7. [1923] P.C.I.J., ser. B, No. 5.

8. Signed October 14, 1920, 1922 *Sbornik dog SSSR I*, 17; 3 L.N.T.S. 5.

9. [1923] P.C.I.J., ser. B, No. 5, at 13.

Accordingly, in the absence of the consent of the States not a member of the League, the Court decided that it could not take part in the settlement of the dispute.¹⁰ The Court considered Article 17 of the League Covenant to be an application of the principle of the independence of States, a fundamental norm of international law, and moreover recognized what it judged to be an equally well established international law principle: that no State can, without its consent, be compelled to submit its disputes to procedures for pacific settlement.¹¹

This determination of the Permanent Court has long presented an obstacle to those who would characterize Covenant Article 17 as the first breach in the traditionally absolute right of non-participant States to ignore pleas by others to settle peacefully international disputes by characterizing pacts such as the League Covenant as *res inter alios acta*. For example, it has been suggested that the Court's restrictive interpretation of Article 17 in *Eastern Carelia* exhausted the Article of its content and thereby effectively ignored the alternative provisions it contained.¹² This criticism, however, fails to recognize that in the *Eastern Carelia* dispute the League was not empowered to intervene under either customary international law or its own Covenant.¹³

II

THE UNITED NATIONS

A. DRAFTING THE UNITED NATIONS CHARTER

Among the more durable agreements reached during the 1944 Dumbarton Oaks conversations concerning an envisaged postwar peacekeeping organization was that embodied in the following language:

The Organisation should ensure that states not members of the Organisation act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.¹⁴

This text had been accepted without serious opposition and adopted nearly verbatim by the 1945 United Nations Conference on International Organization. The only material change made in the above-quoted language at San Francisco was the substitution of the mandatory

10. *Id.* at 28.

11. *Id.* at 27.

12. FALK, *supra* note 6, at 198.

13. The first paragraph of Article 17 was clearly applicable to the *Eastern Carelia* situation, involving as it did a dispute between a member of the League (Finland) and a nonmember (Russia). Russia did not resort to war against Finland until many years after the League invitation was refused. Failing such belligerency, the third paragraph of the Article was not applicable. For the full text of Article 17 see note 5 *supra*.

14. Doc. 1, G/1, 3 U.N.C.I.O. Docs. 2-3 (1945).

“shall” in place of the hortatory “should,” a textual modification somewhat surprisingly dismissed as “a matter of form, of drafting, rather than of substance” by the President of Commission I.¹⁵ In this way, the United Nations imposed an obligation upon itself regarding the regulation of nonmember States insofar as nonmembers might affect the maintenance of international peace and security.¹⁶ Attempting to explain the vote by which the above text (including both the then-undesignated alternatives “shall” and “should”) was adopted, the Rapporteur of Committee I/1/A at the San Francisco Conference said the organization was entitled to so act because it represented “the major expression of the international legal community.”¹⁷ Kelsen later described this as a “revolutionary” attempt to extend the customary competence of the organization.¹⁸

The decision to designate this obligation as one of the principles of the organization was not universally approved, however, and tentative adoption of the draft text by the Coordination Committee of the Conference was made expressly subject to a clarification, *inter alia*, that the obligation was not properly to be included among the principles of the United Nations.¹⁹ Moreover, several delegations to the Conference were apprehensive that any attempt to obligate States not members of the new organization to act in compliance with the Charter would be contrary to customary international law.²⁰

Belgium proposed an amendment to the Dumbarton Oaks proposal which would have confronted these objections by incorporating into the text an explicit declaration that the right of the organization to limit nonmember States in the maintenance of international peace and security was based upon an authorized expression of the international legal community to this effect.²¹ This bold course and other proposed amendments were not favorably received by the Conference.²² However, the

15. Doc. 1123, I/8 6 U.N.C.I.O. Doc. 83 (1945).

16. See also N. BENTWICH & A. MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS 14 (1950); Bindschedler, *Ladélimitation des compétences des Nations Unies*, 108 RECUEIL DES COURS 307, 405 (1963).

17. Doc. 810, I/1/30, 6 U.N.C.I.O. Docs. 348 (1945).

18. H. KELSEN, THE LAW OF THE UNITED NATIONS 109 (1950).

19. See remarks by the Canadian delegate, Doc. WD 410, CO/170, 17 U.N.C.I.O. Docs. 147 (1945).

20. *Id.*

21. See submissions by Venezuela, Doc. 2, G/7(d)(1), 3 U.N.C.I.O. Docs. 193-94 and remarks by the Uruguayan delegate, Doc. 810, I/1/30, 6 U.N.C.I.O. Docs. 348. The Belgian delegation was of the view that such rectification would be necessary if adverse criticism of such extended U.N. competence was to be forestalled. To achieve this end, it proposed that the “moral and legal” basis of the obligation be emphasized in order to achieve a “less unilateral” posture. Doc. 2, G/7(k)(1), 3 U.N.C.I.O. Docs. 337 (1945).

22. Doc. 810, I/1/30, 6 U.N.C.I.O. Docs. 337 (1945).

language of the passage which ultimately became Article 2(6) of the Charter failed to enumerate the legal basis of its authority. This outcome was attributable to the desire shared by most delegations at the Conference to render membership in the new organization a status easily acquired by those States not participating in the United Nations Conference on International Organization.²³ The formation of a closed association of States which would nevertheless assert a legal right to intervene in the activities of nonmember States was never the intent of the authors of the United Nations Charter.²⁴

Are nonmember States, as well as the organization, equally obliged as a matter of law to cooperate with the United Nations in the maintenance of international peace and security by Charter Article 2(6)? Most international publicists have answered this in the negative, denying that the Charter obligates nonmember nations to accept United Nations intervention into their activities for peacekeeping purposes.²⁵ Indeed, even the leading proponent of the minority view, the late Professor Kelsen, acknowledged that Charter Article 2(6) was not in conformity with the general international law prevailing at the time that the Charter entered into force.²⁶

B. THE VIENNA CONVENTION ON THE LAW OF TREATIES

The 1969 Vienna Convention on the Law of Treaties endorsed and adopted the customary norm of international law, expressed in the *pacta tertiis* maxim, that treaties impose no obligation on third States.²⁷ The Vienna Convention further provides that no obligation arises for third States from any treaty provision which is not intended by the Parties to create such obligation and which is not expressly accepted in

23. See proposals by Uruguay, Doc. 2, G/7(a)(1), 3 U.N.C.I.O. Docs. 36 (1945) and by Mexico, Doc. 2, G/7(c)(1), 3 U.N.C.I.O. Docs. 180 (1945).

24. See Bierzanek, *The Principle of Universality and its Realization in the United Nations* (Sprawy Miedzynarodowe, spec. ed.) 28, 30 (1971).

25. See, e.g., BENTWICH & MARTIN, *supra* note 16, at 14; D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 23 (2d ed. 1970); S. HSUEH, *L'ORGANIZATION DES NATIONS UNIES ET LES ÉTATS NONMEMBRES* 84 (1953); G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 167 (5th ed. 1967); 6 J. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 279 (1973); Bindschedler, *supra* note 16, at 404-405; Kunz, *Revolutionary Creation of Norms in International Law*, 41 *AM. J. INT'L L.* 119, 125 (1947). *But see*, e.g., I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 669 (2d ed. 1973); Kelsen, *Membership in the United Nations*, 46 *COLUM. L. REV.* 391, 394 (1946).

26. Kelsen, *Sanctions in International Law Under the Charter of the United Nations*, 31 *IOWA L. REV.* 499, 502 (1946).

27. The Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, in United Nations Conference on the Law of Treaties, *Official Records*, U.N. Doc. A/CONF. 39/11/Add 2, opened for signature May 23, 1969, art. 34, reprinted in 63 *AM. J. INT'L L.* 875 (1969) [hereinafter cited as Vienna Convention].

writing by the third State.²⁸ The practice of States has long embodied the realism inherent in this norm.²⁹ Moreover, no attempt was made during the United Nations Conference on the Law of Treaties to in any way limit this rule as it applied to the constituent instruments of international organizations; the Convention as a whole, including the principle here considered, was made applicable to such instruments.³⁰

In summary, it is plain that as a matter of both customary and conventional international law States not members of the United Nations are not bound by the Charter, to them a *res inter alios acta*, to cooperate with the organization even in the maintenance of international peace and security.

C. THE NAMIBIA DISPUTE

Against this background, the Advisory Opinion of the International Court of Justice concerning the South African presence in Namibia³¹ must be considered. In a written submission to the Court on this question, the Government of Finland maintained the traditional position that States not members of the United Nations were not bound by the Charter, citing in support the *pacta tertiis* rule and the relevant articles of the 1969 Vienna Convention.³² The Court, however, held that "it is incumbent upon States which are not Members of the United Nations to give assistance . . . in the action which has been taken by the United Nations with regard to Namibia."³³ The question arises, therefore, as to whether the Court thus acknowledged an exception to the *pacta tertiis* rule and declared an obligation for third States under the Charter.

At the core of the Namibia dispute was a question of political jurisdiction, centered on the competence of the General Assembly of the United Nations to declare the termination of a mandate agreement. The Court in this instance determined that the illegal presence of South Africa in

28. *Id.*, art. 35. This was precisely the requirement described as necessary before the Charter could bind third States by Judge Krylov in his dissent to the Advisory Opinion concerning *Reparation for Injuries suffered in the Service of the United Nations*, [1949] I.C.J. 174, at 218-19.

29. R. ROXBURGH, *INTERNATIONAL CONVENTIONS AND THIRD STATES* 29 (1917); Fitzmaurice, *Fifth Report on the Law of Treaties*, [1960] 2 Y.B. INT'L L. COMM'N 86, U.N. Doc. A/CN. 4/130 (1960).

30. Vienna Convention, art. 5. See also T. ELIAS, *THE MODERN LAW OF TREATIES* 61 (1974).

31. Advisory Opinion concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] I.C.J. 16 [hereinafter referred to as *Namibia*].

32. Written Statement of the Government of Finland, 1 *Namibia*, I.C.J. Pleadings 375-76 (1971).

33. [1971] I.C.J. 16, 58.

Namibia was "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law" ³⁴ The Court further stated that "in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship, or of the consequences thereof." ³⁵ In other words, the Court gave notice to third States that in the future they would be held by the United Nations to deal with the South African regime in Namibia at their peril; but this is very different from maintaining that such third States are legally obligated to cooperate with the implementation of United Nations policy. Similarly, the incumbency upon States not members of the United Nations to assist the organization in regard to its actions concerning Namibia ³⁶ was not an obligation for third States sounding in any norm of customary international law, but was instead an expression of the organization's international obligation *to its members*, under Article 2(6) of the Charter, to attempt to ensure the compliance of all States with such measures adopted by the United Nations as are designed to aid in the maintenance of international peace and security. ³⁷

The Namibia opinion also addressed the position of third States with regard to Chapter VII measures directed by the Security Council against United Nations members. First, the Court set out the factors which must be considered in determining the legal consequences of a resolution of the Security Council:

In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council. ³⁸

The Court then applied this test to several resolutions at issue, holding, *inter alia*, that paragraph 5 of Security Council Resolution 276 (1970) ³⁹

34. *Id.* at 56.

35. *Id.*

36. See note 33 *supra* and accompanying text.

37. See D. NIŃCIĆ, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 305 n.20 (1970); see also the 1959 Antarctic Treaty for an analogous obligation undertaken by its parties, which are obliged to exert appropriate efforts "to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty." Antarctic Treaty, signed at Washington, Dec. 1, 1959, art. X, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

38. [1971] I.C.J. 16, 53.

39. This paragraph stated in pertinent part:
The Security Council, . . .

had been adopted in accordance with the purposes and principles of the Charter and in accordance with Charter Articles 24 and 25 and, consequently, that this decision was "binding on all States Members of the United Nations."⁴⁰

Since, as explored above,⁴¹ the Court did not attempt to declare that nonmember States were under a legal obligation to cooperate with the United Nations in forcing South Africa out of Namibia, it necessarily follows that the language of the opinion was addressed in a deliberately restrictive manner only to members of the United Nations; to have done otherwise would have been to contravene the rationale adopted by the Court. The language of Security Council Resolution 276 (1970), insofar as it may be considered as addressed to States not members of the United Nations, is thus purely hortatory and devoid of legal effect.

D. SANCTIONS AGAINST SOUTHERN RHODESIA, ACQUIESCENCE AND OPINIO JURIS

Beginning in 1965, the Security Council adopted a series of resolutions which resulted in the application and enforcement of sanctions against Southern Rhodesia. In the first of these, Resolution 216, the Security Council called upon *all* States "not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime."⁴² When the Council later adopted more severe sanctions against Southern Rhodesia it directed the measures to be imposed only by "all States members of the United Nations," not by all States, and urged States not members to act in accordance with sanctions.⁴³ However, on 28 February 1972, the Security Council adopted Resolution 314, which in pertinent part

[u]rges all States to implement fully all Security Council resolutions establishing sanctions against Southern Rhodesia, in accordance with their obligations under Article 25 and Article 2, paragraph 6, of the

Recalling Security Council resolution 269 (1969) of 12 August 1969, . . .

5. *Calls upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution*

S.C. Res. 276, 25 U.N. SCOR, U.N. Doc. S/INF/25, at 1-2 (1970).

40. [1971] I.C.J. 16, 53.

41. See text following note 35 *supra*.

42. S.C. Res. 216, 20 U.N. SCOR, U.N. Doc. S/INF/20/Rev. 1, at 8 (1965). S.C. Res. 217, *id.*, further spelled out Council policy toward Southern Rhodesia and also addressed itself to "all States."

43. See S.C. Res. 232, 21 U.N. SCOR, U.N. Doc. S/INF/21/Rev. 1, at 7 (1966); S.C. Res. 253, 23 U.N. SCOR, U.N. Doc. S/INF/23/Rev. 1, at 5 (1968). See also S.C. Res. 277, 25 U.N. SCOR, U.N. Doc. S/INF/25, at 5 (1970) and S.C. Res. 288, 25 U.N. SCOR, U.N. Doc. S/INF/25, at 7 (1970).

Charter of the United Nations, and deplores the attitude of those States which have persisted in giving moral, political and economic assistance to the illegal regime.⁴⁴

This seemingly broad attempt by the Security Council to establish "obligations" for States not members under Charter Article 2(6) may at most be taken to refer to the language of Security Council Resolutions 216 and 217,⁴⁵ for these are the only resolutions on the Southern Rhodesia question to have comprised a decision addressed to States not members, and therefore are the only ones which could conceivably provide a legal basis for the "obligation."⁴⁶

It is interesting to note that during the Southern Rhodesia dispute the Government of Switzerland, a State not a member of the United Nations, communicated to the Security Council the decision of the Swiss Federal Council that "for reasons of principle, Switzerland, as a neutral State, cannot submit to the mandatory sanctions of the United Nations."⁴⁷ Similarly, the Government of the Federal Republic of Germany, before it became a member of the United Nations, informed the Security Council of a number of measures it had adopted in accordance with those contemplated by Security Council Resolution 217 (1965), "in spite of the fact that the Federal Republic of Germany is not a member of the United Nations."⁴⁸ These two examples illustrate the clear determination of both States, despite their differing views on the efficacy of taking part in sanctions against Southern Rhodesia, to make manifest their belief that they were in no way bound to participate in such sanctions, not being members of the United Nations.

The Security Council appears to have acquiesced in these particular instances to the views of the States not members, since the views of the Swiss and Federal Republic Governments were not refuted. Can it be maintained that other States, though not bound to respect the Charter as a matter of treaty law, have acquiesced through inaction in its application to them in a manner sufficient to bind such States *in futuro*?

The traditional methods of binding a State to international obliga-

44. 27 U.N. SCOR, U.N. Doc. S/INF/28, at 7 (1972). See also, S.C. Res. 320, *id.* at 9.

45. See note 42 *supra* and accompanying text.

46. On 22 May 1973, the Security Council adopted Res. 333, which reiterated the Council's grave concern that "some States contrary to Security Council resolutions . . . and to their obligations under Article 25 of the Charter . . . have failed to prevent trade with the illegal regime in Southern Rhodesia," and specifically named South Africa and Portugal. Since this resolution was directed simply to "States" (rather than "all States"), and since it further noted the obligations of these States under Charter Article 25, rather than under Article 2(6), it is concluded that this resolution was also directed only to States members of the United Nations.

47. 22 U.N. SCOR, Supp. Jan.-Mar. 1967, U.N. Doc. S/7781, at 117 (1967).

48. *Id.* at 93.

tions, namely ratification, acquiescence, consent or estoppel, all reflect the difficulty of binding against its will a State to an emergent rule of customary international law. Even if the principle that all States are bound to observe and cooperate with United Nations peacekeeping efforts was the sort of rule which creates legal norms, which is certainly doubtful in the absence of an international legislature, it would be insufficient to establish a binding precept by the acquiescence of nonmember States. In order for State practice to produce a rule of international law, stated the International Court of Justice in the *North Sea Continental Shelf Cases*, the rule "should have been both exclusive and virtually uniform in the sense of the provision involved."⁴⁹ Acquiescence will not suffice without more to supply the extensive and uniform evidence required. Such is the case here. *Opinio juris sine necessitatis* is equally difficult of proof where a compliant State decides to acquiesce out of the fear of adverse political consequences rather than because of an apprehended legal obligation to refrain from action.

Nonetheless, it has been urged that nonmember States may be regulated whenever their conduct interferes with the efforts of the United Nations to maintain international peace and security⁵⁰ because, it is argued, Article 2(6) of the Charter binds all States not as a matter of treaty law but of customary international law.⁵¹ Passivity in the face of such a claim does not permit the inference of consent to be drawn, since *opinio juris* requires a course of positive action rather than a posture of negative tolerance to endow the conduct with the binding force of legal obligation. *Opinio juris* is quite distinct from that prior acquiescence which has enabled the right correlative to the obligation to be perfected. Therefore, a failure to protest is not equivalent to acquiescence in the emergence of a new customary rule, and thus fails to support a contention that the Article 2(6) pretension has ripened into a norm of customary law.⁵²

III

REGIONAL ARRANGEMENTS

Under Chapter VIII of the United Nations Charter, the legitimacy of regional arrangements and agencies (hereinafter "arrangements") is recognized as uncompromised by the Charter itself so long as measures dealing with the maintenance of international peace and security taken

49. [1969] I.C.J. 3, 43.

50. FALK, *supra* note 6, at 207.

51. *Id.* at 215.

52. See also MacGibbon, *The Scope of Acquiescence In International Law*, 31 BRIT. Y.B. INT'L L. 143, 151 (1954).

thereunder are appropriate for regional action and consistent with the principles and purposes of the Charter.⁵³ The Security Council, in appropriate cases, is itself obliged to employ such regional arrangements for enforcement action under its authority.⁵⁴ The balance of this paper will explore the various conjunctions of circumstance which suggest ways in which obligations arise for States not members of these regional arrangements. The analysis must consider the following classes of States which may be constrained by the implementation of Chapter VIII enforcement action: States which are members of both the United Nations and a regional arrangement, States members of the United Nations but not of a regional arrangement, States members of a regional arrangement but not the United Nations, and States not members of either the United Nations or a regional arrangement.

A. STATES MEMBERS OF BOTH THE UNITED NATIONS AND A REGIONAL ARRANGEMENT

In order to see what obligations may exist for States not contemporaneously members of both the United Nations and a regional arrangement through which enforcement action is taken, it is first necessary to briefly describe the obligations for States possessing such dual membership under Chapter VIII of the Charter. It is not in dispute that such States become obligated by a decision in which they participate to observe the authority of the Security Council. The question, however, is whether a State which dissents from the decision of the regional arrangement to take enforcement action authorized by the Security Council is bound to accept an enforcement duty.⁵⁵ There seems to be no reason in the Charter why such action, or indeed a request to the Security Council to authorize such action, need be based on the unanimity of all States members of the regional arrangement. Of course, the internal rules of the arrangement may require such unanimity; but once the request is made and authorized, all States members of both the arrangement and of the United Nations will be closely bound in law to observe it. This conclusion is compelled when it is recalled that the decision to authorize collective action will inevitably be taken by the Security Council under Charter Article 25. And despite the controversy concerning interpreta-

53. U.N. CHARTER art. 52.

54. *Id.* art. 53, para. 1. See note 99 *supra*.

55. Although the authorization of regional enforcement action presumably may involve two separate votes by the members of the regional arrangement, *i.e.*, one on the substantive resolution and another to seek authorization by the Security Council, it is assumed that the integrity of dissent is not compromised. Therefore, the result will be Security Council authorization of regional enforcement action in which not all members of the regional arrangement concur.

tion of this article in the past,⁵⁶ the International Court of Justice in its *Namibia* Advisory Opinion definitively stated that all decisions of the Security Council are binding upon all States members of the United Nations.⁵⁷ Therefore, Article 25 of the Charter binds dissenting States to observe regional enforcement measures taken by arrangements of which they are members.

B. NONMEMBERS OF REGIONAL ARRANGEMENTS

1. Enforcement Action Under Security Council Authorization

When a member of the United Nations is incidentally affected by enforcement action taken through a regional arrangement of which it is not a member, such a State is obliged to observe this action where it is authorized by the Security Council. Furthermore, it appears that such enforcement action, if authorized, may be validly directed against a nonmember of the regional arrangement. Although it is sometimes argued that the basic purpose of a regional arrangement is to prevent aggression by its members *inter se*,⁵⁸ the Charter itself does not impose any such limitation, and Kelsen ably demonstrated that Charter Articles 52 and 53 in no way exclude the possibility that regional arrangements may provide for enforcement action against States not parties.⁵⁹ Article 53(1) of the Charter explicitly contemplates such action against former enemy States, which were, of course, not members of the United Nations at the time that the Charter was adopted,⁶⁰ but the rule of interpretation embodied in the maxim *expressio unius est exclusio alterius* cannot be employed to exclude regional action against States other than former enemies. Article 53(1) refers to action against enemies only to free it from the requirement of Security Council authorization, not to cast it as an exception to the scope of enforcement action which may be undertaken by a regional arrangement.

When directed by the Security Council, such action is clearly legitimated.⁶¹ The question arises, then, of the extent of such authorization:

56. See, e.g., Higgins, *The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of the Charter?*, 21 INT. & COMP. L.Q. 270 (1972).

57. [1971] I.C.J. 16, 53.

58. See, e.g., A. CHAYES, *THE CUBAN MISSILE CRISIS* 53 (1974); J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 250 n. 36 (2d rev. imp. 1959), Goodhart, *The North Atlantic Treaty of 1949*, 79 RECUEIL DES COURS 187, 208 (1951).

59. Kelsen, *Is the North Atlantic Treaty a Regional Arrangement?*, 45 AM. J. INT'L L. 162, 165 (1951). See also STONE, *supra* note 58, at 248 n.29.

60. A specific example of such an arrangement is the Anglo-French Treaty of Dunkirk, March 4, 1947, Gr. Brit. T.S. No. 32 (CMD. 7123), 9 U.N.T.S. 187, which explicitly declares itself to be a regional arrangement under Chapter VIII of the Charter, directed against renewal of German aggression.

61. See D. BOWETT, *UNITED NATIONS FORCES* 305-306 (1964); J. MOORE, *LAW AND THE*

Can the Council act *ultra vires* in this connection? Article 53(1) provides that the Council "shall, where appropriate, utilize such regional arrangements or agencies for enforcement under its authority," and Article 52(1) states that the Charter does not preclude regional arrangements from "dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action" These phrases limit the action only as to place ("where") and not to time. The key provision is that their legitimacy rests upon "appropriate" action. The Security Council, it may be asserted, possesses the inherent power to define "appropriate" as a product of its decision whether or not to authorize enforcement action in any given instance. And although theoretical definitions of "regional" abound,⁶² for present purposes this functional conception may be accepted as support for the conclusion that no *ultra vires* act in this context may be executed by the Security Council.⁶³

In summary, enforcement action is clearly authorized where directed by the Security Council against nonmembers, and this is equally true of enforcement action undertaken by a regional arrangement on the initiative of its members with the authorization of the Security Council directed against a State not a member of the arrangement.⁶⁴ The validity of this conclusion depends upon the extent to which authorization extended under Article 53(1) to the enforcement action taken by the regional arrangement is based upon a decision of the Security Council taken under Charter Article 25. When such authorization flows from Article 25, the regional arrangement will in effect function as a subsidiary organ of the Security Council. When a regional arrangement attempts to take unauthorized enforcement action, however, Charter Article 2(4) will likely be violated, as the next section will show.

2. *Unauthorized Regional Action and Article 2(4)*

In ratifying the Charter, members of the United Nations have accepted that they may become subjects and objects of regional enforcement action. Some publicists have gone so far as to state that in accepting membership of the United Nations, a State which is located within

INDO-CHINA WAR 341 (1972); A. THOMAS & A. THOMAS JR., *THE ORGANIZATION OF AMERICAN STATES* 276 (1963).

62. See, e.g., the test suggested by F.V. García-Amador to the Sub-Committee on International Cooperation in the Political Field to the Interim Committee of the United Nations General Assembly, U.N. Doc. A/AC. 18/114, para. 19, in 5 U.N. GAOR, Supp. 14, U.N. Doc. A/1388, at 34-35 (1950).

63. But see Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L L. 103, 118-21 (1965-66).

64. Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT'L L. 175, 221 (1967).

a region where a regional arrangement exists but to which it does not belong has indirectly given its consent in advance to intervention by this arrangement into regional matters relating to the maintenance of peace and security.⁶⁵ This view is surely incorrect; no regional enforcement action may be taken against a nonmember of the arrangement without the authorization of the Security Council.⁶⁶

In the case of the 1962 blockade of Cuba by the United States,⁶⁷ undertaken by the authority of a resolution of the Council of the Organization of American States,⁶⁸ the Union of Soviet Socialist Republics was directly affected when one of its vessels was stopped by a ship of the United States Navy on blockade patrol.⁶⁹ Before this interdiction had taken place, the U.S.S.R. protested against the quarantine to the Security Council.⁷⁰ The blockade, generally agreed to have constituted a threat contemplating the use of force,⁷¹ was effectively directed against the political independence of States not members of the O.A.S. to enjoy their rights to freely navigate the high seas in time of peace.⁷²

This action was clearly inconsistent with Article 2(4) of the Charter, in that it involved the threat of the use of force against the political independence of several States; the action failed to come under either of the recognized exceptions to Article 2(4) in that it was purposely not characterized as a measure taken in collective self-defense under Charter Article 51 and was not authorized as regional enforcement action under Article 53(1).⁷³

65. THOMAS & THOMAS, *supra* note 61, at 276.

66. BROWNLIE, *supra* note 25, at 669 n.4.

67. See Pres. Procl. No. 3504, 3 C.F.R. 232 (Supp. 1964), 50 App. U.S.C. § 1 (1970).

68. 17 U.N. SCOR, Supp. Oct.-Dec. 1962, U.N. Doc. S/5193, at 161 (1962).

69. D. WATT, SURVEY OF INTERNATIONAL AFFAIRS 1962 at 64 (1970).

70. 17 U.N. SCOR, Supp. Oct.-Dec. 1962, U.N. Doc. S/5186, at 149. The Government of Sweden likewise protested to the United States; *Washington Post*, Oct. 27, 1962, at A6. See also Wilson, *International Law and the United States Cuban Quarantine of 1962*, 7 J. INTER-AM. STUDIES 485, 486 (1965).

71. See, e.g., Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 523 (1963).

72. See Akehurst, *supra* note 64, at 199-203; Wright, *The Cuban Quarantine*, [1963] PROC. AM. SOC. INT'L L. 9-10; and the remarks of the Romanian representative in the Security Council on 24 October 1962, 17 U.N. SCOR, U.N. Doc. S/PV. 1023, at 14.

73. As a victim of unauthorized regional enforcement action, the U.S.S.R. in this instance would have been legally justified in taking proportionate measures in the exercise of its right to self-defense under Article 51 of the Charter had the enforcement action escalated to the level of armed attack. Since the Security Council was never asked to consider, much less act upon, the O.A.S. resolution, *supra* note 68, it seems pointless to argue that the Council implicitly authorized action taken under the resolution through its own inaction as did, e.g., Meeker, *supra* note 71, at 522. See further, 17 U.N. SCOR, 1022d-1025th mtgs. and the draft resolutions submitted by the U.S.A. (S/5187, U.N. Doc. S/PV. 1022, at 16-17), the U.S.S.R. (S/5187, U.N. Doc. S/PV. 1022, at 36), and jointly by Ghana and the United Arab Republic (S/5190, U.N. Doc. S/PV. 1024, at 20).

A commentator has recently written that, since the Cuban question was essentially a matter between the United States of America and the Union of Soviet Socialist Republics, the vessels of the U.S.S.R. and of other States not members of the Organization of American States were in no way subject to the authority of that arrangement and that therefore this affair was "probably" not contemplated by Chapter VIII of the Charter.⁷⁴ This observation, however, is less than helpful; it must be stressed that such States not members are never subject to the authority of regional arrangements under Chapter VIII, for the reason that when authorization is given by the Security Council to a regional arrangement to undertake enforcement action, the action is taken on the sole and exclusive authority of the Security Council.⁷⁵

When the enforcement action is authorized by the Security Council, on the other hand, the State not a member of the concerned regional arrangement is not only bound by Article 25 of the Charter to accept the validity of such enforcement action, but is also prohibited from employing measures of self-defense when itself affected by such enforcement action. Article 51 specifically states that the right to self-defense is foreclosed if the Security Council has taken measures necessary to maintain international peace and security; authorization of enforcement action by a regional arrangement is manifestly such a measure. Therefore, in the 1962 Cuban situation, if the blockade taken under the resolution of the Organization of American States had been authorized by the Security Council, the Union of Soviet Socialist Republics as a member of the United Nations and nonmember of the regional arrangement would have been obligated to submit peacefully to the blockade. The power to bring about such a result must be regarded as one of the principal inducements for regional arrangements to seek authorization of their enforcement measures by the Security Council.

Another example of regional activity which may conflict with Article 2(4) has been provided by certain undertakings of the Organization of African Unity (O.A.U.). Among the purposes of the Organization is the defense of the sovereignty, territorial integrity, and independence of African states;⁷⁶ its Charter declares that it is founded to "eradicate all forms of colonialism from the continent of Africa" and is dedicated to "the total emancipation of the African territories which are still dependent."⁷⁷ Although this Charter does not fully obligate the members of the Organization to take any such positive action,⁷⁸ it is appropriate to

74. Henkin, *Comment*, in CHAYES, *supra* note 5, at 150.

75. With the exception of action directed against enemy States. See note 60 *supra* and accompanying text.

76. Art. 2(1)(c), 1963 *Journal Officiel* (Gabon) 524, 479 U.N.T.S. 39, at 72 (1963).

77. Arts. 2(1)(d) and 3(6), *id.* at 72, 74.

78. Art. 3(1) and (2), *id.* at 74.

ask if this language could be used as a justification for the adoption of a policy of enforcement action sponsored by the O.A.U. and directed against the governments of dependent territories on the African continent.⁷⁹ Strictly in terms of compliance with the O.A.U. Charter such a plan of enforcement action might be fully justified; but, as has been noted above, the use of armed force by a State member of the United Nations against the political independence or territorial integrity of any State is inconsistent with Charter Article 2(4), except insofar as it may be characterized as an action taken in self-defense or of enforcement by a regional arrangement. Although in the past the mere presence of a colonial power in territory geophysically appearing to properly be part of another State has often been characterized as an act of continuing aggression,⁸⁰ such a presence without more fails to create the conditions precedent necessary for the exercise of self-defense measures such as armed attack.⁸¹ Therefore, where formal links between the O.A.U. and groups of "freedom-fighters" exist, it would not sufficiently legitimate such action under Chapter VIII for the organization to maintain that the action was quite consistent with its own constitution or subsequent resolutions, even those of the United Nations General Assembly.

It may therefore be stated that the members of a regional arrangement cannot, by so constituting themselves, automatically legitimate any group exercise of power in excess of that already made available by the United Nations Charter.⁸² Therefore, no enforcement action taken at the behest of and in conformity with the mandatory or permissive provisions of the constitution of a regional arrangement,⁸³ which otherwise is in breach of the provisions of Charter Article 2(4), can be justified as such without the authorization of the Security Council.

79. Indeed, the O.A.U. in 1963 adopted a plan of economic sanction against the then-Portuguese governments of certain African territories, O.A.U. Doc. CIAS/Plen. 2/Rev. 2 (1963), and in 1964 it called upon African nationalist movements to intensify their struggle against Portuguese domination. O.A.U. Doc. AHG/Res. 9(I) (1964).

80. Cf. remarks by the Indian representative in the Security Council during the debate on the Goa question, 18 December 1961, 16 U.N. SCOR, U.N. Doc. S/PV. 987, at 10-11.

81. For a detailed supportive analysis, see Dugard, *The Organization of African Unity and Colonialism: an Inquiry into the Plea of Self-defence as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT'L & COMP. L.Q. 157 (1967).

82. See the statement of the Office of the Legal Adviser, U.S. Department of State, concerning the Legal Basis for the Quarantine of Cuba, quoted in CHAYES, *supra* note 58, at 145. The O.A.U. Charter in article 2(1)(e), *supra* note 76, at 72, contemplates that its actions should conform to the U.N. Charter; see Elias, *The Charter of the Organization of African Unity*, 59 AM. J. INT'L L. 243, 247 (1965).

83. This distinction, suggested during the 1962 Cuban missile crisis, has been widely discredited. See, e.g., Akehurst, *supra* note 64, at 202-203; Halderman, *Regional Enforcement Measures and the United Nations*, 52 GEO. L.J. 89, 97-105 (1963).

C. MEMBERS OF REGIONAL ARRANGEMENTS NOT ALSO UNITED NATIONS MEMBERS

1. Security Council Authorization and the Effect of Voting Procedures

A nonmember of the United Nations, it is clear, can validly participate in a regional arrangement under Chapter VIII. Article 52(1) of the Charter in no way restricts such membership to United Nations members, merely requiring arrangements which do exist to deal "with such matters relating to the maintenance of international peace and security as are appropriate for regional action" in a manner consistent with the purposes and principles of the United Nations. The fact that Article 52(2) of the Charter imposes a further obligation upon members of the United Nations entering into regional arrangements to endeavor to settle local disputes pacifically through these arrangements is properly interpreted as a clarification of the general conclusion rather than a refutation of it. When enforcement action is taken under a regional arrangement, a question arises as to how the party not a member of the United Nations is affected.

Kelsen wrote that such a State becomes a member of the United Nations "indirectly," through its capacity as a participant in authorized enforcement action undertaken by a regional arrangement.⁸⁴ This means that the obligations of the United Nations nonmember are determined by the constituent agreement upon which the arrangement is based and also by the United Nations Charter, the latter obligation arising only when enforcement action is taken under the authority of the Security Council. Where a regional arrangement takes such enforcement action, a nonmember of the United Nations party to the arrangement becomes bound to execute measures of enforcement in strict compliance with the terms of the authorization granted by the Security Council. This duty is based upon the consent expressed by the regulated State in seeking such authorization.

From this, it follows that where the United Nations nonmember abstains from the request for Security Council authorization it will not be bound to join in approved enforcement action.⁸⁵ But to say this is not to define the controlling issue. The obligations of States not members of the United Nations, based upon consent, may best be comprehended in terms of the structure of the regional arrangement. If, for instance, the arrangement is comprised of both members and nonmembers of the United Nations, the question becomes largely one of internal voting

84. KELSEN, *supra* note 17, at 85; see also Akehurst, *supra* note 64, at 227 n.2; Bebr, *Regional Organizations: A United Nations Problem*, 49 AM. J. INT'L L. 166, 174 (1955).

85. R. YAKEMTCHOUK, L'O.N.U., LA SECURITE REGIONALE ET LE PROBLEME DU REGIONALISME 157 (1955).

procedure. Where Security Council authorization for enforcement action may be sought only by unanimous vote, then obviously all States will be directly bound by the decision, whether the United Nations members are in the majority or minority. In cases where only a majority vote is required, however, the result differs depending upon the composition of the membership. If the United Nations members are in the majority they will necessarily be obliged to seek such authorization and the nonmembers will be forced either to join in the decision and act in legal conformity with the authorization or abstain from action altogether. But where the United Nations members are a minority, authorization by the Security Council will not be required. Members of both the United Nations and of the arrangement could not, as a matter of law, take part in enforcement action of this kind and, as a practical matter, should abstain until such time as they may be able to force a change in the modalities of voting within the arrangement.⁸⁶

The obligations of States not members of the United Nations to adhere to the rigors imposed by the Security Council in authorizing enforcement action is consensual insofar as it may be said to arise out of a desire on the part of such a State, manifested by its membership in a regional arrangement, to aid in the maintenance of international peace and security on a regional basis. Since the collective use of force for the prevention and removal of threats to the peace is one of the purposes of the United Nations,⁸⁷ it constitutes an exception to the Article 2(4) customary norm which prohibits the threat or use of force against the independence or territorial integrity of any State. Enforcement action by a regional arrangement which is unauthorized by the Security Council, however, would necessarily constitute a breach of this norm for member States of the United Nations.

Moreover, since States cannot act individually in breach of Article 2(4), they cannot do so in concert with others. This does not mean, however, that there is no basis for collective enforcement action by nonmember States. The Article 2(4) customary norm is not a principle unique to the Charter or to the organization created thereby. The Charter describes the prohibition against the threat or use of force against the territorial integrity or political independence of any State merely as one example of the many purposes of the United Nations; another purpose, set out in Article 1(1), is the institution of effective collective measures for the prevention and removal of threats to the peace. It appears from the Charter that these purposes are mutually exclusive, *e.g.*, that States acting in conformity with one will not be held

86. P. VELLAS, *LE REGIONALISME INTERNATIONALE ET L'ORGANIZATION DES NATIONS UNIES* 111 (1948).

87. U.N. CHARTER, art. 1(1).

in breach of the other. In this way, Chapter VIII enforcement measures do not constitute acts inconsistent with the provisions of Article 2(4). Therefore, it is concluded that, although Security Council authorization is not required of regional arrangements in which nonmembers of the United Nations are a majority, enforcement action undertaken by them is nonetheless valid in law where it conforms to the Charter purpose of an effective collective measure to remove or prevent a threat to the peace, and may not be regarded as a breach by nonmembers of the United Nations of the customary law norm embodied in Charter Article 2(4).⁸⁸

2. *The Kuwait Example*

The situation in which Kuwait found itself as the result of claims by Iraq to the entire territory of Kuwait during the years between 1960-1963 affords a useful opportunity to reflect on certain of the above principles. After much controversy, the United Kingdom and Kuwait had agreed to the withdrawal of a British protecting force from Kuwaiti territory in 1961.⁸⁹ At its 35th Extra Session in July 1961, the Council of the League of Arab States agreed to safeguard Kuwaiti independence and Kuwait was admitted to membership of the League on 20 July 1961.⁹⁰ An Arab defense force constituted under League auspices arrived in Kuwait on 10 September 1961 in response to a request by the Kuwaiti Government; the force was sent for the express purpose of protecting the independence of Kuwait.⁹¹

Since Kuwait was not admitted to United Nations membership until 14 May 1963,⁹² its position during this period can be determined by the above analysis. A State which joins a regional arrangement in which United Nations members are a majority must be aware that no valid regional enforcement action may be undertaken without Security Council authorization. In the absence of such authorization, therefore, the State must be aware that such action will likely be illegal and a proper subject of legitimate response. In the case of the Arab League guarantee of Kuwaiti independence, Chapter VIII was not necessarily contemplated as a basis for action, since Article 51 of the Charter justifies collective self-defense measures taken in response to armed attack.

88. Cf. M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 126 (1961).

89. See Exchange of Notes between United Kingdom and Kuwait, June 19, 1961, Gr. Brit. T.S. No. 93 (CMND. 1518), 399 U.N.T.S. 239.

90. R. MACDONALD, *THE LEAGUE OF ARAB STATES* 367 (1965); Shwadran, *The Kuwait Incident*, 13 *MIDDLE EASTERN AFF.* 43, 49 (1962).

91. Shwadran, *supra* note 90, at 49.

92. G.A. Res. 1872, U.N. GAOR, 4th Spec. Sess., Supp. 1, U.N. Doc. A/5541, at 7.

But the government of Kuwait must have been aware that although it may not itself have been bound to forego such measures as a pre-emptive attack upon Iraqi forces, the League of Arab States could not act in this way in the absence of Security Council authorization.⁹³

Had the League attempted to effect unauthorized enforcement measures nevertheless, the forces of the League, including those of Kuwait, could legally have been opposed by Iraq acting in accordance with Article 51 of the Charter. Iraq would have been under no obligation to terminate its opposition until called upon to do so in conformity with necessary measures taken by the Security Council to maintain international peace and security, failing which an Iraqi occupation of Kuwait might well have resulted. Clearly, this situation would have been fraught with potentially gross disadvantages, including the possible political extinction of Kuwait, and affords an illustration of the practical nature of the constraints imposed upon the freedom of action of a United Nations nonmember of its relations with member States. Members of the United Nations are bound in their membership of regional arrangements to respect the provisions of Charter Chapter VIII with regard to the application of enforcement action against any State, whether or not a member of the United Nations, and this broad obligation narrows the freedom of action enjoyed by nonmember States in their relations with member States.⁹⁴

D. NONMEMBER STATES

It has been demonstrated above that as a matter of both conventional and customary law, third States not members of the United Nations are not obligated by the Charter. By no means, however, are the activities of such third States free from Charter influences. For instance, if a regional arrangement solely composed of States not members of the United Nations were to be established, it could not profitably be directed against a United Nations member without encouraging that State to employ Article 51 in opposing that action if it is unauthorized by the Security Council under Chapter VIII of the Charter. Therefore, an attempt to employ regional enforcement measures through an arrangement of States not members of the United Nations, although perfectly possible in law in accordance with a broad reading of Charter

93. Such preemption is a proper subject for regional action: see Charter Articles 1(1) and 52(1), the former of which enumerates the taking of effective collective measures for prevention of threats to the peace as one of the purposes of the United Nations. For the view that preemption is a right comprehended by the customary norm, see D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 188-89 (1958).

94. For a similar result in a different context, see J. GOLD, *THE FUND AND NON-MEMBER STATES* 5 (1966).

Article 52(1), will be doomed to frustration within an international community composed in the main of United Nations members.

When States not members of the United Nations take regional action *inter se*, they do not contravene the Charter.⁹⁵ However, such States may become the subjects of United Nations sanctions if they act to the detriment of United Nations members, and in this way the Charter will indirectly give rise to positive ramifications affecting States not members. Peaceful settlement of resultant disputes may be attempted under Charter Article 35(1): any member of the United Nations may bring any dispute, including those wholly between nonmember States, to the attention of the Security Council. Once the Council considers such a dispute as an agenda item, according to the International Court of Justice in the Advisory Opinion concerning the *Namibia Question*,⁹⁶ it is obliged to invite nonmember States party to the dispute to participate in the discussion in accordance with Article 32. The nonmember State, by accepting such an invitation, also accepts such conditions precedent to participation as may be directed by the Council. In practice this has meant that the nonmember is obliged to accept in advance the obligations upon member States to settle disputes pacifically under the Charter, as provided by Article 35.⁹⁷

If the nonmember State were to ignore or decline the invitation of the Security Council to "participate" in such a situation, it would run the clear risk of having measures taken against it by the Security Council acting under Chapter VII of the Charter, based upon a decision reached by the Council without a full presentation of the nonmember's views. The question of whether or not armed attack provokes a "dispute" in the sense employed by the Charter is not of moment here, since any Security Council invitation would necessarily be predicated upon defined terms for the participation of third States.⁹⁸ Therefore, as a matter

95. VELLAS, *supra* note 86, at 111.

96. [1971] I.C.J. 16, 22. Prior to the *Namibia* decision, the Court had considered the question of a nonmember State's obligations upon its acceptance of a Security Council invitation to discuss an international dispute in the *Corfu Channel Case (Preliminary Objection)*, [1948] I.C.J. 15. In that case Albania, a nonmember, accepted the Security Council's invitation to peacefully settle the dispute but disagreed with the United Kingdom's contention that this bound Albania to submit to the jurisdiction of the Court when the Security Council decided that the Court should settle the dispute. The Court found on other grounds that Albania had in fact voluntarily accepted the Court's jurisdiction over this dispute. *Id.* at 27. In view of the *Namibia* advisory opinion, it is clear that a nonmember State today in the position of Albania would be bound by Article 25 to submit to the jurisdiction of the Court if the Security Council so decided.

97. The Charter clearly does not consider that nonmembers are bound by Article 2(3) to settle their disputes peacefully, because of its recognition in Article 35(2) that such States may or may not elect to do so. See generally KELSEN, *supra* note 1, at 107.

98. See generally remarks by the Guatemalan representative in the Security Council on 20 June 1954, 9 U.N. SCOR, U.N. Doc. S/PV. 675, at 20 (1954).

of law, States not members of either the United Nations or of regional arrangements thereunder are free to settle their international disputes without reference to the Charter, but once these States take cognizance of the fact that their dealings with States which are members of the United Nations are incontrovertibly colored and to a large degree controlled by the Charter, the modalities adopted by these third States for the settlement of regional disputes must also reflect the rigors of the Charter.

CONCLUSION

From the above discussion, several principles have emerged which may be described as rules operable in the sphere of regional maintenance of international peace and security. These principles contain ramifications for third States in various classifications of membership in international and regional arrangements which are empowered to employ enforcement action.⁹⁹ These are:

I. States not members of the United Nations or of a regional arrangement are not legally bound by actions taken through either of these organizations in the absence of implied consent thereto or the emergence of relevant Charter articles as customary international law;

II. States not members of regional arrangements are bound to accept regional enforcement action authorized by the Security Council, unless such States are also not members of the United Nations;

III. States not members of the United Nations are bound to accept approved action under the Charter undertaken by regional arrangements of which they are members;

IV. States not members of the United Nations compromise a considerable measure of their legal independence whenever they cooperate in an action designed to maintain international peace and security with or against a member of the United Nations.

99. The conclusions reached in this paper are not thought to be affected by the dispute over the interpretation of the term "enforcement action." For a rehearsal of the various arguments, see, *e.g.*, A. LEVIN, *THE ORGANIZATION OF THE AMERICAN STATES AND THE UNITED NATIONS: RELATIONS IN THE PEACE AND SECURITY FIELD* 52-62 (1974).