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TITLE OF THESIS...Regional Organizations and World Order: A Study of the Problems of Universal-Regional Relationship in the Organization of International Peace and Security

UNIVERSITY..University of Alberta, Edmonton

DEGREE FOR WHICH THESIS WAS PRESENTED....Ph.D..........

YEAR THIS DEGREE GRANTED..Spring...1970..........

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THE UNIVERSITY OF ALBERTA

REGIONAL ORGANIZATIONS AND WORLD ORDER A STUDY OF THE PROBLEMS OF UNIVERSAL-REGIONAL RELATIONSHIP IN THE ORGANIZATION OF INTERNATIONAL PEACE AND SECURITY

BY

RAFIU AYO AKINDELE

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF POLITICAL SCIENCE

EDMONTON, ALBERTA

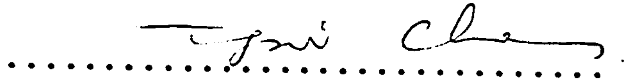
SPRING, 1970

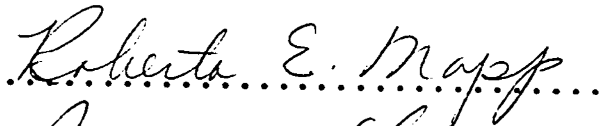
UNIVERSITY OF ALBERTA

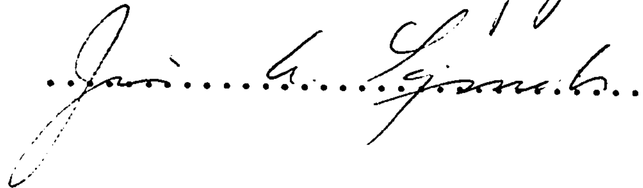
FACULTY OF GRADUATE STUDIES

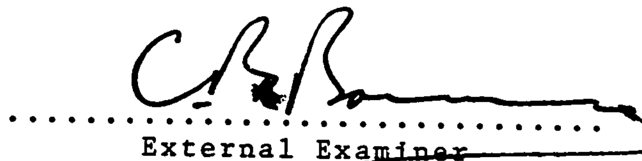
The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled REGIONAL ORGANIZATIONS AND WORLD ORDER: A STUDY OF THE PROBLEMS OF UNIVERSAL-REGIONAL RELATIONSHIP IN THE ORGANIZATION OF INTERNATIONAL PEACE AND SECURITY submitted by Rafiu Ayo Akindele in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

Supervisor









External Examiner

Date 30 April 1970

ABSTRACT

World peace has become indivisible. Nonetheless, international organization of security remains anchored to the principle of division and imperfect coordination of responsibility between universal and regional institutions.

This study deals with a major problem of the twentieth century - the problem of securing a workable and proper relationship between superior and subordinate instrumentalities for the maintenance of international peace and security.

The essential nature of this problem is not constitutional but sociological and political. Fundamentally rooted in the character of the international society, the problem of universal-regional relationship is therefore not susceptible to a purely legal solution. Placed squarely within the context of international power politics, the problem may be reduced to the task of reconciling claims of national interest with some minimum world public order necessary for the preservation of the integrity of the competing social and economic systems.

As the world of the League Covenant differs from that of the U. N. Charter in degree if not in kind, it is hardly surprising that the relationship between universal and regional organizations tended to be less problematical in the former than in the latter. At the heart of the problem today is the fundamental division of the international community into two major ideologically antagonistic power camps. This has resulted in the existence of "the America-centered garrison against the Russia-centered garrison", and in the tendency of regional groupings to develop mainly within rather than across the boundaries of the major ideologically structured power-camps.

Whereas under the law of the United Nations, the authorization principle of Article 53 was intended to be the dominant Charter symbol of the subordination of regional organizations to the United Nations, the constitutional history of the world organization shows that the Charter law of universal-regional relationship has been progressively modified in favour of greater autonomy of regional organizations vis-a-vis the United Nations so much so that the authorization principle of Article 53 may now be considered as in effect "repealed".

The argument for placing an expansive construction on the competence of regional organizations is the political one that the Security Council has often been rendered incapable of performing the role marked out for it in 1945. While one cannot but recognize the practical validity of this explanation, one must express great reservation on the manipulation of legal argument in an attempt to justify the enlarged autonomy of regional organizations within the letter of the law of the United Nations.

A permanent solution to the problem of universal-regional relationship in an interdependent world as ours will probably require nothing short of a radical transformation of the international society in the direction of imperial universality.

ACKNOWLEDGMENTS

A great influence on this study is Professor Leslie C. Green whose stimulating seminar on Problems of International Organization: Political and Security re-kindled my academic interest in this area of research and whose scholarly advice and criticism contributed immensely to the quality of this thesis. My indebtedness to Professor Green is gratefully acknowledged.

I have also benefited from the comments of Professor Tung-pi Chen of the University of Alberta Law School who was kind enough to read through the entire manuscript. Dr. W. Hyrak of the Documents Library carried the great burden of locating the much needed documents while Miss Valerie Becker's encouragement sustained me throughout the preparation of this study. To all these individuals my sincere thanks.

Finally, I wish to place on record the generous financial help from the University of Alberta which enabled me to continue my graduate study here.

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ABBREVIATIONS

A. F. D. I.	Annuaire Francais de Droit International
A.J.I.L.	American Journal of International Law
A.P.S.R.	American Political Science Review
A.S.I.L.	American Society of International Law
B.Y.B.I.L.	British Year Book of International Law
C.J.I.A.	Columbia Journal of International Affairs
C.J.T.L.	Columbia Journal of Transnational Law
C.Yb.I.L.	Canadian Yearbook of International Law
C.L.P.	Current Legal Problems
Cmd. or Cmnd.	United Kingdom Command Papers
F.R.U.S.	Foreign Relations of the United States
G.A.O.R.	General Assembly Official Records
H.A.H.R.	Hispanic American Historical Review
Hague Recueil	Recueil des Cours de l'Academic de Droit International
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
I.L.Q.	International Law Quarterly (now I.L.C.Q.)
I.L.A.	International Law Association
I.L.M.	International Legal Materials
I.Y.B.I.A.	Indian Year Book of International Affairs
I.J.I.L.	Indian Journal of International Law
J.M.A.S.	Journal of Modern African Studies
L.N.O.J.	League of Nations Official Journal
L.N.M.S.	League of Nations Monthly Summary
L.N.T.S.	League of Nations Treaty Series
P.A.U.	Pan American Union
P.S.Q.	Political Science Quarterly
R.I.I.A.	Royal Institute of International Affairs
S.C.O.R.	Security Council Official Records
T.G.S.	Transactions of Grotius Society
U.N.	United Nations
U.N.C.I.O. Doc.	United Nations Conference on International Organizations, Documents
W.P.Q.	Western Political Quarterly
Y.B.W.A.	Year Book of World Affairs
R. G. D. I. P.	Revue Generale de Droit International Public

LIST OF CASES, AND ADVISORY OPINION OF THE WORLD COURT

Permanent Court of International Justice [P.C.I.J.]

Status of Eastern Carelia: Reply to Request for Advisory Opinion, July 23, 1923, P.C.I.J. Series B, No. 5.

Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Turkey and Iraq) Advisory Opinion No. 12, November 21, 1925: P.C.I.J. Series B, Part 2.

The S.S. "Lotus", Judgment No. 9, September 7, 1927: Series A, Part 2, No. 10.

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Admission of a State to the United Nations (Charter, Art.4), Advisory Opinion: I.C.J. Reports 1948.

Reparation for Injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949.

Competence of the Assembly regarding Admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950.

South-West Africa - Voting Procedure, Advisory Opinion of June 7, 1955: I.C.J. Reports 1955.

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CHAPTER I

UNIVERSALITY, REGIONALISM AND UNIVERSAL-REGIONAL RELATIONSHIP IN INTERNATIONAL ORGANIZATION

1. The Falsity of Universal-Regional Dichotomy

The establishment of the League of Nations in 1920 first brought into focus the problem of universal-regional relationship in the organization of international peace.[1] In both the Crillon Commission which formulated the Covenant[2] and the Geneva institution, much discussion took place about the practical and the desirable relationship between the League of Nations and regional arrangements. For example, in the discussion on the Draft Treaty of Mutual Assistance (1923),[3] on the proposed creation of a European Union (1930)[4]

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[1] Ronald Yalem, Regionalism and World Order, (Washington, D.C.: Public Affairs Press, 1965), p. 38.

[2] David Miller, The Drafting of the Covenant, 2 Vols. (New York: Putnam's Sons, 1928). See Chapter II for extensive comments on the formulation of Article 21.

[3] League of Nations, Ten Years of World Cooperation, (Geneva: League Secretariat, 1930), pp. 55-65; Bruce Williams, State Security and the League of Nations, (Baltimore: Johns Hopkins Press, 1927), Ch. 5.

[4] League of Nations Doc. A.46.1930.VII, Documents relating to the Organization of a system of European Federal Union, (1930); Cmd. 3595, (London: H.M.S.O., 1930); "European Federal Union", International Conciliation, No. 265, 1930.

and on the League Reforms (1936-1939),[5] one is left with a firm impression that the Geneva diplomats and statesmen were not thinking of the League and regional security pacts in competitive and mutually exclusive terms.[6]

In spite of the experience of the League of Nations in the area of universal-regional relationship and notwithstanding the intermittent debate on the relative merits of both universal and regional organizations, a noted scholar of international organization, Pitman Potter, complained in 1943 that the issue of universalism versus regionalism "has so far not received anything like the attention it deserves".[7] Potter's comments, it may be observed, were directed at the absence of any theoretical explication of the various dimensions of the concept of regionalism. While Potter's critique of the "treacherous distinction" between the ideas of regionalism and universalism was certainly not novel, his contention that a proper understanding of the term regionalism, when used in relation to the term universalism, requires that it be related to other factors is an important analytical

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[5] L.N.O.J., Sp. Supp. No. 180, Report of the Special Committee Set up to Study the Application of the Principles of the Covenant, (Geneva: 1938), esp. Annex 5, 10; S. Engel, "League Reforms: An Analysis of Official Proposals and Discussions, 1936-1939", Geneva Studies, Vol. 11, Nos. 3-4, August 1940.

[6] See Chapter II below.

[7] Pitman B. Potter, "Universalism versus Regionalism in International Organization", A.P.S.R., Vol. 37, 1943, p. 850.

clarification deserving as much attention as Schwarzenberger's explication of the term universalism in 1936.[8] According to Potter,

> [A]n international organization... may be "regional" in any one of a number of different senses. It may be regional in membership; it may be regional in its area of operations; or it may be regional in its significance. These elements may overlap, but they may also diverge or even seem to conflict. The union of Central American states, while it lasted was regional in all three senses.... The union supporting the International Wine Office includes only states of Europe and North Africa, but the scope of its activities is world-wide. The League of Nations was world-wide in membership, but in many matters (e.g., Danzig and the Saar) it acted very locally, although, in turn, these activities had world-wide political interest. It is absolutely impossible to overlook the multiple permutations and combinations possible among these various phases of the matter, and the regionalist must be prepared to say what he means when he advocates regionalism. Of course he usually means regional membership and assumes that this implies, of necessity, regional operation and regional significance. This is by no means the case, however, and the common mistake of local minorities - overlooking the interests of the community as a whole - ought not to be tolerated here any more than elsewhere.[9]

One must admit, as Potter himself was quick to point out, that a rigid and thorough-going application of these three dimensions of regionalism would "deny all value to regionalism as a principle of international organization or insist

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[8] Georg Schwarzenberger, The League of Nations and World Order: A Treatise on the Principle of Universality in the Theory and Practice of the League of Nations, (London: 1936); See below.

[9] Pitman B. Potter, "Universalism versus Regionalism in International Organization", A.P.S.R., Vol. 37, 1943, p. 854.

upon general and complete application of the universal principle".[10] In view of this apparent practical limitation of any theoretical explication based on abstract reasoning, it may be wondered whether it is necessary at all to understand regionalism in any sense other than in terms of the scope of membership. One misses the thrust of Potter's explication exercise if one accepts a negative answer to this question; for the fundamental purpose of Potter's analysis was to articulate and emphasize the sort of problems that will result if one tries to vitualize the concepts of regionalism and universalism in dichotomous terms. Potter's final warning has a continuing relevance:

> The principal task of the student of international organization is not to waste more time debating over regionalism versus universalism but to study the ways in which, in concrete cases, the two principles can be utilized in combination and the standards to be applied in determining the dosage of each to be adopted.[11]

It may be said that writers on international organization have, generally speaking, heeded Potter's advice,[12] and, if

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[10] Ibid., p. 855.

[11] Ibid., p. 862.

[12] See Commission to Study the Organization of Peace, Regional Arrangements for Security and the United Nations, (New York: 1953), pp. 32-34; Alf Ross, The United Nations: Peace and Progress, (Totowa: Bedminster Press, 1966), pp. 86-90; Stephen Goodspeed, The Nature and Functioning of International Organization, (2nd Ed., New York: Oxford University Press, 1967), pp. 567-570; Institute on World Organization, Regionalism and World Organization, (Washington, D.C.: Public Affairs Press, 1944); Inis Claude, Jr., Swords into Plowshares: The Problems and Progress of International Organization, (3rd Ed. Revised, New York: Random House, 1964), Ch. 6.

the formulation of the law of universal-regional relationship in the United Nations Charter[13] and the subsequent attempts to strengthen the United Nations in the face of increasing regionalist challenge[14] indicate anything at all, it is that statesmen have not behaved as if the two principles of international organization are mutually exclusive.

2. Universality as a Principle of International Organization

For the purpose of this study, the League of Nations and the United Nations are treated as *universal* organizations. The concept of universality requires a brief examination as a preliminary exercise to the explanation of the attribution of a universal character to these two international organizations.

(a) Universality in vacuo is Meaningless

A well-known English international legal scholar, Schwarzenberger, has drawn attention to the need for the explication of the term universality, and has proceeded to relate it to some relevant criteria.[15] We are warned that "[u]niversality in the abstract is meaningless. In order to

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[13] See Chapter IV below.

[14] See Chapter V below.

[15] Georg Schwarzenberger, *The League of Nations and World Order*, (London: 1936), pp. 4-5; also *Power Politics*, (3rd Ed.: London: Stevens & Sons Ltd., 1964), p. 336.

understand the implications of universal and non-universal membership in international organization, it is necessary to relate the scope of membership to other criteria, which give colour to this notion".[16] Schwarzenberger suggests that the concept of universality be related to (i) the over-all structure of the organization of the collective system, (ii) the constitutional structure of the individual member state, (iii) the significance of individual member state, (iv) and the attitudes of individual member state to the organization.

With respect to the first criterion, it is possible to differentiate the Roman Empire from the United Nations: the former is an example of imperial universality while the latter represents the cooperative variant of universality. The basis of this differentiation is the degree of consent and/or coercion used in the establishment of a collective system, and the working relationship among the constituent elements depending on whether the relationship rests upon the principle of equality or of command from above. The second criterion

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[16] Schwarzenberger, Power Politics, p. 336. In his Report on Participation of all States in the League of Nations submitted to the Special Main Committee on the Question of the Application of the Principles of the Covenant, Viscount Cranborne echoed Schwarzenberger: "Universality in vacuo, so to speak, is meaningless; and the question of a universal League cannot fruitfully be considered apart from the nature of the League which is to be universal". See League Doc. C. 367.M.244.1937.VII, [C.S.P. 20], Text in Report of the Special Main Committee Set up to Study the Application of the Principles of the Covenant, (Geneva: 1938), pp. 41-54 Annex 2. Quotation is at p. 45.

calls for a distinction between an international organization whose membership policy is based upon the principle of homogeneity in the social, political and constitutional structure of the member states, and that which admits states irrespective of the latter's ideological and constitutional form. According to the third criterion, an international organization which includes, as a matter of deliberate policy, all states, great or small, necessary or unnecessary, for the achievement of its purposes can be said to aim at absolute universality, whereas an organization that discriminates in its admission policy on the basis of what prospective members can contribute to the achievement of the purposes of the organization aims at relative universality. The purpose of relative universality is to secure the cooperation of the "key states". Finally, "[u]niversality is formal when it is sought for its own sake or reasons extraneous to the purposes of a collective system. It is material if the object is to include in the international organization the greatest possible number of States willing to promote effectively the objects of the organization".[17] It should be noted that the line between the third and fourth criteria is rather thin.

Schwarzenberger's explication exercise addresses itself basically to one dimension of universality: membership. The other major aspect of universality - geographic scope of

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[17] Schwarzenberger, Power Politics, p. 342.

functional competence - is examined peripherally, though competently, in an attempt to explain the political, legal and practical problems that arise when a non-universal organization claims competence to preserve universal peace and, thus, purports to deal with non-members which disturb peace.[18] If it is indeed unlikely that any international organization based on the principle of consent of states will include all members of the international community, then the problem of any international organization with comprehensive and world-wide membership is how to deal with the non-participant states which may be strong both to defy the "world" organization and to prevent, by the simple act of non-cooperation, the achievement of the aim of the global organization. It follows, then, that the problem of universality in international organization is most usefully examined in relation to the purpose and function of the organization and to the contribution a prospective member can make to the realization of the organization's goal.[19] This is what Viscount Cranborne paradoxically called the universality of the "essential States".[20]

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[18] Schwarzenberger, The League of Nations and World Order, p. 95 et seq.

[19] L.C. Green, "Membership in the United Nations", C.L.P., Vol. 2, 1949, pp. 258-282 at p. 263.

[20] L.N.O.J., Sp. Supp. No. 180, Report of the Special Committee Set up to Study the Application of the Principles of the Covenant, 1938, Annex 2, p. 44.

(b) The League of Nations and the United Nations as Universal Peace Organizations

What remains to be done at this juncture and in the context of the concept and problem of universality in international organization is to comment briefly on our attribution of a universal character to the League of Nations and the United Nations. As a point of departure, we accept a two-dimensional conception of the principle of universality, namely, universality in terms of membership and universality in terms of the geographic scope of functional competence of the international organization.[21]

With respect to membership, neither the League of Nations nor the United Nations embodies the principle of absolute or formal universality. In Paris, as well as at San Francisco, the principle of an all-inclusive universality as a basis for membership in the world peace organizations was debated and deliberately rejected. "An idea of universality and of peace"[22] might have inspired the League of Nations, but in drafting the Covenant universality of membership was not assumed, it was at best only hoped for.[23] The Covenant, in

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[21] Potter, "Universalism versus Regionalism in International Organization", A.P.S.R., Vol. 37, 1943; Schwarzenberger, The League of Nations and World Order, (1936).

[22] David Miller, The Drafting of the Covenant, Vol. 1, (New York: Putnam's Sons, 1928), p. 31.

[23] Ibid., pp. 164-167; Viscount Cranborne's Report, L.N.O.J., Sp. Supp. No. 180. Annex 2, p. 46.

so far as it laid down specific criteria for membership,[24] cannot be said to be based on any principle other than that of selected membership. Although it is not immediately obvious from the provisions dealing with admission of members, the League of Nations was conceived as an international organization of "democratic" states.[25] This implicit principle of homogeneous universality amounted to a subtle denial of the principle of an all-inclusive universal membership in so far as there were non-democratic states in the international community. In practice, however, the admission policy of the League showed a gradual abandonment of the initial democratic and homogeneous conception of the organization, and a willingness to welcome states of non-democratic persuasion if such states were deemed essential for the preservation of world peace.[26]

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[24] Art. 1(2), Hudson, "Membership in the League of Nations", A.J.I.L., Vol. 18, 1924, pp. 436-458.

[25] Schwarzenberger, The League of Nations and World Order, p. 19 et. seq.: "The [Crillon] Commission as a whole favoured the idea of universality, to be modified by qualifications of constitutional homogeneity", (p. 35,40); Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations, (1934), pp. 64-65.

[26] Schwarzenberger, op. cit., p. 59 et. seq. The new perspective, as Schwarzenberger explains, rested on the desire "to repair those decisions of the early postwar period which had been based less on the needs of the future League than on the political wishes of the Allied and Associated Powers at that time omnipotent", (p. 72). See also Rudzinski, "Admission of New States: The United Nations and the League of Nations", International Conciliation, No. 480, April 1952; Hans Aufricht, "Principles and Practices of Recognition by International Organizations", A.J.I.L., Vol. 43, 1949, pp. 679-704; Sir John Fischer Williams, op. cit., pp. 66-67.

It may be recalled that the Argentine proposal that "all sovereign States recognized by the community of nations be admitted to join the League of Nations in such a manner that if they do not become Members of the League this can only be the result of a voluntary decision on their part"[27] was not favourably received by the League members. It was contended that the proposal "aims at a radical transformation of the actual character of the League of Nations", and, further, that "the condition of some States renders them unfit for admission, even should they request it".[28] The Report of the First Committee to the League Assembly concluded that "the idea of universality, which is the basis of the amendment and which, in theory, deserves full approval, appears nevertheless to be incompatible with the actual conditions of the world, and cannot therefore be accepted at present.[29] While the principle of homogeneous universality was abandoned in favour of that of heterogeneous universality, it still proved impossible for the League to achieve absolute universality in part because of the practice of withdrawal[30] and expulsion of

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[27] League of Nations, Records of the First Assembly, Meetings of the Committee, Vol. II, (1920), p. 224; Records of the Second Assembly, Plenary Meetings, 1921, p. 683.

[28] League of Nations, Records of the Second Assembly, Plenary Meetings, (1921), p. 684.

[29] Ibid.

[30] See S. Engel, "League Reform: An Analysis of Official Proposals and Discussions, 1936-1939", (continued on page 12)

members from the organization.[31] Perhaps the most important reason which militated against the principle of absolute universality was the underlying feeling that membership policy should be based on the contribution a prospective member could make to the realization of the essential purposes of the League. This view was asserted even at the very time members were expressing dissatisfaction with the non-universal character of the League and attributing the low performance capability of the organization to it.[32]

Turning to the United Nations, a similar pattern may be observed. At San Francisco, some delegations revived the 1920 Argentine proposal to make every state ipso facto members of the United Nations. Their proposal, however, went beyond the import of Argentina's. It was that "all communities should be members of the Organization and that their participation is obligatory, that is to say that it will not

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30 (continued) Geneva Studies, Vol. XI, Nos. 3-4, August 1940, p. 69. As Solis of Panama put it" "We cannot expect those outside to join us as long as we cannot even prevent an exodus from within". L.N.O.J., Sp. Supp. No. 155, p. 55. See also Viscount Cranborne: The problem of universality is "not merely how to increase membership... but how to avoid a further decrease of membership". League Doc. C.367.M.244. 1937.VII, [C.S.P. 20], L.N.O.J., Sp. Supp. No. 180. Annex 2.

31 L.N.O.J., 1939, p. 506; Leo Gross, "Was the Soviet Union Expelled from the League of Nations?", A.J.I.L., Vol. 39, 1945, p. 35 et. seq., Nagendra Singh, Termination of Membership of International Organization, (London: 1957), pp. 34-35, 38-42.

32 Engel, "League Reform: An Analysis of Offical Proposels and Discussions, 1936-1939", Geneva Studies, Vol. XI, Nos. 3-4, 1940. L.N.O.J., Sp. Supp. No. 180, Report of the Special Committee Set up to Study the Application of the Principles of the Covenant, (1938).

be left to the choice of any nation whether to become a member of the Organization or to withdraw from it; thus the question of explusion will not thus be raised".[33] If the proposal had been admitted, the United Nations would have been based upon the principle of formal universality. However, with an eye on comprehensiveness, if not on absolute universality, of membership, the U.N. Charter does not expressly permit withdrawal from the world organization, although an interpretative commentary, whose legal force is much discussed,[34] declared that a member can withdraw under "exceptional circumstances".[35] In this connection, it may be noted that Indonesia did withdraw from the world organization in 1965, and, further, that the Secretariat, with the

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[33] Doc. 1178, I/2/76(2); U.N.C.I.O. Doc., Vol. 17, p. 325; Uruguayan Institute of International Law, Uruguay and the United Nations, (New York: 1958), p. 31; Rudzinski, "Admission of New Members", International Conciliation, No. 480, April 1952, pp. 151-154; Green, "Membership in the United Nations", C.L.P., Vol. 2, 1949, pp. 263-264.

[34] For the view that the 'commentary' has a binding force as the Charter itself, see Goodrich and Hambro, Charter of the United Nations: Commentary and Documents, (Boston: 1949), p. 144. For a contrary view, see Kelsen, "Withdrawal from the United Nations", W.P.Q., Vol. 1, 1948, pp. 29-43; also The Law of the United Nations, (1964) p. 127.

[35] Doc. WD 344; U.N.C.I.O. Doc., Vol. 7, p. 577. See further Nagendra Singh, Termination of Membership in International Organizations, (1957), p. 92 et. seq.

[36] U.N. Doc. A/5852 and S/6157. Text in International Legal Materials, Vol. 4, 1965, p. 365.

"approval" of both the Security Council and the General Assembly, appeared to have treated the case as one involving absence from, and a cessation of cooperation with, the United Nations rather than withdrawal.[37]

The principle of compulsory and automatic membership was firmly rejected in 1945. The San Francisco delegates considered universality of membership as "an ideal toward which it was proper to aim but which was not practicable to realize at once".[38] As the Stettinius Report to the U.S. President rightly explained: "There is nothing in the Charter which could prevent any state from eventually becoming a member. The Charter thus combines regard for present realities with the hope that some day all the nations will join their efforts in maintaining the peace of the world and in advancing the welfare of their peoples".[39] The United Nations is an organization of "peace loving states". The phrase "peace loving" has been interpreted differently, and twenty-five years after the founding of the United Nations, universal membership remains a hope dependent, as it has been, on the course of the ideological struggle between the super-powers

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[37] See Egon Schwelb, "Withdrawal from the United Nations: The Indonesian Intermezzo", A.J.I.L., Vol. 61, 1967, pp. 661-672. For further comments, see below.

[38] Doc. 1178, I/2/76(2); U.N.C.I.O. Doc., Vol. 7, p. 326.

[39] U.S. Dept. of State, Charter of the United Nations, Report to the President on the Results of the San Francisco Conference, (Washington: Publication 2349, Conference Series 71, 1945), p. 46. (Emphasis added).

and their allies.[40] The annual debate over the representation of Communist China in the United Nations[41] has become an important ritual during which the virtues of universality are extolled. The principle of universality is defended today even more strongly than in the dying days of the League of Nations, but, as in the League days, genuine advocates of universality of membership invariably qualify their view by emphasizing the importance of the capacity of the applicant member to fulfil the obligations of membership.[42] It is in this context that the problem of mini-states is discussed.[43]

If by universality we mean the existence of an international organization in which all members of the international community are _ipso facto_ members, that is to say, an organization in which there is an automatic right of mem-

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[40] Green, "Membership in the United Nations", _C.L.P._, Vol. 2, 1949, pp. 258-282; Higgins, _The Development of International Law Through the Political Organs of the United Nations_, (London: Oxford University Press, 1963), p. 11 _et. seq_.

[41] Steiner, "Communist China in the World Community", _International Conciliation_, No. 533, 1960; Lung-Chu Chen and H.D. Lasswell, _Formosa, China and the United Nations_, (New York: St. Martin's Press, 1967), Ch. 1.

[42] See for instance, Commission to Study the Organization of Peace, Fifteenth Report, _A Universal United Nations_, (New York: 1962); Wilcox and Marcy, _Proposals for Changes in the United Nations_, (Washington: 1955), p. 88.

[43] _Introduction to the Annual Report of the Secretary-General on the Work of the Organization 16 June 1966 - 15 June 1967, G.A.O.R._, 22nd Sess., Supp. No. 1A (A/6701/Add.1), pp. 20-21; Patricia W. Blair, _The Ministate Dilemma_, (New York: Carnegie Endowment for International Peace, 1967).

bership and in which all members of the international community exercise that right of membership, then, neither the League of Nations nor the United Nations is a universal organization. This criterion is rather too demanding and unrealistic, and must be rejected. The League of Nations was and the United Nations is a universal organization not only because of the comprehensiveness and the non-exclusive character of their membership, but also because, under their constitutional law, they claim to be guardians of global peace. This leads us to a consideration of the second dimension of universality: the geographic scope of functional competence of an international organization.

The characterization of the League of Nations and the United Nations as universal peace organizations is supported in part by, and derives from, the claim of these organizatios to supervise and maintain global peace and security. This claim can be examined on two levels - law and practice. It may be said that the relationship of both international organizations to non-members is the key to the theoretical claim of either organization to possess responsibility for a community larger than its membership. This relationship is formulated in Article 17 of the League Covenant and Article 2(6) of the U.N. Charter.

In the functional field of war prevention,[44] the League claimed competence to deal with "any matter within the sphere of action of the League or affecting the peace of the world", declared "any war or threat of war... a matter of concern to the whole League",[45] and required non-members to conduct their international relations in such a way that peace was not endangered or face collective sanctions of the League.[46] According to the authoritative British commentary on the Covenant, "Article XVII asserts the claim of the League that no State, whether a member of the League or not, has the right to disturb the peace of the world till peaceful methods of settlement has been tried. As in early English law any act of violence, wherever committed, came to be regarded as a breach of the King's peace, so any and every sudden act of war is hence forward a breach of the peace of the League which will exact due reparation".[47] Without going

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[44] For the conception of the League as "three Leagues in one" - the League to outlaw war, the League to promote international cooperation in the non-political field, and the League to execute the Peace Treaties, see William Rappard, International Relations as Viewed from Geneva, (New Haven: Yale University Press, 1925), Ch. 1.

[45] Art. 3(3), 4(4), II. For an authoritative analysis of the jurisdiction of the League Council is pacific settlement of disputes, see Conwell-Evans, The League Council in Action, (London: Oxford University Press, 1929), Ch. 2.

[46] Art. 17.

[47] Cmd. 151, The Covenant of the League of Nations with a Commentary Thereon, (London: H.M.S.O., 1919), p. 17.

into details, it should be noted that Article 17 deals only with situations in which non-members were parties to a dispute or resorted to war. The Article does not purport to compel a non-member to collaborate with the League. But the Covenant does not restrict the competence of the League to cases in which the consent of the non-member has been obtained. Thus, in so far as Article 17(4), which concerns a dispute between two non-members, empowers the League, in the event that both parties refused Council's invitation, to "take measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute", there is no doubt that the League claimed the theoretical right to be a guardian of global peace.[48] The legal question, then, is whether this is compatible with international law. If it is a rule of international law that "no State can, without its consent, be compelled to submit its disputes with any other States either to arbitration, or to any other kind of pacific settlement",[49] the presumption that failure of two non-members to accept Council's invitation justifies action by the Council against a third party is legally ques-

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[48] Hans Kelsen, "Legal Technique in International Law: A Textual Critique of the League Covenant", Geneva Studies, Vol. X, No. 6, 1939, p. 139. Article 17, Kelsen asserts, constitutes "an attempt to introduce a new juridico-political principle into international law." For a more guarded judgment, see Schwarzenberger, The League of Nations and World Order, (1936), p. 118.

[49] Eastern Carelia Case, P.C.I.J., Series B, No. 5, 1923, p. 27.

tionable.[50] In any case, the League hesitated to apply Article 17 in practice.[51] As a promoter of international cooperation in the non-political field, the League acted, in practice, as the organization of both members and non-members to the extent that non-members were willing to collaborate. The Memorandum by the League Secretariat on the Relations of the League with Non-Member States stated inter alia:

> There is... no universal principle underlying the attitude of non-member States towards the League. That attitude varies according to the general political situation at a given moment, the particular situation in which a State may find itself and the variety and extent of international interests which bring it in contact with the League. Relations of non-member States with the League tend to be closer in a period of rapprochement than in a period of strain; they are more immediate, also, for States near the center of the League than at a distance; and they are more diversified in a larger State with world wide interests than for a small State with limited interest.[52]

Articles 3(3), 4(4), 11 and 17[53] should therefore be seen in the context of the high hopes that the League of Nations would be a universal organization possessing a world-wide

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[50] Schwarzenberger, The League of Nations and World Order, pp. 105-118.

[51] Ibid., pp. 147-148, 176; Richard Falk, The Authority of the United Nations Over Non-Members, (Princeton: Center of International Studies, 1965), p. 26; Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations, (London: Oxford University Press, 1934), p. 167.

[52] League Doc. A.7.1938.VII; L.N.O.J., Sp. Supp. No. 180, Report of the Special Committee set up to Study the Application of the Principles of the Covenant, (1938), Annex 3, p. 67.

[53] For a "relational" analysis of these articles, see Kunz, "L Article XI du Pacte de la Societe des Nations", Hague Recueil, Vol.39, 1932.

competence even if its membership did not embrace all states.[54]

Under the law of the United Nations, Article 2(6) confers upon the world organization the duty to ensure that states which are not members of the United Nations act consistently with the Charter principles so far as may be necessary for the maintenance of international peace and security.[55] The draftsmen at San Francisco reasoned that "the association of the United Nations, representing the major expression of the international legal community, is entitled to act in a manner which will ensure the effective cooperation of non-member states with it, so far as that is necessary for the maintenance of international peace and security".[56]

The first thing to note about the formulation of Article 2(6) is that, in so far as its effects are concerned, the obligation therein is directed to members rather than to non-members. While Article 2(6) does not impose any obligations on non-members, the latter cannot but be "politically alive to the possible consequence of action in defiance of the United Nations".[57] If they indeed conform to the U.N. prin-

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[54] Sir John F. Williams, Some Aspects of the Covenant of the League of Nations, (1934), pp. 167-169; Schwarzenberger, The League of Nations and World Order, (1936), Ch. 6.

[55] Richard Falk, The Authority of the United Nations over Non-Members, (Princeton: 1965).

[56] Doc. 739, I/1/A/19(a); U.N.C.I.O. Doc., Vol. 6. p. 722. Cited in Falk, op. cit., p. 32.

[57] P.C. Jessup, A Modern Law of Nations, (Archon Books, 1968), p. 135.

ciples and purposes it is "not as a matter of law, but a result of the realities of power".[58] In any case, the duty imposed by Article 2(6) does not give the United Nations an all encompassing authority; its authority being restricted to the field of peace maintenance.[59] Article 2(6), it may be further remarked, does not purport to obliterate the distinction between members and non-members of the United Nations. It is possible that if the phrase "maintenance of peace and security" is given a broad interpretation and if there is agreement among the great powers, there is virtually nothing the United Nations cannot do to keep the peace. The law of the U.N. Charter will, under these circumstances, constitute, in effect, the law of the entire international community. But this will, in practice, be due primarily to the result of effective power of the U.N. to induce compliance from non-members.

It is recognized that the interpretation placed on Article 2(6) here is not shared by some scholars. Brownlie, for instance, holds that Article 2(6) is an "exception" to

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[58] Bentwich and Martin, A Commentary on the Charter of the Charter of the United Nations, (2nd Ed., London: Routledge and Paul Ltd., 1969), p. 14.

[59] J. Kunz, "Revolutionary Creation of Norms of International Law", A.J.I.L., Vol. 41, 1947, pp. 119-126; "General International Law and the Law of International Organizations", A.J.I.L., Vol. 47, 1953, pp. 456-462; Goodrich and Hambro, Charter of the United Nations: Commentary and Documents, (1949), pp. 108-110; Alfred Verdross, "The Charter of the United Nations and General International Law" in G. Lipsky (ed.), Law and Politics in the World Community, (Berkeley: 1953), pp. 153-161.

the "general rule... that only states parties to a treaty are bound by the obligations contained in it".[60] Kelsen comments that the U.N. Charter imposes obligations "indirectly ...upon all the states which are not Members of the United Nations",[61] if only because "[i]f the Charter attaches a sanction to a certain behaviour of non-Members, it establishes a true obligation of non-Members to observe the contrary behaviour".[62] Both scholars base their argument on "the special character of the United Nations as an organization concerned primarily with the maintenance of peace and security in the world and including in its membership the great powers as well as the vast majority of states".[63] The view that Article 2(6) imposes obligations on non-members is shared only by a minority of legal scholars.[64] It is no doubt true that, at San Francisco, the reluctance of the drafters of the Charter to jettision the rule pactatertiis nec nocent nec prosunt was matched by an equal determination to endow the United Nations with control over the external behaviour of

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[60] Brownlie, Principles of Public International Law, (Oxford: Clarendon Press, 1966), pp. 530-531.

[61] Kelsen, The Law of the United Nations, (1964), p. 106.

[62] Ibid., p. 107.

[63] Brownlie, op. cit., p. 531.

[64] Green in Ottawa Law Review, Vol. 2, No. 1, Fall 1967, pp. 253-254.;Jochen A. Frowein, "The United Nations and Non-Member States", International Journal (Toronto), Vol. 25, 1970, pp.333-344 at p.337.

non-members so far as it is necessary to maintain international peace and security.[65] One cannot, however, ignore the fact that the Charter carefully avoids placing direct obligations on non-members to collaborate with the United Nations in ensuring the existence of a peaceful international order.

In the context of the relation between the United Nations and non-members, attention is sometimes drawn to the Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations which dealt with the international right of claim of the United Nations. It may be recalled that the World Court held that the United Nations possesses an international right of claim in relation to both member and non-member states.[66] In the first place, it is questionable whether the Opinion is strictly relevant to or supports the claim that a non-member has a duty to respect the Charter obligations relating to the maintenance of international peace: the Court was concerned in that case with the competence of the United Nations to bring an international claim against any state. In the second place, one cannot overlook the fact that even if the United Nations possesses the legal competence to bring a claim against any state before

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[65] Falk, The Authority of the United Nations over Non-Members, (1965), p. 27 et. seq., Ruth Russell, A History of the United Nations Charter, (1958), pp. 437-438.

[66] I.C.J. Reports 1949, p. 174.

an international tribunal, it can only do so by agreement with the defendant which must therefore recognize its existence.[67] In this context, it would seem that the statement of the Court regarding the objective international personality of the United Nations is neither as revolutionary as it sounds nor so directly contrary to the well known maxim _res inter alios acta_ as might at first appear.

The dramatic "withdrawal" of Indonesia from the United Nations in 1965 led to a renewed interest among international legal scholars not only on the legal force of the "declaration" on withdrawal from the U.N. to which reference has been made, but also on the scope of Article 2(6).[68] The Indonesian leaders seemed to believe that withdrawal from the world organization would give them a "freer" hand to pursue their "confrontation" policy against Malaysia without the restraint of the Charter obligations. As the Indonesian note explained, withdrawal "could well entail a beneficial effect for the

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[67] Schwarzenberger, _International Law_, Vol. 1, (1957), pp. 128-129.

[68] See generally, Egon Schwelb, "Withdrawal from the United Nations: The Indonesia Intermezzo", _A.J.I.L._, Vol. 61, 1967, pp. 661-672; L.C. Green, "Indonesia, the U.N. and Malaysia", _Journal of Southeast Asian History_, Vol. 6, No. 2. 1965, pp. 71-86; Frances Livingston, "Withdrawal from the United Nations - Indonesia", _I.C.L.Q._, Vol. 14, 1965, pp. 637-646; William R. Harris, "Legal Aspects of Indonesia's "Withdrawal" from the United Nations", _Harvard International Law Club Journal_, Vol. 6, 1964-65, pp. 172-188; Y.Z. Blum, "Indonesia's Return to the United Nations", _I.C.L.Q._, Vol. 16, 1967, pp. 522-531.

speedy solution of the problem of "Malaysia" itself".[69] The Indonesian leaders spoke as if non-membership of the United Nations would automatically put their country beyond the reach of the U.N. sanctions if Djakata were to disturb international peace.[70] The truth is that it is at least extremely doubtful whether withdrawal, hence, non-membership status automatically terminates obligations already established under international law. More importantly, if the U.N. members are willing to carry out the obligations assumed under Article 2(6), no non-member state can disturb international peace and hope to escape the sanctions of the world organization on the strength of the argument that it is not, or has ceased to be, a party to the U.N. Charter.

In the final analysis, the claim of the Charter to be the law of the whole international community depends partly on the self-restraint of the great Powers exercising the power of veto, and whether the United Nations can take measures to insure that a state like the Communist China conducts its international relations in a peaceful manner. It may be observed that Article 2(6) has so far not been expressly invoked by any United Nations organ, although some resolutions of the General Assembly have been directed to

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[69] U.N. Doc. A/5852 and S/6157. Text in International Legal Materials, Vol. 4, 1965, p. 365.

[70] Green, loc. cit., [note 68], p. 84; Livingstone, loc. cit.

"all States and authorities" in regard to questions of international peace and security.[71]

The foregoing analysis would seem to justify the attribution of a universal character to both the League of Nations and the United Nations.

3. Regionalism as a Principle of International Organization

From a theoretical point of view, the problem of regionalism resolves itself around three interrelated questions: What is a region? What is a regional arrangement? Does the political definition of regionalism require the principle of voluntary association? The following section attempts to answer these questions.

(a) What is a Region?

It is generally agreed among writers in the field of international organization that the geographer's concept of regionalism is inadequate for explaining the political regions of the global system.[72] An extreme expression of this view is found in the statement that "political regionalism has

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[71] United Nations, Repertory of Practice of the United Nations Organs Supplement No. 2, Vol. 1, Articles 1-8 of the Charter, (New York: 1964), p. 117.

[72] See generally, Bruce M. Russett, International Regions and the International System: A Study of Political Ecology, (Chicago: Rand McNally and Company, 1967), Ch. 1.

nothing in common with the endeavor of geographers to describe the comprehensive order of physical and cultural resources of a community".[73] To the extent that geographical location plays some part in determining the desirable boundaries of political regions, the fact of geography cannot be excluded totally from the calculation of statesmen who want to build security zones of collective actions. It is, however, true that political considerations predominate and that the geographical element is usually so defined in purely political terms that it tends to have its geographical force emasculated. Thus, Padelford has rightly pointed out that "[i]n speaking of "regional" organization... we are thinking of those spatial areas which [have] come to be spoken of as "regions" as a result of usage stemming from the practices of states or of groups of states, the utterances of statesmen, or the terms of treaties and agreements between groups of states".[74] It may seem odd from the geographer's point of view to characterize the area covered by the North Atlantic Treaty as a "region". Even if one were to assume that oceans connect rather than separate land masses,[75] it would still be diffi-

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[73] Robert Strausz-Hupé, "Regionalism in World Politics", International Conciliation, No. 419, 1946, p. 118. (Emphasis added).

[74] N.J. Padelford, "Recent Development in Regional Organizations", Proceedings, A.S.I.L., 1955, p. 25.

[75] Eugene Staley, "The Myth of the Continents", Foreign Affairs, Vol. 19, No. 3, 1940-1941, pp. 481-494.

cult to understand how Greece and Turkey could be said to fall within the North Atalantic area.[76] The element of geographical contiguity may make it easy to explain the designation of the area covered by the Warsaw Pact as a region; but it is only in political terms that the significance of the region can be properly understood.[77] Political interests rather than territorial propinquity account for the association of the United States, Great Britain and France with the Southeast Asia Treaty Organization.[78] In order to further illustrate the superiority of political over geographical calculations as the basis of international regionalism, one may draw attention to the absence of Canada from the Organization of American States, Israel from the League of Arab States, South Africa from the Organization of African States, Yugoslavia from the Warsaw Treaty Organization, Hungary from the Little Entente, Spain and Sweden from the North Atlantic Treaty Organization and India from the Southeast Asia Treaty Organization. Thus, it has been well said that "a region is any area that takes into its head to call itself a

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[76] On the problem of defining the North Atlantic Area, see Karl Deutsch _et al._, _Political Community and the North Atlantic Area_, (Princeton: Princeton University Press, 1968), pp. 9-10.

[77] Grzybowski, _The Socialist Commonwealth of Nations_, (New Haven: 1964).

[78] R.I.I.A., _Collective Defence in South East Asia_, (London: 1956); George Modelski (ed.), _SEATO: Six Studies_, (Melbourne: Cheshire, 1962).

region".[79]

(b) The Principle of Voluntary Association

Whether a political definition of regionalism in international organization must incorporate and emphasize the principle of voluntary association is a perplexing difficulty which theory defends but practice invalidates. Van Kleffens has written that "an association may call itself a regional pact, but if it has been established under compulsion, it has no right to that name; it is then in fact no more than a sphere of influence, unilaterally established, of the dominant Power".[80] A regional organization established by compulsion "belongs to the category of imperialism and conquest".[81] The principle of voluntary association draws the line between imperial and cooperative regionalism.[82] There are two aspects to the principle of free will, namely, that no state should be "compelled" to join, and that a state is free to withdraw from

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[79] H.S. Quigley, "Regionalism in Transition", H.A.H.R., Vol. 26, No. 3, 1946, p. 426.

[80] E.N. Van Kleffens, "Regionalism and Political Pacts", A.J.I.L., Vol. 43, 1949, p. 667; John Stoessinger, The Might of Nations: World Politics in Our Time, (Revised Ed., New York: Random House, 1965), p. 301.

[81] Padelford in Proceedings, A.S.I.L., 1955, p. 27.

[82] For an identical distinction made in respect of types of universality, see Georg Schwarzenberger, The League of Nations and World Order, (1936); Power Politics, (3rd Ed., London: 1964), p. 336 et. seq. See above.

a regional organization as considerations of its national interest dictate.

The question of the relevance of the principle of voluntary association may be most appropriately raised in relation to the Warsaw Pact and the Organization of American States both of which are dominated by the U.S.S.R. and the U.S. respectively. The geographical position of some members of these organizations leaves them little room to manoeuvre in regard to the issue of membership.

When the Nagy government proclaimed Hungary's neutrality in November 1956 and gave notice of intention to withdraw from the Warsaw Pact, the Soviet Union moved in and installed a puppet government to ensure the political loyalty of the Hungarian leaders to the Soviet-led socialist world of Eastern Europe.[83] The recent invasion of Czechoslovakia further demonstrates that no strategic state member of the Warsaw Pact can be permitted to deviate too much from socialist orthodoxy let alone to contract out of the Warsaw Pact.[84] Because of the geographical position of Poland, East Germany and Bulgaria the Soviet leaders are not likely to tolerate any attempt to contract out of the regional defence system or to weaken their commitment to the integrity of the socialist

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[83] See F. Fejto, Behind the Rape of Hungary, (New York: David McKay Company, Inc., 1957); T. Meray, Thirteen Days that Shook the Kremlin, (New York: Praeger, 1959).

[84] See Chapter VII below.

system. The Soviet Union may tolerate Rumania's dissidence or national socialism in Yugoslavia and Albania but this is only to the extent that socialism in those countries is not alleged to be in danger of being subverted by the so-called "counter-revolutionary" forces. It can be said that the socialist international regional system in Eastern Europe of which the Warsaw Pact is only a military and political expression comes closer to being, in practice, an imperial than a cooperative regional system.[85] The Brezhnev Doctrine[86] which subordinates the sovereignty of the individual state of the socialist commonwealth to the international duty of the socialist states defined by the Soviet Union is a recent manifestation of the imperial nature of the Warsaw Treaty Organization.

It will be politically naive to think that international relations in the "free" world of the Organization of American States do not show evidence of U.S. domination and hegemony.

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[85] Zbigniew Brzezinski, <u>The Soviet Bloc: Unity and Conflict</u>, (Cambridge, Mass.: Harvard University Press, 1960), pp. 445-479; also "The Organization of the Communist Camp", <u>World Politics</u>, Vol. 13, 1961, pp. 175-209; George Modelski, <u>The Communist International System</u>, (Princeton: Center for International Studies, 1960); R.J. Mitchell, <u>A Theoretical Approach to the Study of Communist International Organizations</u>, (Stanford: 1964); Kazimierz Grzybowski, <u>The Socialist Commonwealth of Nations</u>, (New Haven: 1964); Yacobson, "World Security and Regional Arrangements", <u>Proceedings</u>, <u>A.S.I.L.</u>, 1950, p. 15.

[86] Text in <u>International Legal Materials</u>, Vol. 7, 1968, p. 1323. See Chapter VI below for more extensive comments on this Doctrine.

The character of U.S.-Latin American relations differs not in kind but in degree from that of U.S.S.R.-Warsaw Pact relations.[87] American intervention in Guatemala and in the Dominican Republic to prevent an alleged threat of international communist conspiracy in the Western hemisphere indicates that the United States and, indeed, some conservative Latin American states, cannot stand idly by and watch an OAS member contract out of the ideological framework of the Western Hemisphere.[88] The OAS could afford to exclude the Castro Government of Cuba from participating in the regional arrangement[89] only because the latter's communist regime can be politically and military quarantined to prevent it from constituting a serious security gap in the regional defence system.[90] Almost half a century ago the U.S. Secretary of States, Charles Hughes declared that with respect to the Carribean in particular, if the Monroe Doctrine did not exist, it would have been necessary to invent one.[91] A member of the

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[87] J.E. Fawcett, "Intervention in International Law: A Case Study of Some Recent Cases", Hague Recueil, Vol. 103, 1961 (11), pp. 348-421; Schwarzenberger, "Hagemonial Intervention", Y.B.W.A., Vol. 13, 1959, pp. 236-265.

[88] See Chapter VII below.

[89] OAS Official Record OEA/Ser. C/II.8 (English) CORR. (1962), pp. 12-14; U.S. Dept. of State, Bulletin, Vol. 46, No. 1182, Feb. 19, 1962, pp. 278-283. See Chapter VII below.

[90] See Chapter VII below for an analysis of the Cuban missile crisis.

[91] Charles Hughes, "Observation on the Monroe Doctrine", A.J.I.L., Vol. 17, 1923, p. 620.

OAS can contract out of the regional organization; but such "freedom" is far from being an insurance against the fact and implications of American leadership of the OAS and of American hegemony in the Western hemisphere. For the Latin American republics, the choice between membership or non-membership in the OAS is not a profound one in so far as their ability to pursue an independent foreign policy which the United States considers detrimental to its national or hemispheric security is rather limited. Canada, whose membership in the Inter-American System had usually been opposed by the United States until after the 1939-1945 war,[92] has exercised the right to decide whether or not she wants to seek membership. The decision to stay out has become "acceptable" and "respectable" only because she is a reliable ally of the United States. Canada's defence agreement with the United States indirectly links her to the whole American defence system.

In the light of the above considerations, it may be asked whether it is realistic to insist upon a dogmatic application of the principle of voluntary association. It will run contrary to common sense to insist that neither the Warsaw Pact nor the OAS is a regional organization. The

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[92] F.H. Soward and A.M. Macaulay, Canada and the Pan American System, (Toronto: Ryerson Press, 1948); D.G. Anglin, "United States Opposition to Canadian Membership in the Pan American Union: A Canadian View", International Organization, Vol. 15, 1961, pp. 1-19.

dilemma a theoretical analyst of regional organizations confronts in this type of situation can be avoided if the analyst considers all regional organizations as capable of being classified along an analytic continuum ranging from the theoretically wholly decentralized and voluntarily organized at the extreme left to the most centralized at the extreme right.

(c) What is a Regional Organization?

Those who formulated the League Covenant and the U.N. Charter deliberately avoided placing any explicit construction on the meaning of regional arrangements.[93] At San Francisco, the Egyptian delegation proposed the following definition:

> There shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security in their region, as well as for the safeguarding of their interests and the development of economic and cultural relations.[94]

The definition was rejected. The Charter, like the Covenant,

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[93] Miller, The Drafting of the Covenant, Vol. 1, (1928), p. 443; Vol. 2, pp. 369-370; Doc. 889, III/4/12, U.N.C.I.O. Doc., Vol. 12, pp. 701-702.

[94] Doc. 553, II/4/A/9, U.N.C.I.O. Doc., Vol. 12, p. 850; Egyptian Society of International Law, Egypt and the United Nations, (New York: 1957), pp. 18, 20-21.

takes cognizance of regional arrangements largely and explicitly in the context of the function of the maintenance of international peace and security.[95] This is hardly surprising in view of the fact that both the League of Nations and the United Nations are primarily dedicated to the maintenance of peace and security. It should not be supposed that because the U.N. Charter does not mention economic functions in Articles 52-54, regional economic organizations are not permitted under the Charter.[96] As Goodhart correctly points out, "doubt cannot be thrown on the validity of an arrangement because it falls outside the terms of Article 52 as it is not necessary to prove that such an arrangement has been recognized by the Charter: it is only necessary to show that there is no provision limiting or prohibiting such an arrangement".[97]

The contentious legal issue concerning the proper interpretation to be placed on regional arrangement has become largely the Beckett-Kelsen juridical argument about whether NATO, a collective self-defence organization, is a regional arrangement within the meaning of Chapter VIII of the U.N. Charter. The proposition that NATO is not a regional arrangement of the kind permissible under the U.N. Charter was first

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[95] League Covenant, Art. 21; U.N. Charter, Art. 51-54. See Yakemtchouk, "Le Regionalisme et L'O.N.U." R.G.D.I.P., Vol. 58, 1955, p. 408

[96] Kelsen, The Law of the United Nations, (1964), p. 321.

[97] Goodhart, "The North Atlantic Treaty of 1949", Hague Recueil, Vol. 79, 1951 (1), p. 205.

advanced by the Soviet Union in 1949[98] but the claim that NATO is not a regional arrangement within the meaning of Chapter VIII of the Charter is the formulation of Sir Eric Beckett,[99] a former Legal Adviser to the British Foreign Office.

Stated briefly, Beckett's main thesis is that "a provision in a treaty between a group of States which provides for that group being used by the Security Council for enforcement action against one of its Members is the hall-mark of a regional arrangement and distinguishes such a treaty from other treaties between groups of States which provide for the settlement of disputes by pacific means and provide for collective self-defence".[100] The basic assumption, it should be noted, is that regional arrangements are defined exclusively in the context of Chapter VIII of the U.N. Charter. Beckett's argument is, first, that the subject-matter regulated by Chapter VIII does not include collective self-defence.[101]

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98 R.I.I.A., Documents on International Affairs 1949-1950, pp. 14-33 esp. at pp. 29-29; U.N. Bulletin, Vol. 6, 1949, p. 410. See Chapter VII below.

99 Sir Eric Beckett, The North Atlantic Treaty, The Brussels Treaty and the Charter of the United Nations, (London: Stevens, 1950). For a similar view, see J. Stone, Legal Controls of International Conflicts, (1959), p. 247 et. seq., J.G. Starke, The ANZUS Treaty Alliance, (Melbourne: Melbourne University Press, 1965), p. 76 et. seq.

100 Beckett, op. cit., pp. 22-25.

101 Ibid., p. 16.

In reply, Kelsen has urged that matters "relating to the maintenance of international peace and security as are appropriate for regional action" do not exclude self-defence especially as self-defence relates to peace and security.[102] In any case, it would have been superfluous to mention self-defence again under Article 52.[103] Second, Beckett contends that the use of force by a regional organization under Article 53 differs from that under Article 51 in so far as the former requires prior authorization from the Security Council whereas forceful self-defensive measures can be taken at the initiative of the collective defence organization.[104] The U.N. Charter certainly permits an exception to the prohibition against regional organizations within the context of Articles 52-54 being used for enforcement action without the authorization of the Security Council. A regional organization "directed against renewal of aggressive policy on the part of any such [enemy] state" can resort to the use of force against an enemy state which has neither signed a Peace Treaty nor joined the United Nations without the authorization of the Security Council. Kelsen, thus, rightly contends that the term enforcement action cannot refer exclusively to

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[102] Kelsen, "Is the North Atlantic Treaty a Regional Arrangement?", A.J.I.L., Vol. 45, 1951, p. 163.

[103] Ibid., p. 164.

[104] Beckett, op. cit., p. 16.

measures decided on or approved by the Security Council in as much as no approval of the Security Council is needed for a regional enforcement action against an enemy state. Kelsen reaches the conclusion that "[t]he use of force in the exercise of the right of self-defence too, is an enforcement action in this sense, that is to say, an enforcement action taken, not by the Security Council, but by Members of the United Nations".[105] Third, Beckett argues that collective self-defence arrangements are, generally, externally oriented, whereas the essential characteristic of a regional organization is the assumption of responsibility for enforcement action, under the authority of the Security Council, against a signatory state which resorts to war or threatens international peace.[106] This particular argument is the crux of Beckett's thesis. The question is whether this argument has any validity in terms of the law of the United Nations and of regional self-defence organizations. While it is no doubt true that NATO, the Warsaw Pact, the Southeast Asia Treaty Organization and the ANZUS Treaty have <u>in fact</u> been established to deal with extra-regional aggressors, it seems reasonable to accept Kelsen's argument that, as neither the formulation of Article 51 of the U.N. Charter nor the wording

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[105] Kelsen in <u>A.J.I.L.</u>, Vol. 45, 1951, p. 164; <u>The Law of the United Nations</u>, p.

[106] Beckett, <u>op</u>. <u>cit</u>., p. 21, 22.

of Article 5 of the North Atlantic Treaty explicity rules out the possible use of NATO to deal with an aggressor state which is a signatory to the regional treaty, there is no reason why a collective self-defence arrangement like NATO cannot be used to maintain "internal" peace.[107] Finally, Beckett maintains that the provision stipulating that activities contemplated by a regional organization under Chapter VIII should be reported to the Security Council can hardly be applicable to a collective defence organization; if it were, the defence plans of NATO, for example, would be known in advance to the Soviet Union.[108]

In this study, it is proposed to employ a broad interpretation of the phrase "regional organization" to include both regional arrangements under Articles 52-54 and collective self-defence arrangements permitted under Article 51.[109] We share the view that the "[Beckett-Kelsen] controversy arises from an attempt to characterize organizations by form rather

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[107] Kelsen in A.J.I.L., Vol. 45, 1951, p. 165, 166; The Law of the United Nations, p. 918 et. seq.

[108] Beckett, op. cit., pp. 16-18.

[109] Compare Gerhard Bebr, "Regional Organizations: A United Nations Problem", A.J.I.L., Vol. 49, 1955, p. 169; Bentwich and Martin, A Commentary on the Charter of the United Nations, (London: 1969), pp. 109-110; Andrew Martin, Collective Security: A Progress Report, (Paris: UNESCO, 1952), pp. 171-172; Commission to Study the Organization of Peace, Regional Arrangements for Security and the United Nations, (Eighth Report, New York: 1953), pp. 19-24. Alf Ross, Constitution of the United Nations, (New York: 1950), p. 166 et seq.

than by function, as being either organizations in collective self-defence or regional arrangements".[110] In order to avoid such a controversy which leads nowhere other than to a dead end, we accept a functional analysis of Articles 51-54 which permits us to define the relationship of <u>any</u> limited membership organization of states concerned with peace and security matters to the United Nations on the basis of the specific function the "regional" organization is performing at a particular time.[111]

4. Universal-Regional Relationship in the Hands of Theory Builders

Any study of the theoretical aspects of regional organizations dealing with security matters should give the problem of universal-regional equilibrium a special attention. It is primarily within this framework that the important questions of compatibility, discongruity and complementarity can be fruitfully examined. The mere fact that the twentieth century statesmen have not actually considered both forms of international organizations in mutually exclusive terms on the basis that one is absolutely and theoretically superior to the other, but, rather, have been willing to experiment with

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[110] D.W. Bowett, <u>Self-Defence in International Law</u>, (Manchester: Manchester University Press, 1958), p. 222.

[111] The functional approach is identified with Bowett, <u>Ibid</u>., pp. 220 <u>et</u>. <u>seq</u>. See Chapter IV below for further comments.

both forms of organization reflects the belief that a proper operating relationship can be worked out between them.

A theorist trying to formulate hypotheses on the conditions of universal-regional equilibrium in international politics faces a rather lesser set of problems than a national foreign policy maker who sees the universal-regional relationship as a continually changing one dictated by the demands of national policy and of the effectiveness of international peace machinery. Stated cogently,

> The great difficulty... is not to secure agreement [on coordination] in principle, but to work out the modalities. Shall coordination be given structural form or be sought merely in the realm of action or procedure? Shall collaboration be obtained by asking the regional organizations, once set up, to seek this result by communicating one with another or with the central organization? Shall it be sought by giving the central organization power to impose it upon the regional organizations? Or shall the original creation of the latter be left to the central international authorities? Having local agencies set up from the center would produce the desirable result... but would probably not satisfy the devotees of regionalism, or the most eager among them. Asking local agencies to cooperate voluntarily would be too uncertain and leave the burden and power too largely in the hands of the local authorities. Giving the central organization power to impose order seems to be too drastic, almost more drastic than the central creation of agencies, and indeed to be quite unworkable.[112]

In working out the modalities of universal-regional relationships, one must pay due respect to the degree and level of integration of the international society. More importantly,

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[112] Pitman Potter, "Universalism versus Regionalism in International Organization", A.P.S.R., Vol. 37, 1943, p. 860.

the modalities of coordination must be regarded as merely a phase, a short-run view of a continually evolving political reality. Before we examine the system of coordination formulated under the League Covenant and the United Nations Charter,[113] we propose to survey and criticize the theoretical work in this field of universal-regional relationship.

(a) A Critique of Liska's Multiple Equilibrium Model

The most outstanding, though not completely satisfactory, work in this field is George Liska's theory of multiple equilibrium.[114] According to Liska, "many of the advantages of regionalism and all its consistency with global organization depend on the extent to which the two organizational forms are in reciprocal equilibrium".[115] This presupposes a definition or a statement of conditions under which any international organization may be said to be in an equilibrium position. Liska singles out three variables to which equilibrium status must be related, namely, the structure of the organization, the commitment of its members and the functional and geographic scope of the organization. In his own

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[113] See Chapters II and IV below.

[114] George Liska, International Equilibrium: A Theoretical Essay onthe Politics and Organization of Security, (Cambridge, Mass.: Harvard University Press, 1957).

[115] Ibid., p. 133.

words,

> A composite organization is in structural equilibrium if there is an over-all correspondence between the margins of restraint it imposes on members and their willingness to tolerate them; if the ratios between the influence exercised by individual members and their actual powers are not too unequal; and if the respective powers of the different organs correspond to the composition of their membership.... More important than the structure is the commitment of states participating in an international organization ....What matters is that the actual readiness of members to perform correspond to their formal obligations. A disequilibrium between readiness and obligation results in pressure on the commitment toward its reduction, decentralization, or evasion, which tends to be cumulative. And, lastly, an international organization is in equilibrium with respect to its functional scope when the functions and jurisdiction which it actually exercises correspond to the extent of the needs relevant to its purpose. Depending on the adequacy of the area covered by the organization, its geographic scope can be analyzed in analogous terms.[116]

Reduced to its essential elements, the above passage maintains that institutional equilibrium exists when the distribution of political power outside any international organization corresponds to the location of power within the international organization. Liska then proceeds to formulate a theory of universal-regional equilibrium based largely upon two requirements. A universal and a regional organization are considered to be in reciprocal equilibrium "when the scope of their respective functions correspond to their geographic scope, the composition of their membership, and the needs they are to serve".[117] Furthermore, "the two forms

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116 *Ibid.*, pp. 13-14.

117 *Ibid.*, p. 134.

must mutually reinforce each other by a proper differentiation of their functions on the one hand, and their reciprocal integration under the over-all control of the more inclusive body on the other".[118] Liska concludes that, in order to meet these requirements, "the regional organizations must have a primarily internal focus, i.e., must be chiefly concerned with intraregional peace, security, and welfare, leaving priority in inter- and extraregional security and other problems to the world body; the integration of the two forms is furthered by structural and functional devotailing, mutual checks and overlapping membership, and the ultimate supremacy and control of the central body acting as a coactive framework for regional arrangements".[119]

Liska's theoretical formulation invites criticism on four main grounds. First, it has a static bias. The relationship between the universal and the regional organizations is seen primarily as a function of the constitutional law of international institutions rather than as an evolving process determined, in large part, by the dynamic forces of international power politics. The fact must be accepted that the relationship between the universal and regional organizations must be, and has in practice always been, determined in the light of policy considerations and the need

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118 Ibid.

119 Ibid.

for effective action.[120] Liska shows an awareness of the importance of "policies and predispositions" as significant variables that give shape to the operating relationship between the two forms of international organization;[121] but these variables are left out of the theoretical formulation probably because their inclusion would have altered fundamentally the character of the universal-regional model itself. Second, the implicit assumption that a line can always be drawn between regional and extra-regional problems can easily be falsified by concrete historical evidence. Third, the formulation either postulates a more developed international system than presently exists by assuming the model of an international federal political system or does not sufficiently take into consideration the fundamental division of the present international system which has so far prevented the emergence of a tight superordinate-subordinate status in the relationship between the universal and regional organizations.[122] Fourth, although Liska draws attention to "the structure and internal equilibrium of regional organizations", "the fact of Great Power regional hegemony", and "the antagonistic nature of the most politically relevant regional-security organizations", his analysis remains notoriously

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[120] See Chapter VII below.

[121] Liska, _op. cit._, pp. 139, 148-161.

[122] See Chapter V.

one-dimensional. Problems of equilibrium are seen solely in terms of universal-regional relationship, rarely also in terms of stability in the relationship among regional organizations expressed through the linkage between the politically relevant regional sub-systems and the "dominant system"[123] of the international community. A problem which Liska deals with competently, but which he does not integrate into his formulation is the theory of Great Power orbit. It is hard to see how one can go about positing conditions of a satisfactory equilibrium between the universal and the regional organizations without considering the role of the big powers, especially the United States and the Soviet Union. For the purpose of high politics, the contemporary international system has a peculiar oligopolistic character. The international landscape is not only contoured primarily along the wills of the great powers, the most important regional organizations are centred around the United States and the Soviet Union, so much so that, in practice, the concept of sovereign equality of states has, to a greater extent than

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[123] The term "dominant system" is borrowed from Michael Brechner who used it to describe the U.S.-U.S.S.R. domination of the present international system. See his "International Relations and Asian Studies: The Subordinate State System of Southern Asia", World Politics, Vol. 15, No. 2, 1963, pp. 213-235.

ever before, become a legal fiction.[124] The policies of many of the regional organizations are directly determined or indirectly influenced by these two core-powers. There is, thus, what has been called the "spread effect" whereby "the alliance behavior of a superpower in one subsystem can affect the posture of that power's allies in other subsystems"; there is also the "demonstration effect" of a superpower's influence which helps to establish "perceptual links" among regional organizations.[125] In an ideologically polarized international system, an East-West detente (which does not entail any abandonment of respective ideological position) can be expected, at least, to create conditions favourable to international stability if not to a proper working of the Charter law of universal-regional relationship. Stability in the international system has come to depend not only on the growing interpenetration of the global axis of international politics on the one hand and the increasingly powerful regional arenas on the other hand, but

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[124] Schwarzenberger, "The Forms of Sovereignty: An Essay in Comparative Jurisprudence", C.L.P., Vol. 10, 1957, pp. 264-295; also "Hegemonial Intervention", Y.B.W.A., Vol. 13, 1959, pp. 236-265; Fawcett, "Intervention in International Law: A Study of Some Recent Cases", Hague Recueil, Vol. 103, 1961 (1), pp. 348-421; W. Friedmann, "Interventionism, Liberalism, and Power-Politics: The Unfinished Revolution in International Thinking", P.S.Q., Vol. 83, No. 2, 1968, pp. 169-189.

[125] Oran R. Young, "Political Discontinuities in the International System", World Politics, Vol. 20, 1968, pp. 370-371.

also on the congruence and discontinuity among the different regional organizations.[126] The latter dimension of the problem of peace and stability is cogently formulated in the Eighth Report of the Commission to Study the Organization of Peace: "How might the rivalry between two great regional arrangements - the Soviet System and the North Atlantic Organization - tending toward a bi-polarization of power in the world, be moderated so as to permit the United Nations to function more effectively in the maintenance of collective security".[127] Liska emphasizes the former but remains silent on the latter aspect of the problem of international political equilibrium.

(b) The Claim that Regional Organization is a Necessary Building Bloc of an Effective World Organization

An important theoretical aspect of the relationship between universal and regional organizations deals with the implications of the latter for the former. International regionalism is sometimes defended on the alleged grounds that it constitutes a necessary building bloc in the edifice of an effective world community. Carr, for instance, has written that "[a] world organization may be a necessary con-

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[126] Ibid., pp. 369-392.

[127] Commission to Study the Organization of Peace, Regional Arrangements for Security and the United Nations, (Eighth Report, New York: 1953), p. 11.

venience as well as a valuable symbol. But the intermediate unit is more likely to be the operative factor in the transition from nationalism to internationalism".[128] Holders of this view are always quick to point out that the basic trend in the evolution of political communities has been in the direction of expansion, amalgamation and consolidation either by conquest or by agreement. It is argued and asserted that the increasing permeability of the hard shell of the territorial state[129] and, hence, its conditional viability[130] insures that this evolution of political communities into larger units will continue.

Schwarzenberger rightly warns against an "uncritical acceptance of [this] comfortable principle of gradualness" and asserts with considerable force: "The pattern of non-universal federation in contemporary world society presents ...less of a problem. In relation to the overriding issue of world power politics *versus* world community, proposals for federations inside either of the world's two halves are

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128 E.H. Carr, *Nationalism and After*, (London: Macmillan, 1965), p. 45; see also Bart Landheer, *On the Sociology of International Law and Society*, (The Hague: Martinus Nijhoff, 1968), pp. 17-26, 65-73; Gladwin Jebb, *Halfway to 1984*, (New York: Columbia University Press, 1966), p. 89.

129 See John H. Herz, *International Politics in the Atomic Age*, (New York: Columbia University Press, 1966), Ch. 6.

130 See Kenneth Boulding, *Conflict and Defense: A General Theory*, (New York: Harper and Row, 1962), p. 272.

irrelevant. In other respects, such federations may be highly beneficial. They leave, however, the character of present-day world politics unchanged".[131] Thus, the question of whether the proliferation of regional organizations and communities is an indication of the emergence of an international community will depend upon whether such regional organizations succeed in breaking down the inter-camp ideological differences. While the successful functioning of a web of regional organizations within each of the two most politically and ideologically significant zones of power is not necessarily dysfunctional for the emergence of an international community, it can hardly be expected to promote it at the most critical level where international integration is most rewarding for world peace.[132] Neither the existence of interlocking membership in regional organizations which tends

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[131] Schwarzenberger, Power Politics, (3rd Ed., London: Stevens and Sons, 1964), p. 527.

[132] Schwarzenberger, "Reflections on the Law of Inter national Institutions", C.L.P., Vol. 13, 1960, p. 258; also The Frontiers of International Law, (London: Stevens and Sons, 1962), p. 281. Bart Landheer, On the Sociology of International Law and International Society, (The Hague: 1968), pp. 10-11 makes the following pertinent observation: "In the East-West situation... there are very few carriers of trans-bloc activities; there is no interaction on the ideological level but there are some contacts via international organizations; there is some cultural exchange, some tourism and some commerce, but if one were to evaluate the contacts in terms of their carriers, one would arrive at a very small percentage compared to, for instance, Franco-German contacts before 1914". Landheer's conclusion is a valid one: "[N]o coordinated world society can grow out of coexistence, because there is no foundation for the belief that if two social groups A and B are left to themselves, they will grow to a state of equality and natural harmony". (p. 11).

to increase the "interaction opportunities"[133] of member states, nor the existence of regional subsystem interaction within each of the two major power-camps vitiates the cogency of Schwarzenberger's contention. As a matter of fact, given the peculiar pattern the formation of regional organizations has taken under the United Nations international system, there is much to be said in favour of the view that contemporary regionalism is largely "a manifestation of the world in disorder rather than... an intermediate transition to a new universal order".[134]

The question as to whether the formation of regional organizations has detrimental implications for the flourishing of a universal organization is, in the final analysis, an empirical one. Thus, as Amitai Etzioni has stated,

> Regional and bloc organizations should... not be judged _a priori_ as anti-United Nations or as undermining other global organizations. They might be stepping stones to a global community. The main question is not whether there are initially intermediary bodies or not, but what orientation they take toward global organization. Do they see the bloc organization as the ultimate superior body, and are they jealous of its functions and powers? Or do they orient positively to the more encompassing global structure? Do they attempt to block, to slow down, or to accelerate the process

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[133] For the concept of "interaction opportunity", see K.W. Deutsch and J.D. Singer, "Multipolar Power Systems and International Stability", _World Politics_, Vol. 16, No. 3, April 1964, pp. 390-406.

[134] Roland Yalem, _Regionalism and World Order_, (Washington, D.C.: Public Affairs Press, 1965),p. 141. See Chapter V for further comments on this theme.

> of upward transfer [of power and responsibility] to the global level?[135]

The question as to whether international regionalism leads to or promotes the emergence of a globally organized community may be largely academic and, perhaps, improperly asked. It seems reasonable to accept the view that regionalism will, in some instances, hinder and in some help an evolution toward a new wider international order, depending on the type of regionalism and on the stage of the development of international society or the level of international integration.[136]

5. The Scope, Objectives, and Methods of this Study

This study is concerned with one aspect of the whole problem of regionalism in international relations: universal-regional relationship. The sort of problem to which it addresses itself was cogently formulated by the second U.N. Secretary-General, Dag Hammarskjold, in his 1954 Annual Report on the work of the Organization:

> [D]evelopments outside the organizational framework of

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[135] Amitai Etzioni, "Atlantic Union, the Southern Continents and the United Nations", in Roger Fisher (ed.), International Conflict and Behavioral Science, (New York: Basic Books, Inc., 1964), p. 197.

[136] P.S. Wandycz, "Regionalism and World Federalism", Current History, Vol. 39, No. 228, August 1960, p. 91; Commission to Study the Organization of Peace, Eighth Report, Regional Arrangements for Security and the United Nations, (New York: 1953), p. 32.

> the United Nations, but inside its sphere of interest, do give rise to certain problems which require serious consideration. In the short view, other approaches than those provided by the United Nations machinery may seem more expedient and convenient, but in the long view they may yet be inadequate. To fail to use the United Nations machinery on those matters for which Governments have given to the Organization a special or primary responsibility under the Charter, or to improvise other arrangements without overriding practical and political reasons - to act thus may tend to weaken the position of the Organization and to reduce its influence and effectiveness, even when the ultimate purpose which it is intended to serve is a United Nations purpose.

The balance to be struck here must be struck with care.[137] This study examines the problems arising out of the simultaneous resort to the principles of universalism and regionalism in the organization of international peace and security. Using the case-study method of analysis, it focuses specifically on the degree of cooperation and conflict between the two forms of international organization in the most relevant issue-area, namely, international security and pacific settlement of international disputes, rather than in the broader spectrum of international relations.[138] The relationship between the League of Nations and the United Nations on the one hand, and the most politically important regional organi-

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[137] Annual Report of the Secretary-General on the Work of the Organization, 1 July 1953 - 30 June 1954, G.A.O.R.: 9th Sess., Supplement No. 1 (A/2663) 1954, p. xi.

[138] For a cogent argument in favour of treating relations among nations on the basis of specific issue-areas rather than on the aggregate level, see James N. Rosenau, "The Functioning of International Systems", Background, Vol. 7, No. 3, November 1963, pp. 111-117.

zations on the other hand is discussed on two levels: law[139] and practice.[140] On either level, the analysis has been placed in the political context of both "constitution"-making and "constitution"-implementation. Thus, the problem of universal-regional relationship is put where it belongs - in the center of international political processes.

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[139] See Chapters II, IV and VI.

[140] See Chapters III and VI.

CHAPTER II

REGIONALISM AND THE LEAGUE COVENANT

1. Introduction

Political thinking on the collective organization of international peace and security between 1915 and 1919 was very much in universalistic terms.[1] The assumption was, to paraphrase Litvinov, the Soviet Foreign Minister, that peace, like war, is indivisible.[2] Generally speaking, the relevance of regionalism in the organization of peace was initially overlooked. Thus, neither the influential Phillimore Plan, the Hurst-Miller Draft, nor the Draft Covenant of February 14, 1919, contained any reference to international regionalism.[3] It may, of course, be argued that such omission is of no consequence in view of the general principle that international law permits what it does not prohibit.[4] Regiona-

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[1] See generally, H.R. Winkler, The League of Nations Movement in Great Britain 1914-1919, (Metuchen, New Jersey: Scarecrow Reprint Corporation, 1967); Theodore Marburg, The Development of the League of Nations Idea, (New York: 1932); L.S. Woolf (ed.), The Framework of a Lasting Peace, (London: Allen and Unwin, 1917).

[2] L.N.O.J., 1935, p. 1142. Cited in T.A. Taracouzio, War and Peace in Soviet Diplomacy, (New York: Macmillan, 1940), p. 195.

[3] David Miller, The Drafting of the Covenant, Vol. 2, (New York: 1928), pp. 3-6, 131-141.

[4] The SS Lotus Case. See Hudson, World Court Reports, Vol. 2, 1927-1932, (1935), p. 20 at p. 45.

lism was admitted into the Covenant through the "back-door", that is, in a determined attempt to constitutionalize the Monroe Doctrine reservation.[5] The events which escalated the political value of regionalism, and which, consequently, compelled the Wilson Amendment to Article 10 are too well known to be related here.[6]

The Covenant[7] of the League of Nations permitted the existence of limited membership organizations. Article 21 states as follows: "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace". Any examination of the constitutional and political basis of international regionalism under the League of Nations system must pay due attention to three important considerations. First, as one examines closely the discussion of President Wilson's proposed amendment to Article 10,[8] a discussion which

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[5] Hans Kelsen, "Legal Technique in International Law: A Textual Critique of the League Covenant", Geneva Studies, Vol. 10, No. 6, 1939, p. 152.

[6] Denna F. Fleming, The United States and the League of Nations, (New York: Putnam's Sons, 1932), pp. 118-171; Miller, op. cit., Vol. 1, pp. 276 ff.

[7] Cmd. 151, (London: H.M.S.O., 1919); L.N.O.J., No. 1, February 1920, pp. 3ff; A.J.I.L., Supp., Vol. 13, 1919, pp. 128-140; Hudson, International Legislation, Vol. 1, pp. 2-17.

[8] Article 10 states: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing (continued on page 57)

focused almost wholly on the Monroe Doctrine,[9] one can hardly escape being struck by the fact that Article 21 does not sufficiently convey the model of universal-regional relationship which emerged at the Fourteenth Meeting of the League of Nations Commission on April 10, 1919. The relationship between the League and "regional understandings" seemed to have been more clearly perceived in the discussion than was actually formulated in the Covenant. It is relevant in this context to recall the comments of a noted English legal scholar on the Covenant as a whole. Sir John Fischer Williams pointed out in his study of the League Covenant as a legal instrument that "[t]he Covenant is not expressed in technical language; no British parliamentary draftsman would own it as his child; it is a sketch, or, perhaps it is better to say, an impressionist picture.... It therefore would be a mistake to examine the Covenant with a legal microscope; it must be looked at with the naked and human eye of the student of

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8 (continued) political independence of all Members of the League. In case of such aggression or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled".

9 On the Monroe Doctrine, consult Dexter Perkins, A History of the Monroe Doctrine, (Revised Edition, Boston: Little, Brown and Company, 1955); J.R. Clark, Memorandum on the Monroe Doctrine, (Washington, G.P.O., 1930); Hiram Bingham, The Monroe Doctrine: An Obsolete Shibboleth, (New Haven: Yale University Press, 1913); Pearce A. Higgins, "The Monroe Doctrine", B.Y.B.I.L., Vol. 5, 1924, pp. 103-118.

politics, or perhaps better, of the practitioner of that art".[10] Second, Article 21 must be read in relation to Articles 3(3), 4(4), 11, 12, 13, 15 and 20. It is only by so doing that the League model of universal-regional relationship can be best understood. Third, the constitutional relationship between the League and regional arrangements should be examined in the context of those political developments in the life history of the League of Nations. The Covenant, as President Wilson remarked, "is not a straightjacket, but a vehicle of life. A living thing... a vehicle of power, but a vehicle in which power may be varied at the discretion of those who exercise it and in accordance with the changing circumstances of the time".[11]

2. The Drafting History of Article 21: The Covenant and the Monroe Doctrine

In order to secure an explicit Monroe Doctrine recognition, President Wilson proposed the following amendment to Article 10: "Nothing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings like the

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[10] Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations, (London: Oxford University Press, 1934), pp. 1-2.

[11] Miller, op. cit., Vol. 2, p. 563. Also Cmd. 151, (1919), p. 12.

Monroe Doctrine for securing the maintenance of peace".[12] The ensuring discussion on this amendment did not centre on the question of whether or not regional arrangement should be permitted, but on whether or not the Monroe Doctrine should alone be singled out for explicit mentioning in the Covenant. There was, however, an underlying presumption that regional arrangements could co-exist with the League of Nations only as supplementary adjuncts to the latter.

The response of the members of the Crillon Commission especially that of the most politically important ones was, as one may expect, dictated by considerations of national interests. Britain acquiesced in the proposed American amendment because it served her interests. The clearest evidence that this was the case was Lord Robert Cecil's reply to Wellington Koo's vigorous insistence that it would be sufficient to mention only the Monroe Doctrine in the proposed amendment.[13] Lord Robert Cecil let it be known that Britain had important reasons for desiring to retain the word "understandings". According to him, "[s]o far as the British Empire is concerned there _are_ other understandings. For example[,] there is the ancient understanding concerning Arabia, and the new understanding with regard to the Kingdom of Hedjaz, whereby Great Britain is to direct their foreign

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[12] Miller, _op_. _cit_., Vol. 1, p. 442.

[13] _Ibid_., p. 443.

relations".[14] The British reservation on the Kellogg-Briand Pact of 1928 was perhaps more explicit on the nature of other "understandings". The British Government declared: "[T]here are certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and security".[15]

The initial French opposition to the American amendment can only be understood in the context of France's "insecurity complex". The Wilson proposal was an amendment to Article 10 which was then generally, though erroneously, believed, even by President Wilson himself, to constitute the backbone of the Covenant.[16] The French statesmen seemed to fear that the proposed amendment would create uncertainty about the faithful and prompt execution of the obligation under Article 10.[17] The French delegate, Larnaude, read into the amendment a possible excuse for the continuation of the United States' policy of indifference to European affairs. "Every time liberty had been threatened, either in America or in Europe", commented Larnaude, "the United States had either acted upon

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[14] Miller, _ibid_., p. 446. (Emphasis in the original).

[15] Cmd. 3109, (London: H.M.S.O., 1929), p. 25; R.I.I.A., _Documents on International Affairs 1928_, (1929), pp. 1-14.

[16] Hamilton Foley, _Woodrow Wilson's Case for the League of Nations_, (Port Washington: Kennikat Press, Inc., 1967), p. 77.

[17] Miller, _op_. _cit_., Vol. 1, p. 447.

the [Monroe] Doctrine or had reserved the right to intervene".[18] This was unmistakingly a critique of the U.S. foreign policy of isolationism vis-a-vis Europe and of aggressive military intervention in Latin America.[19] Larnaude sought assurance that the Monroe Doctrine would by no means prevent the United States from active participation in European affairs.

If France was concerned about the anachronism of American isolationist foreign policy vis-a-vis Europe, Portugal seemed to be interested in the other side of the Monroe Doctrine coin - the question of whether the constitutionalization of the Doctrine in the League Covenant would provide justification for excluding the new peace organization from dealing with disputes between two of the League's Latin American members.[20] The Portuguese delegate, Reis, felt strongly that the amendment, as it stood, created a presumption in favour of the compatibility of the Monroe Doctrine with the Covenant. In order that the question of compatibility might not be prejudged, Reis suggested that the following phrase be added to the amendment: "so far as the Monroe Doctrine is not inconsistent with the League".[21] It will,

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18 Miller, op. cit., Vol. 2, p. 369; Vol. 1, p. 443.

19 See Chapter VII below.

20 Miller, op. cit., Vol. 2, p. 370; Vol. 1, pp. 443-444.

21 Ibid., Vol. 2, p. 371; also Miller, Vol. 1, p. 444.

thus, be seen that the French and the Portuguese position reflected the view that the permissibility and creation of regional arrangements should be understood neither as restricting in any way the obligations of League membership nor as imposing limitations on the geographic scope of the jurisdictional competence of the League in so far as the maintenance of peace and security was concerned. As we shall see, President Wilson found this view congenial, although he declined to offer any authoritative definition of the Monroe Doctrine. We shall return to this point later.

The Chinese objection was of a different nature from that of France and Portugal. The Chinese delegate, Koo, cautioned the Crillon Commission against the use of so broad a word as "understandings" because "[a]s the amendment stood, it might uphold understandings which might become obsolete, and might also include future understandings".[22] With the advantage of hindsight, it would seem that in the light of Article 19 which recognized the need for "peaceful change" and of Article 20 which provided for the automatic abrogation of any treaties existing before or contracted after the Covenant if such treaties imposed inconsistent obligations,[23] Koo's objection was quite unnecessary. But this is only an *ex post facto* rationalization. By insisting that it was sufficient

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22 Miller, *op. cit.*, Vol. 2, p. 371; Vol. 1, p. 444.

23 See below.

to mention only the Monroe Doctrine in the amendment,[24] Koo hoped that there would be no loophole in the Covenant which might permit or provide justification for the declaration of a Japanese Monroe Doctrine for Asia.[25] Whatever else might have been at the back of Koo's mind when he raised objection to the rather loose use of the word "understandings", there seems to be no doubt that he articulated the lack of terminological clarity and precision that was to characterize the formulation of Article 21..

At Paris a persistent demand for an authoritative definition of the Monroe Doctrine[26] was rejected because, as Lord Robert Cecil explained, "any attempt at definition might extend or limit its application".[27] A similar demand for the definition of a regional arrangement was rejected by the draftsmen of the U.N. Charter twenty-five years later.[28] What, then, was the status of the Monroe Doctrine and regional

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[24] Miller, Ibid., Vol. 2, p. 371; Vol. 1, p. 445, 446.

[25] Miller, op. cit., Vol. 1, p. 336. On the Japanese Monroe Doctrine, see Yasaka Takaki, "World Peace Machinery and the Asia Monroe Doctrine", Pacific Affairs, Vol. 5, No. 11, November 1932, pp. 941-953; C.C. Hyde, "Legal Aspects of the Japanese Pronouncement in Relation to China", A.J.I.L., Vol. 28, 1934, pp. 431-443; George Blakeslee, "The Japanese Monroe Doctrine", Foreign Affairs, Vol. 11, 1932-33, pp. 671-681.

[26] Especially by France and Portugal. Miller, op. cit., Vol. 1, p. 443.

[27] Miller, op. cit., Vol. 2, pp. 369-370; Vol. 1, p. 443.

[28] Doc. 889, III/4/12, U.N.C.I.O. Doc., Vol. 12, pp. 701-702.

understandings? Was their existence merely taken note of or did the Wilson amendment give them legal validity as being consistent with the principles and spirit of the Covenant? The statement of Lord Robert Cecil seemed to have been accepted: "It [the Wilson amendment] gave to these engagements no sanction or validity which they had not previously enjoyed. It accepted them as they were.... It did not make substance of the Doctrine more or less valid".[29] It would thus appear that what gave validity to the Monroe Doctrine was not so much the fact that the Covenant recognized it as that "it would not be common sense to deny that such a doctrine had existed, had been acted upon, and had been accepted by other states".[30] Although President Wilson was recorded as saying that the inclusion of the reference to the Monroe Doctrine was "nothing but a recognition of the fact that it was not inconsistent with the terms of the Covenant",[31] he was at every turn willing to give assurances which somehow allayed the fear of France and Portugal in particular. It is important for our purpose to note carefully Wilson's assurances for

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[29] Miller, op. cit., Vol. 2, p. 370.

[30] Ibid.; also Cmd. 151 (1919), p. 18); League Doc. C.541.M.137.1928, L.N.O.J., 9th Yr., No. 10, October 1928, Annex 1064a, p. 1608.

[31] Miller, op. cit., Vol. 2, p. 373, Vol. 1, p. 446. The French delegate, Larnaude properly remarked: "If it [the Monroe Doctrine] is not inconsistent with the terms of the Covenant it seems... very unnecessary to refer to it". Miller, Vol. 1, p. 446.

they throw much light on some aspects of universal-regional relationship.

President Wilson assured the League Commission that "if, for any reason, the Monroe Doctrine should take a line of development inconsistent with the principles of the League, the League would be in a position to correct this tendency".[32] The President further said: "[I]f there is anything in the Monroe Doctrine inconsistent with the Covenant, the Covenant takes precedence of the Monroe Doctrine, not only because it is subsequent to it, but because it is a body of definite obligations which the United States cannot explain away even if it wanted to explain".[33] The authoritative British commentary on the Covenant suggests that the presumption of paramountcy in favour of the League did exist. It states: [S]hould any dispute as to the meaning of the latter [the Monroe Doctrine] ever arise between America and European Powers, the League is there to settle it".[34]

President Wilson also left no one in doubt that the explicit recognition of "understandings" like the Monroe Doctrine was not in any way intended to limit the competence of the League of Nations to settle disputes among its Latin American members. The following summary of the discussion

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[32] Miller, <u>Ibid</u>., Vol. 1, p. 442; Vol. 2, p. 371.

[33] Miller, Vol. 1, p. 459.

[34] Cmd. 151, (1919), p. 18.

in the Fifteenth Meeting of the League of Nations Commission is especially illuminating:

> Mr. Kramar asked whether in the case of a dispute between Paraguay and Uruguay the League of Nations would have the right to come to the aid of whichever of the two States was supported by the decision of the Executive Council.
>
> President Wilson replied in the affirmative.
>
> Lord Robert Cecil believed that the Monroe Doctrine would in no wise prevent the forces of an European State from going to America in order to defend the rights of the oppressed. The sole object of the Monroe Doctrine was to prevent any European Power from acquiring any influence, territory, or political supremacy on the American continent. The idea that the Monroe Doctrine would prevent the Executive Council, in the execution of an unanimous decision, from acting in Europe, America, Africa or Asia, was a perversion of the Monroe Doctrine, and the citizens of the United States would be the first to disclaim it.
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> President Wilson agreed.[35]

It is possible to argue that President Wilson neither conceded much nor emasculated the Monroe Doctrine because the United States, like any other projected permanent or non-permanent member of the League Council, could incapacitate the operation of the League Council by exercising an effective right of veto which was indeed the effect of the League principle of unanimity in decision-making.[36] Nevertheless, the passage quoted above supports the contention that the exist-

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[35] Miller, op. cit., Vol. 2, p. 383. See, however, the action of the United States during the Guatemalan crisis. The U.S. led Western coalition prevented the United Nations from dealing with a Western Hemisphere situation. See Chapter VII below.

[36] See Chapter VI below.

ence of regional arrangements or understandings was not conceived as imposing limits on the competence of the League of Nations to take cognizance of disputes and situations involving two or more members of the League anwhere such disputes might occur including the Western hemisphere.

The Wilson amendment to Article 10 was accepted, and became Article 21. We must not delude ourselves and think that the relationship between the League and regional arrangements can be determined by citing pre-Covenant discussion important as it is. Certainly, the actual text of the Covenant may not be overriden by pre-Covenant discussion. However, it is generally agreed that where the text of a treaty is not sufficiently clear in itself, historical interpretation is permissible so long as it is not allowed to form the main or sole basis of interpretation.[37] It becomes relevant to consider whether the language of Article 21 justifies our contention that there was a clear intention to subordinate regional arrangements to the League of Nations.

In his textual critique of the Covenant, Kelsen suggests that the Monroe Doctrine involves "a limitation of the field of application of the Covenant",[38] and concludes that "[t]he

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[37] Lord McNair, The Law of Treaties, (London: Clarendon Press, 1961), pp. 411-423.

[38] Hans Kelsen, "Legal Technique in International Law: A Textual Critique of the League Covenant", Geneva Studies, Vol. 10, No. 6, December 1939, p. 152.

real concordance of these [regional] engagements with the Covenant... is only superficially guaranteed".[39] According to this scholar, what Article 21 says amounts to the following: "If the United States of America joins the League of Nations, it shall only benefit from the provisions of the present Statute or shall only be obligated by it in so far as the provisions are consistent with the principles of the Monroe Doctrine".[40] Such an interpretation is too extreme to be acceptable. It is true that the English text of the Covenant appears to subordinate the Covenant to the Monroe Doctrine while the French text seems to subordinate the Doctrine to the Covenant;[41] but it is also true that both texts were official and authentic. The general practice with respect to bilingual or multilingual treaties is not to recognize the superiority of one text over the other unless the treaty so provides.[42] One fact which cannot be ignored is that, in the light of the discussion in the Crillon Commission, the language of Article 21 in the French text comes nearer the model of universal-regional relationship formulated than the language used in the English text. In any case, as one

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[39] Ibid., p. 153.

[40] Ibid., pp. 154-155.

[41] Dexter Perkins, A History of the Monroe Doctrine, (Revised Ed., Boston: Little, Brown and Company, 1958), p. 297; Williams, Some Aspects of the Covenant of the League of Nations, (1934, p. 63.

[42] McNair, op. cit., pp. 432-435.

reads the Covenant one should keep reminding oneself that the document was "something very different from a complete and perfect construction of an elaborate international constitution worked out minutely and in detail".[43] There is another reason why the Kelsen interpretation cannot be accepted. It appears to assume that Article 21 is a reservation on the entire Covenant. This view is certainly not incontrovertible. It should be borne in mind that Article 21 merely recognized the continuing relevance and appropriateness of regional understandings that promoted international peace as long as the obligations such international engagements imposed on their members did not conflict with those arising from League membership.[44] The acceptance of Kelsen's interpretation would have the effect of denuding Articles 3(3), 4(4), 11 and 17 of their purpose and intention.[45] It may be recalled that the League purported to maintain not only peace among its signatories but also within the entire international community.[46] At Paris, Article 17,

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[43] Williams, _op_. _cit_., p. 1.

[44] League Covenant, Art. 20. It may be pointed out that President Wilson admitted that Article 21 was not immune from the provision of Article 20. He said: "[T]he effect of Article 20 is to abrogate the understandings which are inconsistent with the terms of the Covenant". See Miller, _op_. _cit_., Vol. 1, p. 448.

[45] See Josef Kunz, "L'article XI du pacte de la Societe des Nations", _Hague Recueil_, Vol. 39, 1932 (1), pp. 683-787.

[46] See Chapter I above.

which deals with the relations of the League with non-members for the purposes of the maintenance of international peace and security, was accepted with "no discussion of principle but only of language".[47] Perhaps the best argument against the Kelsen thesis is the practical one that the United States did not unduly obstruct the League endeavour to achieve peaceful settlement of disputes among its Latin American members.[48] The fact that the United States tolerated League adjustment of intra-Western Hemispheric disputes can be said to have a probative value for the interpretation of Article 21 adopted in this study.[49]

3. Article 21 in Relation to Other Provisions of the Covenant

It has already been pointed out that in any consideration of the relationship between the League of Nations and regional arrangements Article 21 must be examined in the context of and in relation to Articles 3(3), 4(4), 11, 12, 13, 15 and 20. Failure to do this has often accounted for the superficial view that the Covenant does not provide any guide to universal-regional relationship outside the provision of Article 21. In the area of universal-regional relationship,

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[47] Miller, *op. cit.*, Vol. 1, p. 182.

[48] Schwarzenberger, *The League of Nations and World Order*, (1936), p. 143; Bryce Wood, *The United States and Latin American Wars 1932-1942*, (New York: 1966), p. 361. See Chapter III below.

[49] Lord McNair, *op. cit.*, p. 424 *et. seq.*

the weakness of the Covenant is not that it did not provide any guide but that such guide as was provided lacks specificity: the rules of universal-regional relationship were not systematically worked out as they are in the U.N. Charter.[50]

A convenient starting point is Article 20[51] which runs as follows:

> 1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings _inter se_ which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.
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> 2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Convenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.[52]

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[50] Liang, "Regional Arrangements and International Security", _T.G.S._, Vol. 31, 1946, p. 221; J.M. Yepes, "Les Accords Regionaux et le Droit International", _Hague Recueil_, Vol. 71, 1947 (11), pp. 235-237; Yalem, _Regionalism and World Order_, (1965), pp. 39-40.

[51] For an illuminating interpretation of this article, see H. Lauterpacht, "The Covenant as the "Higher Law", _B.Y.B.I.L._, Vol. 17, 1936, pp. 54-65; Kelsen, "Legal Technique in International Law: A Textual Critique of the League Covenant", _Geneva Studies_, Vol. 10, No. 6, 1939, p. 148 _et. seq_.

[52] Article 20(2) has no equivalent in the U.N. Charter. It should be noted that Article 103 of the United Nations Charter uses the word 'supersede' instead of "abrogate". The Report of the Rapporteur of Committee IV/2 explains why the Committee considered the idea of automatic abrogation "inadvisable": "A few delegations have observed that the adoption of the terms of Article 20 of the Covenant of the League of Nations would be likely to produce uncertainty regarding the meaning of a great many treaties and to create practical difficulties concerning the designation of the organ or organs which would be competent to determine a question of inconsistency". See Doc. 933, IV/2/42(2); _U.N.C.I.O. Doc._, Vol. 13, p. 707.

This Article faces squarely the question of compatibility between the obligations assumed by states as members of both the League of Nations and of regional arrangements, but does not adequately reflect the discussion at the Seventh Meeting of the Crillon Commission on February 10, 1919. According to Miller, "[n]o one was objecting to a clause against treaties inconsistent with the Covenant. It was agreed to without dissent or even proposal of amendment. But everyone wondered just how far new limitation would extend in practice".[53] The unanimous acceptance of the principle embodied in Article 20 is hardly surprising. What is most surprising is that, although the question of who, or what organ, should pass on the fact of inconsistency of multilateral treaties with the Covenant was discussed and apparently a general consensus reached, Article 20 is silent on this important fact. There were suggestions that the League Council, some tribunal or the rather nebulous "decision of the court of public opinion" should be the arbiter of the consistency or inconsistency of any treaty with the Covenant. Miller went away with the impression that "[t]he idea of a ruling by the Council seemed most acceptable".[54]

Article 20 seems to be a rather timid expression of the trend of opinion that emerged from the discussion in the

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[53] Miller, _op. cit._, Vol. 1, p. 199.

[54] _Ibid._

League Commission in the same sense that the Covenant, on the whole, fell rather short of the world-wide popular demand for an international organization capable of preventing war. This criticism should not, however, be allowed to conceal the important fact that Article 20 does reinforce Article 21. Its primary purpose was not to impose limitations upon the right of Governments to enter into alliances. The provision merely required that such international agreements be guided by the principles and obligations of membership in the League of Nations. We have been reminded that "Article 20 is not a knife blunted by the cutting of the dead wood of inconsistent treaties in force when states enter the League. It is a perpetual source of legal energy possessed of a dynamic force of its own and calculated to ensure the effectiveness of the Covenant unhampered by any treaties between Members whenever concluded".[55]

While the precise relationship between the League and regional arrangements was not systematically formulated in the Covenant in great detail as it was between the United Nations and regional organizations in the 1945 Charter,[56] Articles 3(3), 4(4), 11, 12, 13 and 15 are suggestive of the nature of that relationship. Articles 3(3) and 4(4) authorized the League Assembly and the Council respectively to

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[55] H. Lauterpacht, "The Covenant as the "Higher Law"", B.Y.B.I.L., Vol. 17, 1936, pp. 58-59.

[56] See Chapter IV below.

deal with "any matter within the sphere of action of the League or affecting the peace of the world". A more forceful declaration of the League's universal competence finds expression in Article 11: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations".[57] When this Article is read along with Article 17, it becomes clear that the League of Nations was intended to exercise a geographically unlimited scope of jurisdiction in matters relating to the maintenance of international peace and security.[58] What is important to note here, however, is not so much the fact that the League was declared competent to deal with _any_ acts of aggression as that the formulation did not in any way give the League an exclusive jurisdiction. As a matter of fact, the paramountcy of the League can only be assumed, deriving as it did from the inclusiveness of the League relative to other limited-membership organizations.

One does not need to rely on Article 21 as the sole

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[57] For a cogent analysis of the competence and jurisdiction of the League Council in the settlement of international disputes, see T.P. Conwell-Evans, _The League Council in Action: A Study of the Methods Employed by the Council of the League of Nations to Prevent War and to Settle International Disputes_, (London: Oxford University Press, 1929), Ch. 2; League of Nations, _Ten Years of World Cooperation_, (1930), pp. 19-25.

[58] See Chapter I above.

basis for the jurisdiction of regional arrangements in the field of the pacific settlement of disputes. Article 12 implicitly recognized the principle of concurrent jurisdiction: "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council". Article 21 certainly contemplated regional understandings performing arbitral functions. If, as was indeed the case, the Covenant of 1919 made no provision for any Protocol of Arbitration, it may well be assumed that the function of arbitration was intended to be carried out by the regional arrangement or by special arrangements between states parties to a dispute.

As between the League and regional understandings, the Covenant lacked any principle of functional differentiation.[59] It took for granted the subordination of the regional arrangements.[60] Equally important is the fact that it overestimated the devotion of its signatories to the principles of the League. For example, the weakening of some of the most

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[59] Liska, International Equilibrium, (1957), p. 134.

[60] Lauterpacht explained that the Covenant was the superior law "not because there is any hierarchical superiority about the Covenant as a legislative instrument - for there is none", but because of "the comprehensiveness of the Covenant which not only limits the right of resort to war but also imposes most far-reaching obligations for the enforcement of the Covenant". See "The Covenant as the "Higher Law"", B.Y.B.I.L., Vol. 17, 1936, p. 59.

important provisions of the Covenant, especially Articles 10 and 16, through a series of interpretative resolutions[61] is a clear indication that members were not willing to accept, in practice, the principle of unlimited liability inherent in the collective security system of the Covenant.[62] In defence of the fathers of the Covenant who appeared to underestimate the potential resources of regional arrangements, it may be said that, since there was probably only the semi-formal Inter-American System in existence in 1919, there was no compelling reason to engender a greater appreciation of the political relevance of regionalism and, consequently, to define in clearer and fairly more precise terms the relations between the League of Nations and regional arrangements. When interpreting the relationship between the League and regional security arrangements, it is, therefore, advisable to bear in mind that in 1919 it was not considered a matter of urgent political importance and necessity that the principle of universalism be tempered with that of regionalism.[62a] As already indicated, regionalism was admitted into the

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[61] See W.A. Riddell, World Security by Conference, (Toronto: Ryerson Press, 1947), p. 19 et. seq.; W. Rappard, The Quest for Peace Since the World War, (Cambridge, Mass.: 1940), p. 219 et. seq.; S. Mack Eastman, Canada at Geneva: A Historical Survey and Its Lession, (Toronto: 1946), p. 51 et. seq. S.S. Jones, The Scandinavian States and the League of Nations, (Princeton: 1939), pp. 217-220.

[62] See S. Engel, "League Reform: An Analysis of Official Proposals and Discussions, 1936-1939", Geneva Studies, Vol. 11, No.s 3-4, 1940.

[62a] J. M. Yepes, "Les accords regionaux et le droit International", Hague Recueil, Vol. 71, 1947 (II), pp. 235-344, and p. 257.

Covenant as a by-product of the attempt to amend Article 10 and secure a Monroe Doctrine recognition. In 1945, as we shall see later in this study, the view was that universalism must be tempered with regionalism and the problem of universal-regional relationship has, with justification, been called "the crux of the Conference".[63]

4. Concluding Comments

The extensive use of the record of the Crillon Commission in order to throw some light on the considerations behind the formulation of Article 21 should be understood in the context of the peculiar problem of interpreting the League model of universal-regional relationship embodied in a provision which is full of imprecise and contradictory phrases. Article 21 raises a number of pertinent questions. It is sufficient to raise one or two of them. First, is Monroe Doctrine a regional understanding? It is well known that the said Doctrine is a unilateral policy declaration of the United States, and that successive American Administrations have always emphasized the unilateral character of the Doctrine. The Fifth Senate reservation on the Treaty of Versailles clearly

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[63] Alberto Lleras Camargo, "Regionalism in the International Community", in Carnegie Endowment for International Peace, Perspectives on Peace, (New York: 1960), pp. 107-119. See Chapter IV below for more extensive comments.

expresses this point of view.[64]. The Monroe Doctrine is thus not an understanding among states of a region but an understanding concerning a region.[65] The Clark Memorandum on the Monroe Doctrine stated authoritatively:

> The [Monroe] Doctrine does not concern itself with purely inter-American relations; it has nothing to do with the relationship between the United States and other American nations, except where other American nations shall become involved with European governments in arrangements which threaten the security of the United States, and even in such cases, the Doctrine runs against the European country, not the American nation, and the United States would primarily deal thereunder with the European country and not with the American nation concerned. The Doctrine states a case of the United States _vs_. Europe, and not of the United States _vs_. Latin America.[66]

Why, then, should the draftsmen of the Covenant have used the expression "regional understandings like the Monroe Doctrine"? It should be borne in mind that the substance of Article 21 was originally proposed as an amendment to Article 10. To meet the French resistance to the Wilson amendment, Lord Cecil proposed that a new place be found for the amendment in order not to create the impression that the obligation

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[64] Henry Cabot Lodge, _The Senate and the League of Nations_, (New York: 1925), p. 186; D.F. Fleming, _The United States and the League of Nations 1918-1920_, (New York: 1934), p. 424.

[65] John H. Spencer, "The Monroe Doctrine and the League Covenant", _A.J.I.L._, Vol. 30, 1936, pp. 400-413 at p. 410.

[66] U.S. Dept. of State, _Memorandum on the Monroe Doctrine_, (Washington: G.P.O., 1930), p. xxiv; see also John H. Spencer, "The Monroe Doctrine and the League Covenant", _A.J.I.L._, Vol. 30, 1936, pp. 400-413 at p. 410.

under Article 10 was being watered down.[67]

A second question that may be raised in connection with Article 21 is simply this: why attempt to embody in multilateral treaty regulating the conduct of international relations a provision which lacks terminological clarity and a generally accepted definition? Salvador, for example, noted quite correctly that Article 21 "has provoked vehement discussion throughout the American continent including the United States, without doubt because of its brevity and lack of clearness",[68] and demanded from the United States "the authentic interpretation of the Monroe Doctrine as the illustrious Government of the White House understands it in the present historical moment and in its intention for the future".[69] Eight years later, Costa Rica, in a letter to the Acting President of the League Council, wanted "to know the interpretation placed by the League of Nations on the Monroe Doctrine and the scope given that Doctrine when it was

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[67] Miller, op. cit., Vol. 1, p. 445.

[68] Doc. 710, 11/433, F.R.U.S., 1920, Vol. 1, p. 224.

[69] Ibid., p. 225. The letter from the Government of Salvador to the U.S. Secretary of State formulated what may be regarded as the Latin American interpretation of the Monroe Doctrine: "[T]he Monroe Doctrine consolidated the independence of Latin continental states and spares them the grave danger of European intervention.... this [D]octrine... erected a barrier against colonization by Europe..." (p. 225).

included in Article 21 of the Covenant".[70] The official reply did no more than restate the substance of Lord Cecil's observation in 1919.[71] In answer to the question raised above it may be said that the Crillon Commission found it politically difficult to reject an amendment proposed by the United States and supported firmly by Britain. As a matter of fact, it may further be said that, in the light of President Wilson's explanation and assurances and Lord Cecil's statements, the rejection of the Wilson amendment would have been difficult to understand, explain and justify. If the Monroe Doctrine were interpreted in the light of the discussion in the Crillon Commission, then the apparent vagueness in the formulation of Article 21 would tend to be minimized if it does not disappear.

Those who, having first read the U.N. Charter, look for a similar elaboration of the rules of universal-regional relationship systematically formulated in the Covenant would be disappointed. But it seems incontrovertible that the League was conceived as the dominant instrumentality for peace, and regional understandings were permitted only on the understanding that they would neither hinder nor restrict the constitutional competence of the League to take cognizance of any disputes between its members. The contention

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[70] L.N.M.S., Vol. 8, No. 8, 1928, p. 224.

[71] L.N.O.J., 9th Yr., No. 10, 1928, p. 1608.

by certain American writers that the United States, invoking the Monroe Doctrine, could prevent the League of Nations from extending its jurisdiction to the Western Hemisphere[72] has no basis in the Covenant.[73] It can neither be sustained satisfactorily by the argument that the United States was not a member of the League nor by the claim that the Monroe Doctrine is a unilateral policy declaration of the United States in so far as most of the Latin American Republics, though geographically protected against European "re-colonization" by the Monroe Doctrine, were politically affiliated to the Geneva institution.[74] It needs to be pointed out, however, that the United States foreign policy makers realized that Latin American membership in the League of Nations was "an important factor which must have friendly but adequate recognition in considering our relations with our neighbors".[75]

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[72] Henry W. Taft, "The Monroe Doctrine", League of Nations, (Boston), Vol. 2, June 1919, p. 154; C. [Elihu Root?], "The Future of Monroe Doctrine", Foreign Affairs, Vol. 2, 1923-1924, p. 387.

[73] F.P. Walters, The History of the League of Nations, (London: 1967), p. 350; D. Fleming, The United States and the League of Nations 1918-1920, (1934), p. 424; Williams, Some Aspects of the Covenant of the League of Nations, (1934), p. 63; Margaret La Foy, The Chaco Dispute and the League of Nations, (Ann Arbor: 1946), pp. 37-38.

[74] W.H. Kelchner, Latin American Relations with the League of Nations, (Boston: World Peace Foundation Pamphlets, Vol. 12, No. 6, 1929).

[75] Charles Evans Hughes, Our Relations to the Nations of the Western Hemisphere, (Princeton: 1928), pp. 2-3.

CHAPTER III

REGIONAL ORGANIZATIONS AND THE LEAGUE OF NATIONS

1. Introduction

The development of regionalism permitted by Article 21 of the Covenant was largely confined to the field of security and pacific settlement of disputes.[1] For the purposes of this study, three regional organizations, namely, the Inter-American System, the Little Entente and the Locarno security system, will be examined in order to determine the extent to which their activities were compatible or inconsistent with those of the League of Nations. Two different analytical procedures will be employed. First, the relationship between the Inter-American System led by the United States and the League of Nations will be analyzed by examining critically the degree of conflict and collaboration that ensued between both forms of international organization in the course of the settlement of intra-Western Hemisphere boundary disputes. Attention will be focused on the Leticia conflict between Colombia and Peru, and the Chaco conflict

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[1] The Stein Report on Regional or Continental Organizations of the League of Nations submitted to the Special Main Committee on Questions of the Application of the Principles of the Covenant, Doc. C.364.M.246.1937.VII.[C.S.P. 14] Report No. 4; L.N.O.J., Special Supplement, No. 180, Annex 5. See generally, Orue y Arregui, "Le Regionalisme dans L'Organisation Internationale", Hague Recueil, Vol. 53, 1935 (III), pp. 1-93; Axel von Freytagh-Loringhoven, "Les Ententes Regionales", Hague Recueil, Vol. 56, 1936 (II), pp. 589-671.

between Bolivia and Paraguay. Second, the compatibility and complementarity of the Little Entente and the Locarno Pact with the League of Nations will be determined by a comparative analysis of their constitutional foundation and, to the extent that it is possible, by an examination of their operational conduct as it affected the functioning of the League of Nations. This second research strategy will be guided by the criteria of compatibility suggested by the League Assembly Resolution of 1921 which authoritatively pronounced on Article 21. The Resolution stated as follows:

> [A]greements between Members of the League, tending to define or complete the engagements contained in the Covenant for the maintenance of peace or the promotion of international cooperation, may be regarded as of a nature likely to contribute to the progress of the League in the path of practical realizations.[2]

2. The Monroe Doctrine, Inter-American System and the League of Nations

No attempt will be made at this point to outline the history of the Pan American movement.[3] It is sufficient for our purpose here to merely indicate that the Inter-American System has, since 1890, been functioning primarily on the

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[2] League of Nations, Records of the Second Assembly, Plenary Meetings, 1921, p. 833.

[3] See Chapter VII below.

basis of Conference Resolutions and Declarations,[4] and was not given any explicit constitutional form until 1948.[5] The Inter-American System, subsequently called the Organization of American States, is a regional organization of twenty-two American states dominated politically, militarily and economically by the United States. Any examination of the relationship between this regional organization and the League of Nations must come to terms with two important considerations. The first is that the preponderant "leader" of the Inter-American System, the United States, was not a member of the League of Nations although she participated in many of the League's non-political activities.[6] Secondly, a great majority of the Latin American Republics joined the League at one time or the other.[7] These two considerations created a situation in which some Latin American Republics saw the League as *the* organization that could dilute the preponderant

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[4] See J.B. Scott (ed.), *The International Conferences of American States*, 1889-1928, (New York: Oxford University Press, 1931); also *The International Conferences of American States, First Supplement, 1933-1940*, (Washington: Carnegie Endowment for International Peace, 1940).

[5] Thomas and Thomas, *The Organization of American States*, (Dallas: 1963), p. 35 *et. seq*.

[6] Fleming, *The United States and World Organization 1920-1933*, (1939).

[7] Kelchner, *Latin American Relations with the League of Nations*, (Boston: 1929).

influence of the United States in the Western Hemisphere.[8] In actual fact, the League was not used for this purpose: the policy of the United States could hardly be described as outrightly antagonistic to the Geneva institution.[9] Although before 1924 the "unofficial observer" of the United States was "something between a guest and a spy in a gathering called and financed by organization which his Government considered too dangerous to approach except with the most extreme caution",[10] by 1924, Hudson could say this of the relationship between the United States and the League of Nations: "The truth is that in spite of our efforts, in spite of the fulminations in the Senate, the United States has not seceded from the organized world. It has not kept out of the activities of the League of Nations. Individual Americans first became engaged; then American philanthropic organizations; and then the Government. The result is that many of the League's activities are today manned from this side of

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[8] Perkins, A History of the Monroe Doctrine, (Boston: 1955), p. 326ff; Kelchner, op. cit., pp. 6, 12-14.

[9] Bryce Wood, op. cit., p. 361; Schwarzenberger, The League of Nations and World Order, (1936), p. 143; Berdahl, "Relations of the United States with the Assembly of the League of Nations", A.P.S.R., Vol. 26, 1932, pp. 99-111; also "Relations of the United States with the Council of the League of Nations", A.P.S.R., Vol. 26, 1932, pp. 497-526.

[10] Fleming, The United States and World Organization 1920-1933, (New York: 1939), p. 220.

the Atlantic".[11] The essential point to bear in mind is that the nature of the relationship between the Inter-American System and the League of Nations was determined in large measure by three axes of relationship, namely, the U.S.-League, the U.S.-Latin American and the League-Latin American relationships.

(a) The Leticia Conflict

The League of Nations was the central third party actor in the adjustment of the boundary dispute between two of its Latin American members, Colombia and Peru. The Treaty of 1922[12] which fixed the boundary between both countries awarded Leticia to Colombia. In September 1932, some Peruvian citizens attacked Leticia "on their own authority". When the Colombian government retaliated by force of arms, the Peruvian authorities felt bound to support the initial apparently unauthorized action of the Peruvian citizens of Loreto. The result was a military conflict between the two League members.[13]

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[11] M.O. Hudson, "American Cooperation with the League of Nations", World Peace Foundation Pamphlets, (Boston), Vol. 7, 1924, p. 7.

[12] L.N.T.S., Vol. 74, p. 9.

[13] Russell M. Cooper, American Consultation in World Affairs, (New York: Macmillan, 1934), p. 285ff; L.H. Woolsey, "The Leticia Dispute Between Colombia and Peru", A.J.I.L., Vol. 27, 1933, pp. 317-324; Bryce Wood, The United States and Latin American Wars 1932-1942, (New York: 1966), p. 169 et. seq.

The relationship between the Inter-American System and the League of Nations in the settlement of this conflict should be examined in the context of the convergence of interests of both the United States and the Geneva institution. The U.S. Secretary of State pronounced Washington's policy position in a despatch to the U.S. Ambassador in Peru on September 15, 1932: "The orderly procedure to follow in this case would seem to be to disavow the [Peruvian] occupation of Leticia and to assist in restoring Colombian authority there or at the very least to do nothing to thwart the re-establishment by Colombia of its jurisdiction... To endeavor to negotiate on the basis of the occupation of Leticia by Peru is in effect to consider the boundary treaty a scrap of paper".[14] Two days later, in a second telegram to the same Ambassador, Stimson added: "We are willing to do what we can to assist in a friendly manner to keep the question within proper bounds, but we have no responsibility to act as sole guardian of peace of Latin America nor do we desire to assume such responsibility".[15] Thus, from the beginning, the United States seemed to have ruled out any unilateral intervention for the purpose of finding a solution to the conflict. It may be recalled that in the Panama-Costa Rica boundary conflict in 1921, the United States, a

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[14] Doc. 721.23/54; F.R.U.S., 1932, Vol. V, p. 278.

[15] Doc. 721.23/79; F.R.U.S., 1932, Vol. V, p. 280.

partial third party mediator, secured a settlement of the dispute by threatening Panama with sanctions.[16] In the Leticia conflict, Washington committed itself to the maintenance of the territorial _status quo ante bellum_, that is, to a solution based upon strict respect for the treaty of 1922 which both Colombia and Peru had willingly ratified.

Peru called for a third party intervention on October 3, 1932 by appealing to the Inter-American Permanent Commission in Washington, one of the two commissions established by the Gondra Treaty of 1923.[17] She requested the Commission to set up an inquiry with a view to promoting a peaceful settlement of the dispute. Colombia rejected this Peruvian proposal on the grounds that the situation in Leticia fell within its domestic jurisdiction.[18]

Meanwhile, Brazil had been actively trying to promote a settlement. Her proposal of January 8, 1933 for the neutralization and demilitarization of Leticia was accepted

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[16] Doc. 718.1915/577; _F.R.U.S._, 1921, Vol. 1, p. 227. See also Gordon _Ireland, Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean_, (Cambridge, Mass.: 1941), pp. 33-42 esp. at p. 40.

[17] _L.N.T.S._, No. 33, p. 36; Hudson, _International Legislation_, Vol. 2, p. 1006; For an analysis, see Galeano, "The Gondra Treaty", _T.G.S._, Vol. 15, 1929, pp. 1-16.

[18] See Woolsey, "The Leticia Dispute between Colombia and Peru", _A.J.I.L._, Vol. 27, 1933, pp. 317-324.

by Colombia but rejected by Peru.[19] It is hardly surprising that Peru should reject a proposal which required her to cede to Brazil Leticia which would, after a short duration of the Brazilian administration, be returned to Colombia until both sides could arrive at a mutually agreeable settlement through direct negotiation. The United States, for her part, expressed satisfaction with the Brazilian initiative.[20]

The Colombian government drew the attention of the Secretary-General of the League of Nations to the dispute on January 4, 1933.[21] The League Council President, promptly reminded both parties of their obligations as members of the League. Moreover, the League Council asked the Committee of Three, which had been dealing with the Chaco conflict,[22] to follow the Leticia dispute and report to the Council.[23] On February 18, 1933, Colombia asked the League Council to intervene under Article 15 of the Covenant,[24] and, in response to this request, an extradordinary meeting of the Council took

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19 League Doc. C.71.M.28.1933.VII; C.97.M.36.1933.VII; L.N.O.J., 14th Yr., No. 4 (Part 1), April 1933, p. 522ff, p. 557.

20 Doc. 721.23/633; F.R.U.S., 1932, Vol. V, p. 313.

21 League Doc. C.20.M.5.1933.VII; L.N.O.J., 14th Yr., No. 4 (Part 1), April 1933, p. 544.

22 See below.

23 L.N.M.S, Vol. 13, No. 1, January 1933, pp. 20ff.

24 League Doc. C.139.M.63.1933.VII; L.N.O.J., 14th Yr., No. 4, April 1933, pp. 562-563.

place on February 21. 1933.

The League's role in the Leticia dispute should be examined in the light of the important discussion between the U.S. Secretary of State, Stimson, and the Ambassadors of Great Britain, France, Italy, Germany and Japan in Washington on January 24, 1933.[25] Stimson discussed the Leticia dispute within the context of the Kellogg-Briand Pact[26] and made no reference whatsoever to the role the League could play and, indeed, had been playing in order to achieve a settlement of the dispute. Of course, Stimson's preference for the Pact of 1928 was justified if only because the United States was not a party to the League Covenant. What came out of the Washington discussion was the official notification by the United States that she would prefer a solution along the lines of the Brazilian proposals.

The fact that the League Council convened on February 21, 1933 to consider the Colombian request may be interpreted as a clear assertion of the competence of the League of Nations to deal with a dispute between its two Latin American members, and a rebuff to the United States which preferred to see the dispute handled within the framework of the Kellogg-Briand Pact. However, one must not lose sight of

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[25] Doc. 721.23/1052; F.R.U.S., 1933, Vol. IV, pp. 421-422.

[26] Cmd. 3410, (London: H.M.S.O., 1929); R.I.I.A., Documents on International Affairs 1928, (1929), pp. 1-2.

the strong probability that the similarity between the League's proposed solution and the Brazilian formula of January, which the United States considered satisfactory, might have been the measure of Washington's influence on the League of Nations.

The League Council passed two resolutions:[27] one called for a direct negotiation between Colombia and Peru aimed at an early settlement of the dispute; the other established an Advistory Council consisting of representatives from Britain, China, Czechoslovakia, France, Germany, Guatemala, Irish Free State, Italy, Mexico, Norway, Panama, Poland and Spain, to watch the situation. The Resolution also invited the United States and Brazil to collaborate with the Advisory Council. The last two countries accepted the Council's invitation to participate without vote in the deliberations of the Advisory Council.[28]

The League Council Committee of Three[29] which had earlier been charged with the responsibility of studying the dispute recommended that a League of Nations Administration Commission be constituted to adminster Leticia for a year "in

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[27] League Doc. C.201.M.98.1933.VII; L.N.O.J., 14th Yr., No. 4, (Part 1), April 1933, pp. 525-526.

[28] League Doc. C.203.M.99.1933.VII; C.213.M.104.1933. VII; L.N.O.J., 14th Yr., No. 4, (Part 1), April 1933, p. 614.

[29] For the work of the Committee of Three, see L.N.M.S., Vol. 13, No. 4, April 1933, pp. 89-90.

the name of the Government of Colombia".[30] This major recommendation, unanimously adopted by the League Council, was accepted by Colombia but rejected by Peru. The United States welcomed the League proposal and even urged both Colombia and Peru to accept it. The deadlock resulting from the rejection by Peru of the League proposal was broken by the assassination on April 30, 1933 of the recalcitrant President of Peru, and the emergence of a new leadership more disposed to reaching a settlement of the dispute along the line suggested by the League Council.[31]

In a Memorandum prepared by the United States Assistant Secretary of State, White, on March 16, 1933, following his talk with the Colombian Foreign Minister, the relationship between the U.S. Government and the League of Nations in regard to the Leticia conflict was summarized in the following words:

> The League, on its part, took action on a dispute between two of its members without any consultation with us whatsoever and after taking this action, had advised us thereof. These two independent sets of action has shown that this Government and the League looked at the matter very much in the same light.
>
> Later on, the League presented a definite plan to Colombia and Peru. This plan was drawn up without any consultation with us and without our prior knowledge. We were asked to support the plan and we did so because

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[30] L.N.M.S., Vol. 13, No. 5, May 1933, p. 105.

[31] Bryce Wood, The United States and Latin American Wars 1932-1942, (1966), pp. 228, 346.

> we felt that the plan offered a satisfactory solution to the matter.[32]

Although the proposals of the League Committee of Three which provided the framework for the League policy were formulated without the knowledge of the United States, Washington was informed about them and, indeed, gave its approval before they were submitted to the League Council.[33] While rightly emphasizing the vigorous assertion of competence by the League, White underestimated the political significance of U.S. consultation with the senior members of the League of Nations. It was not by mere accident that the solution proposed by the League was closely tied to the *status quo ante*, a policy goal to which the United States had been committed from the beginning. Similary, it could hardly have been accidental that two of the three members of the League of Nations Administration Commission for Leticia were from the Western Hemisphere, and that these two members were from the United States and Brazil. The inclusion of Spain which had extremely close ties with Latin America was, in all likelihood, part of the strategy designed to emphasize the fact that in matters affecting world peace Geneva had vital interests.

The League Commission administered Leticia from June

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[32] Doc. 721.23/1462; *F.R.U.S.*, 1933, Vol. IV, p. 500.

[33] Cooper, *op. cit.*, pp. 340-341.

1933 to June 1934 while direct negotiations went on between Colombia and Peru in Rio de Janeiro. Under the agreement reached in May 1934 and ratified in September 1934, both sides recognized the validity of the Treaty of 1922 and Peru recognized the legal ownership of Leticia by Colombia.

The League set a precedent in trying to control the adjustment of a dispute in the traditional backyard of the United States. Cordell Hull was later to recall that the decision to accept the League's invitation to the United States for participation in the work of the Advisory Council was a "delicate" one in as much it involved acquiescence in the League's assumption of jurisdiction over a dispute in the heart of the Western Hemisphere without infringing in any way the Monroe Doctrine.[34]

Credit for the peaceful settlement of the Leticia dispute belongs to the League of Nations.[35] It should, however, be borne in mind that the League succeeded because of, and not in spite of, the convergence of the interests of the American states, especially of the interest of the United States and Brazil with those of the League of Nations.

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[34] Cordell Hull, The Memoirs of Cordell Hull, Vol. 1, (New York: Macmillan Company, 1948), pp. 310-311.

[35] See F.P. Walters, op. cit., p. 525; L.H. Woolsey, "The Leticia Dispute between Colombia and Peru", A.J.I.L., Vol. 29, 1935, p. 95; Manley O. Hudson, The Verdict of the League: Colombia and Peru at Leticia, (Boston: World Peace Foundation, 1933).

Although the machinery of the Inter-American System was not directly involved in the adjustment of the dispute, it is possible that Brazil, in her mediatory role, was acting as much in the interest of Geneva as in that of the Inter-American System. The League-American collaboration which began as a friendly but disjunctive one ended up as a unified and concerted effort.

(b) The Chaco Conflict

The Chaco conflict provides the most illuminating study of the degree of conflict and cooperation between the Inter-American System and the League of Nations. It was the most important test case for the effectiveness of the League and Inter-American peace machinery.[36]

Geneva faced a dilemma when called upon to act. As Arthur Sweetser put it: "If it did, there was a risk, though not the certainty, of antagonizing the United States; if it did not, there was the certainty of alienating and perhaps losing Latin America".[37] As far as the League was con-

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[36] See generally, Margaret La Foy, The Chaco Dispute and the League of Nations, (Ann Arbor: 1946); William R. Garner, The Chaco Dispute: A Study in Prestige Diplomacy, (Washington: 1966); Bryce Wood, op. cit., H.P. Kirpatrick, "The Chaco Dispute: The League and Pan Americanism", Geneva Special Studies, June 1936.

[37] Arthur Sweetser, "The Practical Working of the League of Nations: A Concrete Example", International Conciliation, No. 249, 1929, p. 201.

cerned, its assertion of competence was the lesser of the two evils. Commenting on the significance of the League's decision to act, the delegate from Uruguay, Antuna, rightly observed:

> The Council's action deserves to be emphasized, implying as it does a recognition of the fact that Latin America constitutes an integral part of the League. This serves to dissipate what was felt to be a very real anomaly, in that, despite the American countries' membership of the League, the latter appeared to take no action where problems affecting America were concerned. Latin America shared the costs and responsibilities devolving upon the League, but remained in practice outside its sphere of political action and could not be said to enjoy the benefits of membership.
>
> The frank and timely intervention of the Council at its Lugano session established a precedent of the greatest significance both for Latin America and for the League.
>
> This action... had the effect of binding Latin America more closely to the League, now that the League's apparent hesitation in regard to American question - due perhaps to the over-rigid interpretation of Article 21 of the Covenant - has been disproved.[38]

The satisfaction of the Latin Americans at the assertion of competence by the League was understandable. They had nursed the belief that in both the Tacna-Arica dispute between Chile and Peru, and the Panama-Costa Rica boundary conflict, the influence of the United States had prevailed upon the League and had prevented the latter from dealing with those conflicts. It may be recalled that, in connection with the Tacna-Arica dispute, the United States requested

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[38] L.N.O.J., Sp. Supp. No. 75, p. 35; League of Nations, Ten Years of World Cooperation, (1930), pp. 45-46.

Brazil to transmit to the League Council "a suggestion that the Council of the League of Nations do not take cognizance at the present time of the Tacna-Arica dispute which Bolivia is reported to have referred to the League of Nations",[39] that under pressure from the United States, Peru, which had requested the League of Nations to revise the Treaty of 1883 between her and Chile,[40] withdrew the request,[41] and, finally, that the League denied it had competence on the grounds that "the request of Bolivia is not in order, because the Assembly of the League of Nations cannot of itself modify any treaty, the obligation of treaties lying solely within the competence of the contracting States".[42] In the Panama-Costa Rica boundary case, the League stood helpless while a dispute between two League members was settled by a partisan non-member of the League - the United States - in a way that smacked of imposition.[43]

To be sure, when the Boliva-Paraguay conflict over Chaco first broke out, the League hesitated to intervene.[44]

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[39] Doc. 862.85/1148; F.R.U.S., 1920, Vol. 1, p. 341.

[40] League of Nations, Records of the First Assembly, Plenary Meetings, 1920, pp. 595-596.

[41] Ibid., p. 468.

[42] League of Nations, Records of the Second Assembly, Plenary Meetings, 1921, p. 466.

[43] Gordon Ireland, op. cit., pp. 33-42.

[44] Margaret La Foy, op. cit., pp. 18, 31-32, 37-38, 135.

The initial hesitation by Geneva soon melted away when it became clear that Washington's first reaction to the despatch of telegrams by the League to Bolivia and Paraguay was "guarded but not unfriendly" and certainly "not disapproved".[45]

As early as February 4, 1928, the U.S. Secretary of State, Kellogg, informed the U.S. Chargé in Bolivia, McGurk, that "while the Government of the United States is of course always willing to lend its good offices in the cause of international harmony it does not wish at the present time ...to be placed in the position of undertaking to settle the boundary dispute between Bolivia and Paraguay, either by arbitration or other procedure".[46] Thus, when the dispute came into the open in late 1928, both sides were well aware that the United States was unwilling to play the role she had traditionally been called upon to play by the Latin American Republics with boundary disputes.

As soon as the League learned from newspaper reports that a state of dangerous tension and conflict existed between two of its Latin American members, it despatched on December 11, 1928, identical telegrams to both sides urging them to settle their disputes peacefully in conformity with their

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[45] Russell Cooper, op. cit., p. 117, See also, R. Cooper and Mary Mattison, "The Chaco Dispute", Geneva Special Studies, Vol. 5, No. 2, 1934, p. 6; Garner, op. cit., p. 86.

[46] Doc. 724.3515/182; F.R.U.S., 1928, Vol. 1, p. 672.

international obligations under the Covenant.[47] On December 14, 1928, Bolivia charged Paraguay with aggression "in contradiction with the stipulations of Articles 10 and 13 of the League of Nations".[48] Paraguay later denied the Bolivian charge and informed the League Secretary-General that she had accepted the good offices of the Pan American Conference which happened to be meeting in Washington at that time.[49] Meanwhile, Bolivia had also accepted the mediation of the International Conference of American States on Conciliation and Arbitration.[50]

That the League of Nations intended to take charge of the dispute was indicated by the acting President of the Council, Briand, in an aide-memoire handed on December 18, 1928 to Argentina and the United States, the latter "in its capacity as furnishing the President of the Pan-American Conference":

> If, in the next few days, the two Governments do not, in some form or other, accept such mediation as will afford a likelihood of the settling by the pacific methods of the request for reparation submitted by the Bolivian Government - thereby excluding the possibility of further hostilities - the Council can hardly avoid holding an extraordinary session. The Council will, in such an eventuality, have to con-

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[47] L.N.O.J., 10th Yr., No. 1, January 1929, p. 21.

[48] L.N.O.J., 10th Yr., No. 2, February 1929, p. 264.

[49] Ibid., p. 265.

[50] Doc. 724.3415/275; F.R.U.S., 1928, Vol. 1, p. 695.

> sider what measure should be taken, either because war has broken out - or because it is on the point of breaking out - between two Members of the League, neither of which appears to recognize any common contractual obligation not to resort to war other than that arising under the League Covenant, by which they are both bound.[51]

The United States did not, however, over-react to the readiness and willingness of the League to involve itself in the dispute probably because, as the U.S. Minister in Switzerland, Wilson, observed in a telegram to Kellogg on December 11, 1928, "they [the League Council Members] had all borne deeply in mind the relation of the United States to this question and had endeavored so to frame the message that it could not be interpreted as contravening the Monroe Doctrine or conflicting with any possible action on our part".[52]

Meanwhile, the Commission of Inquiry and Conciliation[53] established under the Protocol of 1929[54] by the Pan-American Conference in Washington proceeded to find a solution to the dispute. The McCoy Commission proposed that both sides forget all offenses and grievances, and urged them to re-establish the _status quo ante_ and resume diplomatic relations. It is clear that the cause of the controversy, the territo-

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[51] _L.N.O.J._, 10th Yr., No. 2, February 1929, p. 266.

[52] Doc. 500.C112/437; _F.R.U.S._, 1928, Vol. 1, p. 686.

[53] The members of the Commission were the U.S., Uruguay, Mexico, Cuba, Colombia, Bolivia and Paraguay.

[54] Doc. 724.3415/394; _F.R.U.S._, 1929, Vol. 1, pp. 835-837.

rial question, was left untouched under the settlement.[55] In fact, the McCoy Commission itself admitted that the settlement was only a Pyrrhic victory: "the neutral Commission have reached the conclusion that it is not possible, at the present time to reconcile the divergent view-points of the parties to the controversy through a formula for direct settlement..."[56]

With the acceptance by both sides of the recommendations of the Neutral (McCoy) Commission, the first phase of the conflict came to an end. Throughout this first phase of the crisis, the League of Nations confined itself mainly to supporting the efforts of the Neutral Commission.[57]

The period between 1929 when a temporary cessation of hostility was achieved and 1932 when renewed fighting broke out was characterized by absence of any coordination between the League and the Pan American peace efforts.[58] Neither the Non-Aggression Pact[59] negotiated under the auspices of the

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[55] Garner, op. cit., p. 60.

[56] Doc. 724.3415/688; F.R.U.S., 1929, Vol. 1, p. 874.

[57] See Senor Alverez Del Vayo, "The Chaco War", in Pacifism Is Not Enough, (London: Allen and Unwin Ltd., 1935), p. 153 et. seq.; M. La Foy, op. cit., p. 31 et. seq.

[58] Ursula P. Hubbard, "The Cooperation of the United States with the League of Nations", International Conciliation, No. 329, April 1937, p. 390ff.

[59] Doc. 724.3415/182 1/2; F.R.U.S., 1932, Vol. V, p. 41ff.

Neutral Commission and signed by both Bolivia and Paraguay, nor the August 3, 1932 Declaration of the Conference of American Republics stating that the American Republics "will not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms"[60] prevented the resumption of hostility in late 1932. The new conflict posed new challenge to the peace machinery of both the Inter-American System and the League of Nations.

Consider, again, the policy position of the United States as stated in a Note to the U.S. Minister, Wilson, in Switzerland. The Note declared that the purpose of the U.S. government was that of "staving off any independent action on the part of the League in the matter". The Note continued: "We of course understand that if either Bolivia or Paraguay makes a request of the [League] Assembly...to study the matter it will have to do so".[61] The U.S. Assistant Secretary of State, White, further expressed the hope that the League "will continue not to get into the matter any

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[60] Doc. 724.3415/1958b; F.R.U.S., 1932, Vol. V, pp. 159-160; Hudson, International Legislation, Vol. VI, pp. 105-106. This declaration was inspired by the Stimson Doctrine of Non-Recognition formulated on January 7, 1932 in a diplomatic note to China and Japan. See F.R.U.S., 1932, Vol. III, p. 8; A.J.I.L., Vol. 26, 1932, pp. 342-48. For a similar League Assembly Resolution, see L.N.O.J., Special Supplement, No. 101, pp. 87-88.

[61] Doc. 724.3415/2067a; F.R.U.S., 1932, Vol. V, p. 222.

more than it absolutely has to, and that if it has to take action it will use its influence to support what the Neutral Commission in Washington is doing".[62] It should be noted that what the United States was opposed to was "independent action on the part of the League". Washington conceded that it could not stop the League from considering a request for action from either of the parties to the dispute.

Almost simultaneously Geneva was making it clear that "[i]nasmuch as the present situation is one which might disturb the peace or the good understanding between two Members of the League, the other Members cannot regard the development of the situation with indifference".[63] The European members of the Council, especially de Madariaga of Spain and Paul-Boncour of France, expressed militant attitudes and called for a vigorous assertion of the Council's responsibility and interest in the conflict.[64] At its Sixty-eighth Session, the Council adopted Madariaga's suggestion that a Committee of Three be established to follow the Latin American situation closely.[65]

The Council's Committee of Three was treading very cautiously. It promptly announced on September 30, 1932 that it would "give all possible support to the endeavours

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62 Ibid., p. 226.

63 L.N.O.J., 13th Yr., No. 9, September 1932, p. 1575.

64 L.N.O.J., 13th Yr., No. 11, November 1932, p. 1720.

65 Ibid., p. 1721.

of the Commission of Neutrals", and requested the Neutral Commission to keep the Committee informed of whatever steps the former was taking to effect a peaceful solution to the conflict.[66] On November 5, 1932, White made it quite clear that the United States was "in favor of keeping them [the League Council members] informed so long as they play the game with us", and warned that "the Neutral Commission cannot afford either to be put in the position that it is subordinate to the League" and that the League "can only work through it [the Neutral Commission] or as permitted by it".[67] When the Committee of Three boldly proposed the establishment of a League Military Commission which would be sent to Chaco on a fact finding mission,[68] the Neutral Commission not only denounced this proposal as "futile", but also informed Sir Eric Drummond on December 31, 1932 that the "Neutral Commission is convinced that the nations of America working in common accord can preserve peace in this [Western] Hemisphere and have asked the cooperation of the four countries nearest the scene of hostilities".[69] As the

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[66] L.N.O.J., 13th Yr., No. 12, December 1932, p. 1924.

[67] Doc. 724.3415/2434 1/2; F.R.U.S., 1932, Vol. V, p. 245.

[68] League Doc. C.101.1933,VII; L.N.O.J., 14th Yr., No. 2, February 1933, pp. 253-255.

[69] Doc. 724.3415/2707, Doc. 724.3415/2716a; F.R.U.S., 1932, Vol. V, pp. 258, 259.

League proposal to send a Military Commission to Chaco was not, initially, favourably received by the two combatants, the Committee of Three had no choice but to advise the League Council to suspend action on the proposal.[70]

The increasing frustration experienced by the Neutral Commission and the formal declaration of war by Paraguay on May 10, 1933 probably led the United States to accept, grudgingly, the necessity of a League of Nations Military Commission. The United States now expressed the view that "as there are many non-combatant South American countries that have real political interests involved in this dispute, any commission which the League might send to the Chaco could appropriately be composed entirely of Latin Americas".[71] With this possibility in view, the Neutral Commission persuaded Argentina, Brazil, Chile, and Peru - the so-called ABCP group - to act as mediators. The acceptance of this role by the ABCP powers prepared the way for the withdrawal of the Neutral Commission from the scene. In its statement of withdrawal, the Neutral Commission articulated unambiguously the crux of the problem of finding a peaceful solution to the Chaco conflict. It stated:

> Experience has shown that if there is more than one center of negotiation confusion and lack of agreement

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[70] L.N.O.J., 14th Yr., No. 4, (Part II), April 1933, p. 623.

[71] Doc. 724.3415/3251a; F.R.U.S., 1933, Vol. IV, p. 340.

> are the inevitable results. The Commission therefore feels that it can best contribute to peace on this continent by withdrawing from negotiations. Thus negotiations can be centered in Geneva, if other peace agencies will take a similar attitude, allowing the League Committee to work with universal support for peace.[72]

In view of the above statement, it is not clear why, on July 26, 1933, Bolivia and Paraguay should have urged the League of Nations to confer upon the ABCP powers a wide mandate to intervene in the dispute in place of the League's Commission of Five set up by the Council.[73] This suggestion was strongly resented by the League Council members who had always contended that the League was the only international instance legally obliged, under the Covenant, to seek the settlement of the dispute between Bolivia and Paraguay.[74] Noting the pragmatic advantages of such a proposal, the League Council acquiesced but requested the ABCP group to submit a formula for the settlement of the dispute. The ABCP group declined; consequently, the League Commission was despatched to the Chaco.[75]

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[72] Doc. 724.3415/3207c; F.R.U.S., 1933, Vol. IV, pp. 343-344.

[73] L.N.O.J., 14th Yr., No. 9, (Part II), September 1933, p. 1083.

[74] L.N.O.J., 13th Yr., No. 11, November 1932, p. 1720.

[75] L.N.M.S., Vol. 13, No. 10, October 1933. Report of the League of Nations Commission on the Chaco Dispute Between Bolivia and Paraguay. Text in A.J.I.L., Vol. 28, 1934, pp. 137-217 at p. 139.

The League Commission[76] made up of representatives from France, Britain, Spain, Italy and Mexico, worked hard to secure a peaceful solution and apparently enjoyed the goodwill of the American states. For instance, the Seventh International Conference of American States passed resolutions on December 24 and 26, 1933 extending "a cordial greeting to the Commission whose high purposes made it worthy of the recognition of the nations of America",[77] and urged the belligerents "to accept juridical methods for the solution of the dispute, as consistently recommended by the Commission of the League..."[78] The Commission's Report[79] was rejected by Paraguay.[80]

The League of Nations made a final attempt to put pressure on both sides to accept cessation of fighting by asking the Committee of Three to consider the possibility of imposing an arms embargo on the belligerents. The Committee of Three consulted thirty-five Governments on the question of

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[76] For an account of the work of the Commission as narrated by its Chairman, see Senor Alverez Del Vayo, "The Chaco War", in Pacifism Is Not Enough, (London, 1935), pp. 150-173.

[77] J.B. Scott (ed.), The International Conferences of American States, First Supplement, 1933-1940, p. 84.

[78] Ibid., p. 105.

[79] League Doc. C.154.M.64.1934.VII; L.N.O.J., 15th Yr., No. 7, (Part I), July 1934, pp. 789-790. Also in A.J.I.L., Vol. 28, 1934, pp. 189-190.

[80] League Doc. C.154.M.64.1934.VII; L.N.O.J., 15th Yr., No. 7, (Part I), July 1954, p. 791ff.

an arms embargo; of these, twenty-eight announced that they had taken measures to prohibit the sale of arms to the belligerents.[81] In regard to this new venture, the United States not only cooperated but actually led the way.[82] Although Washington's action was taken "wholly independently of actions by other governments", it was, nevertheless, founded "upon inspiration from Geneva and after consultation with other governments".[83] It is important to point out that the Council did not take any decision to impose an arms embargo on Bolivia and Paraguay. As a publication of the League explained, "The members of the League, who had decreed such prohibition, had... acted independently of the provisions of the Covenant and not in application of any of its articles. The prohibitions thus decreed by the States members of the League had been a lawful emanation of their sovereignty, and did not run counter to any provision of the Covenant".[84]

The legal basis of the Chaco embargo was much debated

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[81] L.N.M.S., Vol. 14, No. 9, September 1934, p. 207.

[82] La Foy, op. cit., p. 81 et. seq.

[83] M.O. Hudson, "The Chaco Arms Embargo", International Conciliation, No. 320, 1936, p. 241; James T. Shotwell, On the Rim of the Abyss, (New York: Macmillan Company, 1936), p. 158; C.G. Fenwick, "Arms Embargo against Bolivia and Paraguay", A.J.I.L., Vol. 28, 1934, pp. 534-538.

[84] L.N.M.S., Vol. 14, No. 9, September 1934, p. 208. See also Doc. A.I./7(i).1934. A.VI/14.1934.

in the first committee of the League Assembly. As it has little to do with the question of competing jurisdiction between the League and the Inter-American System, it is not necessary to do more than pass a few comments on it. Article 16(1) contemplated the use of economic sanction against any Member of the League which resorted to war in disregard of Articles 12, 13 or 15 of the Covenant.[85] Once the aggressor state had been identified, members of the League undertook immediately "to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State whether a Member of the League or not".[86] The language of Article 16(1) suggests that the imposition of economic sanction was automatic once a League member knew who the aggressor was. The automatic character of this obligation was removed by the interpretative resolution of the League Assembly in 1921. At the instigation of the Scandinavian states,[87] the League

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[85] R.I.I.A., International Sanctions, (London: 1938), Ch. 4, esp. pp. 28-37; R.F. Taubenfeld and H.J. Taubenfeld, "The "Economic Weapon": The League and the United Nations", Proceedings, A.S.I.L., 1964, pp. 183-205.

[86] Art. 16(1).

[87] Jones, The Scandinavian States and the League of Nations, (Princeton: 1939), pp. 217-220.

Assembly adopted the following interpretative resolution on Article 16: "It is the duty of each Member of the League to decide for itself whether a breach of the Covenant has been committed, and whether they ought, in consequence, to adopt the measures laid down in the Covenant".[88]

What may be said with reference to the Chaco arms embargo is that at no time did either the League Council or the Assembly issue a recommendation to members of the organization. The Committee of Three did not reach a decision about the arms embargo within the framework of the Covenant. While the states imposing an arms embargo were acting individually they, nonetheless, hoped that such action would help towards the achievement of a major purpose of the Covenant, the prevention or termination of hostilities.

The Chaco arms embargo had a lesson to teach about the efficacy of economic measures as a means of terminating conflicts or of inducing changed behaviour from states which the international community considers as "threatening" world peace. With Chile refusing to prohibit transit of munitions across its territory, Uruguay to impose the embargo, with some countries making their cooperation conditional on the action of other states, and with others excepting contracts already made before the embargo went into effect, the Chaco arms embargo as a form of economic pressure proved ineffec-

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[88] League of Nations, Records of the Second Assembly, Minutes of the Committee, Vol. 1, p. 355.

tive.[89] The subsequent use of economic coercion by international organizations in the service of world peace has not been more successful than the Chaco experience was.[90]

Throughout the Chaco conflict, the United States never abandoned her original thesis that "American problems can be most advantageously solved through some form of cooperation between the American states themselves and not through the utilization of non-American agencies";[91] yet she was rather reluctant to behave in a way that "would inevitably be construed as an attack upon the League of Nations or as a deliberate reflection upon its general utility".[92] The attempt to reconcile these two considerations produced some ambiguity and inconsistency in the United States policy. The

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[89] Hudson, "The Chaco Arms Embargo", International Conciliation, No. 320, 1936, pp. 239-240; Mary Mattison, "The Chaco Arms Embargo", Geneva Special Studies, Vol. 5, No. 5, 1934; R.I.I.A., International Sanctions, (1938), Ch. 4, esp. p. 27, 30.

[90] See Albert Highley, "The First Sanctions Experiment", Geneva Studies, Vol. 9, No. 4, 1938, pp. 73ff; R.I.I.A., International Sanctions, (1938); R. St. J. Macdonald, "The Resort to Economic Coercion by International Political Organizations", U. of T. Law Journal, Vol. 17, 1967, pp. 86-169; Ralph Zacklin, "Challenge of Rhodesia", International Conciliation, No. 575, November 1969; Ronald Segan et al., Sanctions against South Africa, (Middlesex: Penguin Books, 1964); Taubenfeld and Taubenfeld, "The"Economic Weapons": The League and the United Nations", Proceedings, A.S.I.L, 1964, pp. 183-205.

[91] Doc. 724.3415/4210; F.R.U.S., 1934, Vol. IV, p. 97.

[92] Ibid., p. 98.

U.S. government found the League formula proposed by the League Commission "a fair and equitable basis for a peaceful solution",[93] and promised to "adopt a friendly and cooperative attitude to the activities of the Commission whenever in its own judgment such attitude may prove of practical assistance in furthering the pacific solution of the Chaco problem".[94]

Neither the United States nor the Inter-American System had been able to make any progress towards the solution of the dispute partly because there were disagreements and political rivalry among the states of the Inter-American System, especially between the United States and Argentina.[95] Cordell Hull, in a diplomatic note to the U.S. Chargé in Brazil on December 1, 1934 confessed that "the time has not yet come when efficient machinery is functioning nor have the peace machinery created by common agreement between the American nations so far acquired sufficient prestige to prove their usefulness at this juncture. Frequently the peace efforts of the American nations during the years of the

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[93] Doc. 724.3415/3553; F.R.U.S., 1934, Vol. IV, p. 55.

[94] Doc. 724.3415/4188; F.R.U.S., 1934, Vol. IV, p. 88.

[95] For a study of the Chaco conflict as a diplomatic warfare and prestige conflict between the U.S. and Argentina, see W.R. Garner, The Chaco Dispute: A Study in Prestige Diplomacy, (Washington, D.C.: Public Affairs Press, 1966); See also Harold Peterson, Argentina and the United States, 1810-1960, (New York: State University of New York, 1964), pp. 385-389.

continuation of the Chaco dispute have broken down as a result of disagreement between the American mediating nations".[96] Besides the political squabbles among the American states, the lack of confidence of the belligerents in the political neutrality of some of the neighbouring states partly accounted for the prolonged failure of the inter-American pacific settlement procedure.[97]

The Buenos Aires Peace Conference which brought the conflict to an end was organized by six American states, namely, the United States, Argentina, Brazil, Chile, Peru and Uruguay in 1935.[98] Bolivia and Paraguay signed a Peace Protocol on June 12, 1935 while the Treaty of Peace, Friendship and Boundaries was not concluded until 1938.[98a] Some writers have pointed out that the termination of the Chaco conflict owed much more to the weariness and financial exhaustion of the two belligerents than to the mediation of any third parties, and, moreover, that the military gains on the battlefield determined, in large measure, the settle-

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96 Doc. 724.3415/4373; F.R.U.S., 1934, Vol. IV, p. 115. See also R.S. Kain, "The Chaco Dispute and the Peace System', P.S.Q., Vol. 50, 1935, pp. 321-342; Bryce Wood, op. cit., p. 348.

97 Cooper, op. cit., pp. 152-159; Wood, op. cit., p. 354; M. La Foy, op. cit., pp. 45, 46.

98 See L. B. Rout, Jr., Politics of the Chaco Peace Conference, 1935-1939, (Austin, Texas: 1969.)

98a Text in L. N. O. J., 19 Yr., Nos. 8-9, 1938, pp. 662-668.

ment reached.[99]

There seems to be no doubt that the undercurrent of rivalry among the League of Nations, the Neutral Commission and the ABCP powers contributed greatly to the prolonged failure to arrive at a peaceful solution. De Madariaga of Spain at one point complained that on nine occasions "the Council's action has been paralyzed, stopped, and thrown out of gear because the Commission of Neutrals was going to settle the question".[100]

Although the United States did not hide her preference for a purely American solution, she equally did not propound any policy of exclusive American competence to deal with the conflict.[101] The "failure" of the League's efforts was not due to opposition from the United States. In fact, the relationship between the League and the United States in regard to the settlement of the Chaco conflict cannot be described in one dimensional term - the extreme League defer-

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[99] See, for instance, L.H. Woolsey, "The Settlement of Chaco Dispute", A.J.I.L., Vol. 33, 1939, p. 128; Sir Alfred Zimmern, The League of Nations and the Rule of Law, 1918-1935, (London: Macmillan Company, 1935), p. 425; R.S. Kain, "The Chaco Dispute and the Peace System", P.S.Q., Vol. 50, 1935, p. 322.

[100] L.N.O.J., 14th Yr., No. 6 (Part II), June 1933, p. 764.

[101] Schwarzenberger, The League of Nations and World Order, (1936), pp. 142-143.

ence to the United States.[102] On the contrary, all evidence suggests a situation of mutual deference, occasional collision and general, but faulty, collaboration. The remarks of the Portuguese representative on the League Council, De Vasconcellos, during the Seventeenth Session of the Council are an appropriate epitaph on the role of the League in the adjustment of the dispute. The Buenos Aires Peace Conference "brings to a happy conclusion a conflict which has often led to unjust attacks against the League of Nations, without the latter ever having been discouraged in its action, pursued with perseverance, zeal and wisdom".[103]

3. The Little Entente, Hungary, and the League of Nations

The Little Entente was the creation of a series of bilateral treaties called "defensive Convention" between Yugoslavia and Czechoslovakia, Rumania and Czechoslovakia, and Rumania and Yugoslavia.[104] Like any defensive organization, the Little Entente was a product of political expediency. As successor states to the Austro-Hungarian empire,

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[102] For this view, see Norman A. Bailey, Latin America in World Affairs, (New York: Walker and Company, 1967), p. 149.

[103] L.N.O.J., 17th Yr., No. 2, February, 1936, pp. 87-88; also L.N.O.J., Special Supplement No. 155, p. 93.

[104] L.N.T.S., Vol. VI, No. 154, p. 209; No. 155, p. 215; Vol. 54, p. 257; Arnold Toynbee, Survey of International Affairs 1920-1923, (London: Oxford University Press, 1927), pp. 505-508.

Rumania, Czechoslovakia and Yugoslavia had a unity of purpose in preventing any Hungarian revisionism, the Habsburg monarchical restoration and the subvertion of the Treaties of Trianon and Neuilly.[105] Each of the three defensive conventions specifically identified Hungary as the state against which the alliances were directed, while the Rumania-Yugoslavia treaty mentioned Bulgaria in addition.[106] The Czechoslovak-Rumania treaty called for a coordination of the foreign policy of both states in relation to Hungary; so also did the Czechoslovak-Yugoslav treaty. The Yugoslav-Rumania convention similarly provided for consultation on questions of foreign policy in relation to Hungary and Bulgaria. Certainly the most important provision in each of the three treaties is Article 2 under which the signatories undertook to decide, by mutual agreement, upon the measures necessary to counter an unprovoked attack from Hungary and/or Bulgaria.

In contrast to contemporary defense organizations, the Little Entente, as it existed in the early 1920's, lacked any permanent institutions for regular consultation and long-

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[105] Edward Benes, "The Little Entente", Foreign Affairs, Vol. 1, No. 1, 1922, pp. 66-72; R. Machray, The Little Entente, (London: Allen & Unwin Ltd., 1929), pp. 115-118; P.M. Brown, "The Little Entente", A.J.I.L., Vol. 15, 1921, pp. 67-68; Stefan Osusky, "The Little Entente and the League of Nations", International Affairs (London), Vol. 13, 1934, pp. 378-393.

[106] Article 1 of each of the three Treaties.

range planning. Notwithstanding its institutional deficiency, the Little Entente was an organization with an unusually great sense of solidarity. Until 1929 the Little Entente was basically a defensive military alliance with a purely external orientation. In that year the representatives of the states of the Little Entente concluded in Belgrade a tripartite Treaty of Conciliation and Arbitration "on the lines of the model treaty elaborated by the League".[107] With respect to institutional growth and structuralization of relations, the most notable innovation came in the wake of the rise of Hitlerism in Germany in early 1930's. In response to the general international situation in Europe and to counteract the general tendency towards a certain loosening of bonds among themselves,[108] the Little Entente powers transformed the regional organization into a permanent diplomatic federation with organs like a Permanent Council, a Permanent Secretariat and an Economic Council in February 1934.[109] The well-known Czechoslovak statesman, Edward Benes, who was, perhaps, most identified with the Little Entente, explained the significance of the 1934 Pact of Organization a month later when the Marseilles assassina-

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[107] L.N.T.S., Vol. 96, No. 2210, p. 311.

[108] See Arnold Toynbee, Survey of International Affairs 1926, (London: Oxford University Press, 1928), p. 147.

[109] L.N.T.S., Vol. 139, No. 3213, p. 233.

tion of King Alexander of Yugoslavia was being discussed in the League Council. He declared:

> I have no reason not to state before you that, since the signature of the Pact of Organisation of the Little Entente of February 16th, 1934, the three countries - Czechoslovakia, Roumania and Yugoslavia - having established the unity of their foreign policy, constitute an international political community which cannot but act jointly in circumstances so serious as those with which we are faced. Peace may be threatened in our neighbourhood and our direct interests are at stake.[110]

How, it may be asked, could an alliance system directed against specified antagonists be peaceful in its relations to such antagonists in conformity with the obligations of membership of the more inclusive organization to which they all belonged. This is the type of problem faced by the League of Arab States in its relation to Israel and the Organization of African Unity to the Republic of South Africa and colonial regimes in Africa.[111] There is considerable force in the argument that regional pacts directed against an aggressor state whichever it may be fit most accurately into the framework of the League and conform most closely to its principles, and that a country is not encircled by a group pledged to mutual defence when it has the

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[110] L.N.O.J., 15th Yr., No. 12, (Part II), December 1934, p. 1724.

[111] See Chapters VII and VIII below.

opportunity of joining that group if it so desires.[112] Benes had this type of criticism in mind when he wrote in 1922:

> It is true that there is one gap in the structure [of the Little Entente]. Hungary still stands outside. She has excluded herself by virtue of her policy, directed as it is against the security of her neighbors. There is little doubt that the isolation cannot be permanent, and that Hungary too will one day take the place in this Central European peace block which is hers both politically and economically.[113]

Forty years later, members of the O.A.S. were to use a similar argument to justify the exclusion of the "communist" Government of Cuba from the regional organization, hoping that one day Cuba would resume its participation in the OAS.[114] As long as the Little Entente lasted, the isolation of Hungary was "permanent". The question may be raised as to whether the Little Entente treaties of 1920-1921 did not, in fact, predispose the Yugoslavs, the Czechoslovaks and the Rumanians to belligerency with the Hungarians and the Bulgarians at the slightest of all provocations.[115] Whether

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[112] The Paul-Boncour Report on Regional Pacts of Mutual Assistance submitted to the Special Main Committee on the Question of the Application of the Principles of the Covenant. Doc. C.361.M.243.1937.VII.[C.S.P.10]; L.N.O.J., Special Supplement No. 180, Annex 10.

[113] Edward Benes, "The Little Entente", Foreign Affairs, Vol. 1, No. 1, 1922, p. 70.

[114] See Chapter VI and VII below.

[115] See Count Stephen Bethlen, The Treaty of Trianon and European Peace, (London: Longman's, 1934), p. 145 et. seq.

or not the Little Entente contrasts with modern ideas of a peace organization must be determined empirically by a study of its actions *vis-a-vis* the League of Nations.

The relationship between the League of Nations and the Little Entente was almost exclusively bound up with the question of Hungarian revisionism. This is hardly surprising in view of the fact that it was the need to defend the integrity of the Treaties of Trianon and Neuilly, the symbols of the dismemberment of the Austro-Hungarian Empire, which compelled the creation of the Little Entente. The League-Little Entente relationship can be analyzed in the context of three incidents which brought the Little Entente powers together before the League Council.

(a) The Szent-Gotthard Incident

On January 1, 1928, some five wagon loads of machine guns, falsely declared as machine parts, and clandestinely being transported from Verona in Italy ostensibly to Warsaw in Poland, were uncovered by the Hungarian railway officials in Szent-Gotthard at the Austro-Hungarian border.[116] As the shipment had no valid "transit" permit, the Hungarian authorities proceeded to treat the incident in accordance with customs and railway regulations: the war materials were sold or destroyed *after* the Hungarian authorities had been

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[116] Robert Machray, *The Little Entente*, (London: 1929), pp. 330-337.

officially notified by the acting President of the League Council that the matter had been placed on the Council's agenda, and had, indeed, been advised "to suspend this action as the matter is shortly to be considered by the Council".[117]

In identically worded letters, Rumania, Yugoslavia and Czechoslovakia drew the attention of the League Council to the incident on February 1, 1928, and "without wishing to accuse or suspect anyone whatsoever in connection with this incident", urged the Council to investigate it.[118] The Little Entente signatories put the incident within the context of European peace. In a joing declaration, they stated:

> The States of the Little Entente consider that the question of the machine guns is one of general importance, and not a question concerning especially, the Little Entente. The States of the Little Entente have acted as Members of the League of Nations, and they have not acted with a desire to accuse anyone. They have acted solely in the general interest, taking into consideration the question of principle and the respect of treaties, and also respect for the duties which have been assumed by the Council of the League. It is for that reason that we drafted our notes to the Secretariat, in a form which avoids any possible dispute between our States and Hungary, and in order to emphasise especially that in dealing with this matter account should be taken of the position of the League and of the Council and general respect for its rights

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[117] League Doc. C.52.1928.IX: L.N.O.J., 9th Yr., No. 4, April 1928, p. 548, Annex 1021a.

[118] League Doc. C.25.1928.IX; Ibid., pp. 545-546, Annex 1021. The right to demand investigation of such incidents was provided for under Article 143 of the Treaty of Trianon.

and duties.[119]

The League Council considered the Szent-Gotthard incident on March 7, 1928 as its Forty-ninth Session: it set up a Committee of Three to study the complaint, investigate the incident and report to the Council.[120] The Report of this Committee[121] remained a controversial document because it provided no answer to the most vital question - the final destination of those five wagon-loads of war materials. The Little Entente powers and some Council members, including France, failed to understand why the Committee was unable to ascertain the final destination of the machine gun parts and questioned the credibility of the Committee's conclusion that there was no evidence that the war material was intended to remain in Hungary. In view of the fact that the said war material was not only of little military significance but had also been either destroyed or sold, there was a general feeling that there was no need to pursue the matter further. The Council closed the matter by adopting a resolution which amounted to a censure of the manner in which the Hungarian authorities handled the affair. The resolution stated that when a question had been placed before the Council, "the

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[119] L.N.O.J., 9th Yr., No. 4, April 1928, p. 393.

[120] Ibid., p. 397.

[121] League Doc. C.207.1928.IX; L.N.O.J., 9th Yr., No. 7, July 1928, p. 905.

Government concerned should take whatever step may be necessary or useful to prevent anything occurring in their respective territories which might prejudice the examination or the settlement of the question by the Council".[122] The Little Entente members declared themselves gratified that international attention had been focused upon a question of great importance to European peace and security. For our purpose, the important thing is that the Little Entente powers resorted to the processes and procedures of the League of Nations.

(b) <u>The Hirtenberg Affair</u>

A second and similar incident occurred in 1933. In January of that year the Little Entente powers received information that large consignments of arms had arrived at the cartridge factory at Hirtenberg in Lower Austria from Italy. Contending that the import of arms contravened the terms of Articles 132 and 134 of the Treaty of St. Germain which constituted the state of Austria, and dissatisfied with the explanations offered by the Austrian Government, the Little Entente powers accepted the good offices of the Governments of Great Britain and France which undertook to clear up the matter through diplomatic channels. In joint identical letters from the Little Entente powers to Britain

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[122] <u>L.N.O.J.</u>, 9th Yr., No. 7, July 1928, pp. 909-910.

and France, it was pointed out that the Governments of the states of the Little Entente "postponed the carrying out of their decision to bring the matter before the Council of the League of Nations... in deference to the United Kingdom and France, whose _démarches_ they considered should not only lead to an explanation of this matter but... should induce Austria to conform to the obligations of the Treaty of Peace".[123]

The political demands of the Little Entente powers were that the arms which arrived from Italy should be sent back to the consignor. If the consignor refused to take delivery of such arms, the Austrian Government should destroy them and provide evidence that it did so. Moreover, the three powers also wanted assurances that no part of the arms had crossed over to Hungary and that similar incident would not occur again. The Anglo-French negotiation with the Austrian Government led to an agreement in which Austria agreed to send back, and Italy to receive, the controversial war material. The Little Entente powers accepted this settlement, but, fearful that the procedure might constitute a precedent for the future, brought the matter to the attention of the League Secretary-General with the request that the Secretary-General "be good enough to have the present letter and annexes thereto communicated for information

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[123] _L.N.O.J._, 14th Yr., No. 3, March 1933, pp. 398-399, Annex 1.

to the States Members of the [League] Council".[124]

The investigation and the settlement of the legitimate complaint of the Little Entente Powers in regard to this affair were conducted _outside_ the League framework. This procedure was politically appealing to Britain and France which did not want to embarass Italy politically. The Little Entente could not realistically turn down the offer of good offices from the two leading League members, especially from France which had, since 1920, given strong diplomatic backing to the Little Entente powers. It is, however, significant that the basic attachment of the Little Entente powers to the procedures and ideals of the League made it necessary for them not only to reserve their right to ask the League Council to consider the matter but also to consider it a matter of importance that the League Council be notified of the settlement of the affair.

(c) The Marseilles Tragedy

Diplomatic unity among the Little Entente powers was again demonstrated against Hungary following the assassination of King Alexander I of Yugoslavia and Louis Barthou, the French Foreign Affairs Minister, in Marseilles on October 9, 1934. The assasins were members of the Ustasa organization whose anti-Yugoslav activities were condoned

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[124] League Doc. C.163.1933.IX: _L.N.O.J._, 14th Yr., No. 3, March 1933, p. 398.

by the Hungarian authorities. The Little Entente resorted to the procedures of the League. Yugoslavia, supported by Czechoslovakia[125] and Rumania,[126] requested the League Council to investigate the odious crime which "seriously compromises relations between Yugoslavia and Hungary and which threatens to disturb the peace and good understanding between nations".[127] Yugoslavia charged Hungary with complicity in the assassination and in the terrorist activities directed against the Yugoslav state.

The League Council considered the request on December 7, 1934. It is the view of the major powers which deserves close examination for it determined how the Council handled the question. France placed her full diplomatic support behind Yugoslavia. To Laval, the French representative on the Council, "[t]he attack on the Knightly King, Alexander the First, the Unifier, was an attack on peace".[128] He went on to warn in apparent reference to the well-known revisionist fever in Hungary that "[a]ny person who tried to remove a

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[125] League Doc. C.509.M.228.1934.VII; L.N.O.J., 15th Yr., No. 12, (Part II), December 1934, p. 1767, Annex 1523b.

[126] League Doc. C.507.M.226.1934.VII; Ibid., Annex 1523a.

[127] League Doc. C.506.M.225.1934.VII; Ibid., p. 1766. Annex 1523.

[128] L.N.O.J., 15th Yr., No. 12, (Part II), December 1934, p. 1730.

frontier-mark disturbs the peace of Europe".[129] Aloisi of Italy took a different view. While condemning terrorism and political assassination, he indicated that the Hungarian revinisionist posture was a legitimate political demand which the League should not ignore.[130] Italy had, for some time, been known for her anti-Little Entente attitude, the sin of the Little Entente being that it stood for the status quo, the preservation of frontiers and was France's diplomatic front in Central Europe. Eden of Britain acted as a conciliator between the French and the Italian position.[131] "Let me confess at the outset", he said, "that I feel some difficulty in forming any opinion as to the responsibilities for the tragic events which have occurred".[132] He urged the Council "to proceed with extreme caution",[133] and carefully avoided getting into the fundamental question of the relationship between the Little Entente powers and Hungary. It came as no surprise that Eden was unanimously appointed as Rapporteur. The British statesman came to the conclusion

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[129] Ibid., p. 1731.

[130] Ibid., p. 1732.

[131] Anthony Eden, Facing the Dictators, (Boston: Houghton Mifflin Company, 1962), pp. 119-133.

[132] L.N.O.J., 15th Yr., No. 12, (Part II), December 1934, p. 1734.

[133] Ibid., p. 1735.

that "certain Hungarian authorities may have incurred, at any rate through negligence, certain responsibilities relative to acts connected with the preparation of the Marseilles crime".[134] He urged the Hungarian authorities to "undertake an inquiry and take the appropriate action as regards those of its authorities whose culpability may be established",[135] and to report the steps which they had taken to the Council. A resolution to this end was unanimously accepted by the Council.[136] What is of great relevance for our purpose is that the Little Entente powers resorted to the instrumentality of the League to deal with a major political crisis which could conceivably have provoked a war between the Little Entente powers and Hungary.

4. The Locarno Security System and the League of Nations

In a Memorandum dated February 9, 1925, the German Government proposed the establishment of "a pact expressly guaranteeing the present territorial status on the Rhine", and "a comprehensive arbitration treaty... amalgamated with such a pact" by the "Powers interested in the Rhine - above

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[134] *Ibid.*, p. 1759.

[135] *Ibid.*, p. 1759, 1760.

[136] *Ibid.*, p. 1760.

all, England, France, Italy and Germany".[137] The Memorandum was conspicuously silent on the relationship between the proposed pact and the Covenant of the League of Nations.[138]

The response of France to the German proposal, after consultation with her allies, deserves a close analysis because of the light it throws on the Anglo-French conception of the relationship between any regional security organization and the League of Nations. The following extracts from the Memorandum are especially pertinent:

> (1) [N]o agreement could be achieved unless Germany on her side assumes the obligations and enjoys the rights laid down in the [C]ovenant of the League.
>
> (2) The search for the quarantees of security which the world demands cannot involve any modification of the peace treaties.

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137 Cmd. 2435, Papers respecting the Proposals for a Pact of Security Made by the German Government on February 9, 1925, (London: H.M.S.O., 1925). The German Ambassador to Washington first proposed a security pact among the Great Powers in his conversation with the U.S. Secretary of State, Hughes, in December 1922 but the proposal then was rejected by France. See F.R.U.S., 1922, Vol. 2, pp. 203-211.

138 The German reply dated July 20, 1925 to the French Note of 16th June 1925 maintained that although Germany believed that "the entrance of Germany into the League of Nations would not be a necessary condition for the realisation of the fundamental ideas of the German memorandum", she would "not raise any objection against the linking of the two problems". See Cmd. 2468, Reply of the German Government to the Note handed to Herr Stresemann by the French Ambassador at Berlin on June 16, 1925 respecting the Proposals for a Pact of Security, (London: H.M.S.O., 1925), p. 9.

(3) Where one of the contracting parties, without resorting to hostile measures, fails to observe its undertakings, the Council of the League of Nations shall propose what steps should be taken to give effect to the treaty.

(4) Nothing in the treaties contemplated in the present note should affect the rights and obligations attaching to membership of the League of Nations under the Covenant of the League.

Thus, right from the very beginning of this new venture in regional security arrangement, the leadership of the Geneva institution was thinking of the new pact in terms of its congruity and compatibility with the League Covenant.

At Locarno the following treaties and conventions were concluded:[139] (1) Treaty of Mutual Guaranty between Germany, Belgium, France, Great Britain and Italy (Annex A): (2) Arbitration Covention between Germany and Belgium (Annex B); (3) Arbitration Covention between Germany and France (Annex C); (4) Arbitration Treaty between Germany and Poland (Annex D); (5) Arbitration Treaty between Germany and Czechoslovakia (Annex E); (6) Collective Note to Germany Regarding Article 16 of the Covenant of the League of Nations[140] (Annex F);

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[139] L.N.T.S., Vol. 54, Nos. 1292-1296, pp. 289ff; Hudson, International Legislation, Vol. 3, pp. 1690ff; Cmd. 2525, (London: H.M.S.O., 1925); A.J.I.L., Supp. Vol. 20, 1926, p. 21 et. seq.

[140] This Note purported to give Germany a special status under Article 16 of the Covenant. The German Government could allege that it could not participate in any military sanction because of its disarmed status. The Collective Note stated: "[T]he obligations resulting from the said article [i.e., Article 16] on the Members of the League must be understood to mean that each state Member of the League is bound to cooperate (continued on page 131)

(7) Treaty between France and Pland (Annex F, No. 2); (8) Treaty between France and Czechoslovakia (Annex F, No. 3); and (9) a Final Protocol of the Locarno Conference.

Consider some of the claims made by the Locarno Treaties in regard to their relationship with the Covenant of the League of Nations. The preamble to the Rhine Pact (Annex A) asserts that the treaty provisions were "[a]nimated ...with the desire of giving to all the signatory powers concerned supplementary guarantees within the framework of the Covenant of the League of Nations". This claim is amply borne out by a careful analysis of the other provisions of the Treaty. For instance, the obligation not to resort to war against each other exempted actions in pursuance of Article 16 of the Covenant,[141] while, in cases where two parties to a dispute failed to accept the recommendations of a conciliation commission, the treaty required that the question be brought before the Council of the League of Nations which would then deal with it in accordance with Article 15 of the Covenant.[142] Moreover, any allegation by

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140 (continued) loyally and effectively in support of the Covenant and in resistance to any act of aggression to an extent which is compatible with its military situation and takes its geographical position into account". In view of the interpretative resolution on Article 16 in 1921, the necessity of the substance of this Note is rather doubtful.

141 Rhine Pact, Art. 2.

142 Art. 3.

a signatory of the Rhine Pact that Article 2 of the Pact or Articles 42 or 43 of the Treaty of Versailles had been breached was to be brought before the Council of the League of Nations.[143] According to Article 7, "[t]he present treaty, which is designed to insure the maintenance of peace and is in conformity with the Covenant of the League of Nations, shall not be interpreted as restricting the duty of the League to take whatever action may be deemed wise and effectual to safeguard the peace of the world". This Article was tailored to respect the universal jurisdiction of the League under Articles 3(3), 4(4) and 11 of the Covenant. Under Article 8 of the Rhine Pact, the League was to have the power, by a two-thirds majority, to terminate the entire Locarno regional security arrangement on the ground that the League of Nations had acquired sufficient strength to enable the universal organization to protect any of the Rhine Pact powers from external aggression.

The assertion that the Locarno Treaties were conceived in the League spirit[144] is essentially correct, but it is a mild and modest one that hardly portrays the extent to which the provisions of these treaties were subordinated to the principles, obligations, laws and procedures of the

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[143] Art. 4.

[144] Eduard Benes, "After Locarno: The Problem of Security Today", Foreign Affairs, Vol. 4, No. 2, January 1926, pp. 62-72.

League of Nations and its Covenant.[145] It has been well said in respect to the Rhine Pact that "[n]ever did an international agreement concluded outside Geneva base itself so completely on the principles and the actual mechanism of the League".[146] Another scholar writes: "Supporters of the League had indeed a double motive for satisfaction.... Every line of the pacts was based upon the [Geneva] Protocol [of 1924][147] or the Covenant. Every provision for their application depended in the last resort on action by the Council. What had been planned at Locarno could be fulfilled nowhere else than at Geneva".[148] Sir Austen Chamberlain was quite sincere when, speaking before the Thirty-seventh Session of the League Council on the occasion of the deposit of the Locarno Treaties in the Archives of the League, he remarked that "in placing these documents under the guardianship of the League and attributing to the League all the authority which is therein specified... we have made a contribution

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[145] Bruce Williams, State Security and The League of Nations, (Baltimore: 1927), Ch. 6, esp. pp. 219-226.

[146] H.W. Harris, "Locarno: A European View", Annals of the Association of American Political and Social Sciences, Vol. 126, No. 215, 1926, p. 160.

[147] P.J. Noel Baker, The Geneva Protocol for the Pacific Settlement of International Disputes, (London: 1925).

[148] F.P. Walters, A History of the League of Nations, (London: 1967), p. 291. See also J. R. de Orue y Arregui, "Le Regionalisme dans L'Organisation Internationale", Hague Recueil, Vol. 53, 1935 (III), pp. 49-50.

which... will be acceptable to the League towards the support and increase of its authority and strength".[149]

If the commitment to the League principles, obligations and procedures was as total as the preceding account has demonstrated, one would not normally expect a disjuncture to exist between the two types of organization; after all, the Locarno Powers provided the leadership of the Geneva universal organization. Long ago, Sir Alfred Zimmern warned students of the League of Nations to always bear in mind that "the external facts, the details of machinery and organization, are not the essential facts for the understanding of the problems which the League exist to solve", and that "the essential facts are in the realm not of machinery but of politics and psychology".[150] This warning suggests that when examining the degree of congruity and incompatibility in the League-Locarno Pact relationship, we must move beyond a mere constitutional and legal analysis. It also implicitly suggests that the analyst should interpret this relationship in a realist manner that shows an understanding of the character and nature of international power politics. This warning has a logic of its own. It is certainly conceivable that a regional organization not in immediate or

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[149] L.N.O.J., 7th Yr., No. 2, February 1926, p. 179.

[150] Sir Alfred Zimmern, The League of Nations and the Rule of Law, 1918-1935, p. 9.

initial contravention of the terms of the Covenant could, after a lapse of years, develop in such a way as to contravene those provisions. The way an organization operates is sometimes different from the way the constitution says it ought to function. This is especially so in international organizations of politically competitive states where decisions are made largely on the basis of national interests. It is indeed incumbent upon any analyst of the relationship between the League and the Locarno regional security system to examine, to the extent that it is possible, the actual operational conduct of the Locarno Pact signatories as members of the larger collectivity - the League of Nations. Due allowances have to be made for the difficulty of distinguishing the behaviour of Great Britain, France, Germany, and Italy as the leading and politically most important members of the League from their behaviour in their capacity as members of the Locarno regional organization.

At the bottom of the argument that the Locarno Pact, as a regional security system, usurped the powers and functions that constitutionally belonged to the League of Nations is partly the implicit acceptance of the criterion of "capability" for judging the compatibility of the regional with the universal organization.[151] While the Little Entente and

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[151] See Commission to Study the Organization of Peace, Regional Arrangements for Security and the United Nations, (1953), p. 33; Quincy Wright in Proceedings, A.S.I.L., 1955, p. 57.

the Balkan Entente[152] were small-states regional organizations incapable of posing real challenges to the League of Nations, supported firmly and genuinely by the political heavyweights like Britain, France, Germany and Italy, the Locarno system, composed of the same powerful states, had the capability to do so. A historian of the League, Walters, portrays vividly the alleged consequences for the Geneva institution of the secret meetings of the Locarno powers. According to him, the so-called "Locarno tea parties" or "hotel talks" were used to discuss not only the West-Russian relations, but also to decide what issues were to be placed on the League agenda and to prevent issues which might prove embarassing to any member of the Locarno group from being discussed in the League Council. Walters concluded:

The result was naturally a loss of corporate sentiment

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[152] The Balkan Pact was drawn up in 1934. Its signatories, Greece, Yugoslavia, Rumania and Turkey, undertook "to assure respect for contractual agreements already existing and the maintenance of present territorial boundaries in the Balkans" and "to mutually guarantee the security of all their Balkan frontiers". They pledged themselves "to agree upon measure to be taken in case of eventualities capable of affecting their interests". The Pact of February 9, 1934 instituted no machinery for consultation but this was rectified in November 1934 with the establishment of a Permanent Council of Foreign Ministers, an Advisory Economic Council "for the progressive coordination of the economic interests of the four states", and a Secretariat. See L.N.T.S., Vol. CLIII, No. 3514, p. 153; Hudson, International Legislation, Vol. VI, pp. 634, 640; For an account of the Balkan Conferences, see M.A. Caloyanni, "The Balkan Union, The Balkan Conferences, and the Balkan Pact", T.G.S., Vol. 18, 1932, pp. 97-108; Vol. 19, 1933, pp. 89-101; R.J. Kerner and H.N. Howard, The Balkan Conferences and the Balkan Entente, 1930-1935, (Berkeley: University of California Press, 1936).

> in the Council, and the loss of cohesion as between the Secretariat and the delegations. Most serious of all, the Covenant itself seemed to be in danger of oblivion. The Locarno group was to some extent a re-embodiment of the old Concert of Europe; it reached its conclusions, not by respecting the principles, nor by using the methods, of the League, but by finding diplomatic compromises between the wishes and interests of the great powers.[153]

This indictment of the Locarno security system vis-a-vis the League is apparently intended to cast doubts on the hypothesis of congruity and compatibility which a comparative constitutional analysis of the two organizations has established beyond any doubt. On the charge of secret meetings it is not necessary to say more than that secrecy and intrigues have always been part and parcel of international diplomatic behaviour and that it is unrealist to expect that parliamentary (open) diplomacy, popularized by the emergence of permanent international organizations, has superseded the traditional methods and style of inter-state relations. As the Anglo-French domination of the League existed before the creation of the Locarno Pact, it follows that the establishment of the Locarno Pact could not have accounted for the behavioural pattern described by Walters. At best, it could be said that the Locarno arrangement provided a convenient machinery for the big power management of the League of

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[153] F.P. Walters, op. cit., p. 342. See also, "Great and Small States at Geneva", The Round Table, Vol. 17, 1926-1927, pp. 684-700; C. Howard-Ellis, The Origin, Structure and Working of the League of Nations, (London: Allen and Unwin Ltd., 1928), p. 144.

Nations system. The truth is that, if the Locarno Pact did not exist, the leading powers of the League would have invented a machinery for securing greater coordination and consultation as the Council became unwiedly following the admission of a group of lesser states. Furthermore, as one commentator has quite rightly pointed out, with the formation of the Locarno regional security system and the consequent assumption by Germany of League membership, "[t]he League, which had begun on the periphery of international life was now fast moving towards the center".[154] This does not mean that Geneva determined the policy of its members, but that its members used the organization to implement their goals in ways deemed consistent with the Covenant. It was not by mere accident that the growing political importance of the League began in the very year the Locarno Treaties were concluded.[155] As to the domination of the League system by Britain, France, Germany and Italy, it was to be expected. No dispute of any importance was ever settled in Geneva other than by agreement among the Great Powers. The Permanent Court of International Justice was being realistic when it observed in the Mosul case: "It is hardly conceivable that

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[154] Arthur Sweetser, "The First Ten Years of the League of Nations", International Conciliation, No. 256, 1930, p. 19.

[155] See William Rappard, Uniting Europe: The Trend of International Cooperation Since the War, (New Haven: Yale University Press, 1930), pp. 201-205.

resolutions on questions affecting the peace of the world could be adopted against the will of those amongst the Members of the [League] Council who, although in a minority, would, by reason of their political position, have to bear the larger share of the responsibilities and consequences ensuing therefrom".[156] That this was so is a manifestation of big power hegemony at Geneva, an inevitable and perhaps a necessary evil which the League had to put up with. The point cannot be overemphasized that the political life of the League was determined primarily by the interests of Britain and France as leaders of the universal organization, and, only incidentally, as members of the Locarno Pact. It is not clear to what extent the policy of the major powers would have been different from what it was if the Locarno Pact had not existed.

It has been well observed that "[t]he whole of the Geneva procedure is, in fact, a system of détour, all of which lead to one or other of these two issues: agreement or disagreement between Great Britain, Italy, France and Germany".[157] Great power disagreement was no less important than great power agreement; yet there is a tendency to overemphasize the extent and degree of unity among the Locarno

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[156] Hudson, World Court Reports, Vol. 1, p. 741.

[157] Jules Cambon et al., The Foreign Policy of Powers, (New York: Harper and Brothers, 1935), p. 89.

powers, a tendency which predisposes analysts to interpret the anti-League behaviour of the great powers as a manifestation of the Locarno front against the League. There was no such thing as a Locarno front <u>against</u> the League. In the first place, Britain and France interpreted the Locarno Treaties differently. From the British point of view, the guarantees offered under the Locarno Pact were far from being the centre of the agreement but merely an incidental part of a broad policy of reconciliation of Germany with France in particular and with the League members in general.[158] British policy in the League days can be understood with little or no reference to the Locarno obligations. France was certainly far from being satisfied with the Locarno Pact because Britain was prepared to commit herself only to the defense of the West and not of the East of the Rhine. This explains why France never really ceased to regard the League as "another instrument to keep Germany in her place".[159] The anti-revisionist posture of the Locarno security system and, indeed, of the Peace of Versailles, was far from acceptable to Italy. Germany, of course, continued to complain that both treaties emphasized security at the expense of

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[158] Alfred Wolfers, <u>Britain and France between Two Wars</u>, (New York: 1963), pp. 254ff; Sir Alfred Zimmern, <u>op. cit.</u>, p. 400.

[159] Alfred Wolfers, <u>op. cit.</u>, p. 155, 180.

equality.[160] The divergence of views between Britain and France concerning the political problem of Germany's power and position, and the upsurge of revisionist tendencies in both Italy and Germany are evidences of internal strains within the Locarno security system. It should also be pointed out that among the leading powers of the League of Nations system there were different conceptions of the League itself.[161] The "security first" conception was held by France as well as Belgium, the Baltic States and the Little Entente powers. Britain led the group of members which held the "peace first" conception. The defeated powers and the Latin American Republics held the "justice first" view. The German demand for equality, the French obsession with security, the Canadian attempt to emasculate Article 10 of the Covenant, the British policy of eventual reconciliation of Germany and France, and of equilibrium in Europe were thus based upon different calculations arising from different images of the League of Nations. It is interesting to compare the maiden speech of Bourgenois of France and of Lord Curzon in the First Session of the League Council in 1920 for what it reveals about what France and Britain considered to be the

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[160] Jules Cambon et al., The Foreign Policy of Powers, pp. 25-53, 78-101; Clarence A. Berdahl, "Disarmament and Security", Geneva Special Studies, Vol. 3, No. 4, 1932.

[161] William Rappard, International Relations as Viewed From Geneva, (New Haven: Yale University Press, 1925), Ch. 6.

number one purpose of the new organization. According to Bourgenois, the primary purpose was "the practical execution of the clauses of the Treaty of Peace".[162] Lord Curzon spoke of the League as "the expression of a universal desire for a saner method of regulating the affair of mankind",[163] an association whose purpose was "to reconcile divergent interests and to promote international cooperation".[164] This difference in emphasis persisted almost throughout the life of the League.

The Locarno system was certainly much less cohesive than the Little Entente. Given these divergent and conflicting interests of the Locarno powers, it is hardly surprising that, with the remilitarization of the Rhineland by Germany in 1936 on the pretext that the Franco-Soviet Pact of 1935[165] violated the Locarno agreement,[166] the Locarno security system ceased to exist for all practical purposes.

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[162] L.N.O.J., 1st Yr., No. 1, February 1920, p. 19.

[163] Ibid., p. 20.

[164] Ibid., p. 21.

[165] Cmd. 5143, (1936), pp. 26-29; André Geraud, "France, Russia, and the Pact of Mutual Assistance", Foreign Affairs, Vol. 13, No. 2, January 1935, pp. 226-235.

[166] For the German Memorandum of May 25, 1935 on the Franco-Soviet Pact, see Cmd. 5143, (London: H.M.S.O., 1936), pp. 36-39; R.I.I.A., Documents on International Affairs 1935, Vol. 1, (London: 1936), pp. 264-267.

The political dynamics of the international system centred in Geneva can, in the mid-1930's, neither be examined meaningfully in terms of cooperative interactions between the universal and the regional forms of international organization nor in terms of confrontation between them. Neither Britain nor France, the two leading members of the League, put her eggs in either the Geneva or the Locarno basket. Their shifting appeal to the use of one rather than the other reflected a policy of opportunism which showed little respect for neither the League obligations nor the Locarno principles, but amounted to the triumph of national interest. Sir Alfred Zimmern has asserted with considerable perception that "the period from 1930 onwards was characterized by a play of power in the course of which Europe rapidly slipped back from the "new order", not into the nineteenth century but into the eighteenth. Geneva became an immense chessboard on which not only the Great Powers but knights and bishops and multitudinous pawns practiced the art of manoeuvre".[167] The betrayal of the Covenant by France over the Italo-Ethiopian conflict, as could be seen from her half-hearted application of the League sanctions against Italy, not only inflicted irreparable wounds on the League, but also, in the long-run, failed to strengthen significantly the Franco-Italian _détente_, the political pay off France

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[167] Alfred Zimmern, _The League of Nations and the Rule of Law, 1918-1935_, p. 409.

wanted at all cost and believed it achieved in the Franco-Italian agreement of January 7, 1935.[168] Britain's vacillation was equally harmful to the integrity of the League: her emphasis on the notions of "collective maintenance of the Covenant" and "collective obligation" was a calculated deception intended to enable her to evade responsibility and circumvent the League.[169] The international behaviour of the two leading League members during the gravest crisis faced by the organization has been well described in the following manner: "France was willing to give form to the League but would have the substance go to Mussolini, and Britain... sought "sanctioning in principle" but accommodation in fact".[170] The consequence of this duality was "a lack of credibility in the League's posture".[171] Moreover, neither Britain nor France ever thought of using the League to discipline and coerce Germany for the latter's flagrant violation of the

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[168] See George W. Baer, The Coming of the Italian-Ethiopian War, (Cambridge, Mass.: 1967), pp. 62-95; Toynbee, Survey of International Affairs 1935, Vol. 1, pp. 91-108.

[169] Baer, op. cit., pp. 172-210, 327ff; D.F. Fleming, The Cold War and its Origins, 1917-1950, Vol. 1, (New York: Doubleday, 1961), pp. 56-57; For a dissenting view, see William Rappard, The Quest for Peace Since the World War, (Cambridge, Mass.: 1940), pp. 280-283.

[170] Rt. St. J. Macdonald, "Resort to Economic Coersion by International Political Organizations", U. of T. Law Journal, Vol. 17, No. 1, 1967, p. 94.

[171] Ibid., p. 99.

Locarno agreement and the Treaty of Versailles. Although the League pronounced on the German violation of the Treaty of Versailles,[172] it did nothing further. This minimalist action on the part of the major League members neither activated the Stresa front of Britain, France and Italy against German rearmament,[173] nor restored the prestige of the League. In the words of a scholar, the League of Nations had become "a ponderous and rusty apparatus which proceeds on its path with a great deal of creaking and spluttering".[174] The policy of the Locarno Powers was hardly based upon any rule of law; but if Britain and France were willing to jettision the League's rules and ideals and also to leave the authority undeveloped, it was not for the purpose of resurrecting and strengthening the Locarno system, but of appeasing Germany and Italy for whom the Locarno arrangement had become politically meaningless and irrelevant by 1936.

To deny that there was a Locarno front against the

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[172] L.N.O.J., 17th Yr., No. 4, (Part I), April 1936, pp. 311-325, 348.

[173] The Final Declaration of the Stresa Conference states as follows: "The Three Powers, the object of whose policy is the collective maintenance of peace within the framework of the League of Nations, find themselves in complete agreement in opposing, by all practical means, any unilateral repudiation of treaties which may endanger the pace of Europe, and will act in close and cordial collaboration for this purpose". See R.I.I.A., Documents on International Affairs, 1935, Vol. 1, p. 82; Toynbee, Survey of International Affairs, 1935, Vol. 1, p. 161.

[174] Alfred Zimmern, "The Testing of the League", Foreign Affairs, Vol. 14, No. 3, April 1936, p. 383.

League is not to fail to take cognizance of the important fact that the League, in spite of the democratic egalitarianism of its Covenant, was dominated, in practice, by an oligarchy of Britain, France, Germany and Italy. It has been said with great authority that "[t]o discuss the Great Powers in the League is really to discuss the League itself. Without the smaller States the League would be an oligarchy - perhaps a tyranny; but it would still exist and function; it would still be a League. But without the Great Powers the League would be nothing more than a debating society".[175] If, therefore, great power leadership was in indispensable to the successful operation and management of the Geneva-based international system, and if the smaller and less powerful states "tended to stress rather than erase the distinction between Great and Small States in the League... [in order]... to throw the responsibility for the League's failure on the Great Powers and to call upon them for more constructive leadership",[176] then one must regard as functional for the Geneva international system a machinery which provided another opportunity for deliberation and collaboration among the essential members of the League of Nations. This caveat

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[175] Sir Alfred Zimmern, "The Great Powers in the League of Nations", in <u>Pacifism Is Not Enough</u>, (London: Allen and Unwin, 1935), p. 54.

[176] William E. Rappard, "Small States in the League of Nations", in <u>Pacifism Is Not Enough</u>, p. 4.

is not intended to suggest that the anti-League behaviour of the Locarno powers can be wholly excused and exonorated by drawing attention to the significance for the League of the essential nature of the membership of the Great Powers. It merely draws attention to the fact that any indictment of the Locarno powers must be mitigated by considerations of this factor.

5. Concluding Comments

International political relations between 1919 and 1939 cannot be adequately analyzed and explained in terms of the dimensions of conflict and collaboration between the universal and the regional organizations. The politics of universal-regional relationship was much less of crucial importance than it has been in the United Nations international system.[177] When the claim is made that, for most part of the period between 1920 and 1939, the League of Nations was the dominant instrumentality for peace (it certainly was up to 1931 in a real sense,[178] and from 1931 only in the sense that there was no other organization that could provide an alternative to it), there is no intention of suggesting that the League was an unqualified success. The failure of the League was

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[177] See Chapter VII below.

[178] Viscount Cecil, The Great Experiment, (1941), p. 330 ; David Wainhouse, International Peace Observation, (1966), p. 78. F.P. Walters, A History of the League of Nations, (1967).

the failure of the big powers to deal with individual big powers which disregarded with impunity the law of the Covenant - Japanese aggression in Manchuria, Italian annexation of Albania and forceful conquest of Ethiopia, German annexation of Austria and Czechoslovakia and Russian aggression against Finland. It is essential to bear in mind that the behaviour of the Great Powers in the League days can be explained with only a peripheral reference to their membership in the Locarno regional security system.

It has been shown that the regulative and mediatory force of the League was not seriously threatened by the Monroe Doctrine and the Inter-American System. There was faulty collaboration between the League and the American regional organization, but confrontation based upon a claim by either of the third intervening parties of exclusive jurisdiction was notably absent. Mutual deference did exist. The League's hesitancy and caution resulted from the hard political reality that disputes among its Latin American members were taking place in the backyard of a powerful nonmember of the League, the United States. Washington's cooperation, even if not overtly enthusiastically given, reflected an acute awareness of the political fact that many of her geographically protected neighbours were members of the League. Perhaps more importantly, it reflected the fact that "the United States has gradually become a strongly "Associated Power" _vis-a-vis_ the League, regardless of the

issue of formal membership",[179] and, hence, the increasing belief by the policy makers in Washington that the League settlement of intra-Western Hemisphere disputes need not be incompatible with the Monroe Doctrine.[180] It may also be pointed out that the disputes the League attempted to settle were connected with international boundaries.[181] Apart from the fact that such disputes among the Latin American Republics created intolerable situation in the Americas, they hardly interfered with the interests of the United States. It is hardly surprising that the U.S. placed no obstacle in the way of League activities, even though Washington would have liked the League to stand aloof. As we shall see later in this study, Washington is much less disposed to tolerate the "intervention" of the United Nations in the affairs of the Western Hemisphere simply because such "intervention" permits the Soviet Union, a permanent member of the Security Council, to "interfere" in the political backyard of the United States.[182]

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[179] Felix Morley, The Society of Nations, (Washington: Brookings Institution, 1932), p. 256.

[180] Benjamin Williams, American Diplomacy: Policies and Practice, (New York: 1936), p. 58; Stephen P. Duggan, "Latin America, the League and the United States", Foreign Affairs, Vol. 12, 1934, pp. 281-293.

[181] A great majority of the disputes that came before the League were boundary disputes. See David Wainhouse, International Peace Observation, (Baltimore: 1966), pp. 7, 11-82, 94-101.

[182] See Chapter VII below.

The experience of faulty collaboration between the League and the Inter-American System pointed out the need for a formal and institutionalized relationship between them. Colombia articulated this need clearly in 1934. In a letter to the President of the Fifteenth Session of the League Assembly, the Colombian delegate drew attention to "the necessity of establishing a link between the League of Nations and the Pan-American Union", as "the Pan-American Union is in no way opposed to the principle of universality of international organization towards which the League of [N]ations is happily progressing".[183] Colombia would like a League Committee to examine "the possibility of each of the two institutions appointing official observers to follow the work of the other, and the desirability of drawing up a declaration of the great principles of international law common to both".[184] The League Assembly, in its Sixteenth Session, resolved to postpone the examination of the proposal pending the publication of a similar study commissioned by the Pan-American Conference in December 1933.[185] It, however, authorized the Secretary-General "to maintain such relations for mutual information with the Director-General

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[183] L.N.O.J., Sp. Supp. No. 139, pp. 93-94, Annex 5.

[184] L.N.M.S., Vol. 14, No. 9, September 1934, p. 209.

[185] J.B. Scott (ed.), International Conference of American States, First Supplement, 1933-1940, p. 18.

of the Pan-American Union as may prove desirable".[186]

The Inter-American System was also concerned with the search for greater collaborative efforts between it and the League of Nations. A resolution of the Inter-American Conference for the Maintenance of Peace at Buenos Aires in 1936 urged the American States members of the League "to cooperate with the League of Nations in the study of projects for the coordination of [pacific] instruments with the Covenant of the League of Nations". It further urged the American States which were not members of the League to "cooperate with the League of Nations in the measures which it may adopt to prevent war or to settle international conflicts by pacific means, whenever the respective legal systems of the said States permit".[187]

The relationship between the "universal" system of the League and the "regional" arrangement of the Little Entente was complementary.[187a] There is no need to attach significance to the fact that the draftsmen of the three bilateral treaties which created the Little Entente failed to place the regional arrangement explicitly, by constitutional provisions, within the framework of the League at the time the Little

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[186] <u>L.N.O.J.</u>, Special Supplement, No. 139, p. 95.

[187] Both quotations are from Resolution XXIX. See J.B. Scott (ed.), <u>op</u>. <u>cit</u>., p. 162.

[187a] Jose Ramon de Orue y Arregui, "Le Regionalisme dans L'Organisation Internationale", <u>Hague Recueil</u>, Vol. 53, 1935 (III), pp. 1-93 at pp. 56-64, 89-90; V. M. Radovanovitch, "La Petite Entente", <u>R.G.D.I.P.</u>, Vol. 40, 1933, p. 716 et seq.

Entente was established.[188] The Little Entente powers were fanatically devoted to the preservation of peace on the basis of the new territorial status quo and the sanctity of the Peace Treaties. The convergence of primary interests of both the Little Entente and the League of Nations made their complementary relationship not surprising but inevitable.[189]

The League-Locarno relationship cannot be analyzed in one-dimensional terms. The lack of cohesion in the Locarno group, the divergent conception of the value of the League among the Locarno members and the political difference between Britain and France on the German question make it unrealistic to hypothesize the dimension and nature of political conflict at Geneva as one between the universal system of the League and the regional arrangement of the Locarno, and one in which Geneva existed in the framework of Locarno. It is equally unrealistic to deny that the relationship did exhibit some of this tendency. The important point to bear in mind is that the League was largely dominated by the political interests and preferences of the Great Powers whose political actions can be explained with only a passing reference to the Locarno regional security system.

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[188] The Pact of Organization of the Little Entente, 1933 put the Little Entente within the framework of the League of Nations by explicit constitutional provisions. See Article 10. L.N.T.S., Vol. 139, p. 233.

[189] Compare George Liska, International Equilibrium, (Cambridge, Mass.: 1957), Ch. 5.

CHAPTER IV

REGIONALISM AT SAN FRANCISCO
THE CHARTER LAW OF UNIVERSAL-REGIONAL RELATIONSHIP

1. Introduction

It is well known that the British war-time leader, Winston Churchill, and the U.S. President, Roosevelt, were, up to the spring of 1943, strongly in favour of the organization of the post war international system on a regional basis.[1] According to Churchill, "[t]he central idea of the structure was that of a three-legged stool - the World Council resting on three Regional Councils".[2] By October of the same year, these two leading world leaders had apparently changed their mind. Along with the leaders of the Soviet Union and China, President Roosevelt and Prime Minister Churchill recognized and accepted the "necessity of establishing at the earliest practicable date a general international organization, based on the principle of sovereign equality of all peace-loving

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[1] Winston Churchill, The Second World War, Vol. 4: The Hinge of Fate, (Boston: Houghton Mifflin Company, 1950), pp. 802-805; Cordell Hull, The Memoirs of Cordell Hull, Vol. 2, (New York: Macmillan Company, 1948), p. 1640; Geoffrey L. Goodwin, Britain and the United Nations, (New York: Manhattan Publishing Company, 1957), pp. 4-13; Lawrence D. Weiler and Anne P. Simons, The United States and the United Nations, (New York: Manhattan Publishing Company, 1967), p. 20.

[2] Churchill, op. cit., p. 804.

states, and open to membership by all such states, large and small, for the maintenance of international peace and security".[3] This Moscow Declaration was conspicuously silent on the question of regionalism, and, as if to emphasize this fact, Cordell Hull, in a statement reminiscent of President Wilson's public utterances earlier in the century, told the joint session of the U.S. Congress that "[a]s the provisions of Four-Nation Declaration are carried into effect, there will no longer be need for spheres of influence, for alliances, for balance of power, or any other of the special arrangements through which, in the unhappy past, the nations strove to safeguard their security or to promote their interests".[4]

The Dumbarton Oaks Proposals,[5] which embodied the results of the four-power discussion on a General International Organization, accorded regional organizations a minor and dependent existence. Russell recalls that "[a]t the beginning of the talks, Great Britain declared that all regional organizations should be auxiliary to, consistent with, and under the supervision of the world body when matters of world security were involved; hence the general

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[3] R.I.I.A., United Nations Documents 1941-1945, (London: 1946), p. 13; U.N. Yearbook 1946-1947, p. 3.

[4] Cordell Hull, *op. cit.*, pp. 1314-1315.

[5] Cmd. 6560 (1944).

character of the global organization should be decided before the regional aspects were discussed. The United States and the Soviet Union agreed".[6] The section on regional arrangements in the Dumbarton Oaks Proposals states as follows:

> Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the Organization. The Security Council should encourage settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference from the Security Council.
>
> The Security Council should, where appropriate utilize such arrangements or agencies for enforcement action under its authority but no enforcement action should be under regional arrangements or by regional agencies without the authorization of the Security Council.
>
> The Security Council should at all time be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.[7]

Every account suggests that the problem of universal-regional relationship was "the crux of the Conference".[8]

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[6] Ruth Russell, A History of the United Nations Charter, (Washington: 1958), p. 472.

[7] Cmd. 6560 (1944).

[8] Arthur Vandenberg, Jr. (ed.), The Private Papers of Senator Vandenberg, (Boston: 1952), p. 191; Yuen-li Liang "Regional Arrangements and International Security", T.G.S., Vol. 31, 1946, p. 226; Alberto Lleras Camargo, "Regionalism and the International Community", in Carnegie Endowment for International Peace, Perspectives on Peace 1910-1960, (New York: 1960), pp. 107-119; Russell, op. cit., p. 688 et. seq.; Hanna Saba, "Les Accords Regionaux dans la Charte de L'O.N.U.", Hague Recueil, Vol. 80, 1952 (I), pp. 639-716, at p. 674.

The fundamental problem then, as it is now, was "to find a formula which will reasonably protect legitimate regional arrangements without destroying the overall responsibility of united action through the Peace League and without inviting the formation of dangerous new "regional spheres of influence" etc.".[9] The extent to which the Charter law of universal-regional relationship may be said to represent this ideal formula is the subject of our inquiry in this chapter.

At San Francisco, a thousand and two hundred amendments were proposed to the Dumbarton Oaks Proposals,[10] many of them dealing with the relationship between the projected world organization and regional arrangements. The Report of the Canadian delegation to the Conference cogently summarizes the major types and categories of amendments which bear on the problem of universal-regional relationship:

> Three sorts of amendments to these [Dumbarton Oaks] proposals were submitted to the Conference. Australia, Belgium and Venezuela wanted to limit the right of a Great Power to veto regional enforcement action. Other delegations, chiefly those of Latin American Republics and of the League of Arab States, wanted to increase the autonomy of regional arrangements. The purpose of the third group of amendments was to ensure that the Charter did not interfere with the operation of pacts of mutual assistance directed against enemy states.[11]

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[9] Vandenberg Jr. (ed.), _op. cit._, pp. 189, 190, 191, 198.

[10] Cmd. 6666 (1945), p. 21.

[11] _Report of the United Nations Conference on International Organization_, (Ottawa: Conference Series, 1945, No. 2), p. 41.

As we shall see later, the explicit declaration of the right of self-defence in the form of Article 51 was the answer to the political demands articulated in the first and second groups of amendments, while the third group of amendments was accepted by permitting an exception to the general rule prohibiting regional enforcement action without the authorization of the Security Council.[12] Two more minor amendments complete the picture. One adds "resort to regional agencies or arrangements" to the list of means of peaceful settlement of disputes: under the second amendment members of the United Nations which are parties to regional organization undertake to settle their disputes through their regional organization before referring them to the world body.[13]

2. A Functional Interpretation of the Charter Law of Universal-Regional Relationship

Much of the confusion arising from interpretations of the universal-regional relationship in the U.N. Charter derives from the mistaken tendency to differentiate regional organizations on the basis of form. Thus, it is sometimes contended that collective self-defence organizations like

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[12] See Hanna Saba, "Les Accords Regionaux dans la Charte de L'O.N.U", Hague Recueil, Vol. 80, 1952 (I), pp. 677-683.

[13] Liang, "Regional Arrangements and International Security", T.G.S., Vol. 31, 1946, p. 227. Dept. of State, Report to the President on the Results of the San Francisco Conference, (1945), p. 85, 104.

the NATO, SEATO, the Warsaw Pact and the ANZUS Treaty Alliance cannot be regional organizations within the context of Chapter VIII of the Charter.[14] It is believed that a proper interpretation of Articles 51-54 demands the recognition of the fact that the Charter differentiates regional organizations and determines their relationship to the United Nations on the basis of the functions they are performing at a particular time.[15] For each of the functions posited in Articles 51-54, the Charter establishes a set of essential rules of behaviour for any regional organization operating in that particular functional capacity. This, in a nutshell, is the essence of the functional approach to the analysis of the law of universal-regional relationship.

This functional analysis has the following advantages which highly recommend it. First, it enables us to define the obligations the Charter imposes or the privileges bestowed on member states according to whether the regional organizations to which they belong are taking enforcement actions authorized by the Security Council, exercising their right of collective and individual self-defence, taking enforcement action against "enemy" states or acting as a third party in the settlement of disputes. Second, a func-

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[14] See Chapter I above.

[15] Bowett, Self-Defence in International Law, (1958), pp. 215-223. See also Michael Akehurst, "Enforcement Action by Regional Agencies, With Special Reference to the Organization of American States", B.Y.B.I.L., Vol. 42, 1967, pp. 180, 184; Asbjorn Eide, "Peace-keeping and Enforcement by Regional Organizations", Journal of Peace Research, Vol. 3, No. 2, 1966, p. 125.

tional interpretation of the provisions of Articles 51-54 enables us to avoid the Beckett-Kelsen controversy about whether or not a collective self-defence organization is a regional arrangement within the meaning of Articles 52-54.[16] In view of the fact that a collective self-defence organization is not prohibited by the Charter from settling disputes among its members, there is no reason to suggest that a collective self-defence organization cannot operate in the functional field defined in Articles 52-54. Thirdly, it should be borne in mind that the Charter does not provide for a formal procedure whereby regional arrangements could be brought into relationship with the United Nations. Admittedly, the Charter entreated, in fact obligated, adherents to regional arrangements to conduct themselves in accordance with the principles of the United Nations; but it is only if they did so that any regional arrangement could function within the framework of the United Nations. It may be recalled that, at San Francisco, some delegates sought a definite statement on the question of what body is to pronounce on whether regional organizations and their activities are consistent with the purposes and principles of the Charter. For instance, the New Zealand delegation suggested that the words "are consistent with the Purposes and Principles of the Organization" be deleted and replaced

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[16] See Chapter I above.

by the following words: "are approved by the Organ as being consistent with its purposes and principles".[17] The amendment was rejected. Similar proposals jointly sponsored by Chile, Colombia, Costa Rica, Equador and Peru suffered the same fate.[18] Thus, the compatibility of any regional organization with the United Nations can only be judged by examining the extent to which the regional organization conforms with the set of behavioural rules the Charter posits for the performance of specific functions.

The logic of functional interpretation demands the assumption that the authorization principle of Article 53 be read in the light of Article 51. The legal effect of Article 51 is that it overrides Article 53 prohibiting regional arrangements from taking enforcement action without the authorization of the Security Council.[19] Of course, it could be argued, and indeed, has been argued, that such an interpretation reduces the authorization principle of Article 53 to futility. One scholar observed that "[i]t would seem to be a technical fine point to say that a group of states can act independently of the Security Council under Article

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[17] Doc. 2, G.14(f); U.N.C.I.O. Doc., Vol. 3, p. 488; Report on the Conference held at San Francisco, (Wellington: 1945), p. 96.

[18] Doc. 576, 111/4/9; U.N.C.I.O. Doc., Vol. 12, p. 688.

[19] Stone, Legal Controls of International Conflict, (1959), p. 262; Kelsen, The Law of the United Nations, (1964), p. 328; Ross, Constitution of the United Nations, (1950), p. 172.

51 (until the Council acts) and that the same group cannot act without authorization of the Council if they constitute a regional arrangement; but it could also be said that Article 53 has little meaning without such an interpretation".[20] It should be remembered that, in 1945, it was envisaged that aggression would not take place, that if it did, the collective might of the Great Powers acting together would be more than sufficient to deal with it, and that all military action would be sponsored by the Security Council which would make use of regional facilities whenever possible. At the same time, it was understood that if state X were attacked, it could not be expected to await United Nations authorization before responding in self-defence.[21]

It follows logically from a functional interpretation of Articles 51-54 that it is rather superfluous for any regional organization to define expressly its relationship to the United Nations in terms of specific constitutional provisions of the U.N. Charter. As has been indicated, the relationship between the United Nations and a regional organization is defined according to the specific function the regional organization is performing at a particular time.

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[20] Clyde Eagleton, "The North Atlantic Defence Pact", C.J.I.A., Vol. 3, No. 2, 1949, p. 29.

[21] Kelsen, "Collective Security and Collective Self-Defence Under the Charter of the United Nations", A.J.I.L., Vol. 42, 1948, p. 785.

As long as the regional organization adheres strictly to the rules of behaviour defined by the U.N. Charter for the specific function, it can be said to be operating consistently with the United Nations

3. The Charter Law of Universal-Regional Relationship

Consistent with the functional approach outlined above, it is suggested that we recognize the behaviour of regional organizations in two major functional capacities and not only outline the rules of behaviour set out for each function but also differentiate between those rules on the basis of the scope of autonomy they permit the regional organization to enjoy in relation to the United Nations.

The various sections of the U.N. Charter dealing with the relationship between the universal and regional organizations can be divided into two categories, namely, those concerned with the pacific settlement of local disputes and those relating to the permissible use of force by a regional organization in self-defence or against an "enemy" state. This study takes cognizance of regional organizations in the functional fields of peaceful settlement of disputes and collective self-defence against attack. It is believed that it is not necessary to discuss the two "enemy" state clauses in the context of a general analysis of universal-regional relationship. It is, nevertheless, proper to pass a few comments on those provisions of the Charter.

(a) <u>The Great Powers and the Use of Force Against "Enemy" States</u>

Articles 53 and 107 envisage the possibility of establishing regional organizations to deal with the renewal of aggressive policy on the part of any "enemy" state. The drafting history of these Articles shows that the regional organizations contemplated were those of "the Governments having responsibility for such action", which were understood to be the Great Powers. It may be recalled that at San Francisco, Britain, the United States and the Soviet Union, desirous of implementing their mutual defence pacts directed against the enemy states of the 1939-1945 war, particularly against Germany, proposed an amendment in order to ensure that the enforcement action under such treaties would not be subject to prior authorization by the Security Council.[22] These proposed amendments became the exception to the authorization principle of Article 53 in addition to the related provisions of Article 107. The New Zealand commentary on the Charter recorded the general feeling in 1945 about these "enemy" states clauses: "It cannot perhaps be suggested that this is an ideal arrangement, but it was generally conceded that it was the best that could be made in the circumstances as they exist, and it was accepted accord-

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[22] Doc. 2, G/14(p); Doc. 2, G/14(v); Doc. G/14(w)(1); U.N.C.I.O. Doc., Vol. 3, pp. 575, 598-599, 601. See Also Russell, op. cit., pp. 690-692. Dept. of State, Report to the President, p. 106.

ingly".[23] Thus, under Article 53, an action of a regional arrangement of the Great Powers directed against the renewal of aggressive policy on the part of an enemy state is given a status similar to that of a collective self-defence organization under Article 51. There is, however, an important difference. As the Commission to Study the Organization of Peace pointed out in its Eighth Report, "the exception in Article 53 seems to have been retained even after Article 51 was drafted because the action authorized by these arrangements might in some instances have gone beyond "collective self-defence if an armed attack occurs against a Member of the United Nations" and also because the parties to the World War II alliances may have wished to escape the ultimate control of the Security Council provided for collective self-defence arrangements under Article 51".[24] Thus, whereas the self-defensive measures taken under Article 51 can, theoretically, be terminated by the Security Council on its own initiative at any time, under Article 53, action taken by a regional organization of Great Powers against the renewal of aggression by an enemy state cannot be terminated by the United Nations until a request has been received from "the Governments having responsibility for such

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[23] Report on the Conference at San Francisco, (Wellington: 1945), p. 96.

[24] Regional Arrangements for Security and the United Nations, (New York: 1953), p. 23.

action. In fact, on a strict interpretation of Article 107, the Security Council has no possible function. Hence, together, the two enemy state clauses confer on the Great Powers a sphere of legal competence to resort to permissible forecful action against any aggressive enemy state. To the extent that this freedom of action, unrestricted by the U.N. Charter, is not a general right applicable to all the U.N. members, and, furthermore, to the extent that the provisions of Article 53 and 107 deal only with matters arising out of the second world war, there is adequate justification for not treating the problems they raise in the context of a general legal analysis of the relationship between the United Nations and regional organizations. There is another reason for neglecting these provisions: their relevance today is much disputed.

On the legal validity of the enemy state clauses against those ex-enemy states which have signed peace treaties and have become members of the United Nations, in particular, Japan[25] and Italy,[26] Kelsen argues that, from a legal standpoint, membership of an enemy state in the United Nations neither terminates nor invalidates the legal competence of the Great Powers under Articles 53 and 107 _vis-a-vis_ an enemy

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[25] Japanese Association of International Law, _Japan and the United Nations_, (New York: 1958).

[26] Italian Society for International Organization, _Italy and the United Nations_, (New York: 1959).

state which renews its policy of aggression:

> [T]he ex-enemy states are, in principle, outside of the law of the Charter. This outlawry is permanent; for according to the wording of Article 107, it is not terminated by the admission of an ex-enemy state to the Organization. The definition of the term "enemy state" in Article 53, paragraph 2, applies also to states after they have become Members of the United Nations. All this was probably not intended and is politically hardly justifiable; but the text of the Charter does not correspond to the probably more reasonable intention of its authors.[27]

This interpretation ignores the fact that under Article 2(1), members of the United Nations are sovereign legal equals. If Article 107 remains valid in respect of an ex-enemy state which has signed a peace treaty and has been admitted to the United Nations, a new element of inequality would have been introduced among U.N. members in addition to the political inequality expressly recognized in Articles 27(3) and 108.[28]

Are the enemy state clauses relevant to Germany which has neither signed a peace treaty nor become a member of the United Nations? Recently, when the Soviet Union threatened to invoke these enemy states clauses against the Bonn Republic, the British and the U.S. Governments responded by saying that the provisions are today politically irrelevant.[28a]

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[27] Kelsen, The Law of the United Nations, (1964), pp. 813-814.

[28] Bentwich and Martin, Commentary on the Charter of the United Nations, (1969), p. 114.

[28a] The West German Government promptly called for the repeal of the enemy state clauses. See The Times (London), Sept. 16, 1968, p.4.

As West Germany is a member of NATO,[29] the British and American response can be understood only in the context of the balance of power politics between the East and the West. It has no force in law. One can detect a tension between the legal and the political dimensions of the problem of the relevance of Article 107 to West Germany in the view of the authors of the Germany Volume on National Studies on International Organization. Droge, Münch and Von Puttkamer wrote: "The effect on Germany of Article 107 of the United Nations Charter is quite unclear.... It may thus be expected that NATO partners, which have undertaken to deal with questions concerning Germany according to the principles of Article 2 of the Charter, would take a stand in the United Nations against countries making demands on Germany or taking measures against it that were inconsistent with those principles".[30]

It is doubtful if the enemy state clauses are still legally valid or politically relevant in respect of ex-enemy states like Italy and Japan which have signed peace treaties and have been admitted to the United Nations. The British commentary on the Charter noted with authority: "It might...

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[29] Cmd. 9304 (1954); M.E. Bathust and J.L. Simpson, Germany and the North Atlantic Community: A Legal Survey, (London: Stevens, 1956), pp. 169-172.

[30] The Federal Republic of Germany and the United Nations, (New York: Manhattan Publishing Company, 1967), pp. 13, 14.

be assumed that, if any such [enemy] state were to be admitted to the Organization, the necessity of making special arrangements to prevent aggression on its part would disappear, since it could only be admitted if all the Permanent Members of the Security Council and two-thirds of the Members of the General Assembly were convinced that it qualified under Article 4".[31] Although there is a general support for this interpretation among international legal scholars,[32] it is felt preferable by some scholars to clarify the whole question and thus remove all doubts by means of a technical amendment to those provisions that are likely to be interpreted as discriminating against the ex-enemy states admitted to the United Nations.[33]

(b) Collective Self-Defence

The Dumbarton Oaks Proposals prohibited regional enforcement action which has not been authorized by the Security Council. This authorization principle which reflects the subordination of regional organizations to the United Nations

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[31] Cmd. 6666 (1945), para. 41.

[32] Stone, op. cit., p. 254; Bentwich and Martin, op. cit., p. 114, 186.

[33] See generally the Cheng-Green Memorandum, I.L.A., Report of the 46th Conference, Edinburgh, 1954, Appendix 5, pp. 160-183. Tabata of Japan went beyond the Cheng-Green proposals when he suggested in 1958 that the discriminating provisions of Articles 53 and 107 be deleted. See I.L.A., Report of the 48th Conference, New York, 1958, pp. 528-529.

with respect to the use of force was seen by many delegates at San Francisco in relation to, and in the context of, the Yalta Voting Formula[34] requiring unanimity among the Great Powers as the decisional rule on substantive matters in the Security Council. It was clear to many of the delegates that, under the Dumbarton Oaks Proposals, if the Security Council should fail to reach a decision because of the exercise of the veto power by a permanent member, regional organizations would be useless as enforcement agencies.

A number of proposals put forward in the form of amendments sought to emancipate regional organizations from the consequences of political paralysis of the Security Council. For instance, the Belgian delegate proposed that the following words be added to Chapter VIII, Section C Paragraph 2 of the Dumbarton Oaks Proposals: "Dissentient votes of the permanent Members of the [Security] Council which are not

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[34] For the Yalta Formula on Voting in the Security Council, see Cmd. 7088, (London: H.M.S.O., 1947), p. 3; Doc. 852, III/1/37(1); U.N.C.I.O. Doc., Vol. 11, pp. 711-714. For the genesis and negotiation leading to the Yalta Formula, see Winston Churchill, The Second World War: Triumph and Tragedy, (Boston: Houghton Mifflin Company, 1953), pp. 354-357. At San Francisco, the non-sponsoring powers, led by Australia, demanded clarifications of the Formula in a questionnaire sent to the Four Sponsoring Governments: See Doc. 885, III/1/B/2(a), U.N.C.I.O. Doc., Vol. 13, pp. 700-709. For the "veto crisis" at San Francisco centering on the American-Russian versions of the Yalta Formula, see Vandenberg, Jr., (ed.), op. cit., pp. 199-208. See, generally, F.O. Wilcox, "The Yalta Voting Formula", A.P.S.R., Vol. 39, 1945, pp. 943-956; B.A. Wortley, "The Veto and the Security Provisions of the Charter", B.Y.B.I.L., Vol. 23, 1946, pp. 95-111; D.E. Lee, "The Genesis of the Veto", International Organization, Vol. 1, 1947, pp. 33-42.

parties to such [regional] arrangements or agencies will not impair the validity of a decision of the Council in this respect".[35] The Australian proposal urged the creation of a separate section containing the following provision: "If the Security Council does not itself take measures, and does not authorize action to be taken under a regional arrangement or agency, for the maintaining or restoring of international peace, nothing in this Charter shall be deemed to abrogate the right of the parties to any arrangement which is consistent with the Charter to adopt such measures as they deem just and necessary for maintaining or restoring international peace and security in accordance with that arrangement".[36] The Latin American Republics, desirous of protecting the autonomy of the Inter-American System, sought changes which went beyond what the United States and other great powers were prepared to accept.[37] The net result of these amendments was the Vandenberg formula known in the Charter as

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[35] Doc. 2, G/7(k)(1); U.N.C.I.O. Doc., Vol. 12, p. 767; L'Institut Royal des Relations Internationales, La Belgique et les Nations Unies, (1958), pp. 62-63, 160-161.

[36] Doc. 2, G/14(1); U.N.C.I.O. Doc., Vol. 12, p. 766; Harper and Sissons, Australia and the United Nations, (New York: 1959), p. 49 et. seq.

[37] Vandenberg, Jr. (ed.), op. cit., pp. 192, 197; F.R.U.S., 1945, Vol. 1, pp. 712-719, 730-736; J.A. Houston, Latin America in the United Nations, (New York: 1956), pp. 46-50; Russell, op. cit., pp. 693-703; Galo Plaza, "Latin America's Contribution to the United Nations Organization", International Conciliation, No. 419, pp. 150-157; Josef Kunz, "Inter-American System and the United Nations Organization", A.J.I.L., Vol. 31, 1945, pp. 758-767; J.L. Mecham, "The Integration of the Inter-American Security System into the United Nations", Journal of Politics, Vol. 9, 1947, pp. 178-196.

Article 51. This provision, which one commentator called "the most important contribution to the Charter made at San Francisco",[38] states as follows:

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

The examination of this Article which follows below is based upon the conviction that the question, when may a collective self-defence organization resort to the use of force in self-defence, is an integral part of the whole problem of the relationship between the United Nations and regional organizations operating in the functional field of self-defence. Therefore, before the relationship between the United Nations and regional organizations performing the function of collective self-defence is analyzed, it is necessary to pass a few comments on the right of self-defence in international law. It is believed that the extent of auto-

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[38] Sir Charles Webster, "The Making of the Charter of the United Nations", in The Art and Practice of Diplomacy, (London: 1961), p. 90. It should be noted that Article 51 was a contribution not in the sense that the right of self-defence was conferred by the Charter, for it was not conferred but merely preserved, but in the sense that it provides a formula for reconciling the competing claims of the principles of universalism and regionalism in the field of security.

nomy a regional organization carrying out the function legitimate self-defence enjoys _vis-a-vis_ the United Nations depends, in practice, not only upon the ability of the Security Council to take measures necessary to restore international peace but also upon the interpretation that one places on the right declared in Article 51. Unfortunately, international legal scholars speak with discordant voices on the scope of the right of self-defence declared in the U.N. Charter.[39] The central issue in the unsettled controversy over Article 51 is whether Article 51 involves a restriction of the right of self-defence which states possess under customary international law.

International legal scholars who give an affirmative answer[40] draw attention to the use of the phrase "armed attack" in the formulation of Article 51 and contend that the U.N. Charter outlaws any anticipatory or preventive self-defence. Thus, until a member of the U.N. has become a victim of an armed attack, it will be illegal under the U.N.

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[39] Whiteman, _Digest of International Law_, Vol. 5, p. 971 _et. seq._

[40] See Josef Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations", _A.J.I.L._, Vol. 41, p. 877; Bentwich and Martin, _op. cit._, p. 107; Kelsen, _op. cit._, p. 791 _et. seq._; Brownlie, _International Law and the Use of Force by States_, (Oxford: 1963), pp. 275-280; Judge Krylov, in I.L.A., _Report of the 48th Conference_, New York, 1958, p. 512; Nagendra Singh, _Nuclear Weapons and International Law_, (New York: Praeger, 1959), pp. 114-121; Quincy Wright, _International Law and the United Nations_, (1960), p. 100.

Charter to exercise the right of self-defence. This view amounts essentially to the proposition that the customary right of self-defence which permits anticipatory self-defence, subject, of course, to the restraint of proportionality and necessity, has been overridden by the conventional law of the United Nations.

The view that self-defence is permissible only if an armed attack occurs is open to criticism on two grounds. First, the Charter itself does not lend an unequivocal support to the claim. It may be observed that the Charter refers to the "inherent" right of self-defence. This is an admission that "the right is an existing right, independent of the Charter and not the subject of an express grant".[41] Under customary international law each state defines for itself whether circumstances justifying the exercise of the right of self-defence have arisen. It is believed that neither the League Covenant nor the Kellogg-Briand Pact of 1928 affected the customary nature of this right.[42] There is no reason to believe that the U.N. Charter restricts this right. Thus, according to Green, "[t]he right of self-defence was inherent before the Charter was written; it has remained inherent, and

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[41] Bowett, _op. cit._, p. 187.

[42] Green, "Armed Conflict, War and Self-Defence", _Archiv des Völkerrechts_, Vol. 6, 1956-1957, pp. 387-438 at p. 410; Bowett, _op. cit._, p. 124, 135; Edwin Borchard, "The Multilateral Treaty for the Renunciation of War", _A.J.I.L._, Vol. 23, 1929, pp. 116-120.

as such it covers preventive self-defence as well as self-defence resorted to after you have already been exterminated.[43] Another scholar maintains that "it would be a travesty of the purposes of the Charter to compel a defending State to allow its assilant to deliver the first and perhaps the fatal blow", and adds that to deny the right of anticipatory attack is "to protect the aggressor's right to the first stroke".[44] Second, a restrictive interpretation of Article 51 tends not only to ignore developments in military weapons system, the practice of states, but also to contemporary relevance of non-military forms of attack.[45] It must be admitted that the 1945 Charter is a pre-atomic document. If it is to be relevant, it must be interpreted in the light of the transformation that has taken place in the environment of the international system. As the OAS Secretary General pointed out in the wake of the Cuban missile crisis, "the Charter of the United Nations, the Charter of our own Organization, and the Rio Treaty should be considered as instruments that antedated the entry of mankind into the

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[43] I.L.A., Report of the 48th Conference, New York, 1958, p. 581. Cited also in Whiteman, Digest of International Law, Vol. 5, p. 982. See also Brierly, The Law of Nations, (5th ed., 1955), p. 315; McDougal and Feliciano, op. cit., pp. 238-241.

[44] Waldock, "The Regulation of the Use of Force by Individual States in International Law", Hague Recueil, Vol. 81, 1952 (II), p. 489.

[45] Thomas, Thomas and Salas, The International Law of Indirect Aggression and Subversion, (Dallas: 1966).

Atomic Age. Thus, the concepts of "armed attack", "aggression which is not an armed attakc",... must be interpreted in the light of new circumstances when, for example, the destructive potential of a nuclear missle installation may threaten imminent and inevitable devastation".[46] Experience has shown that it is inadvisable to underestimate the efficacy of non-military forms of attack.[47] Besides, states in their actual practice have not accepted the "sitting duck" conception of the right of self-defence.[48]

It may be concluded that the proposition that the right declared in Article 51 entails a limitation on the right of states under customary international law must be rejected.

Subsequent to the exercise by states or organization of states of the inherent right of individual and collective self-defence, the U.N. Charter imposes certain obligations on the individual state or the collectivity of states and reserves the right of the Security Council "to take at any time any action as it deems necessary in order to maintain

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[46] OAS Official Records OEA/Ser.D/III.14, Report of the Secretary General 1962, (Washington: 1962), p. i. See, however, Singh, Nuclear Weapons and International Law, (1959), Ch. 5; Louis Henkin, "The United Nations and Its Supporters: A Self-Examination", P.S.Q., Vol. 78, 1963, p. 504, 527-533 for the view that in a nuclear age, anticipatory attack is the more illegal under the Charter.

[47] McDougal and Feliciano, op. cit., pp. 240-241.

[48] See Chapter VII below.

or restore international peace and security". Members of a regional organization which resorted to forceful action in collective self-defence are under obligation to report to the Security Council immediately the measures they have just taken. Theoretically, the Security Council can order collective self-defence measures to stop if it is able to overcome the technicalities of Article 27(3). However, as each of the major regional organizations primarily concerned with the function of collective self-defence - NATO, SEATO, ANZUS Treaty Alliance, Rio Treaty, and the Warsaw Pact - contains at least one of the permanent members of the Security Council, it may be expected that a veto will almost certainly be used to prevent the Security Council both from condemning regional collective action and from taking actions necessary for the maintenance of peace. The Security Council was rendered helpless by the Soviet veto at the time of the Czechoslovak crisis in 1968, by the Anglo-French veto at the time of the Suez crisis and by the series of "hidden vetoes" organized by the United States.

(c) Pacific Settlement of Disputes

Regional organizations are competent to deal with "matters relating to the maintenance of international peace and security as are appropriate for regional action". The Charter requires members of regional arrangements to "make every effort to achieve pacific settlement of local disputes

through such regional arrangements... before referring them to the Security Council". It also places on the Security Council an obligation to "encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiatives of the States concerned or by reference from the Security Council". These provisions of Article 52 should be read along with those of Article 33(1) enumerating methods of pacific settlement of international disputes. Article 33(1) states as follows: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own". There is nothing to suggest that resort to regional organizations takes precedence over resort to other means of pacific settlement. However, it is often argued by international legal scholars from the Soviet bloc that the list in Article 33(1) is hierarchic.[49]

The provisions of Article 52 do not constitute limita-

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[49] See the 1964 and 1966 Reports of the Special Committee on the Principles of International Law concerning Friendly Relations and Cooperation among States. U.N. Doc. A/5746, November 16, 1964; U.N. Doc. A/6230, June 27, 1966. See also Bogdanov, I.L.A., Report of the 53rd Conference, Buenos Aires, 1968, p. 4, who said: "negotiations occupy the first place among such means [of pacific settlement], and the Charter of the United Nations is very clear on this".

tions on the recommendatory authority of the United Nations in the functional field of pacific settlement of disputes.[50] By way of reservation on the "try-the-regional organization-first" and "encourage-the-regional-pacific-settlement-of-disputes" principles, the Charter grants member states the constitutional right to bring any disputes to the attention of the Security Council or of the General Assembly,[51] and also declares the Security Council competent to investigate any disputes "in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security".[52] Article 34 thus permits the Security Council to intervene _ex officio_ in any dispute not with the intention of proposing conditions of settlement but of determining the nature of the dispute in terms of whether it is capable of threatening international peace.[53] It was the understanding in 1945 that "no State,

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[50] F.V. Garcia Amador, _Regional Action for Pacific Settlement Within the Framework of the Charter_, (A/AC/18/SC.9/L.7) 1950. Reproduced in _G.A.O.R._, 5th Sess., Supp. No. 14 (A/1388), pp. 31-34.

[51] Art. 35.

[52] Art. 34. See generally Paul Hasluck, _Workshop of Security_, (Melbourne: 1948), pp. 99-108; E.J. de Arechaga, _Voting and the Handling of Disputes in the Security Council_, (New York: 1950), pp. 75-89; Ernest Kerley, "The Powers of Investigatoin of the United Nations Security Council", _A.J.I.L._, Vol. 55, 1961, pp. 892-918.

[53] Kelsen, _The Law of the United Nations_, (1964), p. 387 _et. seq._

great or small, whether party to a dispute or not, can prevent the Security Council from taking cognizance of such dispute and examining it and dicussing it".[54] Article 52(4) rescues Articles 34 and 35 from the implications of Articles 52(1), (2) and (3). The Stettinius Report to President Roosevelt on the San Francisco Conference rightly stated that Article 52(4) was inserted into the Charter "[t]o insure the paramount authority of the [Security] Council and its right to concern itself if necessary with disputes of this [local] character".[55] From a purely superficial consideration, it would appear that the provision of Article 37 obligating parties which have failed to settle their dispute to refer such dispute to the Security Council strengthens the hand of the Security Council. However, in so far as the Charter is silent on what conditions constitute failure to settle a dispute, a party to such dispute can contend that the critical point has not been reached and, consequently, deny that the obligation under Article 37 has arisen.[56]

What is the extent of the authority of the Security Council in the functional field of peaceful settlement of

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[54] Cmd. 6666 (1945), para. 86.

[55] Department of State, Charter of the United Nations Report to the President on the Results of the San Francisco Conference, (Washington: 1945), p. 105.

[56] Stone, op. cit., pp. 118-119; Liang, "The Settlement of Disputes in the Security Council: The Yalta Voting Formula", B.Y.B.I.L., Vol. 24, 1947, pp. 335-336.

disputes? One line of argument, which this study accepts, is that the power of the Security Council is rather limited. In support of this claim, it may be pointed out that while the Security Council can recommend a settlement procedure, parties to the dispute may or may not accept it. The Security Council may propose terms of settlement but these are not binding on the parties.[57] The claim that the authority of the Security Council is not so limited seems to be based on two interrelated propositions: that the Security Council has primary responsibility for the maintenance of international peace and security[58] and that the procedures for both pacific settlement and the determination of threats to peace under Article 39, are in fact, part and parcel of the same sequence of events. It has already been pointed out that the provisions of Chapter VI of the Charter make it abundantly and unmistakingly clear that the authority and power of the Security Council in the field of pacific settlement cannot be enforced. The question may arise concerning whether the Security Council can consider failure to accept its recommendation under Chapter VI as constituting a threat to international peace, and, consequently, invoke Article 39 of the Charter. The problem here, then, is whether the pro-

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[57] Eagleton, "The Jurisdiction of the Security Council Over Disputes", A.J.I.L., Vol. 40, 1946, pp. 513-533; Goodrich, "Pacific Settlement of Disputes", A.P.S.R., Vol. 39, 1955, pp. 956-970. Dept. of State, Report to the President, p. 84, 86; Jimenez de Arechaga, "Le traitement des differends internationaux par le Conseil de Securite", Hague Recueil, Vol. 85, 1954 (I), pp. 94.

[58] Art. 24

cedures for pacific settlement and those for determining threats to peace are necessarily logically connected in the same sequence of events. A close look at the Dumbarton Oaks Proposals and the U.N. Charter shows that the two sets of procedures are more closely linked in the former than in the latter document.[59] The formulation used in the Dumbarton Oaks Proposals would have made it mandatory for the Security Council to decide whether or not failure to settle a dispute constitutes a threat to international peace, and to act accordingly in the event of an affirmative answer. Under the U.N. Charter, the two sets of procedures appear separate and independent. As one commentator pointed out, "[t]here is no specific reference in the Charter to the fact that a failure to settle a dispute according to the Council's recommendations may constitute a threat to peace. The Charter does not place the Security Council in a position of having to determine whether there has been a failure to settle a dispute according to its recommendations. It is only required to determine the existence of a threat to peace. The objective existence of this fact is not [necessarily] connected with any previous recommendations on any dispute or situation".[60] Article 39, therefore, is "entirely

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[59] Wellington Koo, <u>Voting Procedures in International Political Organizations</u>, (New York: 1947), p. 179.

[60] E.J. de Arechaga, <u>op</u>. <u>cit</u>., p. 41. See also Hasluck, <u>op</u>. <u>cit</u>., p. 114.

without reference to the status of a dispute upon failure to settle it".[61] A decision of the Security Council which, in fact, amounts to regarding failure to settle a dispute as constituting a threat to peace is at best only implied by the wording of Article 39. In any case, strictly speaking, the power which Article 39 confers on the Security Council is not in the field of pacific settlement but in that of enforcement. When the Security Council acts under Article 39, it is not as a toothless conciliatory, but as an enforcement, agency.[62]

The relationship between the United Nations and regional organizations performing the function of peaceful settlement of disputes is complicated by the provision of Article 52(4) which raises the possibility of double jurisdiction of both the universal and the regional agencies.[63] At San Francisco, the Peruvian delegate expressed fear that Article 52(4) might result, in practice, in the simultaneous handling of disputes by a regional organization and the Security Council or in the failure of the Security Council to rely upon the actions being taken by the regional organization.[64] He was not taken seriously. Camargo, the Colombian chairman of

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[61] Koo, op. cit., p. 180.

[62] Clyde Eagleton, "The Jurisdiction of the Security Council Over Disputes", A.J.I.L., Vol. 40, No. 3, 1946, p. 514.

[63] See Chapter VII below.

[64] Doc. 576, III/4/9; U.N.C.I.O. Doc., Vol. 12, p. 685.

Committee 111/4 which dealt with the problem of regionalism attempted to allay this fear by offering the following interpretation of the constitutional relations between the United Nations and regional organizations in the field of the pacific settlement of disputes:

> If a dispute arises between two states which are members of a regional organization, such controversy should be settled by peaceful means established within the said organization. The obligation exists for all States which are members of a regional organization to make every effort to settle the controversy through this agency, and at the same time, the obligation exists for the Security Council to promote these regional peaceful settlements. But the Security Council has the right to investigate in order to determine whether the controversy may constitute a threat to international peace and security.... [T]he Council has jurisdiction only to investigate, and the nations, whether or not they are members of the [U.N.] organization, have the right only to ask for an investigation.... It is evident that if the regional systems for peaceful settlement fail, the Council can intervene... for the purpose of promoting formulas for settlement.... But if at any time an armed attack should ensure, that is, an aggression against a state which is a member of a regional group, self-defence, whether individual or collective, exercised as an inherent right, shall operate automatically within the provisions of the Charter, until such a time as the Security Council may take the appropriate punitive measures against the aggressor state.[65]

If, as is the case, the Charter places no obligation on member states to exhaust all the alternative procedures for pacific settlement enumerated under Article 33(1) before having recourse to the

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[65] Ibid., pp. 686-6871

Security Council,[66] if the Security Council may investigate any dispute at any time,[67] and if any U.N. member or the Secretary-General is constitutionally competent to bring any dispute to the attention of the world body,[68] then the possibility of simultaneous consideration of a dispute by both the United Nations and a regional organization does exist, in spite of assurances to the contrary. Camargo has, in practice, been proved wrong.[69] The simultaneous consideration of a dispute by both the world and the regional agencies can, of course, be avoided if one agency is willing to defer to the other. This was the case in the early stages of the Lebanese crisis in 1958. Lebanon had called for an urgent meeting of the Security Council to consider an alleged intervention of the UAR in Lebanon. With Lebanon agreeing, the Security Council unanimously voted tc suspend consideration of the complaint when it was learned that the League of Arab States was about to consider the affair.[70]

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66 Bowett, "The United Nations and Peaceful Settlement" in Report of a Study on the Peaceful Settlement of International Disputes, (London: 1966), p. 162; Kelsen, op. cit., pp. 374-375.

67 Art. 34.

68 Art. 35, 99.

69 See Chapter VII below.

70 United Nations, Repertory of Practice of United Nations Organs, Supplement No. 2, Vol. 2, Articles 9-54 of the Charter, (New York: 1964), p. 475, Boutros-Ghali, "La Crise de la Ligue Arabe", A.F.D.I., Vol. 14, 1968, p. 103.

In conclusion it may be said that the jurisdiction of both the Security Council and regional organizations in the field of pacific settlement is concurrent but independent.[71]

4. Concluding Comments

The authors of the U.N. Charter were convinced that the troublesome problem of universal-regional relationship had been satisfactorily solved, permitting what the Mexican Ambassador, Castillo Najera, called a "harmonious result which conciliates... differences for the benefit of common cause".[72] The Venezuelan Minister of Foreign Affairs modestly described regionalism as "one of the cogs, and a very essential one, of the general mechanism for the establishment and defense of universal peace",[73] and expressed the optimistic view that "experience will consecrate a complete harmony in the coordinated working of the world Organization and regional systems".[74] Senator Vandenberg, calling the achievement, "new landmarks in international relationships", was more lavish in his praise of the universal-regional compromise achieved. He said:

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[71] Bentwich and Martin, op. cit., p. 76.

[72] Doc. 972, III/6; U.N.C.I.O. Doc., Vol. 11, p. 54.

[73] Ibid., p. 56.

[74] Ibid.

> We have found a sound and practical formula for putting regional organizations into effective gear with the global institution which we here erect on behalf of the world's peace and security.... [W]e have infinitely strengthened the world organization by thus enlisting, within its overall supervision, the dynamic resources of these regional affinities. We do not thus substract from global unity on behalf of the world's peace and security; on the contrary, we weld these regional king-links into the global chain.[75]

There was some basis for this optimism in 1945. It was hoped that aggression would not occur and that, if it did, the collective might of the United Nations, led by a united concert of the Great Powers, would descend very heavily on the aggressor. Article 47 contemplates the formation of a Military Staff Committee and of regional subcommittees. Regional organizations in an international community in which great power cooperation was hoped for, if not assumed, could not have been seen other than as potential resources for the maintenance of international peace.

With the advantage of hindsight, it is possible for a researcher, writing a quarter of a century later, to suggest that the thesis of a thorough-going harmonization of the rival claims of universalism and regionalism in the Charter cannot be accepted without reservations. But this is only an <u>ex post facto</u> rationalization.

Amidst the chorus of enthusiasm at San Francisco over

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[75] Doc. 972, III/6; <u>U.N.C.I.O. Doc.</u>, Vol. 11, p. 52. See also Vandenberg, Jr. (ed.), <u>op. cit.</u>, p. 198; Department of State, <u>Charter of the United Nations, Report to the President on the Results of the San Francisco Conference</u>, (Washington, C.D.: 1945), p. 108.

the universal-regional balance formulated in the Charter, there were a few voices counselling a more restrained and sober judgment. Liang, regretting the fact that it had been found necessary to introduce the concept of collective self-defence in order to mediate the competing claims of universalism and regionalism, wrote the following words in 1946. No apology is needed for quoting the statement at length in view of the continuing relevance of its message:

> The provisions of the United Nations Charter regarding regional arrangements cannot be said to have solved, even in a preliminary way, the problem of regionalism versus universalism. The most that can be said at this moment is that this part of the Charter, as indeed many other parts, is preeminently a compromise of conflicting political forces. And in this disillusioned world, so soon after the termination of the holocaust, it is but natural that on this question the pendulum should swing somewhat toward the conception of individual and collective self-help than toward the ideal of organized society enforcing law on a global basis. If international lawyers would judge of the Charter in the political context, as statesmen and politicians are bound to do, then they would find that the solution of the question of regional arrangements and international security could not be expected until the emergence of a system which has its being in a world that has demonstrated its political and economic stability. And nothing short of complete confidence in the overriding authority of the World Organization, a confidence inspired by the ability and experience of the Organization to deal swiftly and effectively with situations in any part of the world, can persuade the regional groups to entrust their fate to a central regime of law, and to weld the various segments of the efforts to maintain peace into a comprehensive and indivisible whole in the interest of international community.[76]

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[76] Yuen-Li Liang, "Regional Arrangements and International Security", T.G.S., Vol. 31, 1946, pp. 230-231.

CHAPTER V

REGIONALIST CHALLENGE AND UNIVERSALIST RESPONSE: TRENDS IN POST-WAR INTERNATIONAL POLITICS

1. Introduction

In defence of the U.S. sponsored naval "quarantine" of Cuba in October 1962, the Legal Adviser to the State Department, Abram Chayes, drew attention to the importance of coming to grips with the political changes that have taken place in the U.N.-based international system.[1] Summing up the constitutional history of the United Nations, he offered the following observation: "The withering away of the Security Council has led to a search for alternative peacekeeping institutions. In the United Nations itself the General Assembly and the Secretary-General have filled the void. Regional organizations are another obvious candidate".[2] When it is remembered that, under the constitutional law of the United Nations, the Security Council has "primary responsibility for the maintenance of international peace and

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[1] The Cuban missile crisis is discussed in Chapter VII below.

[2] Abram Chayes, "The Legal Case for U.S. Action on Cuba", U.S. Dept. of State, Bulletin, Vol. 47, 1962, p. 765; See also L.M. Tondel, Jr. (ed.), The Inter-American Security System and the Cuban Crisis, (New York: Oceana Publications Inc., 1964), p. 47.

security",[3] this political development is one which no student of international organization of peace and security can ignore. It is the purpose of this chapter to examine, in a rather general way, trends in post 1945 international politics in the light of Chayes' observation, and to suggest that, while the observation is, on the whole, a valid one, it is not generous enough to the radical transformation that has taken place in the role of regional organizations as agencies for the maintenance of international peace and security.

2. Impact of the East-West Rift on the United Nations

The political landscape of the United Nations international system shows conspicuous regionalist features.[4] A political researcher, surveying the international landscape, is often greatly tempted to describe and define it as little more than the sum total of its regionalist characteristics. If the researcher succumbs to this temptation he may earn the name of a political realist; if he tempers his judgment

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[3] Art. 24(1). See Goodrich and Simons, The United Nations and the Maintenance of International Peace and Security, (Washington: Brookings Institution, 1955).

[4] Gerhard Bebr, "Regional Organizations: A United Nations Problem", A.J.I.L., Vol. 49, 1955, pp. 166-184; Ruth Lawson (ed.), International Regional Organizations: Constitutional Foundations, (New York: 1962); Ronald Yalem, Regionalism and World Order, (Washington: 1965); Joseph Nye Jr. (ed.), International Regionalism: Readings, (Boston: 1968); Daniel Vignes, "La Place des Pactes de Defense dans la societe internationale actuelle", A.F.D.I., Vol. 5, 1959, pp. 37-101.

by the realization that the whole is more than the sum of its component parts, he would be more astute, objectively perceptive without unduly offending the political sensibilities of idealists in international life. International regionalism, to be sure, has become politically more important in the post 1945 international community than it was in the League of Nations days. The popularity of regional systems of public order is such that statesmen and scholars alike have come to think more and more about the idea of regional systems of defence and of political cooperation as an inevitable alternative to the idea of universal collective security system embodied in the United Nations Charter.

As was indicated in the last chapter, the possibility of regional arrangements assuming critical political and security functions figured prominently in the political calculations of the delegates at San Francisco. These delegates certainly realized that the universal political edifice they erected was potentially vulnerable to political impotence.[5] The Charter bears the evidence of, and the various national reports on the Charter emphasize, the potential fragility of the United Nations as a universal instrumentality for the

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[5] The Report of the Rapporteur of Commission III to the Plenary Session of the Conference states in part: "To summarize this general scheme for future world security, it may be pointed out that it is based on the unanimity of the great powers, which will bear the brunt of future enforcement action.... The future alone can disclose whether we have builded wisely and well". See Doc. 1170, III/13; U.N.C.I.O. Doc., Vol. 11, p. 235.

maintenance of international peace and security in situations where the five permanent members of the Security Council have been unable to reach a unanimous agreement.[6] For example, the New Zealand Report on the Charter sounded this note of warning: "Not security, but the way to security lies in this Charter".[7] The British commentary contains the following pertinent statement:

> It is imperative that the consent of the Great Powers should be necessary to actions in case in which they are not parties, since they will have the main responsibility for action. It is also imperative that no enforcement action by the [United Nations] Organization can be taken against a Great Power itself without a war. If such a situation arises the United Nations will have failed in its purpose and all members will have to act as seems best in the circumstances.... Thus the successful working of the United Nations depends on the preservation of the unanimity of the Great Powers; not of course on all details of policy, but on its broad principles. If this unanimity is seriously undermined no provision of the Charter is likely to be of much avail. In such a case Members will resume their liberty of action; though in doing so they would no doubt be influenced by the fact that they had been working together in close cooperation for the maintenance of international peace and security.[8]

The above statement may be properly regarded as a commentary on the implication of Article 27(3) for the newly constructed

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[6] For a trenchant critique of the collective security system of the U.N. Charter, see Inis Claude, Jr., Power and International Relations, (New York: 1962), p. 155 et. seq.; Erich Hula, "Fundamentals of Collective Security", Social Research, Vol. 24, 1957, pp. 1-36.

[7] Report on the Conference held at San Francisco, (Wellington: 1945), p. 18.

[8] Cmd. 6666 (1945), pp. 16, 17.

organization of peace.[9] Britain's realistic interpretation of the significance and meaning of Article 27(3) was, however, matched with an equally idealistic and certainly over-optimistic assessment of the possibility of continuing political cooperation among the Great Powers. In retrospect, the British commentary seemed too optimistic when it expressed the view that "there are good grounds for believing that the Great Powers are determined to avoid actions which would destroy their unanimity, and to carry out the obligations which they have undertaken as Members of the United Nations".[10] The Economist, the influential British weekly periodical, was far more realistic when it warned in September 1945 that "[i]t would be little short of miraculous if three great nations divided by history, by civilization, by habit and by interest were, from the brief experience of four years' fighting, to learn how to work together closely for peace".[11]

It is rather ironic that the schism in East-West rela-

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[9] Tom Connally, the U.S. Delegate on Committee III/1, linked the retention of the veto power with the acceptance of the Charter. According to the Report of the 19th Meeting of Committee III/1, "He asked if delegates could face the public opinion at home if they reported that they had killed the veto but had also killed the Charter". See Doc. 956, III/1/47; U.N.C.I.O. Doc., Vol. 11, p. 493.

[10] Cmd. 6666 (1945), para. 88. (Emphasis added).

[11] The Economist, Vol. CXLIX, No. 5327, September 29, 1945, p. 441.

tions came into the open at the very first meeting of the United Nations in London. Commenting on the Bevin-Vyshinsky confrontation over the Iranian question,[12] the New Statesman said gloomily:

> [T]he first session of U.No. leaves us with very little hope either of U.No. or of peace.... History has never forgiven Nero for fiddling while Rome was burning; perhaps she will always remember the first meeting of U.No. for the spectacle of the representatives of a Socialist Republic and a Socialist Monarchy ranting the ancient rubbish about prestige and honour while the workers of the world were starving.[13]

Trygve Lie, the U.N. Secretary-General, also placed on record that, during the first meeting of the Security Council, "the hard realities of world politics intruded. Like gusts of wind warning of future storms to come, they blew in the door of the new-built house of peace before the workmen had finished".[14] Lie aptly described the split developing between the Soviet Union and the West as "a crevasse in a glacier which might spread wider beneath the bridge of soft

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[12] See R.W. Van Wagenen, The Iranian Case 1946, (New York: Carnegie Endowment for International Peace, 1952).

[13] New Statesman and Nation, Vol. 31, No. 783, February 23, 1946, p. 129. For a comprehensive and illuminating review of the Security Council in action in the first two years, see Green, "The Security Council in Action", Y.B.W.A., Vol. 2, 1948, pp. 125-161.

[14] Trygve Lie, In the Cause of Peace, (New York: Macmillan Company, 1954), p. 28.

surface snow that was called great power unity".[15] Lie's metaphor was hardly misplaced. Bevin, the British statesman, told the House of Commons on January 22, 1948 that "the United Nations up to now has been disappointing", and added, as if to rationalize this disappointment, that "it may be better to have disappointments at the beginning than to have enthusiasm at the start and the disappointments later on".[16] Bevin blamed the state of affairs on "this ideological thing that is constantly coming up, and the extensive use of the veto which was never contemplated".[17] The British Report on the proceedings of the first part of the Third Session of the U.N. General Assembly noted that "the existing difficulties in the [Security] Council arose not from the existence of the unanimity rule, but from the misuse of it by States", and warned, quite rightly, that "[o]nly a real improvement in international relations could provide a solution to the present difficulties".[18] If there was any further doubt as to what the international situation was in the late 1940's, in particular, as to full blossoming of the cold war, it was removed by 1949. In his report to

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[15] Ibid., p. 35.

[16] Parliamentary Debates, House of Commons Official Rpeort, Fifth Series, Vol. 446, 1948, p. 401.

[17] Ibid.

[18] Cmd. 7752 (1948), p. 3.

Parliament in connection with the signing of the North Atlantic Treaty, the British Defence Minister confessed with great regret:

> [I]n the first two years of the life of the United Nations the conflict between the points of view of these Western Powers and of Soviet Russia and its Eastern European associates went so deep as to make improbable the early achievement of a world-wide basis of the major purposes which the Charter was designed to achieve.[19]

The Great Powers, especially the Soviet Union, seemed to have turned a deaf ear to the admonition of the Secretary-General of the United Nations who, in his first Annual Report, reminded the veto-wielding Powers that the right of veto, paradoxically, imposed upon them a moral obligation to strive to seek agreement among themselves in a spirit of mutual understanding and compromise, and that they should not abandon their efforts until the necessary consensus had been reached.[20]

The developing East-West cleavage[21] affected the balance

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[19] Cmd. 7883 (1949), p. 3.

[20] Report of the Secretary-General on the Work of the Organization, 30 June 1946, U.N. Doc. No. A/65, p. vi.

[21] Georg Schwarzenberger, "The Impact of the East-West Rift on International Law", T.G.S., Vol. 36, 1951, pp. 229-269; also The Frontiers of International Law, (London: Stevens and Sons, 1962), Ch. 7; Rosalyn Higgins, Conflict of Interest: International Law in a Divided World, (London: Bodley Head Ltd., 1965), p. 101 et. seq.; H.A. Smith, The Crisis in the Law of Nations, (London: Stevens and Sons, 1947); Oliver Lissitzyn, "International Law in a Divided World", International Conciliation, No. 542, March 1963; also International Law Today and (continued on page 196)

achieved between the rival claims of universalism and regionalism at San Francisco. As Bevin's statement shows, it is customary to establish a direct link between the exercise of the right of the veto and the impotence of the United Nations. It is also fashionable to blame the Soviet Union for an improper use or misuse of the veto power. That the exercise of the veto power "disrupted the working of the [Security] Council... delayed action... confused and complicated the process of negotiation" must be acknowledged.[22] However, when the exercise of the veto power is examined and interpreted as the effect rather than the cause not only of the political and ideological schism between the East and the West, but also, and perhaps more importantly, of the rather short-sighted and unconcealed attempt of the U.S.-led Western Powers to use the United Nations for the prosecution of Western interests to the detriment of those

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21 (continued) Tomorrow, (New York: Oceana Publications, Inc., 1965); Grigory Tunkin, "Co-existence and International Law", Hague Recueil, Vol. 95, 1958 (III), pp. 5-78; Kathleen Courtney, "The United Nations in a Divided World", International Affairs, (London), Vol. 25, No. 2, April 1949, pp. 168-174; Kenneth Dawson, "The United Nations in a Disunited World", World Politics, Vol. 6, No. 2, 1954, pp. 209-235.

22 See Norman Padelford, "The Use of the Veto", International Organization, Vol. 2, 1948, pp. 245-246; Sydney Bailey, "Veto in the Security Council", International Conciliation, No. 566, January 1968; P. Hasluck, Workship of Security, (Melbourne: Cheshire, 1948), p. 125 et. seq.

of the Soviet Union and her allies,[23] the hypothesis formulated by some Western scholars that the Soviet Union has been responsible for the political impotence of the Security Council will be seen to require a more objective analytical clarification and modification.

It has been well said that the Soviet attitude to international organizations involving states of different social order springs from "the feeling of isolation, of the Soviet Union specifically, and of the Socialist states as a whole in a world in which the free economy countries still vastly outnumber the members of the Soviet bloc".[24] The Soviet Foreign Minister, Molotov, reiterated before the Plenary Meeting of the General Assembly in 1946 that the veto was the *sine qua non* of Soviet participation in the United Nations and that "the rejection of the principle of unanimity of the great Powers... would actually mean the liquidation of the United Nations organization; for this

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[23] For an American view to this effect, see Lung-Chu Chen and Harold Lasswell, *Formosa, China and the United Nations*, (New York: St. Martin's Press, 1967), p. 28 *et*. *seq*.

[24] K. Grzybowski, "International Organizations from the Soviet Point of View", *Law and Contemporary Problems*, Vol. 29, No. 4, 1964, p. 891; Tunkin, "Co-existence and International Law", *Hague Recueil*, Vol. 95, 1958 (II), pp. 5-79; Kathryn W. Davis, "The Soviet Union and the League of Nations 1919-1933", *Geneva Special Studies*, Vol. 5, No. 1, 1934; D.C. Fuller, "Lenin's Attitude Toward an International Organization for the Keeping of Peace, 1914-1917", *P.S.Q.*, Vol. 64, 1949.

principle is the foundation of the Organization".[25] Four years later, following the adoption of the "Uniting For Peace" Resolution,[26] Vyshinsky, the Soviet U.N. Ambassador, warned: "A majority, of course, is a majority.... Arithmetic is arithmetic. But no arithmetic can solve the questions pertaining to matters very far removed from arithmetical problems".[27]

One wonders whether the policy makers in the West saw the veto, properly as it should be seen, as a right of legitimate dissent possessed by any of the five permanent members of the Security Council, and, furthermore, whether western statesmen appreciated the unpleasant fact that the exercise of this right of veto by the Soviet Union, in particular, is the only strategy in the hand of an important

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[25] V.M. Molotov, Problems of Foreign Policy, (Moscow: Foreign Languages Publishing House, 1949), p. 255. See also Tunkin, "Co-existence and International Law", Hague Recueil, Vol. 95, 1958 (II), pp. 5-78; Academy of Sciences of the U.S.S.R. Institute of State and Law, International Law, (Moscow: Translated by Denis Ogden, No Date), p. 334, 338; Alexander Dallin, The Soviet Union at the United Nations, (New York: Praeger, 1962), pp. 23, 50-54; U.S.S.R. Memorandum on United Nations Operations for the Maintenance of International Peace and Security, U.N. Doc. S/7841 (April 5, 1967), Reproduced in International Legal Materials, Vol. 6, 1967, pp. 545-552.

[26] See below.

[27] Cited in Rupert Emerson and Inis L. Claude, Jr., "The Soviet Union and the United Nations: An Essay in Interpretation", International Organization, Vol. 6, 1952, p. 7.

permanent minority in the Security Council. In scholarly writing, this interpretation is sometimes not well understood. Witness, for example, the bold but politically fallacious assertion that "the presence of Russia is the weakness of the United Nations".[28] More important still, it is difficult to escape the conclusion that the West seemed not to have appreciated the continuing relevance of Count Metternich's definition of diplomacy as "the art of avoiding the appearance of victory".[29] The U.S.-led coalition, relying on its mechanical majority, behaved as if the purpose of the United Nations was to keep the Soviet Union in its place.[30]

The theory of misuse of the veto power, spurned by scholars and statesmen in the West,[31] has, technically speak-

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[28] Thomas, Communism Versus International Law, (1953), p. 86.

[29] Cited in Paul Martin, "The United Nations Political Organs and Multilateral Diplomacy", Statements and Speeches No. 68/12, (Ottawa: Dept. of External Affairs, 1968), p. 3.

[30] A "western" scholar has drawn attention to "a tendency to pay more attention to the size of majorities than to their composition and to prefer winning a victory to the maximization of agreement". Nicholas, The United Nations as a Political Institution, (3rd Ed., Oxford: 1967), p. 127.

[31] See Review of the United Nations Charter: Final Report of the Committee on Foreign Relations: Subcommittee on the United Nations Charter, (Washington: 1956), pp. 18-19.

ing, no substance; for, the Charter does not make any distinction between bad and good exercise of that right.[32] "The philosophy of the veto", a perceptive scholar of international organization once said, "is that it is better to have the Security Council stalemated than to have that body used by a majority to take action so strongly opposed by a dissident great power that a world war is likely to ensure".[33] It is well known that the composition of the Security Council[34] has always been such that while the Soviet Union _must_ exercise its veto power in order to prevent decisions it

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[32] Judges Basdevant, Winiarski, McNair and Reid pointed out in their dissenting joint opinion on _Conditions of Admission of a State to Membership in the United Nations_ that "it would be a strange interpretation which gave a Member freedom to base its vote upon certain consideration and at the same time forbade it to invoke that consideration in the discussion preceding the vote". This freedom cannot be otherwise because "The main function of a political organ [like the U.N.] is to examine questions in their political aspect, which means examining them from every point of view. It follows that the Members of such an organ who are responsible for forming its decisions must consider questions from every aspect, and in consequence, are legally entitled to base their arguments and their vote upon political considerations". See _I.C.J. Reports 1947-1948_, pp. 82, 85.

[33] Inis Claude, Jr., _Power and International Relations_, (New York: Random House, 1962), p. 160; Hernane Tavares De Sá, _The Play Within the Play: The Inside Story of the U.N._, (New York: Alfred Knopf, 1966), p. 9; The dissenting opinion of Judge Winiarski in the _Certain Expenses_ Case, _I.C.J. Reports 1962_, p. 151 at p. 230.

[34] For an analysis of patterns of Security Council representation, see L.C. Green, "Gentlemen's Agreements and the Security Council", _C.L.P._, Vol. 13, 1960, pp. 255-275; also "Representation in the Security Council: A Survey", _I.Y.I.A._, Vol. XI, 1962, pp. 48-75.

considered detrimental to its interests from being made, the United States need not do so and yet be able to prevent action considered prejudicial to its interests or those of its allies. It has been relatively easy for the U.S.-led western camp to defeat Soviet proposals not by the positive exercise of the veto power, but by organizing abstentions and, thus, denying the Soviet camp the votes necessary to pass resolutions it sponsored. This "hidden veto", as it is called, has been used with great effectiveness.[35]

To the Western mind, there was a definite connection among the political paralysis of the Security Council resulting from the exercise of the veto by the Soviet Union, the Soviet aggressive militiarism in Eastern Europe and the failure of the Military Staff Committee of the Great Powers to come up with concrete proposals and principles governing the organization of the armed forces to be placed at the disposal of the Security Council in accordance with Article 43.[36] These events were interpreted in Western capitals as demanding imaginative improvisation in the name of national security and of the integrity of liberal capitalist democracy. For

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[35] J.G. Stoessinger, _The United Nations and the Superpowers_, (New York: Random House, 1965), p. 3; Emerson and Claude Jr., _loc. cit._; L.C. Green, "Membership in the United Nations", _C.L.P._, Vol. 2, 1949, pp. 258-282.

[36] For text of the Report of the Military Staff Committee, See Doc. S/336, (April 30, 1947), _U.N.Y.B._, 1946-1947, pp. 424-443.

example, The Economist, which had been critical of Articles 51 and 52 in an editorial comment on June 30, 1945, had by May 10, 1947 felt compelled by forces of circumstances to see and appreciate the expediency value of those Articles. In 1945, it made the following observation:

> Again, the provisions justifying "self-defence" in the event of aggression and allowing "regional agencies" great latitude in settling their disputes and maintaining peace can easily become mere licence to carry on separate defence policies with little or no attempt to coordinate them with any wider conception of security.[37]

By 1947, following the deterioration of the relations between the East and the West, and the conflict of policies over international security,[38] The Economist articulated, in the following statement, the view of many a leader of the Western camp:

> It would be more honest, more realistic and pacifying if the British, French and Americans went on with the regional arrangements for defence and economic co-operation, which are provided for in the United Nations Charter. The Russians have already made theirs in Eastern Europe[39] - a point which is often overlooked - and there is no reason why Mr. Molotov should be either

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[37] The Economist, Vol. CXLVIII, No. 5314, June 30, 1945, p. 878.

[38] For a stimulating discussion of this issue, see J.E. Johnson, "The Soviet Union, the United States and International Security", International Organization, Vol. 3, 1949, pp. 1-13.

[39] The reference here is to the Soviet system of bilateral alliances in Eastern Europe. See Wandycz, "The Soviet System of Alliances in East Central Europe", Journal of Central European Affairs, Vol. 16, 1956-57, pp. 177-184; Yacobson, "World Security and Regional Arrangements - Soviet Position", Proceedings, A.S.I.L., 1950, p. 15.

> surprised or irretrievably enstranged if similar arrangements were set in train in western Europe, the Mediterranean and the Pacific. Sooner or later any international security system will have to be based on such regional plans, and Article 53 of the Charter recognises the fact. It is true that Article 53 provides that "enforcement action" under regional arrangements shall be taken only with the approval of the Security Council. But approval by the Security Council means now agreement between the Americans and the Russians. And that agreement will not come about inside U.No. until it has been vigorously and earnestly sought outside it. Meanwhile it will do the Security Council no great harm to remain tootless for a couple of years or more; the likely bones of contention are still too large for it and are likely to remain so.[40]

However unpleasant the statement above may be, it, at least, captures the salient features of the new international system in which regional power structures were to become the major challenge to the world organization and the primary guarantors of international peace. Nowhere has a better case been made for the establishment of regional collective security systems by the Western Powers in the face of the developing impotence of the Charter's universal collective security arrangement than in the New Statesman of March 20, 1948. The New Statesmen commented editorially as follows:

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[40] The Economist, Vol. 152, May 10, 1947, p. 700. (Emphasis added). For suggestions on the same line, see Hamilton A. Armstrong, "Coalition for Peace", Foreign Affairs, Vol. 27, No. 1, 1948, pp. 1-16; Sir Charles Webster, "The United Nations Reviewed", International Conciliation, No. 443, 1948, pp. 441-452. For a completely different set of answer to meet the same problem of western security, see the Draft of A Treaty for Collective Self-Defense Supplementary to the United Nations Charter prepared by the Commission to Study the Organization of Peace, Sixth Report, Collective Self-Defense Under the United Nations, (New York: 1948).

> Because of her [the Soviet Union's] indiscriminating negatives at U.N.; because of her refusal to participate or to allow satellite Powers which needed dollar aid to join in the Marshall conversations at Paris; because in consolidating the strategic area allotted her at Yalta and in dealing with Socialist parties in Czechoslovakia and beyond, she has shown no consideration for Western susceptibilities or understanding of the desire for personal freedom in the world - for these reasons the U.S.S.R. has brought against her a coalition which includes many who wished to be her friends and has hurried the United States in two years through a psychological evolution which would otherwise have taken twenty years to complete.[41]

These comments were made shortly after the conclusion of the Brussels Treaty by France, Britain, Belgium, Luxembourg and the Netherlands,[42] and when many people were already thinking aloud on the need for North Atlantic unity.

3. The Growth and Challenge of Regional Organizations

Since 1945, thinking about the organization of international security in terms of regionalism has become an established habit. The proliferation of regional collective security systems[43] like the Dunkirk Treaty, the Brussels

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[41] New Statesman, Vol. 35, No. 889, March 20, 1948, p. 225.

[42] Cmd. 7599 (1948); Beckett, op. cit., pp. 23-24, 59-64.

[43] For the constitutional documents of the organizations cited here, see Ruth Lawson (ed.), International Regional Organizations: Constitutional Foundations, (1962); Amos J. Peaslee, International Governmental Organizations, 2 Vols. (2nd Ed. Revised: The Hague: Martinus Nijhoff, 1961); Van Panhuys, Brinkhorst, and Maas, (eds.), International Organization and Integration, (Leyden: A.W. Sijthoff, 1968).

Treaty, the Bogota Charter of the Organization of American States (OAS), the North Atlantic Treaty (NATO), the Treaty of Alliance between Australia, New Zealand and the United States (ANZUS), the Warsaw Pact and the South-East Asia Treaty Organization (SEATO), to mention only the most important, is, in the words of Schwarzenberger, "a confession of the constitutional inability of the United Nations to achieve its avowed main purpose of maintaining world order".[44] Other important regional organizations include the Arab League[45] and the Baghdad Pact (now called the Central Treaty Organization - CENTO)[46] in the Middle East. There are in Europe a host of regional organizations performing consultative and economic functions, the most prominent being the Council of Europe, the European Economic Community, the Organization for Economic Cooperation and Development,[47] and

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[44] Schwarzenberger, "The North Atlantic Pact", W.P.Q., Vol. 2, September 1949, p. 309.

[45] Robert Macdonald, The League of Arab States, (Princeton: 1965).

[46] John C. Campbell, Defence of the Middle East, (New York: 1960).

[47] See, generally, M. Palmer and J. Lambert et al., A Handbook of European Organizations, (New York: Praeger, 1968); A.H. Robertson, European Institutions, (2nd Ed., New York: Praeger, 1966), also European Organizations, (London: George Allen & Unwin Ltd., 1959).

the Nordic Council among the Scandinavian countries.[48] The Council for Mutual Economic Assistance (COMECON) is the most prominent economic face of the socialist commonwealth of states of Eastern Europe.[49] In the Western Hemisphere such regional or sub-regional economic organizations like the Central American Common Market, the Latin American Free Trade Association exist virtually independently of the premier organization of the hemisphere, the OAS.[50] Africa has its regional economic unions like the Union of Central African States,[51] the East African Common Market,[52] the newly created West African Economic Commission,[53] and the consultative organization mainly composed of the Francophone states.[54] The most inclusive continental organization of Africa is,

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48 Stanley V. Anderson, The Nordic Council: A Study of Scandinavian Regionalism, (Seattle: University of Washington Press, 1967).

49 Andrzej Korbonski, "Comecon", International Conciliation, No. 549, September 1964.

50 Robert W. Gregg (ed.), International Organization in Western Hemisphere, (Syracuse: 1968).

51 International Legal Materials, Vol. 7, 1968, pp. 725-734. See Francois Borella, "L'Union des Etats de L'Afrique Centrale", A.F.D.I., Vol. 14, 1968, pp. 167-173.

52 J.S. Nye, Jr., Pan Africanism and East African Integration, (Cambridge, Mass.: Harvard University Press, 1965).

53 Text in International Legal Materials, Vol. 6, 1967, p. 776.

54 Albert Tevoedjre, Pan Africanism in Action: An Account of the U.A.M., (Cambridge, Mass.: 1965).

of course, the Organization of African Unity (OAU).[55] Asian regionalism has been very slow to develop notwithstanding the fact that an Asian Relations Conference was held in New Delhi, India, as early as 1947. This has mainly been due to the fear of domination by India and Japan among the smaller Asian states,[56] and, paradoxically to the luke warmness and hesitation of India[57] and Japan.[58] The most prominent regional arrangements in this part of the world, the ANZUS Treaty Alliance[59] and the SEATO,[60] are dominated by powers external to the area, particularly, the United States. The last decade witnessed the establishment of two indigenous

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[55] Zdenek Cervenka, The Organization of African Unity and its Charter, (New York: Praeger, 1969); Boutros Boutros-Ghali, "The Addis Ababa Charter", International Conciliation, No. 546, January 1964; Borella, "Le Regionalisme Africain et L' Organisation de L'Unite Africaine", A.F.D.I., Vol. 9, 1963, pp. 838-865.

[56] B.K. Gordon, The Dimensions of Conflict in Southeast Asia, (Englewood Cliffs: 1966), p. 141 et. seq.; Werner Levi, The Challenge of World Politics in South and Southeast Asia, (Englewood Cliffs: 1968), Ch. 3; L.P. Singh, The Politics of Economic Cooperation in Asia: A Study of Asian International Organizations, (Columbia: University of Missouri Press, 1966).

[57] Sisir Gupta, India and Regional Integration in Asia, (London: Asia Publishing House, 1962), Ch. 2.

[58] Japanese Association of International Law, Japan and the United Nations, (New York: Manhattan Publishing Company, 1958), pp. 216-222.

[59] J.G. Starke, The ANZUS Treaty Alliance, (Melbourne; 1965).

[60] R.I.I.A., Collective Defense in South East Asia, (London: 1956); G. Modelski (ed.), SEATO: Six Studies, (Melbourne: Cheshire, 1962).

regional organizations - the Asian and Pacific Council,[61] and the Association of Southeast Asian Nations.[62] More recently, the Soviet leaders are reported to be contemplating the establishment of an Asian security pact possibly against China.[63]

(a) The Challenge of Regionalism

The abounding enthusiasm for regional solutions to security problems and the consequences of this regional pactomania for the universal-regional relationship have raised great concern and, indeed, alarm among scholars and statesmen alike. Without necessarily implying the abandonment of the universalist idea, regional pactomania threatens the theoretical supremacy of the United Nations if only because a regional organization may become so strong and large as to rival the United Nations and, thus, force members of the former to concentrate on their regional problems and neglect the need for universal collective security in the global

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[61] Text of the Seoul joint Communique in International Legal Materials, Vol. 5, 1966, pp. 985-986. Members are Australia, Republic of China (Formosa), Japan, Republic of South Korea, Malaysia, New Zealand, Philippines, Thailand, Republic of South Vietnam.

[62] Text of Declaration in International Legal Materials, Vol. 6, 1967, pp. 1233-1235. Members are Indonesia, Malaysia, Singapore, Thailand and the Philippines.

[63] Henry Kamm in The New York Times Review, June 15, 1969, p. 3. See Lawrence Whetter, "Moscow's Anti-China Pact", World Today, Vol. 25, No. 9, 1969, pp. 385-393.

organizations.[64] This theme permeated scholarly writing in the 1950's. For example, in 1953, Calvocoressi asserted that regionalism in world affairs reflected "a shifting of the balance of power within the United Nations Organization at the expense of the central organs and in favour of regional authorities".[65] Two years later, Furniss contended that "[i]n the name of regional arrangements the United Nations has been placed in a position of inferiority so that now the links between the regional arrangements and the world organization exist at the pleasure of the former".[66] Writing in 1957, Goodwin complained that "the 'particular' has superseded the 'general', 'regionalism' has ousted 'universalism', and the United Nations has been elbowed off the centre of the international stage".[67] In the same year,

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[64] Commission to Study the Organization of Peace, Eight Report: Regional Arrangements for Security and the United Nations, (New York: 1953), p. 33; Clark Eichelberg, "Ten Years of the United Nations" in Eagleton and Swift (eds.), Annual Review of United Nations Affairs, 1955-1956, pp. 198-199.

[65] Peter Calvocoressi (ed.), Survey of International Affairs 1949-1950, p. 517; L.M. Goodrich, "Regionalism and the United Nations", C.J.I.A., Vol. 3, No. 2, 1949, pp. 13-17.

[66] Edgar S. Furniss, Jr., "A Re-examination of Regional Arrangements", C.J.I.A., Vol. 9, No. 2, 1955, p. 84.

[67] Geoffrey L. Goodwin, Britain and the United Nations, (New York: Manhattan Publishing Company, 1957), p. 193.

one other commentator observed that "[t]he world body is depressed from a controlling into a subsidiary and ancillary position".[68] With the experience of the Guatemalan affair (1954) in mind, Dag Hammarskjold, in his 1954 Annual Report, drew attention to the danger of excessive reliance on regional machinery and warned: "[I]n those cases where resort to such [regional] arrangements is chosen in the first instance, that choice should not be permitted to cast doubt on the ultimate responsibility of the United Nations. Similarly, a policy giving full scope to the proper role of regional agencies can and should at the same time fully preserve the right of a Member nation to a hearing under the Charter".[69] Though cautiously and carefully framed, the comment betrayed Hammarskjold's uneasiness about the political consequences of increasing reliance by member states of the United Nations on regional organizations, and specifically, the comment may be regarded as a gentle but firm critique of the U.S. policy posture on the jurisdictional disputes involving the United Nations and the Organization of American States over the Guatemalan situation in 1954.

At this stage, it is not necessary to prejudice the

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[68] George Liska, International Equilibrium, (1957), p. 137.

[69] Annual Report of the Secretary-General on the Work of the Organization 1 July 1953 - 30 June 1954 in G.A.O.R., 9th Sess., Supplement No. 1 (A/2663), New York, 1954, p. xi.

conclusion of this study by accepting or rejecting the observations cited above. It ought to be stated that the competitive existence of regional organizations _vis-a-vis_ the United Nations need not always be considered, in principle, dysfunctional for the latter. In fact, the question, is the ascendancy of regional over universal collective security arrangement a healthy or an unhealthy development in international politics of an interdependent global system, is improperly asked. Trygve Lie emphasized this point in the early stages of the formation and development of regional collective self-defence arrangements. In his Annual Report for the year 1947-48, the Secretary-General reminded member-states that eventhough "[r]egional arrangements can never be... substitute[s] for world organization,... if they are kept carefully within the framework of the United Nations, and subordinated to it, as the Charter provides, they can play a most important role in the gradual strengthening of the structure of peace".[70] Trygve Lie returned to this theme in his 1951-1952 Report. While noting that the shortcomings of regional collective self-defence organizations lie in

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[70] _Annual Report of the Secretary-General on the Work of the Organization, k July 1947 - 20 June 1948_, _G.A.O.R._, 3rd Sess., Supplement No. 1 (A/565), p. x; Commission to Study the Organization of Peace, Eight Report: _Regional Arrangements for Security and the United Nations_, (1953), pp. 34-35: "[S]tability would probably be promoted if there were a large number of more nearly equal regional and collective self-defense arrangements in the world", (p. 34). This statement must not be accepted uncritically. One must ask the critical question. Do regional organizations transcend the ideological frontier in their membership?

their formal commitment only to act regionally against armed aggression, the Secretary-General saw the advantage of these organizations "in their contribution to the military power available to combat armed aggression". Furthermore, "[t]hey make possible close coordination of defence preparations and advance creation of combined military force among the participating members".[71] In theory, Trygve Lie was right, for the image of a regional organization described is that in Article 53(1) in which a regional organization is an agency of the Security Council "for enforcement action under its authority". Granted that Lie's view is not only over simplified, but also looks like a rationalization of the United Nations' Korean operations,[72] it drives home the essential point that Articles 51-54 of the Charter may constitute potential resources for the United Nations depending on the purposes for which the resources of the Charter are being utilized. When a regional organization succeeds in settling disputes between or among its members, the relevance of regionalism is often not sufficiently appreciated when it challenges the competence of the United Nations, there

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[71] Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 1 July 1951 - 30 June 1952, G.A.O.R., 7th Sess., Supplement No. 1A (A/2141/Add. 1), p. 4.

[72] See L.M. Goodrich, "Korea: Collective Measures Against Aggression", International Conciliation, No. 494, 1953, pp. 131-192. also Korea, (New York: 1956); Trygve Lie, op. cit., Ch. 18, 19.

is much talk about the changing balance of power between the two forms of international organization. Any assessment of the relevance of regional organizations should take into account the story of both their danger and the record of their "domestic" successes.

Mention must be made at this juncture of the problem of regionalism in international law and the contribution of the law of regional organizations to the elaboration, clarification and development of the principles of general international law.[73] Since universality is not the accepted postulate, but only the goal, of international law,[74] international legal scholars have come to recognize the relevance of the principle of regional international law, "provided it is not debased by becoming a fad, and provided that a stern sense of proportion is applied to keep it within prac-

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[73] See Chapter VI below.

[74] See C.W. Jenks, The Common Law of Mankind, (London: Stevens and Sons, 1958), Ch. 2; Lasswell and McDougal, "The Identification and Appraisal of Diverse Systems of Public Order", A.J.I.L., Vol. 53, 1959, p. 1ff; Kurt Wilk, "International Law and Global Ideological Conflict: Reflections on the Universality of International Law", A.J.I.L., Vol. 45, 1951, pp. 648-670; Lissitzyn, "International Law in a Divided World", International Conciliation, No. 542, March 1963; H.A. Smith, The Crisis in the Law of Nations, (London: Stevens and Sons, 1947), pp. 17-32, 100-102; Higgins, Conflict of Interest; International Law in a Divided World, (London: 1965), p. 101 et. seq.; Schwarzenberger, The Frontiers of International Law, (London: Stevens and Sons, 1962), Ch. 7; Tunkin, "Co-existence and International Law", Hague Recueil, Vol. 95, 1958 (III), pp. 5-78.

tical bounds".[75]

4. Manifestations of Universalist Response

It is clear that the authors of the U.N. Charter regarded Article 51 not as an open invitation or a licence to by-pass the world organization's machinery, but as a declaration of the inherent right of a victim of armed attack to defend itself unilaterally or with the help of those states which, by treaties, have obligated themselves to come to the victim's aid until the Security Council was in a position to act.[76] The paralysing consequences of the veto power created a situation in which Western statesmen appeared to vaccilate between strengthening the General Assembly and building up regional security systems as their first line of defence. In actual fact, both strategies were adopted.[77] Unfortunately, but understandably, the universalist response to the regionalist challenge has been too feebly and too half-heartedly supported by its protagonists,

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[75] J.G. Starke, "Regionalism as a Problem of International Law", in G.A. Lipsky (ed.), Law and Politics in the World Community, (Berkeley: University of California Press, 1953), p. 126; L.C. Green, "New States, Regionalism and International Law", C.Yb.I.L., Vol. 5, 1967, pp. 118-141; also "The Impact of the New States on International Law", Israel Law Review, Vol. 4, No. 1, January 1969, pp. 27-60.

[76] See Chapter IV below.

[77] See H. Field Haviland Jr., The Political Role of the General Assembly, (New York: Carnegie Endowment for International Peace, 1951), pp. 154-165.

and bitterly denounced by those who interpreted it as amounting to a *de facto* revision[78] of the balance of power and functions between the General Assembly and the Security Council.

(a) The "Little Assembly"

The universalist response first manifested itself in the proposal of the U.S. Secretary of State, Marshall, for establishing an Interim Committee on Peace and Security.[79] As Sir Hartley Shawcross, the British delegate, frankly admitted, "the establishment of this interim commitee of the General Assembly is somewhat related to the experience, during the past year or more, of the operation of the Security Council...".[80] The 'Little Assembly', whose purpose was to enable the General Assembly to function continuously,[81] was

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[78] On *de facto* Charter amendment, see Andrew Martin and John Edwards, *The Changing Charter: A Study in the Reform of the United Nations*, (London: Sylvan Press, 1955), Ch. 2.; S. Engel, "The Changing Charter of the United Nations", *Y.B.W.A.*, Vol. 7, 1953, pp. 71-101; Jacob Robinson, "Metamorphosis of the United Nations", *Hague Recueil*, Vol. 94, 1958 (II), p. 32.

[79] U.N. Doc. A/454. For a consideration of this proposal, see *G.A.O.R.*, 2nd Sess., 110th Plenary Mtg., 13 November 1947, pp. 753-833.

[80] G.A.O.R., *Ibid.*, p. 789.

[81] See generally, L.C. Green, "The 'Little Assembly'", *Y.B.W.A.*, Vol. 3, 1949, pp. 169-183; Douglas Coster, "The Interim Committee of the General Assembly: An Appraisal", *International Organization*, Vol. 3, 1949, pp. 444-458.

constituted in November 1947.[82] The third paragraph of the Resolution of November 13, 1947 which is the most crucial runs as follows:

> In discharging its duties the Interim Committee shall at all times take into account the responsibilities of the Security Council under the Charter for the maintenance of international peace and security as well as the duties assigned by the Charter or by the General Assembly or by the Security Council to other Councils or to any committee or commission. The Interim Committee shall not consider any matter of which the Security Council is seized.[83]

As the Interim Committee was explicitly prohibited from considering matters which were on the agenda of the Security Council, it is difficult to understand the logic of Vyshinsky's contention that the proposal was an attempt "to nullify the Security Council and undermine its foundations".[84] From the Soviet point of view, the political motive behind the creation of this Interim Committee was suspect. The proposal was American; the beneficiary was the American dominated General Assembly. In terms of the law of the United Nations, the Interim Committee was not unconstitutional. The General Assembly can properly establish subsidiary organs

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[82] General Assembly Resolution 111 (II), 13 November 1947; See also G.A. Res. 196 (III), 3 December 1948; G.A. Res. 295 (IV), 21 November 1949.

[83] U.N. Official Records of the Second Session of the General Assembly: Resolutions 16 September - 29 November 1947 (A/519), p. 16.

[84] G.A.O.R., 2nd Sess., 110th Plenary Mtg., 13 November 1947, p. 764.

in discharge of its responsibilities under the Charter.[85] What about the argument that the General Assembly was not intended to meet continuously and that, as the Interim Committee achieved this very end, it amounts to an amendment of the Charter. The answer to this argument is a technical one that calls for the recognition of the difference between the General Assembly as a main organ created by the Charter and a subsidiary organ created by a main organ of the United Nations.

In pushing through the General Assembly the proposal to establish an Interim Committee, the American-led Western camp had behind it not only the law of the Charter but also the necessary parliamentary strength that could only give effect to its proposal. Besides, the Western powers contended that the need for the application of the principle of effectiveness to the United Nations provided the most powerful justification for their action. The Soviet bloc, having voted against the establishment of the Committee, refused to participate in its activities. In retrospect, it is hardly surprising that the Committee had, by 1952, ceased to meet. What is significant for our purpose here is that, although the creation of an Interim Committee was considered by its protagonists as a device for strengthening and increasing the efficiency of the United Nations, the usefulness of

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[85] Art. 22.

the Committee is questionalbe. The Interim Committee reflects the rather politically naive thinking that the United Nations Organization can be strengthened and made more effective in the absence of a developing political _détente_ between the two major ideological camps. Green did not exaggerate when he offered the following comments on the impact of this first evidence of universalist response to the cold war situation and the regionalist challenge: "Despite all the sound and fury that accompanied the Caesarean birth of the Interim Committee, instead of some Gargantua being born, what came forth were a mere Tom Thumb ...it is nothing more or less than 'a glorified Hampstead Garden Suburb debating society'".[86]

(b) _The "Uniting for Peace" Resolution_

The passing of the "Uniting for Peace" Resolution[87] in 1950 must be seen in the context of the phenomenon of universalist answer to the problem of creeping political impotence of the Security Council. Again, the Resolution was the brain child of the United States.[88] It was, in the

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86 Green, "The 'Little Assembly'", _Y.B.W.A._, Vol. 3, 1949, p. 187.

87 General Assembly Resolution 377 (V); See Resolutions adopted by the General Assembly during the period 19 September to 15 December 1950, _G.A.O.R._, 5th Sess., Supplement No. 20 (A/1775), pp. 10-11; Hans Kelsen, _The Law of the United Nations_, (New York: Praeger, 1964), pp. 953 _et. seq_.

88 Weiler and Simons, _The United States and the United Nations_, (New York: Manhattan Publishing Co., 1967), pp. 284ff.

words of Lester B. Pearson, "our answer to those who would frustrate and make futile the efforts of the Security Council to carry out the task for which it has primary responsibility, the maintenance of international peace and security".[89] The General Assembly Resolution of November 3, 1950 declared in Section A that

> [I]f the Security Council, because of lack of unanimity of permanent members, fails to exercise its primary responsibility for the maintenance of peace and security in any case where there appears to be a threat to peace, or an act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request thereof. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members or by a majority of the Members of the United Nations.

In Section C, the Resolution recommended that

> [E]ach Member maintain within its national armed forces elements so trained, organized and equipped that they could promptly be made available, in accordance with its constitutional processes, for service as a United Nations unit or units, upon recommendation by the Security Council or General Assembly, without prejudice to the use of such elements in exercise of the right of individual or collective self-defence reconnised in Article 51 of the Charter.

The Resolution further authorized, in Section B, the establishment of a Peace Observation Committee composed of fourteen member states to "observe and report on the situation

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[89] United Nations Bulletin, Vol. 9, No. 10, November 15, 1950, p. 515.

in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security". Also constituted in Section D was a fourteen member Collective Measures Committee "to study and make report to the Security Council and the General Assembly... on methods... which might be used to maintain and strengthen international peace and security in accordance with the Purposes and Principles of the Charter, taking account of collective self-defence and regional arrangements".[90]

Strictly speaking, the driving motive behind the Acheson Plan was not to strengthen the United Nations with the ultimate purpose of steming the rising tide of the forces of regionalism. If it were genuinely so, the intention would have been unequivocably respectable. The formulation of the Resolution discourages any such interpretation in as much as it makes deferential references to the integrity of regional organizations. On the contrary, it was highly probable that the political calculation in the Western camp in 1950 was

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[90] For a summary of the debate on this Resolution and a critical analysis of its implication, see United Nations Bulletin, Vol. 9, No. 10, 1950, pp. 497-515; H.F. Bancroft, "Can the U.N. Become a Collective Security Organization?", U.S. Dept. of State, Bulletin, Vol. 24, No. 619, 16 May, 1951, pp. 771-779; Joseph E. Johnson, "The Uniting For Peace Resolution" in Eagleton and Swift (eds.), Annual Review of United Nations Affairs 1951, pp. 239ff; L.M. Goodrich and P. Simons, The United Nations and the Maintenance of International Peace and Security, (Washington, D.C.: Brookings Institution, 1955), pp. 406-423; Hans Kelsen, The Law of the United Nations, (1964), p. 953ff.

that if the western dominated General Assembly could be strengthened and its political resources used in critical situations to give legitimacy and universal character to essentially regional operations, the United Nations would not only retain its theoretical superiority but, more importantly, would also continue to serve the policy interests of the western camp.[91]

The Acheson Plan was certainly not unconstitutional[91a] even though it smacked of anti-Soviet intention. The delegates from the Soviet bloc confused its pro-Western bias with the question of its constitutionality. Opposition to the Resolution rested on the contention that it violates the Charter by arrogating to the General Assembly the power to determine that a breach of the Charter has occurred, and that, by setting up a new set of machinery, it was intended to supersede the Security Council and the enforcement organ of the United Nations. The Soviet Ambassador to the U.N., Vyshinsky, told the First Committee of the General Assembly

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[91] Ernst B. Haas argues that collective security as a concert of major powers has, following the 1950 'Uniting for Peace' Resolution, given way to what he called "permissive enforcement" by which the U.N. delegates enforcement power to a group of states. "The striking and unique feature of permissive enforcement lies in the fact that it could be directed _against_ one of the guarantors of collective security". See his "Types of Collective Security: An Examination of Operational Concepts", _A.P.S.R._, Vol. 41, No. 1, March 1955, p. 47. (Emphasis in the original). See also his _Collective Security and the Future of International Security_, (Denver: The University of Denver, 1968), p. 41.

[91a] See Alfred von Verdross, "Idees directrices de L'Organisation des Nations Unies", _Hague Recueil_, Vol. 83, 1953 (I), pp. 63-67.

that the Soviet had no objection to the proposal in Section A calling for special extraordinary session of the General Assembly, but maintained and insisted that the decision to do so "required the concurring votes of the permanent members".[92] While welcoming the establishment of the Peace Observation Commission, he emphasized the desirability of making it in real practice "a representative organ of the United Nations and not a mere tool in the hands of one group of States".[93] He rejected categorically Section C because "it constituted an attempt to usurp the rights of the Security Council and violated Chapter VII of the Charter".[94] He similarly considered Section D, which called for the establishment of a Collective Measures Committee, as "contradictory to Chapters V and VII of the Charter and would encroach upon the functions of the Security Council".[95]

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[92] G.A.O.R., 5th Session, First Committee, 357th Mtg., October 10, 1950, para. 42, p. 85.

[93] Ibid., para. 43, p. 85.

[94] Ibid., para. 44, p. 85.

[95] Ibid., para. 47, p. 86. Seventeen years later (1967) a Soviet Memorandum on United Nations Operations for the Maintenance of International Peace and Security reiterated that the Soviet Union "cannot agree that questions relating to the use of force on behalf of the United Nations should be referred for decision by a mechanical majority of votes in the General Assembly mainly because the imperialist forces can use this procedure in their own interest". See U.N. Doc. S/7841 (April 5, 1967), Text in International Legal Materials, Vol. 6, 1967, pp. 545-552.

An objection based on the contention that the Resolution was not in conformity with the original intention of those who framed the Charter would have been more respectable than one that the Resolution was not in conformity with the wording of the Charter. The responsibility of the Security Council for the maintenance of peace and security is primary and not exclusive.[96] Besides, the particular Resolution in question respects the primary responsibility of the Security Council in the maintenance of peace and security. It nowhere grants the General Assembly any greater powers than those enjoyed by that organ under Articles 10 and 11(2).[97] The General Assembly cannot enforce its recommendations, and, as Vallat has persuasively asserted,

> The limitations of Article 10 are not on the field of the competence of the General Assembly but on the powers that it may exercise within that field.... There is no limitation on the kind of recommendation that the Assembly is entitled to make. Accordingly, if one looks only to Article 10 the Assembly appears to have the right to recommend to Members of the United Nations that they take any measures, including the use of armed

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[96] Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 151, at 168.

[97] See. J. Andrassy, "Uniting for Peace", A.J.I.L., Vol. 50, 1956, pp. 563-582; L.B. Sohn, "The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force", A.J.I.L., Vol. 52, 1958, pp. 232-233; D.W. Bowett, United Nations Force, (1964), pp. 290-294; Stone, Legal Conflict of International Conflict, (1959), p. 266 et. seq. Contrast Kelsen, "Is the Acheson Plan Constitutional?", W.P.Q., Vol. 3, 1950, p. 527; also The Law of the United Nations, (1964), p. 960. R.W. Tucker, in I.L.Q., Vol. 4, 1951, pp. 33-38.

> force, which it was contemplated the Security Council might decide to employ under Articles 41 or 42 of the Charter.[98]

The question of the constitutionality of the Acheson Plan, important as it is, is, strictly speaking, at best peripheral and incidental to our main argument here. For our purpose, it is sufficient to note that the hoped for ascendancy of the General Assembly, following the self-imposed retreat of the Security Council,[99] has not been able to stem the political appeal of regionalism and was not really intended for that purpose. The "Uniting for Peace" Resolution neither redressed the growing disequilibrium in the universal-regional relationship which would seem to have

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[98] F.A. Vallat, "The General Assembly and the Security Council of the United Nations", <u>B.Y.B.I.L.</u>, Vol. 29, 1952, pp. 96-97; also "The Competence of the United Nations General Assembly", <u>Hague Recueil</u>, Vol. 97, 1959 (II), pp. 203-291: "The broad intent of those who drafted the Charter was to give the General Assembly wide functions but limited powers" (p. 225). Hans Kelsen, agreeing with F.A. Vallat, added a qualification. "[T]here is hardly any international matter which the General Assembly is not competent to discuss and on which it is not competent to make recommendations. But it is important to note that the main competence of the Assembly, as determined by Article 10, has a political, not a legal character". See <u>The Law of the United Nations</u>, (1964), pp. 198-199.

[99] On the "retreat" and subsequent "rejuvenation" of the Security Council, see Green, "The Security Council in Retreat", <u>Y.B.W.A.</u>, Vol. 8, 1954, pp. 95-117; Keith S. Peterson, "The Business of the United Nations Security Council: History (1946-1963) and Prospects", <u>Journal of Politics</u>, Vol. 27, 1965, pp. 818-834; A.L. Bennett, "The Rejuvenation of the Security Council - Evidence and Reality", <u>Midwest Journal of Political Science</u>, Vol. 9, 1965, pp. 361-375.

been in favour of regional organizations nor converted the United Nations into an effective international security system against aggression. Green was even more critical of the usefulness of the Resolution:

> In practice, the Resolution has added nothing. It purports in high-sounding phrases to elevate the Assembly almost to the level of the Council. In fact it has not altered the status quo one iota, save to enable the Assembly to be summoned more quickly. Whatever is done under this Resolution could be done just as well as if it had never been passed. The members will still decide, as they have done in the past, what recommendations of the Council or the Assembly they intend to carry out. In view of this nothing has been achieved.[100]

Another scholar has rightly pointed out that the Resolution produced "over-optimistic and even harmful attempts to strengthen it [the U.N.]", and "whether or not the belief is justified, it must... be accepted as a political fact that [the] work... being undertaken by the Collective Measures Committee has come to be regarded as anti-Soviet in character".[101]

(c) Strengthening the Peace-keeping Capacity of the U.N.

A third manifestation of universalist response to regionalist challenge was the successful creation of an *ad*

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[100] L.C. Green, "The Security Council in Retreat", *Y.B.W.A.*, Vol. 8, 1954, pp. 116-117.

[101] Sir Gladwyn Jebb, "The Role of the United Nations", *International Organization*, Vol. 6, 1952, pp. 512, 513.

hoc United Nations Peace-keeping Force in the Middle East (1956), in the Congo (1960) and in Cyprus (1964).[102] In these three crisis-situations, the claim of the universal organization as the dominant instrumentality for peace met with an almost instant, though doubtful long-run, success. The General Assembly Resolution under which the United Nations Emergency Force (UNEF) in the Middle East was set up was adopted with fifty-seven votes in favour, nineteen abstentions and no votes against.[103] The Security Council Resolution which authorized the Secretary-General to set up the United Nations in the Congo (ONUC) was approved with eight votes in favour, no votes against, and with China, France and the United Kingdom abstaining for reasons not connected with the establishment of the Force which they supported.[104] Although the Soviet Union had some reservation on the fourth paragraph of the March 4, 1964 Security Council Resolution authorizing the Secretary-General to constitute a U.N. Peace-keeping Force in Cyprus (UNFICYP), the Resolu-

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[102] See Rosalyn Higgins, United Nations Peace-keeping 1946-1967: Documents and Commentary, (London: Oxford University Press, 1969), p. 219 et. seq.

[103] G.A. Res. 998 (ES-1), 4 November 1956; G.A.O.R., First Emergency Special Session Supplement No. 1 (A/3354), pp. 2-3; Rosalyn Higgins, op.cit., pp. 230-231.

[104] U.N. Doc. S/4387 (1960), S.C.O.R., 15th Yr., 873rd Mtg., p. 42. King Gordon, The United Nations in the Congo: A Quest for Peace, (1962), p. 24.

tion,[105] on the whole, was approved with three abstentions and no negative votes. It will, however, be grossly mistaken to equate the absence of positive dissent on the part of the members of the United Nations, especially the most powerful ones, with support for improving the peace-keeping capability of the U.N. The Soviet member of the International Court of Justice, Koretsky, in his dissenting opinion in the *Certain Expenses* case, pointed out that abstention from voting did not amount to approval of resolutions adopted for the creation of UNEF and the ONUC:

> Abstention from the vote on the resolutions cannot be made equal to the Old Roman "*non liquet*". Another Old Roman rule could be recalled, i.e., if one ought to say "yes", but keeps silent, then that means "no". But that would be excessively logical. Abstention from the vote on the resolutions on these or those measures proposed by the Organization should rather be considered as an expression of unwillingness to participate in these measures (and eventually in their financing as well) and as unwillingness to hamper the implementation of these measures by those who voted "in favour" of them.[106]

This explanation is only of theoretical interest, for, it is one thing obtaining initial support and consensus of the major powers for the establishment of an *ad hoc* international force, it is quite another thing securing the continuing support of those essential major powers. The constitutional crisis of 1965 demonstrated that there did not exist an

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[105] U.N. Doc. S/5575 (1964), *S.C.O.R.*, 19th Yr., 1102nd Mtg., p. 5. J.A. Stegenga, *The United Nations Forces in Cyprus*, (1967), p. 70.

[106] *I.C.J. Reports 1962*, p. 151 at p. 279.

adequate political consensus within the United Nations Organization for the claim of that Organization as the dominant international machinery for the maintenance of global peace and security.[107]

In assessing the degree of success of the resurgence or ascendancy of universalism symbolized by the establishment of _ad hoc_ international forces under the U.N. Command, one must not lose sight of the fact the United Nations was cast in what Dag Hammarskjold called "preventive diplomacy"[108] and not what the Charter means by collective security. According to Resolution 998 (ES-1) of November 2, 1956, the purpose of the U.N. Force was "to secure and supervise the cessation of hostilities". Dag Hammarskjold's plan for the U.N. Force not only accepted this fundamental principle but went further to stipulate that "as a matter of principle, troops should not be drawn from countries which are permanent members of the

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[107] See Inis Claude, Jr., "The Political Framework of the United Nations' Financial Problems", _International Organization_, Vol. 17, 1963, pp. 831-859; Ruth B. Russell, "United Nations Financing and "The Law of the Charter"", _C.J.I.L._, Vol. 5, No. 1, 1966, pp. 68-95 esp. pp. 83-95; Stoessinger, _The United Nations and the Super-powers_, pp. 103-113; A.G. Nicholas, "The United Nations in Crisis", _International Affairs_ (London), Vcl. 41, No. 3, July 1965, pp. 441-450; Hernane Tavares de Sá, _The Play Within the Play: The Inside Story of the U.N._, (New York: Alfred Knopf, 1966), pp. 15-54.

[108] _Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1959 - 15 June 1960_, _G.A.O.R._, 15th Sess., Supplement No. 1A (A/4390/Add. 1), p. 4ff.

Security Council",[109] a principle which was definitely not intended by the provisions of Chapter VII of the Charter.[110] Thus, the purpose for which consensus was apparently achieved in 1956, as well as in 1960 and 1964, was not the enhancement of the collective capacity of the United Nations to enforce peace by initiating actions against an aggressor within the meaning of Chapter VII of the Charter, but the more modest, yet important, one of "keeping newly arising conflicts outside sphere of bloc differences", and thus "avoiding an extension or achieving a reduction of area into which the bloc conflicts penetrate".[111] The validity of this distinction was recognized by the International Court in the Certain Expenses case. The Court, in its majority opinion, asserted that "the operations known as UNEF and ONUC were not enforcement action within the compass of Chapter VII of the Charter and that therefore Article 43 could not have only applicability to the cases with which the Court is

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[109] U.N. Doc. A/3289, G.A.O.R., First Emergency Special Session, Supplement No. 1 (A/3354), Annexes, p. 14. See also U.N. Doc. A/3943 (October 9, 1958), Summary Study of the Experience derived from the Establishment and Operation of the Force: Report of the Secretary-General, G.A.O.R., 13th Sess. Annexes 1958-1959, pp. 8-33.

[110] See Doc. 1170, III/13, U.N.C.I.O. Doc., Vol. 11, p. 235.

[111] Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1959 - 15 June 1960, G.A.O.R., 15th Sess., Supplement No. 1A (A/4390/Add. 1), p. 4. See also Schwarzenberger, "Problems of a United Nations Force", I.L.A., Report of the 50th Conference, 1960, pp. 130ff.

hereby concerned".[112] It is also relevant to point out that whereas the consent of the aggressor is not needed for the deployment and operationalization of a United Nations enforcement force, the consent of the host state is the basis of the U.N. Peace-keeping operations.[113]

The interpretation of UNEF, the ONUC and the UNFICYP as "a manifestation of the view that an organization which is incapable of providing collective security may yet contribute significantly to peace and security if it concentrates on helping states to avoid drifting too near the brink of war, and not on rescuing them from the brink itself",[114] is not intended to belittle the significance of the establishment of these ad hoc U.N. Forces; rather, it is intended to emphasize that strengthening the peace-keeping capability of the United Nations falls far short of restoring the United Nations, more precisely, the Security Council, to the managerial role marked for it in 1945. In this context, it is worth noting that the assertion of dominance by the United Nations has neither been strengthened nor further encouraged

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112 I.C.J. Reports 1962, p. 151 at p. 166.

113 Bowett, United Nations Forces: A Legal Study, (1964), p. 124 et. seq.; Higgins, United Nations Peace-keeping 1946-1967: Documents and Commentary, (1969), p. 335 et. seq.

114 Inis Claude, Jr., "The United Nations and the Use of Force", International Conciliation, No. 532, March 1961, p. 375; also Power and International Relations, (1962), pp. 283-284.

by the reluctance of the politically powerful members of the Organization to consider seriously proposals for a permanent U.N. Peace Force and Observer Corps.[115] Finally, there is considerable force to the argument that the model of the United Nations implicit in the dissenting opinion of Judges Koretsky of the Soviet Union and Winiarski of Poland in Certain Expenses case,[116] and in the Soviet Trioka proposal for the reorganization of the U.N. machinery, in parti-

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[115] See, for instance, The Green-Sohn Draft Resolution on the establishment of U.N. Peace Force and Observer Corps in I.L.A., Report of the 48th Conference, New York, 1958, pp. 518-519, and the discussion on the legality of such a Force in I.L.A., Report of the 49th Conference, Hamburg, 1960, pp. 96-152; U.N. Monthly Chronicle, Vol. 11, No. 11, December 1965, p. 73ff; Fin Seyersted, United Nations Forces in the Law of Peace and War, (Leyden: A.W. Sijthoff, 1966), pp. 85-89.

[116] I.C.J. Reports 1962, p. 151ff. President Winiarski had this to say: "The intention of those who drafted it [the Charter] was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council.... It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article 1 of the Charter, but that is the way in which the Organization was conceived and brought into being" (p. 230). Koretsky's model of the U.N. is that of 1945 which postulated and accepted political impotence and indecision as the only alternative to an international government of the great powers. By implication, he asserted that the unpleasant consequences of a big power dissent must be accepted and respected rather than circumvented by any ingenious anti-Charter device which the dissenting great power finds unacceptable and politically offensive: "I am prepared to stress the necessity of the strict observation and proper interpretation of the provisions of the Charter, its rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: "The ends justify the means"" (p. 268).

cular, the U.N. Secretariat,[117] leads inevitably to the conclusion that the Soviets in particular (and the West too) still regard the United Nations, to use the much quoted phrases of Dag Hammerskjold, as a "static conference machinery" rather than a "dynamic instrument of governments".[118]

The foregoing analytical survey of the history of the United Nations in terms of the developing contest between the rival claims of universalism and regionalism, more precisely, between the challenge of regionalism and the induced response of universalism, reveals an important paradox about the veto. The veto has been the cause of the impotence of the Security Council and the catalyst for whatever development there has been of the United Nations. The East-West

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[117] Whiteman, Digest of International Law, Vol. 13, (1968), pp. 792-793; R.I.I.A., Documents on International Affairs 1960, pp. 239-242, 246-255; Documents on International Affairs 1961, pp. 485-487; Sydney Bailey, "The Troika and the Future of the U.N.", International Conciliation, No. 536, May, 1962; Report of the Soviet Association of International Law on Peaceful Co-existence, I.L.A., Report of the 50th Conference, Brussels, 1962, p. 359: "Under present conditions the principle of peaceful co-existence requires consideration for the legitimate interests of the three groups of States - socialist, Western capitalist, and neutralist. It rules out the diktat of any one of these groupings. This thesis must find its reflection in a reasonable reorganization of the United Nations machinery".

[118] Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1960 - 15 June 1961, G.A.O.R., 16th Sess., Supplement No. 1A (A/4800/ Add. 1), p. 1ff. See also Robert M. MacIver, The Nations and the United Nations, (New York: Manhattan Publishing Company, 1959), pp. 145-171.

ideological rift has assured and insured the political and strategic value of the veto power. The history of the United Nations shows evidences of creative efforts, sometimes politically naive, to overcome the unpleasant consequences of the exercise of the veto power. Stoessinger captures the significance of this paradox in the following statement:

> The veto, then, has not been an insurmountable obstacle, but a constant incentive toward greater inventiveness and improvisation in international problem-solving. Perhaps more than any single provision in the Charter, the veto has been responsible for the Charter having remained a living document and the U.N. itself a living organization.[119]

Stoessinger should have also added that the "open veto" of the Soviet Union and the "hidden veto" of the United States, though functional in this extremely limited sense, changed the character of the United Nations so fundamentally that the expectation that Organization would develop as an international government of the Great Powers has proved illusory.[120]

5. Concluding Comments

An English scholar, Andrew Martin, concluded a study

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[119] John G. Stoessinger, The United Nations and the Superpowers, p. 19.

[120] Inis Claude, Jr., The Changing United Nations, (New York: Random House, 1967); Jacob Robinson, "Metamorphosis of the United Nations", Hague Recueil, Vol. 94, 1958 (II), p. 32ff; Ruth Russell, "Changing Patterns of Constitutional Development", International Organization, Vol. 19, 1965, pp. 410-425.

on Collective Security with the following passage in which he offered advice on how to handle the challenge posed by the proliferation of regional collective self-defence organizations for the supremacy of the universal collective security system of the United Nations:

> [T]hose who made the Charter have not been more successful than their predecessors in devising adequate legal quarantees against the dangers inherent in rival alliances. The world was not entitled to expect otherwise. In an imperfectly co-ordinated international society there will always be dangers that do not respond to purely legal treatment, but call for that kind of safeguard which only superior power can provide. The answer to the problem of regional arrangements lies not in legal rules designed to weaken them; it lies in the political action designed to enhance the military and economic power that can be mobilized from the centre.[121]

While the history of the United Nations shows no record of any attempt to weaken the Charter provisions dealing with regional organizations, it abounds with efforts aimed at strengthening the General Assembly and the peace-keeping capability of the United Nations. The limited success attending such efforts may be regarded as a measure of the strength of the East-West ideological rift. Collective self-defence arrangements have largely superseded collective security under the authority of the Security Council. The extent to which the law and activities of regional organizations are consistent with the principles, purposes and law of the United Nations is a matter of empirical determination.

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[121] Andrew Martin, Collective Security: A Progress Report, (Paris: U.N.E.S.C.O., 1952), p. 178.

CHAPTER VI

REGIONAL INTERNATIONAL CONSTITUTIONAL LAW AND THE CHARTER OF THE UNITED NATIONS

The purpose of this chapter is to examine and analyze the international constitutional law of some of the most important regional organizations with a view to assessing not only the compatibility of the principles it embodies with those of the United Nations Charter but also its contribution to the development, clarification and codification of international law.

1. The Relationship between General International Law and the Law of International Institutions

Classical international law of the pre-twentieth century made no differentiation between international law at large and the constitutional law of international organizations. Apart from the existence of specialized international unions performing non-political functions,[1] international life, until the founding of the League of Nations in 1920,

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[1] For an account of the early international "non-political" institutions, see Paul S. Reinsch, Public International Unions, (Boston: 1911); L.S. Woolf, International Government, (London: 1916), Part II; G.J. Mangone, A Short History of International Organization, (New York: 1954); Norman Hill, International Administration, (New York: 1931); F.B. Sayre, Experiments in International Administration, (New York: 1919).

lacked permanent global institutions dedicated primarily to the maintenance of international peace and security.[2] Europe in the nineteenth century was "governed" by a system of ad hoc conferences[3] aptly described as "a system of Rights without Duties, and Responsibilities without Organization".[4] The increasing institutionalization of international relations which began in the mid-nineteenth century but largely confined to non-political areas of international cooperation triggered a process which eventually transformed international society into an organized, though decentralized and primitive, political system.[5] The systematization and regularization of international relations through and by means of permanent public international organizations has left its impact on thinking about international law. It is

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[2] C.W. Jenks, The World Beyond the Charter, (London: Allen and Unwin, 1969), Ch. 1.

[3] See R.B. Mowat, The Concert of Europe, (London: 1930); F.S. Dunn, The Practice and Procedure of International Conferences, (Baltimore: 1929); Norman Hill, The Public International Conferences, (Stanford: 1929).

[4] Sir Alfred Zimmern, The League of Nations and the Rule of Law, (1936), p. 75. See also, Henry Strakosch, "The Place of the Congress of Vienna in the Growth of International Law and Organization", I.Y.I.A., Vol. 13, Part 2, 1964, pp. 184-206; Paul Reuter, International Institutions, (London: 1958), p. 58.

[5] A most recent count shows that there are 4254 international organizations of which 744 are either dead or inactive. See Yearbook of International Organizations, 1968-1969, (Brussels: 1969).

now generally accepted that international law is so closely related to international organizations that the former cannot be treated fully independently of the latter.[6] The growth of international institutions has led to a re-examination not only of the question of the sources[7] but also of the subject and subject-matter of international law.[8] More importantly, and perhaps paradoxically, it has induced the tendency to differentiate the law of international institutions[9] from general (customary) international law.

The relationship between the constitutional law of international organizations and general international law is much discussed among international legal scholars. Some, especially the Soviet scholars, seem to subscribe to the theory of substitution or amalgamation which claims that it

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[6] William L. Tung, International Law in an Organizing World, (New York: 1968); C.W. Jenks, The Common Law of Mankind, (London: 1958), p. 22 et. seq.; P.E. Corbett, Law and Society, (New York: 1951).

[7] On sources of international law, see Schwarzenberger, The Inductive Approach to International Law, (London: 1965); Clive Parry, The Sources and Evidences of International Law, (Manchester: 1965); Torsten Gihl, "The Legal Character and Sources of International Law", Scandinavian Studies in Law, 1957, pp. 53-92.

[8] Jenks, The Common Law of Mankind, p. 7 et. seq.; W. Friedmann, The Changing Structure of International Law, (1964); Schwarzenberger, The Frontiers of International Law, (1962), p. 210 et. seq.

[9] For a comprehensive bibliography on the law of international institutions, see Schwarzenberger, A Manual of International Law, (5th Ed., London: 1967), p. 581 et. seq.

is unnecessary to distinguish between classical international law and the international law of the United Nations if only because both are based upon the positive consent and agreement of states. The eminent Soviet jurist, Judge Krylov stated this view cogently in the following words: "I would underline that I am opposed to making any distinction between general international law and the international law of the United Nations. I think the law of the United Nations is only the part of international law which must unite us all. The distinction between so-called classical international law and international law of the United Nations, is not necessary. We have no classical law now, we have the law of the 81 States belonging to the United Nations".[10] This theory of substitution or amalgamation seems to be based on the assumption by the Soviet scholars of the primodial position of international treaty as the source of international law.[11] Generally speaking, western legal scholars

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[10] I.L.A., Report of the 48th Conference, New York, 1958, p. 512. See also Lukashuk (U.S.S.R.), I.L.A., Report of the 52nd Conference, Helsinki, 1966, p. 563; Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law", California Law Review, Vol. 49, No. 3, 1961, pp. 419-430; "Co-existence and International Law", Hague Recueil, Vol. 59, 1958 (II), pp. 5-78; Academy of Sciences of the U.S.S.R. Institute of State and Law, International Law, (Moscow: Translated by Denis Ogden, no date 1961?), pp. 12-14.

[11] T. Taracouzio, The Soviet Union and International Law, (New York: 1935), pp. 13-14; Triska and Slusser, The Theory, Law, and Policy of Soviet Treaties, (Stanford: 1962), Ch. 1; Tunkin, "Co-existence and International Law", Hague Recueil, Vol. 95, 1958 (II), pp. 5-78; J.N. Hazard, "The Soviet Union and International Law", Illinois Law Review, Vol. 43, No. 3. 1948, pp. 591-607.

repudiate the theory of substitution and contend that the law of international institutions is no more and no less than a specialized and largely autonomous branch of general international law: the law of international institution presupposes and stands under the impact of general international law.[12]

It is beyond the scope of this chapter to examine arguments marshalled in support of both the theories of amalgamation and differentiation. It is sufficient to indicate that the theory of differentiation is the more plausible of the two. However, to reject the contention that the law of the United Nations should be substituted for or amalgamated with international law at large is not to be oblivious of the dual relationship between the two, and, in particular, the extent to which the former has rendered obsolete or modified some of the assumptions of the latter. It has been rightly urged by the International Law Commission in its 1950 Report on _Ways and Means of making the evidence of customary international law more readily available_ that

> [T]he differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon.... A principle or rule of

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[12] Oppenheim, _International Law_, Vol. 1, (1955), p. 25; Kelsen, _Principles of International Law_, (2nd Ed., 1966), p. 438; Kunz, _The Changing Law of Nations_, (1968), p. 335 _et. seq_.; Verdross, "The Charter of the United Nations and General International Law" in Lipsky (ed.), _Law and Politics in the World Community_, (1953), pp. 153-161; Parry, _op. cit_., pp. 28-25; Schwarzenberger, "Reflections on the Law of International Institutions", _C.L.P._, Vol. 13, 1960, pp. 276-292; Gihl, _loc. cit_., p. 75; Bowett, _The Law of International Institutions_, (New York: 1963).

> customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law.[13]

On the question of the impact of international institutions on general international law, legal scholars agree that the law, practice and procedures of international institutions have made positive contributions to the progressive development of international law.[14] There also seems to be an awareness that the modification introduced by the development of per-

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[13] U.N. Doc. A/1316, Report of the International Law Commission to the General Assembly, Yearbook of International Law Commission, 1950, Vol. 2, p. 368.

[14] See Higgins, The Development of International Law Through the Political Organs of the United Nations, (London: 1963); H. Lauterpacht, The Development of International Law by the International Court, (London: Stevens, 1958); C. Jenks, "The Impact of International Organizations on Public and Private International Law", T.G.S., Vol. 37, 1951, pp. 23-49; The Common Law of Mankind, (London: 1958), pp. 173-204; A.J. Tammes, "Decisions of International Organs as a Source of International Law", Hague Recueil, Vol. 94, 1958, pp. 265-363; Obed Y. Asamoah, The Legal Significance of the Declaration of the General Assembly of the United Nations, (The Hague: 1966); Oscar Schachter, "The Development of International Law Through the Legal Opinions of the Secretariat", B.Y.B.I.L., Vol. 25, 1948, pp. 91-132; J.G. Starke, "The Contribution of the League of Nations to International Law, I.Y.I.A., Vol. 13, Part II, 1964, pp. 207-226; Louis Henkin, "International Organization and the Rule of Law", International Organization, Vol. 23, 1969, pp. 656-682; A.S.I.L., "Development of International Law by International Organizations", Proceedings, A.S.I.L., 1965, pp. 1-212.

manent international institutions is, to a large extent, not so much in the specific rules of international law as in certain assumptions traditionally postulated by the law of nations.[15]

For the purpose of this study, the constitutional law of the following organizations will be examined: the Organization of American States (OAS), the League of Arab States, the North Atlantic Treaty Organization (N.A.T.O.), the Warsaw Treaty Organization (W.T.O.); the Council of Europe, the Organization of African Unity (OAU), the South-east Asia Treaty Organization (S.E.A.T.O.); the ANZUS Treaty Alliance, and the Association of the Southeast Asian Nations (A.S.E.A.N.). The particular aspects of their constitutional law[16] to be analyzed are those that deal with (a) relations with and deferential references to the U.N. Charter, (b) membership, (c) regional treaty principles of international

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[15] Schwarzenberger, "Reflections on the Law of International Institutions", C.L.P., Vol. 13, 1960, pp. 276-292; The Frontiers of International Law, (1962), p. 274 et. seq.; J. Kunz, "The Distinctiveness of the International Legal System: Comparison and Contrast", Ohio State Law Journal, Vol. 22, No. 3, 1961, p. 451.

[16] The constitutional documents of all these regional organizations except the OAU and ASEAN can be found in Ruth Lawson, International Regional Organizations: Constitutional Foundation, (New York: 1962); A.J. Peaslee, International Governmental Organization, 2 Vols, (Revised Ed., The Hague: 1961). For the OAU Charter, see International Legal Materials, Vol. 2, 1963, p. 766.

law, (d) modes of decision-making, and (e) pacific settlement of disputes and legal regulation of the use of force. The approach to this subject is comparative: the provisions of regional multilateral treaties are not only compared <u>inter se</u>, but also with the similar provisions of the League Covenant and the U.N. Charter. It is firmly believed that "comparative law serves a triple purpose for the international lawyer. In the first place it enables him to seek those common rules of local law which might form the basis of a uniform international code. Further, by seeking the universal concept of justice, it permits a court to avoid lacunae when called upon to decide international juridical disputes. From the developmental point of view, it makes possible the supplementation of established law through the medium of the general principles of law recognized by civilized nations, either with the aim of clarifying existing law or in order to allow the existing law to adjust itself to the new social conditions".[17]

It has been pointed out that the United Nations Charter gives great prominence to regionalism in the maintenance of international peace and security. The U.N. Charter, after permitting the existence of regional organizations, lays down

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[17] L.C. Green, "An International Lawyer Looks at Comparative Law", <u>Israel Law Review</u>, Vol. 1, 1966, p. 592; "Comparative Law as a "source" of International Law", <u>Tulane Law Review</u>, Vol. 42, 1967-1968, p. 66.

some behavioural rules that purport to guide the activities of these regional organizations.[18] The Charter goes further to postulate the superiority and paramountcy of its obligations over those of other international agreements to which U.N. members may be contracting parties in the event that the two sets of obligations lead to inconsistent and conflicting duties.[19] The general assumption is that, being a "higher law", the law of the United Nations will stand as an example and a guide to statesmen who decide to establish regional organizations. This presumption does not necessarily imply that the law of the United Nations in fact constitutes an international <u>jus cogens</u>.[20] It should be pointed out that unorganized or partly organized international society knew no such peremptory rules of international law, and, because of the fundamental antagonism between the socialist and capitalist systems of social and economic organization which

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[18] See Chapter IV above.

[19] U.N. Charter, Art. 103. See Charles Cadoux, "La Superiorite du Droit des Nations Unies sur le droit des stats members, <u>R.G.D.I.P.</u>, Vol. 63, 1959, pp. 649-680.

[20] Article 50 of the International Law Commission's draft Law of Treaties reads: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Text in <u>A.J.I.L.</u>, Vol. 61, 1967, p. 263 <u>et. seq</u>. For a critical examination of this formulation see Egon Schwelb, "Some Aspects of International <u>Jus Cogens</u> as Formulated by the International Law Commission", <u>A.J.I.L.</u>, Vol. 61, 1967, pp. 946-975. For a defence of the existence of international <u>jus cogens</u>, see Alfred Verdross, "Jus Dispositivum and Jus Cogens in International Law", <u>A.J.I.L.</u>, Vol. 60, 1966, pp. 55-63; McNair, <u>The Law of Treaties</u>, (Oxford: Clarendon Press, 1961), pp. 213 <u>et. seq</u>.

determines the landscape of the international quasi-order of the United Nations,[21] it cannot yet be said that an effective international *jus cogens* does exist today.[22]

2. Deferential References to and Relations with the United Nations

Consider first the deferential references made by the major multilateral treaties to the Charter of the United Nations. The law of regional organizations is nominally rather generous to the law of the United Nations in this respect. It is common practice to include in the constitutional law of regional organizations statements in the preamble or in the operative part declaring that none of the provisions of the particular treaty are to be so construed as to impair the rights and obligations of the signatories as members of the United Nations, and reaffirming expressly the faith of the signatories in the purposes and principles of the U.N. Charter.[23] These declarations and reaffirmations

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[21] See Chapter V above.

[22] Schwarzenberger, "International Jus Cogens", *Texas Law Review*, Vol. 43, 1964-1965, pp. 455-478; "The Problem of International Public Policy", *C.L.P.*, Vol. 18, 1965, pp. 191-214.

[23] Statute of the Council of Europe, Art. 1(c); Manila Treaty, Art. 6; North Atlantic Treaty, Premable and Art. 7; OAS Charter, Art. 137; OAU Charter, Art. 2(1)(e); Warsaw Pact, Preamble and Art. 1; ANZUS Treaty, Art. 6; CENTO, Art. 4; ASEAN Declaration, 2(2). As the Pact of the Arab League antedated the U.N. Charter, it contains (continued on page 245)

have, as we shall see later in this study,[24] proved to be largely empty and nothing but mere lip-services to the superiority of the obligations of U.N. membership.

Apart from the generalities of these deferential references to the U.N. Charter, some treaties define their relationship to the U.N. Charter in specific terms. NATO, SEATO, ANZUS Treaty, CENTO, and the Warsaw Pact are collective self-defence organizations justifying their existence explicitly or implicitly under Article 51 of the U.N. Charter.[25] The law of the OAS and of the Arab League defines the regional organization as both a collective self-defence system under Article 51 and a regional organization under Articles 52-54.[26]

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23 (continued) no specific deferential references to the U.N. Charter but it imposes on the League Council the duty "to decide upon the means by which the League is to cooperate with international bodies to be created in the future in order to guarantee security and peace and regulate economic and social relations". Art. 3.

24 See Chapter VII below.

25 Beckett, The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations, (London: 1950); Starke, The ANZUS Treaty Alliance, (Melbourne: 1965); R.I.I.A., Collective Defence in South East Asia: The Manila Treaty and Its Implications, (London: 1956); K. Grzybowski, The Socialist Commonwealth of Nations, (New Haven: 1964), Ch. 5.

26 Thomas and Thomas, The Organizations of American States, (Dallas: Southern Methodist University Press, 1963), p. 48 et. seq.; M.F. Anabtawi, Arab Unity in terms of Law, (The Hague: Martinus Nijhoff, 1963); R.W. Macdonald, The League of Arab States, (Princeton: Princeton University Press, 1965).

There is much to be said in favour of the view that the definition of the relations of a limited-membership organization in terms of specific articles of the U.N. Charter is hardly necessary. In accordance with a functional analysis of the provisions of the U.N. Charter dealing with regional organizations, the relation of a regional organization to the United Nations is determined not by the character of the regional organization but by the functions it is performing in particular situations.[27] The trend towards multi-functionality in the activities of regional organizations gives logic to a functional interpretation of Articles 51-54. The compatibility of the activities of a regional organization with the principles and purposes of the United Nations depends on whether the regional organization is conforming to the behavioural rules prescribed for the particular type of activity. For instance, although neither the OAU Charter nor the ASEAN Declaration envisages the regional organization as a collective self-defence arrangement, there is no reason why either of them cannot act in that functional capacity. This reasoning is based partly on the view that the U.N. Charter right of self-defence is not constitutive but merely declaratory, and partly on the argument that "matters relating to the maintenance of international peace and security as are appropriate for regional action" do not exclude the

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[27] See Chapters I and IV above.

function of self-defence.[28] However, while there is no legal prohibition against the use of the OAU and the ASEAN for self-defensive actions, there are technical difficulties arising from the lack of well-established machinery for effecting and coordinating such self-defensive measures. It can similarly be argued that the limitation of collective self-defence organizations like the NATO, the Warsaw Pact, the ANZUS Treaty and the Manila Treaty in the field of pacific settlement of disputes is also a technical one relating to the existence of appropriate machinery for the exercise of this functional activity. It is certainly not beyond human political ingenuity to make ad hoc arrangements for the pacific settlement of disputes between members of a collective self-defence organization. This has been the case in NATO. On the recommendation of the Committee of Three on Non-Military Co-operation within the organization,[29] the NATO Council adopted a resolution in 1957 in which members undertake to "submit any disputes which have not proved capable of settlement directly, to good offices procedures within the NATO framework before resorting to any other international

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[28] Kelsen, The Law of the United Nations, (1964), p. 918 et. seq.

[29] Report of the Committee of Three on Non-Military Co-operation in NATO, U.S. Dept. of State, Bulletin, Vol. 36, No. 915, 1957, p. 18 et. seq.

agency".[30]

A good deal of confusion will be avoided if the relation of a regional organization to the United Nations Charter is defined on the basis of the specific function that the regional organization is performing. The compatibility of the activities of a regional organization to the law of the United Nations then depends on whether, in carrying out a particular activity, the regional organization conforms to the rules of behaviour postulated for such functional activity.[31]

3. Membership: The Definition of 'State' for the Purposes of International Organization

The 1933 Montevideo Convention on the Rights and Duties of States posited four criteria of statehood: (1) a permanent population, (2) a defined territory, (3) stable and effective government, and (4) capacity to enter into relations with other states, that is, independence and sovereignty.[32] It is not always the case that these criteria can be objectively determined. Recognition of states in international law and

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[30] Text of Resolution in NATO Facts About the North Atlantic Treaty Organization, (Paris: 1962), pp. 277-278.

[31] For more extensive comments, see Chapter IV above.

[32] Hudson, International Legislation, Vol. 6, p. 620; L.N.T.S., Vol. 165, p. 19.

the admission policy of international organizations are always based on political calculations and interests of the recognizing state or the admitting organization.[33] Thus, Article 4(1) of the U.N. Charter, laying down the conditions of U.N. membership, states as follows: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations".[34] As interpreted in the Admission Case, "[t]he requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a state; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so".[35] These five conditions constitute an exhaustive enumeration. As to the respective competences of the Security Council and the General Assembly in the processes of admitting new members, the International Court of Justice asserted authoritatively

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[33] Hans Aufricht, "Principles and Practices of Recognition by International Organizations", A.J.I.L., Vol. 43, 1949, pp. 679-704.

[34] On the initiative of the United States, the possibility of creating a category of associate membership for the "micro-states" is being examined by a Committee of Experts of the Security Council. U.N. Monthly Chronicle, Vol. 6, No. 8, 1969, p. 95.

[35] Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter), Advisory Opinion of May 28th, 1948, I.C.J. Reports 1947-1948, p. 57 at p. 62.

that admission of an applicant state requires the positive consent of both organs.[36] Whether one agrees or not with the reasoning of the majority opinion in the Conditions of Admission case to the effect that political considerations should not enter into a state's pre-voting calculations,[37] one cannot ignore the fact that, in practice, admission of new members to the United Nations has always been a contentious political problem enmeshed in cold war ideological confrontation.[38] It has, however, been said that, in spite of the existence of non-legal factors in the voting behavior of the United Nations members on admission of new members, "variations in the United Nations practice concerning claims of statehood are a result not of an abandonment of traditional

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[36] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of March 3, 1950, I.C.J. Reports 1950, p. 4 at p. 9. It may be noted that Trygve Lie's term of office as Secretary-General was extended by the General Assembly without a positive recommendation from the Security Council. See Lie, In the Cause of Peace, (1954), p. 367 et. seq.; U.N. Bulletin, Vol. 9, No. 10, 1950, p. 516.

[37] See the Dissenting Opinion of Judges Basdevant, Winiarski, McNair and Read, I.C.J. Reports, 1947-1948, p. 57 at p. 82.

[38] See generally, L.C. Green, "Membership in the United Nations", C.L.P., Vol. 2, 1949, pp. 258-282; Rudzinski, "Admission of New Members: The United Nations and the League of Nations", International Conciliation, No. 480, April 1952; Higgins, The Development of International Law Through the Political Organs of the United Nations, p. 11 et. seq.; Leo Gross, "Progress Towards Universality of Membership in the United Nations", A.J.I.L., Vol. 50, 1956, pp. 791-827; Nathan Feinberg, "La'Admission de Nouveaux Membres a la Societe des Nations et a l'Organisation des Nations Unies", Hague Recueil, Vol. 80, 1952 (I), pp.297-389.

legal criteria of statehood but of the proper use of flexibility in interpreting these criteria in relation to the claim in which they are presented".[39]

Like the law of the United Nations, constitutional provisions dealing with the admission of new members to the regional organizations considered here reflect the principle of functional essentiality which denies an automatic right of membership to applicant states.[40] The OAS Charter posits the following conditions: (1) an applicant member must be an independent American state, and (2) must be willing to sign and ratify the Charter of the Organization and the obligations inherent in membership, especially those relating to collective security.[41] The decision to authorize the Secretary-General to permit the applicant state to sign the Charter, and to accept the deposit of the corresponding instrument of ratification requires an affirmative vote of two thirds of the members of the General Assembly, upon the recommendation of the Permanent Council of the Organization.[42]

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[39] Higgins, op. cit., p. 54.

[40] D.W. Bowett, The Law of International Institutions, (New York: Praeger, 1963), p. 312.

[41] L.R. Scheman, "Admission of States to the Organization of American States:, A.J.I.L., Vol. 58, 1964, pp. 968-974.

[42] See The Act of Washington (Admission of New Members to OAS), Text in International Legal Materials, Vol. 4, 1965, p. 194; Charter of Bogota (as amended by the Protocol of Buenos Aires in 1967). Text in International Legal Materials, Vol. 6, 1967, p. 310.

In view of the series of anti-communist declarations[43] since 1954, it seems obvious that an independent communist American state cannot become a member of the OAS. The Punta del Este declaration of 1962 which excluded the Castro Government of Cuba from participating in the inter-American System because it has officially identified itself as a Marxist-Leninist government demonstrates that there is an underlying ideological foundation for the OAS.[44] It is difficult to accept the view advanced during the Security Council debate on Cuba's protest against the measures adopted by the OAS at Punta del Este that the Government of Cuba was excluded from the regional organization not because of her social and economic system but because of her violation of the Charters of the OAS.[45] In any case, it should be noted that the Punta del Este action against Cuba has been officially defended as "implicit in the essential purposes of the

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[43] See U.S. Dept. of State, Bulletin, Vol. 30, 1954, p. 638; OAS Official Records OEA/Ser.C/II.5 (English), Fifth Meeting of Consultation of Ministers of Foreign Affairs, 1959, p. 4 et. seq.; OAS Official Records OEA/Ser.C/II.8 (English), Eighth Meeting of Consultation of Ministers of Foreign Affairs, 1962, p. 6.

[44] Thomas and Thomas, "Democracy and the Organization of American States", Minnesota Law Review, Vol. 46, 1961-62, pp. 337-383, who further added that "no firm legal obligations backed by adequate sanctions have been agreed upon to assure the growth of democracy throughout the region" (p. 374).

[45] U.N. Doc. S/PV 992-998. See Chapter VII below.

Organization".[46] The conclusion seems inescapable that the concept of statehood in the practice of the OAS is one based upon a democratic "capitalist" ideology.

A similar conclusion can be drawn in respect of the Council of Europe.[47] Membership is open to any European state which is not only able but also willing to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms".[48] Faithful to this ideological requirement of membership, it has been necessary to exclude Spain and Portugal from membership by simply not inviting them to accept the obligation of membership.[49] More recently, the Council of Europe served notice on Greece presently ruled by a military oligarchy that it must return to democracy or consider withdrawal from the regional organization in violation of one of the major conditions of membership, the undertaking to uphold human rights and fundamental

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[46] OAS Official Records OEA/Ser.D/III.14 (English), Annual Report of the Secretary General, 1962, p. ii.

[47] A.H. Robertson, The Council of Europe, (London: 1961), pp, 12, 15-21; Cmd. 7720, Explanatory Note on the Provisions of the Statute of the Council of Europe, (1949), p. 3.

[48] Statute of the Council of Europe, Art. 3, 4. See Kiss, L'Admission des Etats Comme Membres du Conseil de L'Europe", A.F.D.I., 1963, pp. 695-708.

[49] Spain in particular was generally shunned by Western as well as Eastern statesmen. See R.I.I.A., Survey of International Affairs 1947-1948, pp. 123-130.

freedoms.[50] Faced with a possible expulsion, Greece "voluntarily" withdrew from the Council in December 1969.[51] The Statute of the Council of Europe provides that a prospective member must wait until invited to accept the obligations of membership: the decision of the Committee of Ministers to invite any European state requires a two-thirds majority of all the representatives entitled to sit on that Committee.

The OAU Charter hides the fact that membership in the Organization is not open to all African states. According to Article 5, "[e]ach independent sovereign African State shall be entitled to become a Member of the Organization".[52] The article conveys the impression that membership is a matter of right. This impression is, however, discouraged by Article 28(3) which stipulates, *inter alia*,: "Admission shall be decided by a simple majority of the Member States". The proper interpretation of the admission provisions is that an independent African State is entitled to apply for membership; whether the applicant state can become a member depends upon the judgment of the Conference of Heads of State and Government, the supreme organ of the OAU. What is an independent African state? Elias, a Nigerian

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[50] See International Legal Materials, Vol. 7, 1968, p. 706; Vol. 8, 1969, pp. 890, 892; J.E.S. Fawcett, "Council of Europe Action on Greece", World Today, November, 1969, pp. 464-465.

[51] The Times (London), December 13, 1969, p. 1; International Legal Materials, Vol. 9, 1970, pp. 408-409.

[52] Emphasis added. For a literal interpretation of Art. 5, see Diallo Telli, "The Organization of African Unity in Historical Perspective", African Forum, Vol. 1, No. 2, 1965, p. 23.

member of the Committee which drew up the OAU Charter at Addis Ababa, recalls that the question whether an independent state not under an African rule should qualify for membership in the Organization was much debated: "Some members contended that there would be nothing wrong in an independent state in Africa, with a non-African, possibly European Prime Minister, becoming a member of the Organization. Most members, however, preferred an independent state under an African Prime Minister as a candidate for membership".[53] In this connection, it has been well said that "[a]ll African governments do not... have an equal right to adhere to the Organization.... The African concept of legitimacy must be borne in mind: the government of a state that wishes to join the Organization must not only be in effective control of an African territory, but must also meet the ideological requirements laid down by the OAU - the requirements of African ethics, which recognize the right of all peoples to self-determination and call for the complete eradication of colonialism".[54] It can be concluded that the law of the OAU defines the concept of statehood in a way intended to meet the ideological purposes of this particular regional organi-

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[53] T.O. Elias, "The Charter of the Organization of African Unity", A.J.I.L., Vol. 59, 1965, p. 251.

[54] Boutros-Ghali, "The Addis Ababa Charter", International Conciliation, No. 546, January 1964, pp. 38-39.

zation.

The 1945 Pact of the League of Arab States declares that any independent Arab state[55] has an unqualified right of membership of the League.[55a] Admission procedure appears simple. An applicant independent Arab state only has to notify, in writing, the Secretary-General who, in turn, submits the request to the League Council. The Pact remains silent on whether the Council could reject on admission request from an independent Arab state. It is not clear why the Pact should speak of the right to membership when the application of a prospective member has to be and has always been submitted to the League Council for final decision.[56] It should be noted that, although the Pact emphasizes the principle of independence as a condition of membership, it accepted Trans-Jordan as a founding member at a time when the latter was still a mandated territory.[57] Just as the admission of India into the United Nations before achieving a sovereign status was not considered as implying

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[55] On the problem of defining the term "Arab state," see Boutros-Ghali, "La crise de la Ligue Arabe", A.F.D.I., Vol. 14, 1968, pp. 89-90.

[55a] The Pact of the League of Arab States, Art. 1. (Emphasis added). Text in A.J.I.L., Supp. Vol. 39, 1945, p. 266.

[56] Bowett, The Law of International Institutions, (New York: Praeger, 1963), p. 193; Anabtawi, Arab Unity in Terms of Law, (The Hague: 1963), p. 73.

[57] Anabtawi, Arab Unity in Terms of Law, p. 72 et. seq.; Majid Khadduri, "The Arab League as a Regional Arrangement", A.J.I.L., Vol. 40, 1946, p. 767.

the abandonment of the criterion of statehood[58] as a condition of admission, it may be similarly contended that the original membership of Trans-Jordan, then a mandated territory, is not sufficient to cast doubt on the integrity of the requirement of independence as a condition of full membership in the League of Arab States. It should be further noted that, in order to emphasize the principle of national independence, but desirous of involving the Palestine Arabs in the work of the League, provision was made for a representative of Palestine selected by the League itself to participate in the work of the League "until that country can effectively exercise its independence".[59]

Restrictive and selective, the admission policy of the North Atlantic Treaty Organization states that the parties to the treaty, acting unanimously, may "invite any other European state in a position to further the principles of this Treaty and contribute to the security of North Atlantic area". Admission is completed when any European state so invited has deposited its instrument of accession with the United States Government. It should be noted that, while the Preamble expresses the determination of members "to safe-

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[58] Higgins, The Development of International Law Through the Political Organs of the United Nations, (1963), pp. 16-17.

[59] Annex Regarding Palestine; Macdonald, The League of Arab States: A Study in the Dynamics of Regional Organization, (Princeton: 1965), p. 325.

guard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law", the Treaty, in contrast to the Statute of the Council of Europe, refrains from making respect for human rights and fundamental freedom an ideological requirement of membership. The simple reason is that the North Atlantic Treaty, a collective self-defence organization, needs members which, because of their geographical position or material resources, can contribute to the defence of the North Atlantic Area.[60] The Council of Europe which excludes defence matters from its activities can afford not to invite Spain and Portugal to accept the obligation of membership; but geography makes Portugal an important member of NATO. The geographical position of Spain is equally of strategic importance but, at the time NATO was founded, the political regime in Spain was an international leper ostracized by a large number of the U.N. members. This was enough at that time to exclude Spain from NATO. The question of Spanish membership of NATO has not become urgent because the U.S.-Spanish defence agreement of 1953 makes Spain indirectly a key state in the Western defence.[61]

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[60] R.I.I.A., Atlantic Alliance: NATO's Role in the Free World, (London: 1952), p. 32; Marina Salvin, "The North Atlantic Pact", International Conciliation, 1949, p. 397.

[61] A.P. Whitaker, Spain and Defense of the West, (New York: Harper & Brothers, 1961), Ch. 8; also "Spain and the Atlantic Alliance", Orbis, Vol. 10, 1966, pp. 42-78.

The constitutional law of admission of new members to the SEATO is substantially the same as that of NATO. Article 7 states: "Any other State in a position to further the objectives of this Treaty and to contribute to the security of the area may, by unanimous agreement, of the parties, by invited to accede to this treaty".[62]

The Warsaw Pact describes the foundation members of the regional organization as "peace-loving States of Europe", and reaffirms the desire of the original members "to create a system of collective security in Europe based on the participation of all European States, irrespective of their social and political structure". The operative part of the Pact dealing with admission states: "The present Treaty shall be open for accession by other States, irrespective of their social and political structure, which express their readiness... to help in combining the efforts of peace-loving States to ensure the peace and security of the peoples".[63]

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[62] The Manila Protocol created rights without duties for Laos, Cambodia and South Vietnam. The SEATO members agreed that they would come to the aid of these states if the latter were to request assistance in the event of an armed attack. See R.I.I.A., Collective Defence in South East Asia, (1956), p. 171. The neutralization of Laos has removed that country from the SEATO protective umbrella. See Cmnd. 1828 (1962); George Modelski, International Conference on the Settlement of the Laotian Question 1961-2, (Canberra: 1962), p. 144 et. seq. Cambodia has taken herself out of the SEATO shield. See Michael Leifer, Cambodia: The Search for Security, (New York: Praeger, 1967), Ch. 3; R.M. Smith, Cambodia's Foreign Policy, (Ithaca: 1965), p. 73, et. seq.

[63] Warsaw Pact, Art. 9.

Accession to the Treaty does not become effective by merely depositing the instrument of ratification, but, more importantly, by the consent of the members of the organization. In so far as it is claimed by the Soviet leaders and scholars that relations among socialist states are qualitatively different from and superior to those among capitalist states or between socialist and capitalist states,[64] it is difficult to see how membership of a non-socialist state in the regional organization of Eastern Europe could be contemplated without substituting the principle of "peaceful coexistence" for that of "proletarian internationalism" as the basis of the Soviet regional system of public order. Admission of a non-socialist state into the Warsaw Treaty Organization will certainly transform radically the character of the organization.

The Declaration[65] of the Association of Southeast Asian Nations opens participation in the new regional organization to "all states in the Southeast Asian region subscribing to... [its] aims, principles and purposes". This Declaration is silent on the procedures for admission of new members. Although members of this organization with the possible exception

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[64] Grzybowski, The Socialist Commonwealth of Nations, (1964), p. 256 et. seq.; Hazard, "Soviet Socialism as a Public Order System", Proceedings, A.S.I.L., 1959, pp. 30-41. Tunkin, Droit International Public, (Paris: 1965), Ch. 12.

[65] Text in International Legal Materials, Vol. 6, 1967, p. 1233.

of Indonesia are pro-West, there is yet no conclusive evidence that A.S.E.A.N. is a militant anti-communist organization in the sense that the SEATO and the ANZUS Treaty Alliance are defensive arrangements against communist aggression and expansion in Southeast Asia.

No international organization need be obliged to admit to its membership states which do not share its sense of common purpose or retain members which persistently violate the "obligations" of membership.[66] It will, however, be a breach of international law of treaties if a regional law were to impose obligations on non-members and compel the third parties against their will.[67]

4. Regional Treaty Principles of International Law

The United Nations Charter expresses and declares the following generally recognized principles of international law,[68] namely, sovereign equality, good faith, pacific settlement of disputes, self-defence and non-interference in the

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[66] See L.B. Sohn, "Explusion or Forced Withdrawal from an International Organization", Harvard Law Review, Vol. 77, No. 8, 1964, pp. 1381-1425.

[67] Lord McNair, The Law of Treaties, (Oxford: 1961), p. 309.

[68] See generally, Schwarzenberger, "The Fundamental Principles of International Law", Hague Recueil, Vol. 87, 1955 (I), pp. 195-385.

domestic affairs of any state.[69] Members of the United Nations solemnly undertook to respect these principles in the conduct of their international relations.

The international constitutional law of the regional organizations studied here emphasizes in varying degrees the same or similar principles. To say that these regional organizations constitutionalize these principles as guiding norms is not to vouch that they actually always conduct their external relations in conformity with them. As states tend to behave in an opportunistic fashion one must not assume that what is desirable de lege ferenda in fact exists de lege lata.[70] As these principles and the obligations to

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[69] U.N. Charter, Art. 2, 51. It should be noted that consensus on the meaning and implication of some of these principles is still not possible. In 1963, a General Assembly Resolution 1966 (XVIII) constituted a Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States. Meeting in Mexico (1964) and New York (1966), the Special Committee examined seven principles of international law, namely, (1) prohibition of the threat or use of force, (2) peaceful settlement of disputes, (3) non-intervention, (4) sovereign equality, (5) duty of state to cooperate, (6) principle of equal rights and self-determination, and (7) principle of good faith. On the Mexican session see U.N. Doc. A/5746 (November 16, 1964); Text in International Legal Materials, Vol. 4, 1965, pp. 28-50. Consult also McWhinney, "The 'New' Countries and the 'New' International Law: The United Nations Special Conference on Friendly Relations and Cooperation Among States", A.J.I.L., Vol. 60, 1966, pp. 1-34. On the New York session see U.N. Doc. A/6230 (June 27, 1966). For a critical analysis, see Piet-Hein Houben, "Principles of International Law Concerning Friendly Relations and Cooperation Among States", A.J.I.L., Vol. 61, 1967, pp. 703-736. See also L.C. Green "New States, Regionalism and International Law", C.Yb.I.L., 1967, pp. 118-141; "The Impact of the New States on International Law", Israel Law Review, Vol. 4, 1969, pp. 27-60.

[70] See Chapter VII below.

respect them are either implied or generally expressly stated in the law of regional organizations,[71] it suffices to examine closely only those obligations and principles of regional constitutional law which appear to be potentially incompatible with or alter substantially the generally accepted norms of international law. In this connection, our discussion will focus on the OAU and the Warsaw Pact.

The Warsaw Pact members declare their readiness and willingness to "act in the spirit of friendship and cooperation... in accordance with the principles of respect for each other's independence and sovereignty and of non-intervention in each other's domestic affairs".[72] The pledge contained in Article 8 of the Warsaw Pact has been reiterated in many Declarations of the communist bloc conferences.[73] But the "Brezhnev Doctrine",[74] first formulated in the wake

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[71] Arab League Pact (1945), Art. 2, 5, 8; Statute of the Council of Europe, Art. 1(c); North Atlantic Treaty, Preamble; OAU Charter, Art. 3; OAS Charter, Art. 3, 9, 18, 21, 23-26.

[72] Warsaw Pact, Art. 8. For a recent restatement of these principles, see Evgeny Nasinovsky, "The Impact of Fifty Years of Soviet Theory and Practice of International Law", _Proceedings_, _A.S.I.L._, 1968, p. 189 _et_. _seq_.

[73] For a partial list of such Declarations, see _Problems of Communism_, November-December 1968, p. 31; Grzybowski, _The Socialist Commonwealth of Nations_, (1964), Ch. 7.

[74] Text in _International Legal Materials_, Vol. 7, 1968, p. 1323.

of the Soviet-led Warsaw Pact invasion of Czechoslovakia, amounts to an express denial of the principle of sovereignty of any "socialist" country accessible to the Soviet Union. This "Doctrine", addressing itself to "the question of the correlation and interdependence of the national interests of the socialist countries and their international duties",[75] establishes two basic propositions: (1) "each Communist party is responsible not only to its own people, but also to all the socialist countries, to the entire Communist movement. Whoever forgets this, in stressing only the independence of the Communist party, becomes onesided. He deviates from his international duty",[76] and (2) in so far as "one or another socialist state, staying in a system of other states composing the socialist community, cannot be free from the common interests of that community",[77] "[t]he sovereignty of each socialist country cannot be opposed to the interests of world socialism".[78] In view of the fact that the "common interest" of the "socialist commonwealth" of Eastern Europe is usually defined by the Soviet Union,[79] the "Brezhnev Doctrine" amounts

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[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Ibid.

[79] Grzybowski, op. cit., p. 268; Brzenzinski, op. cit.

to the claim by the Kremlin of the right of intervention in the domestic affairs of socialist states of Eastern Europe.[80] The conclusion is inescapable that norms of international law postulating sovereign equality of states and prohibiting forceful intervention in the domestic affairs of other states are seen as being superseded by "the laws of class struggle" whenever the Kremlin alleges that socialism is "endangered" in "socialist countries". Thus, as one scholar, commenting on the legal structure of the Communist bloc, correctly noted:

> [I]n the final analysis the question of the legal nature of the communist bloc is reduced to the relationship of those powers that claim to watch over the purity of communist ideology and the observance of party discipline. This peculiar union of communist-bloc countries does not lend itself to analysis in terms of general international law, which traditionally regulates only relations between states and not relations between [political] parties. And the rules governing inter-party relations leave no room for application of the principles of co-existence between states - sovereignty, equality, and non-intervention.[81]

Article 3 of the OAU Charter combines generally accepted principles of international law with the following additional

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[80] The doctrine of limited sovereignty of socialist states has, of course, been rejected by Albania, Yugoslavia and Rumania, all of which are socialist states of Eastern Europe. See A.G. Mezerik (ed.), "Invasion and Occupation of Czechoslovakia and the U.N.", International Review Service, Vol. 14, No. 100, 1968, pp. 67-68; Yugoslav Survey, Vol. 9, No. 4, November 1968, p. 131 et. seq.

[81] Dietrich André Loeber, "The Legal Structure of the Communist Bloc", Social Research, Vol. 27, No. 2, 1960, pp. 200-201. See also Grzybowski, op. cit., pp. 269-272.

formulations: (1) "unreserved condemnation, in all its forms of political assassination as well as of subversive activities on the part of the neighbouring States or any other State",[82] (2) "absolute dedication to the total emancipation of the African territories which are still dependent", and (3) "affirmation of a policy of non-alignment with regard to all blocs". Commentators have drawn attention to the implication of the second principle for the development of harmonious relations with certain members of the United Nations, and in particular, to the probability that the obligation to eradicate colonialism by all means might prevent members of the OAU from cooperating with members of the United Nations which deny the right of self-determination to the black majorities in Southern Africa.[83] At this point it is sufficient merely to indicate that some obligations undertaken by the OAU members put the signatories to the regional treaty on a collision course with some obligations of U.N. membership. It is, however, true that when examined

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[82] See the Accra Declaration on Subvertion, International Legal Materials, Vol. 5, 1966, pp. 138-139.

[83] See Boutros-Ghali, "The Addis Ababa Charter", International Conciliation, No. 546, 1964, pp. 36-37; Green, "The Impact of the New States on International Law", Israel Law Review, Vol. 4, 1969, pp. 46-47; "New States, Regionalism and International Law", C.Yb.I.L., 1967, p. 130; Elias, "The Charter of the Organization of African Unity", A.J.I.L., Vol. 59, 1965, p. 250; Krishnan, "African State Practice Relating to Certain Issues of International Law", I.Y.I.A., Vol. 14, 1965, pp. 211-212; Duggard, "The Organization of African Unity and Colonialism...", I.C.L.Q., Vol. 16, 1967, p. 157 et. seq.

in the light of the U.N. resolutions on apartheid and colonialism sponsored by the "new" states,[84] the obligation assumed by the OAU members under the regional treaty in the field of de-colonization may appear in a different light.

It may be noted that the new states of Africa are merely following the example set by the Arab States. In the well known Arab League Resolution of 1951, members of the regional organization indicated that they would not undertake fully their obligations of U.N. membership "while some of them have not attained their complete national sovereignty".[85] While one should not condone this conditional acceptance of and devotion to the obligations of U.N. membership, one should at least try to understand the peculiar position of the new states in an international legal order which, to them, has for a long time existed in the service of the European colonial powers. Granted that certain obligations assumed under the OAU Charter create duties potentially inconsistent with certain obligations of the Charter of the United Nations, it should be borne in mind that, generally speaking, the new Afro-Asian states have neither arbitrarily rejected classical international law nor indicated any desire to retreat into an

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[84] See, in particular, the U.N. Declaration on Colonialism: G.A. Res. 1514 (XV) 14 December, 1960. Text in Brownlie, Basic Documents in International Law, (Oxford: 1967), pp. 176-177.

[85] Egyptian Society of International Law, Egypt and the United Nations, (1957), p. 128. Muhammad Khalil, The Arab States and the Arab League, Vol. 2, (Beirut: 1962), Doc. 59, pp. 147-148.

exclusive system of regional international law.[86]

5. Rules Governing Decision-Making

The question of decision-making in international organizations of independent sovereign states is integrally bound up with the doctrine of the juridical equality of states. Sovereign equality of states has traditionally been interpreted as implying the principle of unanimity in decision-making.[87] For this reason, public international conferences of diplomats in the pre-twentieth century period operated generally speaking, on the basis of unanimity.[88] Although the commissions of public international unions adopted the majority principle as a decisional rule, decision-making in the

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[86] See generally, Syatauw, Some Newly Established Asian States and the Development of International Law, (The Hague: 1961); Sinha, New Nations and the Law of Nations, (Leyden: 1967); Higgins, Conflict of Interest, (London: 1965); Friedmann, The Changing Structure of International Law, (New York: 1964); Lissitzyn, International Law Today and Tomorrow, (New York: 1965); Reports of Asian African Legal Consultative Committee; Jenks, The Common Law of Mankind, (London: 1958); Falk, "The New Nations and International Legal Order", Hague Recueil, Vol. 118, 1966 (II), pp. 7-103; Anand, "Attitude of the Asian-African States Toward Certain Problems of International Law", I.C.L.Q., Vol. 15, 1966, pp. 55-75; Fatouros, "International Law and the Third World", Virginia Law Review, Vol. 50, No. 5, 1964, pp. 783-823.

[87] See generally, Bengt Broms, The Doctrine of Equality of States as Applied in International Organizations, (Helsinki, 1959).

[88] F.S. Dunn, The Practice and Procedure of International Conferences, (Baltimore: 1929); Norman Hill, The Public International Conferences, (Stanford: 1929).

conferences of public international unions was based on the unanimity principle.[89] The League Covenant carried forward the traditions of public international conferences by making unanimity the rule of decision,[90] although it permitted exceptions to the unanimity principle.[91] In any case, the rule of unanimity was interpreted liberally with the result that, in practice, decision-making in the League was governed largely by the majority principle.[92] The voting provisions

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[89] P.S. Reinsch, Public International Unions, (Boston: 1911), p. 152; C.A. Riches, Majority Rule in International Organization, (Baltimore: 1940), Ch. 2; Norman Hill, "Unanimous Consent in International Organizations", A.J.I.L., Vol. 22, 1928, pp. 319-329.

[90] League Covenant, Art. 5. In the Mosul Case (1925), the Permanent Court of International Justice justified the rule of unanimity in the League Council as follows: "In a body constituted in this way, whose mission is to deal with any matter "within the sphere of action of the League or affecting the peace of the world", observance of the rule of unanimity is naturally and even indicated. Only if the decisions of the Council have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have: the very prestige of the League might be imperilled if it were admitted, in the absence of an express provision to that effect, that decisions on important questions could be taken by a majority". Hudson, World Court Reports, Vol. 1, (1934), p. 740.

[91] League Covenant, Art. 1(2), 4(2), 5(2), 6(2), 15(10), 26(1).

[92] Riches, The Unanimity Rule and the League of Nations, (Baltimore: 1933); Sir John Fischer Williams, "The League of Nations and Unanimity", A.J.I.L., Vol. 19, 1925, pp. 475-488; Julius Stone, "The Rule of Unanimity: The Practice of the Council and Assembly of the League of Nations", B.Y.B.I.L., Vol. 14, 1933, pp. 18-42.

of the United Nations Charter[93] reflect the triumph of the principle of majority over that of unanimity.[94] The remnant of the unanimity principle is found in a special form in Article 27(3). According to this Article, decisions of the Security Council on substantive matters require the "concurring votes of the permanent members". The practice of the Security Council has, however, been to interpret intentional abstention and absence of a veto-wielding power as compatible with the requirement of unanimity of the five major powers.[95] Thus, today, the battle for the majority principle as a decisional rule in international organizations has been largely

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[93] U.N. Charter, Art. 18, 27, 67 and 89.

[94] See Willington Koo, Voting Procedures in International Political Organizations, (1947), Ch. 4, 5; Inis Claude, Jr., Swords into Plowshare: The Problems and Progress of International Organization, (3rd Ed., Revised, New York: Random House, 1967), Ch. 7; F.A. Vallat, "Voting in the General Assembly of the United Nations", B.Y.B.I.L., Vol. 31, 1954, pp. 273-298; C.W. Jenks, "Some Constitutional Problems of International Organizations", B.Y.B.I.L., Vol. 22, 1945, pp. 34-42.

[95] See T.J. Kahng, Law Politics and the Security Council, (The Hague: Martinus Nijhoff, 1964), p. 124 et. seq.; Leo Gross, "Voting in the Security Council: Abstention from Voting and Absence from Meeting", Yale Law Journal, Vol. 60, 1951, pp. 209-257; also "Voting in the Security Council: Abstention in the Post-1965 Amendment Phase and Its Impact on Article 25 of the Charter", A.J.I.L., Vol. 62, 1968, pp. 315-334; Yuen-li Liang, "Abstention and Absense of a Permanent Member in Relation to the Voting Procedure in the Security Council", A.J.I.L., Vol. 44, 1950, pp. 694-700; C.A. Stavropoulos, "The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations", A.J.I.L., Vol. 61, 1967, pp. 737-755.

won.[96]

The international constitutional law of regional organizations examined in this study reflects, in varying degrees, the transformation of the international decision-making rule of unanimity to that of majority. The Pact of the Arab League prescribes different voting rules for various situations,[97] and this pattern was to be emulated by many European regional organizations. When the supreme policy organ, the League Council, is called upon to decide on measures to repel aggression voting must be unanimous. If a member state has been the aggressor, its vote does not count.[98] Majority rule governs decisions relating to arbitration and mediation by the League Council.[99] It is also the decisional rule for administrative and procedural matters.[100] Of special importance is Article 7 according to which unanimous

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[96] C.W. Jenks, "Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations" in R.Y. Jennings (ed.), _Cambridge Essays in International Law: Essays in Honour of Lord McNair_, (London: Stevens & Sons, 1965), pp. 48-63; D.W. Bowett, _The Law of International Institutions_, (London: Praeger, 1963), p. 342, _et_. _seq_.

[97] Macdonald, _op_. _cit_., p. 56 _et_. _seq_.

[98] League of Arab States Pact (1945), Art. 6.

[99] Art. 5.

[100] Art. 16.

decisions shall be binding on all members whereas decisions reached by a majority shall be binding upon only those states which accept them. This simply means that while a state has the right to veto the application of a majority decision to itself it does not possess the right to veto the adoption of any decision. The Uniting for Peace Resolution of 1950[101] achieved a similar effect for the United Nations in so far as it permits the General Assembly to recommend measures, including the use of force, for the maintenance of international peace in the event that the Security Council, paralyzed by the exercise of the veto power, has been unable to discharge its primary responsibility. The only difference is that, under the 1950 Resolution, collective measures can theoretically be directed against <u>any</u> state including the permanent members which might have prevented the Security Council from taking action in the first place. When the Joint Defence and Economic Cooperation Treaty Between the States of the Arab League was being drawn up in 1950, it was realized that Article 7 of the 1945 Pact could not be made applicable to decision-making in the newly created Joint Defence Council, an organ under the supervision of the League Council. Thus, according to the 1950 Treaty of Collective Self-Defence, decisions taken by a two-thirds majority are

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[101] See Chapter V above.

deemed binding on all the contracting states.[102] The Arab League seemed to have been influenced by Article 20 of the Rio Treaty.

The pattern of providing and prescribing different voting rules for various situations is followed by the Statute of the Council of Europe.[103] The Committee of Ministers, "an organ which acts on behalf of the Council of Europe",[104] and in which "[e]ach Member shall be entitled to one representative",[105] has only the power of recommendation.[106] Major recommendations of the types enumerated in Article 20 require "the unanimous vote of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee". Certain recommendations, for example, invitation of admission to new members, can only be made by a two-thirds majority of members of the Committee of Ministers. Resolutions relating to rules of procedures, financial and administrative matters require also a two-thirds majority of representatives casting a vote and of a majority of the representatives entitled to sit on the Committee. The Consultative

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[102] Art. 6.

[103] Cmd. 7720 (1949), pp. 4-5; Robertson, The Council of Europe, p. 35 et. seq.

[104] Art. 13.

[105] Art. 14.

[106] Art. 15(b).

Assembly in which member states are represented proportionally on the basis of population can make recommendations by a two-thirds majority.[107] In matters relating to internal procedures the Consultative Assembly is free to determine whether its resolutions are to be governed by a simple or a special majority rule.[108]

The constitutional law of the OAU breaks completely with the tradition of unanimity. Resolutions of the supreme organ of the African regional organization requires only a two-thirds majority of votes. On non-substantive questions, a simple majority is sufficient.[109] The Council of Minsters Resolutions are adopted by a simple majority.[110]

The Manila Treaty, the North Atlantic Treaty, the Warsaw Pact, the NAZUS Treaty Alliance and the Association of Southeast Asian Nations are all silent on the rule governing decision-making. In some cases, the treaty merely stipulates that each member state shall be represented in the supreme decision-making body and shall have one vote.[111] It was

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[107] Art. 29.

[108] Art. 30.

[109] OAU Charter, Art. 10(a) and (3).

[110] Art. 14.

[111] Manila Treaty, Art. 5; Warsaw Pact, Art. 6; North Atlantic Treaty, Art. 9.

actually decided during the first meeting of the SEATO Council that decisions of the Council be made by unanimous vote of member states.[112] It has been said that in the ANZUS Council unanimity evolves and is not registered.[113] It has been the practice in the NATO Council of Ministers, in the Political Consultative Committee of the Warsaw Treaty Organization and in the General Assembly of the OAS[114] to seek a consensus for decisions made.[115] Where resolutions are passed without unanimous consent, such resolutions are meaningful only to those states which voted for them. With respect to the OAS regional international law there are exceptions to this general rule. For instance, under the Rio Treaty, resolution of the Organ of Consultation imposing sanctions on any member state requires only a two-thirds majority but such resolution is considered binding upon all those states which have ratified the Treaty except that no state can be compelled to use force without its express

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[112] U.S. Dept. of State, Bulletin, Vol. 32, No. 819, 1955, pp. 371-375; R.I.I.A., Collective Defence of South East Asia, (1956), pp. 119, 191.

[113] Starke, The ANZUS Treaty Alliance, p. 168.

[114] For recent organizational changes, see International Legal Materials, Vol. 6, 1967, p. 310 et. seq.; A.H. Robertson, "Revision of the Charter of the Organization of American States", I.C.L.Q., Vol. 17, 1968, pp. 346-367.

[15] R.I.I.A., Atlantic Alliance, (London: 1952), p. 42.

consent.[116]

In conclusion, it may be asked whether majority principle as a decisional rule in international organizations derogates from the principle of the sovereign equality of states. The answer must be in the negative for one or both of these two reasons. First, when a state, by an act of free will, accepts membership in an international organization where unanimity is not the basis of decision-making and where functional inequality exists, that state consents to some limitations on its sovereignty. There is nothing incompatible with sovereignty in agreeing to some limitations upon its exercise.[117] Second, what is of utmost importance in international decision-making is not so much whether resolutions are passed and decisions made, important as these are gradually becoming in terms of collective political

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[116] Rio Treaty, Art. 20; C.G. Fenwick, "The Unanimity Rule in Inter-American Conferences", A.J.I.L., Vol. 42, 1948, pp. 399-401.

[117] See Hans Kelsen, "The Principle of Sovereign Equality of States as a basis for International Organization", Yale Law Journal, Vol. 53, No. 2, 1944, pp. 207-220; Potter, An Introduction to the Study of International Organization, (5th Ed., New York: Appleton-Century-Crofts, Inc., 1948), pp. 183, 192; M.S. Korowicz, "Some Recent Aspects of Sovereignty in International Law", Hague Recueil, Vol. 102, 1961 (I), pp. 5-113; Boutros Boutros-Ghali, "Le Principe d'Egalité des Etats et les Organisations Internationales", Hague Recueil, Vol. 100, 1960 (II), pp. 1-73.

legitimization they provide for particular points of view,[118] as whether such decisions and resolutions constitute binding obligations, and, further, whether they can be enforced against a state that wants no part of them. As a rule, resolutions of most international organizations are recommendations which, while possessing legal effects, do not create legal obligations.[119]

6. Pacific Settlement of Disputes and Legal Regulation of the Use of Force

It is well known that traditional international law of the pre-twentieth century neither prohibited nor authorized resort to armed violence. It sought not to define limits and conditions to the use of force in international relations but to restrict war in time, place and method, and in particular, to regulate conduct of hostilities when war existed with a view to mitigating its evils.[120] The law of inter-

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[118] On the concept of collective political legitimization, see Inis Claude, Jr., The Changing United Nations, (New York: Random House, 1967), Ch. 4; Jerome Slater, "The Limits of Legitimization in International Organization: The Organization of American States and the Dominican Crisis", International Organization, Vol. 23, No. 1, 1969, pp. 48-72.

[119] See Chapter VII.

[120] Schwarzenberger, International Law, Vol. 2, (1968), p. 38 et. seq.; Stone, Legal Controls of International Conflict, (1959), p. 297 et. seq.; Green, "Armed Conflict, War, and Self-Defence", Archiv des Völkerrechts, Vol. 6, 1956-1957, pp. 387-438; Brownlie, International Law and the Use of Force by States, (Oxford: 1963); Bowett, Self-Defence in International Law, (1958), p. 122.

national organizations adopted a different attitude; it seeks to restrict international coercion as a modality of political change.

The Covenant of the League of Nations attempted to regulate resort to war on the basis of a distinction between permissible and impermissible resort to war. The Covenant tied the obligation not to resort to war with the obligations to submit disputes between members to arbitration, judicial settlement or enquiry by the League Council,[121] and, further, to the obligation to "respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League".[122] As between members of the League, the obligations not to resort to war were limited and applicable to a period of three months after an arbitral award, a judicial decision or the League Council report had been handed down.[123] When the Council attempted to settle a dispute between states, its report must be unanimously agreeable to all the Council members except the party or parties to the dispute. In the absence of a unanimous report, "the Members of the League reserve to themselves the right to take such action as they consider necessary for

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[121] For a cogent analysis of the League's mandate in pacific settlement, see T.P. Conwell-Evans, The League Council in Action, (London: Oxford University Press, 1929), Ch. 2.

[122] Art. 10.

[123] Art. 12(1).

the maintenance of right and justice.[124] Under Article 17, the Covenant envisaged the application of the obligation not to resort to war to non-members of the League through a device of inviting them "to accept the obligation of membership in the League for the purposes of such disputes upon such conditions as the Council may deem just".[125] The Covenant was silent on the right of self-defence but it must be assumed that members regarded this right as part of the customary rule of international law, and, hence, that it was superfluous to declare it in the Covenant.[126] The corrollary of the obligation not to resort to war for a specified period of time was the provision for collective sanction for a breach of such obligation.[127] Resort to war "in disregard of its convenants under Articles 12, 13 or 15", by a state "whether a Member of the League or not", was declared punishable by an automatic application of economic, financial and diplomatic sanctions on the part of the League members who could also impose military

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[124] Art. 15(7).

[125] Art. 17(1). See Schwarzenberger, The League of Nations and World Order, (1936), pp. 49-58; 95-118.

[126] F.B. Schick, "Peace on Trial - A Study of Defense in International Organization", W.P.Q., Vol. 2, No. 1, March 1949, p. 4; Bowett, Self-Defence in International Law, (1958), p. 124.

[127] Art. 16.

sanctions at their own discretion.[128] Even if it were to be said that the only change effected by the Covenant was to declare war between states as a matter of international concern deserving collective international action, there can be no doubt about the significance of that change.[129]

Neither the Kellogg-Briand Pact[130] nor the United Nations Charter prohibited the use of force in all situations. Under both treaties, the principle of self-defence has come to mark the dividing line between legal and illegal resort to war. In 1928, there seemed to be a consensus behind the view that each state "alone is competent to decide whether circumstances require recourse to war in self-defense".[131] In 1945, the use of the word "inherent" in the U.N. Charter is evidence of the customary nature of that right. In view of the fact that self-defence as a right under customary international law is auto-definable, the liberty of states

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[128] See R.I.I.A., International Sanctions, (London: Oxford University Press, 1938); David Mitrany, The Problem of International Sanctions, (London: Oxford University Press, 1925).

[129] Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations, (London: 1934), pp. 132-135.

[130] J.T. Shotwell, War as an Instrument of National Policy, (New York: Harcourt, Brace & Company, 1929).

[131] See Reservations to the Kellogg-Briand Pact of 1928. Cmd. 3109, p. 25; Cmd. 3153, p. 10. Cited also in Green, "Armed Conflict, War and Self-Defence", Archiv des Völkerrechts, Vol. 6, 1956-1957, p. 410.

to resort to war is still substantial. It should, however, be understood that the propriety of the initial act of self-defence can be subsequently reviewed by the Security Council if the voting problem of great power unanimity demanded under Article 27(3) is overcome.[132] The U.N. Charter makes provisions for collective sanctions directed by the Security Council against "any threat to the peace, breach of the peace or act of aggression". Equally important is that, unlike the Covenant,[133] the Charter, subject to Article 51, leaves the determination of what constitutes a threat to peace or a breach of the peace to the Security Council rather than to the individual State.[134] In accordance with Article 25, members are obligated to "accept and carry out the decision of the Security Council in accordance with the Charter". While it is certainly true that the Charter system of collective security has broken down because of the East-West ideological rift,[135] the fact still remains that the constitutional law of the United Nations attempts to punish

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[132] See Judgement of the International Military Tribunal (Nuremberg), Cmd. 6964, (London: 1946), p. 32; Waldock, "The Regulation of the Use of Force by Individual States in International Law", Hague Recueil, Vol. 81, 1952 (II), p. 495; Brierly, The Law of Nations, (1955), p. 315 et. seq.

[133] Sir John Fischer Williams, op. cit., p. 158.

[134] F.B. Schick, loc. cit; Brierly, "The Covenant and the Charter", B.Y.B.I.L., 1946, pp. 83-94 at p. 87.

[135] See Chapter V above.

aggression through the establishment of a central organization as a guardian of international peace and security.[136]

At the regional level, attempts have been made to constitutionalize obligations forbidding resort to armed violence except in self-defence and requiring pacific settlement of international disputes.[137] We may now consider whether the constitutional law of regional organizations represents any marked advance, a retrogression or merely a restatement of the position in the U.N. Charter.

The 1945 Pact of the Arab League prohibits "[a]ny resort to force in order to resolve disputes arising between two or more member states of the League".[138] While the Arab League members which resorted freely to force against a non-member state, Israel, in 1947 were in breach of the U.N. Charter, it cannot be said that they were in breach of the law of their regional organization which permits the interpretation that in relation to non-Arab members, the Arab League members assumed no formal obligation of peaceful

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[136] See generally, L.M. Goodrich and P. Simons, The United Nations and the Maintenance of International Peace and Security, (Washington: Brookings Institution, 1955).

[137] See generally, United Nations, A Survey of Treaty Provisions for the Pacific Settlement of International Disputes, 1949-1962, (New Yokr: 1966); Report of A Study Group on the Peaceful Settlement of International Disputes, (London: 1966).

[138] Art. 5.

settlement of disputes. However, as the obligations of U.N. membership prevail over those of the League membership when both lead to inconsistent duties, the Arab League members cannot justify their action. vis-a-vis Israel on the ground that it is not prohibited by the constitutional law of their regional organization. In any case, it may be suggested that Article 5 of the Arab Pact should be interpreted in the light of Article 1 of the 1950 Collective Self-Defence Pact[139] under which the contracting parties "confirm their desire to settle their international dispute by peaceful means, whether such disputes concern relations among themselves or with other Powers". The post 1950 history of Arab-Israeli relations suggests that this provision is little more than a mere declaration of intention.

The 1945 Pact authorizes the League Council to "mediate in all differences which threaten to lead to war between two member states or a member state and a third state, with a view to bringing about their reconciliation".[140] For the League Council to mediate in a dispute between a member state and a third party, the latter must accept the League's jurisdiction.[141] Perhaps inconsistently, the Pact excludes from

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[139] Text in Khalil, op. cit., Vol. 2, Doc. 43, p. 101.

[140] Art. 5. (Emphasis added).

[141] See Status of Eastern Carelia, Advisory Opinion of July 23, 1923. Hudson, World Court Reports, Vol. 1, p. 190 at p. 204.

the League's competence disputes concerning a state's independence, sovereignty or territorial integrity unless both parties to such disputes accept the Council's arbitration. This is not unusual as it is customary in treaties of arbitration to exclude matters of vital state interest from the scope of arbitration.[142] Thus, if a state declares that a certain dispute involves its independence and sovereignty it can refuse settlement through the Council's arbitration. In any case, the claim that the decision of the Council made by a majority vote shall be enforceable and obligatory is an empty boast. The worst the Council can do if a party rejects the Council's arbitral award or mediatory decision is to threaten such state with expulsion.[143]

In connection with the pacific settlement system of the Arab Pact, two further comments may be made. First, while voluntary arbitration was accepted with reservation, the Pact designates the League Council, a political organ, as the arbitral "court". It is true that Article 19 leaves room

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[142] See. J.L. Simpson and H. Fox, International Arbitration, (London: Stevens, 1959), p. 15 et. seq.; Hudson, International Tribunals, (Washington: 1944), Ch. 6; L.B. Sohn, "The Function of International Arbitration Today", Hague Recueil, Vol. 108, 1963 (I), pp. 9-113.

[143] League of Arab States Pact (1945), Art. 18. Compare Art 94(2) of the U.N. Charter: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment". See Oscar Schachter "Enforcement of International Judicial and Arbitral Decisions", A.J.I.L., Vol. 54, 1960, pp. 1-24.

for the possibility of constitutional changes intended to accomodate the establishment of an Arab Tribunal of Arbitration, but this has yet to come about.[144] Second, the Arab League members deliberately rejected judicial settlement as a proper method of peaceful adjustment of intra-Arab disputes, an example which African statesmen at Addis Ababa were to follow almost two decades later. Thus, right from the beginning, the Arab League has lacked the method of judicial settlement of disputes based on the rules of positive international law.[145]

Under the 1950 Collective Self-Defence Pact, the obligation undertaken by signatories "to go without delay to the aid of the State or States against which... an act of aggression is made" follows from the acceptance of the view that "any [act of] armed aggression made against any one or more of them, or their armed forces... [is]... directed against them all".[146] The Pact makes self-defence a legal duty but leaves it to each signatory to decide for itself what action it deems necessary. In view of the fact that self-defence under the U.N. Charter is an inherent right

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[144] E. Foda, The Projected Arab Court of Justice, (The Hague: 1957).

[145] M.F. Anabtawi, Arab Unity in Terms of Law, (1963), p. 82 et. seq.; Foda, op. cit., Ch. 2.

[146] Art. 2. Compare Rio Treaty, Art. 3; North Atlantic Treaty, Art. 5; Warsaw Pact, Art. 4.

and not a legal duty,[147] there is much to be said in favour of the view that any treaty which makes self-defence a legal duty creates obligations beyond the scope declared under Article 51 of the U.N. Charter without, of course, in any way infringing the Charter which nowhere forbids self-defence being made a legal duty. It is further to be noted that the 1945 Pact explicitly envisages joint defence against members of the regional organization.[148]

The Council of Europe is not a collective security system. Its Statute expressly excludes matters relating to defence from its constitutional competence.[149] Until 1957 the Council of Europe had no machinery for the pacific settlement of disputes between its members. The European Convention for the Pacific Settlement of Disputes drawn up in 1957[150] lists methods of pacific settlement of disputes in this order; judicial settlement, conciliation and arbitration. The order is not hierarchic.[151] The High Contracting

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[147] Schick, "Peáce on Trial - A Study of Defense in International Organization", W.P.Q., Vol. 2, No. 1, 1949, pp. 1-44; Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations", A.J.I.L., Vol. 41, 1947, p. 875.

[148] Art. 6. Compare Rio Treaty, Art. 7.

[149] Article 1(d) of the 1949 Statute; Cmd. 7720, p. 3.

[150] Text in European Yearbook, Vol. 5, 1959, pp. 347-363; R.G.D.I.P., Vol. 30, 1959, pp. 55-64.

[151] Articles 2(2), 4(2), 18 of the 1949 Statute. See generally, Jean Salmon, "La Convention Europeenne pour le reglement pacifique des differends", R.G.D.I.P., Vol. 30, 1959, pp. 21-54.

Parties undertake to submit to the judgment of the International Court of Justice all international disputes which may arise between them,[152] and to comply with the decision of the International Court of Justice or the award of the Arbitral Tribunal in any dispute.[153] In Article 39(2), the Convention, like the U.N. Charter, stipulates: "If one of the parties to a dispute fails to carry out its obligations under a decision of the International Court of Justice or an award of the Arbitral Tribunal, the other party to the dispute may appeal to the Committee of Ministers of the Council of Europe. Should it deem necessary, the latter, acting by a two-thirds majority of the representatives entitled to sit on the Committee, may make recommendations with a view to ensuring compliance with the said decision or award". As the recommendation of the Committee of Ministers is not binding,[154] the only effective weapon in the hand of the Committee is suspension or expulsion of a recalcitrant member,[155] a procedure that leaves the dispute which provoked it unsolved. The Covention also sets up procedural rules and machinery for

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[152] A contracting State which accepts the compulsory jurisdiction of the World Court under Article 36(2) with reservation is permitted to make the same reservation to the Convention. Article 35(4).

[153] Article 39.

[154] Robertson, op. cit., p. 26 et. seq.

[155] Article 8 of the 1949 Statute.

the adjustment of disputes by conciliation and arbitration.

The OAU Charter nowhere expressly prohibits the use of force by member states in their international relations.[156] The principle of absolute dedication to the total emancipation of the African territories which are still dependent[157] seems to imply, however, that the OAU members believe and are convinced that it is legally justifiable to use every means, including force, if need be, to liquidate colonialism.[158] The OAU is not a collective self-defence arrangement in the commonly accepted sense, that is to say, it has no machinery for dealing collectively with armed aggression against the territorial integrity of a signatory state.[159] This should not be interpreted as meaning that the regional organization cannot legally perform the function of collective self-defence. It is true that the OAU Charter does not mention the right of self-defence; but this omission does not

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[156] The OAU Charter, however, frowns at "political assassination" as well as at "subversive activities" on the part of neighbouring states or any other states. Article 3(5). See also The Accra Declaration on Subversion, especially paragraph 3. Text in International Legal Materials, Vol. 5. 1966, pp. 138-139.

[157] OAU Charter, Art. 3(6).

[158] See Chapter VII below.

[159] At Addis Ababa, the Ethiopian Emperor pleaded in vain for the establishment of a collective machinery for dealing with armed aggression against any African state signatory to the Charter. See Emperor Haile Selassie I, "Towards African Unity", J.M.A.S., Vol. 1, No. 3, 1963, pp. 281-291.

matter as the right is inherent.[160] However, there does exist a collective machinery, the notorious Liberation Committee, for dealing coercively with political regimes that perpetuate colonialism and deny the right of self-determination to the black majorities in South Africa, Angola, Mozambique and Rhodesia.[161] The legality of the activities of this Liberation Committee will be examined later in this study.[162]

With regard to the obligation to settle disputes peacefully, the OAU Charter calls for the establishment of a Commission of Mediation, Conciliation and Arbitration.[163] The 1964 Protocol, which is an integral part of the constitutional law of the OAU, sets out procedures and machinery for the pacific admustment of disputes among member states.[164] What is most significant about the processes of pacific settle-

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[160] See Chapter IV above.

[161] Organization of African Unity, Basic Documents of the Organization of African Unity, (Addis Ababa, 1963), p. 18.

[162] See Chapter VII below.

[163] O.A.U. Charter, Art. 19.

[164] Text in International Legal Materials, Vol. 3, 1964, pp. 1116-1124. For analysis of the Protocol, see T.O. Elias, "The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity", B.Y.B.I.L., Vol. 40, 1964, pp. 336-354; D.V. Degan, "Commission of Mediation, Conciliation and Arbitration of the OAU", Revue Egyptienne De Droit International, Vol. 20, 1964, pp. 53-80.

ment of disputes elaborated in the 1964 Protocol is the rejection of the judicial method of pacific settlement of intra-African disputes. Perhaps to emphasize the rejection of international judicial process, the OAU Charter expressly designates the supreme political organ of the regional organization, the Assembly of Heads of States and Governments, as the authoritative interpreter of the constitutional law of the organization.[165] In relation to non-members of the regional organization, especially the regimes that repudiate the African anti-colonialist ideology, the general black African sentiment was expressed by Taliti of Tanzania in a speech before the Sixth Committee of the United Nations in 1966: "But the African States could not be expected to agree to negotiate indefinitely on disputes arising out of the existence on their continent of colonial domination, racism and apartheid, particularly since certain Western Powers were seeking by double dealing to prevent any progress in the matter".[166] The OAU Charter certainly envisages the necessity of non-peaceful relations with some non-"African" states that practise colonialism.[167]

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[165] O.A.U. Charter, Art. 27.

[166] G.A.O.R., 21st Session, Sixth Committee, 934th Mtg., November 21, 1966, p. 206; also the Representative of Zambia (Chipampata), Ibid., 938th Mtg., November 23, 1966, p. 230.

[167] Boutros-Ghali, "The Addis Ababa Charter", International Conciliation, No. 546, 1964, pp. 31-38.

The undertaking to refrain from the use of force except in self-defence is part of the international constitutional law of the SEATO, NATO, ANZUS Treaty Organization, the CENTO, the Warsaw Treaty Organization and the OAS.[168] With the exception of the OAS, these organizations have been established primarily to perform the function of collective self-defence against an aggressor outside the appropriate "region".[169] Structured principally to handle extra-regional problems, they lack institutional procedures and machinery for the pacific settlement of disputes arising between member states. It may, however, be argued that it is not technically impossible for these collective self-defence organizations to be converted into *ad hoc* pacific settlement agencies.[170] The law of the OAS is certainly the most elaborate of all in respect of the meticulous care with which it sets out the procedures and rules governing the pacific settlement of disputes. The Pact of Bogota (1948),[171] synthesizing the various

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[168] Manila Treaty, Art. 1; North Atlantic Treaty, Art. 1; Warsaw Pact, Art. 1; ANZUS Treaty, Art. 1; C.E.N.T.O., Art. 1, 3; Rio Treaty (OAS), Art. 1.

[169] See Beckett, *op. cit.*; Starke, *The ANZUS Treaty Alliance*, pp. 76-82.

[170] David Davis Memorial Institute of International Studies, *Report of A Study Group on the Peaceful Settlement of International Disputes*, (London: 1966), p. 25.

[171] Text in F.V. Garcia Amador, *The Inter-American System*, (New York: Oceana, 1966), p. 389 *et. seq.*

Arbitration and Conciliation treaties among the American Republics under the rather loose Inter-American System, details rules governing procedures of (1) Good Offices and Mediation, (2) Investigation and Conciliation, Arbitration and Judicial Process. It is hardly necessary here to examine these various methods of pacific admustment of disputes. Attention should be drawn, however, to the fact that, unlike the Pact of the League of Arab States and the Addis Ababa Charter, the OAS Treaty on Pacific Settlement accepts judicial process as a method of peaceful settlement of disputes. Rather than create a regional court, a proposal supported by some Latin American Republics but consistently opposed by the United States,[172] the High Contracting Parties accept "the jurisdiction of the [World] Court as compulsory _ipso facto_, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of juridical nature that arise among them".[173] The International Court of Justice is empowered to decide whether or not a particular dispute falls within the domestic jurisdiction of a state.[174] The undertaking to refer legal disputes to the

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[172] M.O. Hudson, _International Tribunals_, (Washington: 1944), pp. 175-179; C.G. Fenwick, _The Organization of American States_, (Washington: 1963), pp. 208-213.

[173] Pact of Bogota (1948), Art. 31.

[174] Peru and the United States made reservations to the effect that they alone have competence to define and determine what matters fall within their domestic jurisdiction.

judicial processes of the World Court has been largely ignored. Cuba in 1962 proposed that the legality of the Punta del Este sanctions imposed by the OAS, and of her exclusion from the regional organization be referred to the World Court for an advisory opinion. The three OAS members in the Security Council spearheaded opposition to such a procedure and succeeded in securing its rejection by the Council.[175] Besides the principle of compulsory jurisdiction of the World Court, the principle of compulsory arbitration is recognized in cases where the World Court rules it has no jurisdiction to hear and adjudicate a dispute. Of particular relevance for our immediate purpose here is the provision which requires all international disputes arising between OAS members to be submitted to the peaceful procedures elaborated in the constitutional law of the regional organization before being referred to the Security Council of the United Nations.[176] On a purely superficial consideration, one may be tempted to doubt the full compatibility of Article 23 of the OAS Charter with Article 35(1) of the U.N. Charter. It should be borne in mind that Article 35(1) of the U.N. Charter is a constitutional right to be exercised at the discretion of member states. As it does not create

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[175] U.N. Doc. S/PV.998, March 23, 1962. See Chapter VII below.

[176] Charter of Bogota, Art. 23. See also Pact of Bogota, Art. 50; Rio Treaty, Art. 2.

a legal duty, there is nothing inconsistent with the U.N. Charter if members of a regional organization like the OAS willingly agree among themselves to limit their right under the Article so long as, by so doing, the rights of other U.N. members are not interfered with. An OAS member which goes first before the Security Council in the event of a dispute between her and another OAS member is in breach of the OAS Charter. If the same member state goes first to the OAS, she is in breach of neither the OAS nor the U.N. Charter. The above interpretation is not invalidated by Article 137 of the OAS Charter which states that "[n]one of the provisions of this Charter shall be construed as impairing the rights and obligations of Member States under the Charter of the United Nations" in so far as under Article 23 of the OAS Charter members have willingly agreed among themselves to limit their _right_ under Article 35(1) of the U.N. Charter, and, furthermore, as Article 23 neither involves limitations on the _obligations_ of U.N. membership nor interferes with the rights of non-OAS members.

The establishment of regional organizations under the permissive provision of Article 51 raises issues which can be formulated into the following two propositions: both propositions relate to the question of the legal compatibility of these collective self-defence organizations and their activities to the Charter of the United Nations.

(a) The claim that Article 51 does not permit regional

> organizations for collective self-defence in advance of an armed attack.

This claim was advanced by the Soviet Union in 1949 as part of her argument that the North Atlantic Treaty is incompatible with the United Nations Charter.[177] It is systematically formulated by the Mexican legal scholar, Castaneda, in this manner:

> The creation of permanent agencies of collective defence represented quite a deviation from the system established by the Charter. Self-defence under Article 51 of the Charter was thought of as a real exception to the essential principle of an orderly co-existence.... Therefore, its scope was limited to a simple initial and provisional action against armed attack.... Collective defence was never conceived of as a substitute for the collective security system of the United Nations, nor was it thought that a right granted to the states for emergency cases would become a duty through treaties.[178]

This view should not be taken seriously. In the first place, it is difficult to understand why, if Article 51 permits self-defensive action by any single state[179] and expects such state to prepare for it, it should be illegitimate for the

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[177] U.N. Bulletin, Vol. 6, 1949, p. 410; R.I.I.A., Documents on International Affairs 1949-1950, pp. 14-33.

[178] Jorge Castaneda, Mexico and the United Nations, (New York: 1958), p. 153. See also F.B. Schick, "The North Atlantic Treaty and the Problem of Peace", Juridical Review, 1950, pp. 48, 50.

[179] The interpretation of Article 51 as making the right of self-defence available only to U.N. members ignores the fact that the right of self-defence is "inherent" and, thus, exists independently of the U.N. Charter. For the view that the right is available only to U.N. members, see R.A. Falk (ed.), Vietnam and International Law, (Princeton: 1968). pp. 36-37.

same state and its allies, even if organized in a regional arrangement, to prepare for self-defence.[180] It may be said that the establishment of a collective self-defence organization is not in itself an exercise of the right of collective self-defence but a preparation for the exercise of that right.[181] Second, the best argument in support of the view accepted here is the political and practical one that the delegates at San Francisco placed it on record that they understood Article 51 as preserving regional organizations which were already in existence and those which might later be established among states with common security interests. The delegate from Colombia, Camargo, in a statement supported by fifteen Latin American Republics asserted that "the right

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[180] See Green, "Armed Conflict, War, and Self-Defence", Archiv des Volkerrechts, Vol. 6, 1956-57, p. 435.

[181] Kelsen, The Law of the United Nations, (1964), p. 915; Bentwich and Martin, Commentary on the Charter of the United Nations, (2nd Ed., London: 1969), p. 107; McDougal and Feliciano, Law and Minimum World Public Order, (New Haven: 1961), p. 246; Schwarzenberger, International Law, Vol. 2, (1968), pp. 35-36; Eagleton, "The North Atlantic Defence Pact", C.J.I.A., Vol. 3, No. 2, 1949, p. 27: "If collective self-defence is legitimate, it must surely be legitimate to organize it and plan it in advance". Contrast this view with that of Julius Stone: "The mere fact that the words of Article 51 do not exclude preparation from its ambit, does not mean that preparation is included within its ambit. And unless preparation is so included, it may remain forbidden by other Articles of the Charter". See Legal Controls of International Conflicts, (1959), p. 262. This view overlooks the principle formulated in The S.S. Lotus case to the effect that, under international law, everything which is not expressly prohibited is permitted. See Hudson, World Court Reports, Vol. 2, (1935), p. 20 at p. 45.

of defense is not limited to the country which is the direct victim of aggression but extends to those countries which have established solidarity through regional arrangement with the country directly attacked",[182] and, therefore, "[t]he Latin American countries understood... that the origin of the term 'collective self-defence' is identified with the necessity of preserving regional systems like the Inter-American one".[183] The delegate from Egypt made similar claims for the Arab League[184] while the Australian representative advanced a similar interpretation.[185] It was the understanding of the French delegate, Paul-Boncour, that, as far as repression of aggression was concerned, "the text indicates the right of the signatories of regional understandings or treaties of mutual assistance to act immediately".[186] It is also pertinent to draw attention to the explanation given by the Committee of Jurists when it decided against placing Article 51 under Chapter VIII as a separate section. Placing the article after Chapter VIII, it explained,

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[182] Doc. 576, III/4/9, U.N.C.I.O. Doc., Vol. 12, pp. 680-681.

[183] Ibid.

[184] Ibid., p. 682.

[185] Ibid.

[186] Doc. 972, III/6, U.N.C.I.O. Doc., Vol. 11, p. 58.

"might have the effect there of limiting the right of self-defence only to regional arrangements, thus depriving a state which was not a party to such arrangement of that right".[187] Finally, a veteran of San Francisco, Australia's Evatt has written that Articel 51 was demanded because "it was essential that there should be [a] clear recognition of the right of a country to defend itself against aggression and to call its friends to its assistance under regional or other defensive arrangements".[188] Thus, there is conclusive evidence that the delegates wrote Article 51 because they wanted those regional organizations which they had established on a permanent basis or which might later be established to be exempted from the authorization principle of Article 53 in the event of an armed attack against any of their members.[189]

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[187] Doc. WD 435, CO/199, U.N.C.I.O. Doc., Vol. 17, p. 287.

[188] H.V. Evatt, The United Nations, (Cambridge, Mass., Harvard University Press, 1948), p. 28. The British Commentary on the Charter is also instructive. It states: "But self-defence may be undertaken by more than one State at a time and the existence of regional organizations made this right of special importance to some states while special treaties of defence made its explicit recognition important to others. Accordingly, the right is given to individual States or to combination of States to act until the Security Council itself has taken the necessary measures". Cmd. 6666 (1945), p. 9.

[189] Compare McDougal and Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, (1961), p. 235; Nguyen Quoc Dinh, "La Legitime Defense d'apres la Charte des Nations Unies", R.G.D.I.P., Vol. 52, 1948, pp. 244-246.

(b) The claim that no state in international law has a right of "self-defence" in respect of an armed attack upon a third state.

The argument in the preceding section assumes that there is no reason why a state, in coming to the defence of another state is not defending itself. The question may well be asked whether Article 51 can, in international law, extend the right of self-defence to any state which is itself not directly threatened with attack but which goes ahead to help a state exercising its right of self-defence. Bowett, for instance, has expressed the view that "[t]he situation which the Charter envisages by the term [collective self-defence] is... a situation in which each participating state bases its participation in the collective action on its own right of self-defence. It does not, therefore, generally extend the right of self-defence to any state desires to associate itself in the defence of a state acting in self-defence".[190] For Bowett, the right of collective self-defence rests upon two fundamental requirements: "firstly that each participating state has an individual right of self-defence and secondly that there exists an agreement between the participating states to exercise their rights collectively".[191]

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[190] Bowett, Self-Defence in International Law, (1958), p. 216. For a similar view, see Stone, op. cit., p. 245.

[191] Bowett, Ibid., p. 207. For a powerful critique of the first fundamental requirement, see McDougal and Feliciano, Law and Minimum World Public Order, (New Haven: 1961), pp. 247-253.

The main problem which Bowett's first fundamental requirement raises is whether the actual violation of the legally protected rights and security of a state is the sine qua non of a lawful exercise of the right of self-defence. If Litvinov was right in asserting that peace, like war, is indivisible, then any state coming to the assistance of another is acting in self-defence.[192] It has been persuasively asserted that "the legality of the exercise of the right of collective self-defence depends on whether the state in whose favor it is being exercised has a right of individual self-defence. In consequence all further legal problems concerning collective self-defence depend on the problem of individual self-defence".[193] Besides, no scholar can, in all seriousness, afford to ignore the fact that many nations, especially the powerful ones, consider their "zone of security" or "power frontier" as extending beyond their recognized territorial state boundary.[194] It is submitted that a state in

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[192] Green, "Armed Conflict, War, and Self-Defence", Archiv des Völkerrechts, Vol. 6, 1956-57, p. 434: "The fact that such action has not been so described does not invalidate it, nor alter its character as such.... [I]t falls within the scope of self-defence..."

[193] Josef L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations", A.J.I.L., Vol. 41, 1947, p. 875.

[194] See, for instance, Kenneth Boulding, Conflict and Defence: A General Theory, (New York: 1962), pp. 265-266 for the concept of "critical boundary" in international politics and security. For the notion of "power frontier", consult J.E. Fawcett, "Intervention in International Law: A Study of Some Recent Cases", Hague Recueil, Vol. 103, 1961 (II), pp. 348-349.

modern conditions cannot wait until its legal rights have actually been violated before exercising its right of defence. If a State X becomes convinced that an attack by Z upon a strategic state Y would have detrimental consequences for X's security, state X can not only exercise its anticipatory and inherent right of self-defence by aiding state Y that has become a victim of an armed attack or threatened with an attack, but can also exercise its right of preventive self-defence to attack state Z.[195] If state X can act in this manner, there is no reason why states A, B, and C which are friendly to Y cannot similarly act if invited by Y. Thus, in the words of McDougal and Feliciano, "[i]t is not... an atomistic inquiry into the existence of an "individual right" to self-defence in each component member of a group-claimant, but rather a determination of the reasonableness of coercion by the group considered as a unified whole, as a collective "self", that is demanded by basic policy and prescription".[196]

Bowett's second fundamental requirement for the legitimate exercise of the right of collective self-defence is equally open to criticism. There is nothing in the U.N. Charter to warrant the view that unless states organize in a regional arrangement the right of collective self-defence cannot be

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[195] See Chapter IV above.

[196] McDougal and Feliciano, op. cit., p. 251.

exercised. As Beckett rightly pointed out, "while States forming part of a region and linked by regional arrangements may engage in collective self-defence, those which are not in the same region or not linked by regional arrangements may do the same".[197]

The key to the legal compatibility of regional organizations (specifically established to perform the function of collective self-defence) with the law of the United Nations lies in the manner in which the casus foederis has been formulated. It is to this that the remaining part of this chapter addresses itself.

The casus foederis of the regional arrangements under consideration is defined slightly differently; but, in each case, the use of the term "armed attack" indicates that consistency with the letter of Article 51 of the U.N. Charter was intended by the draftsmen of the various treaties.[198] Regional collective self-defence agreements usually demand two types of commitments from their signatories, namely, the commitment to consult, and the obligation to come to the assistance of the victim of an armed attack.[198a] The character of the latter obligation varies from treaty to treaty. Con-

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[197] Beckett, op. cit., p. 16; Green in Archiv des Volkerrechts, Vol. 6, 1956-1957, p. 434.

[198] Beckett, op. cit., p. 29; Bowett, op. cit., p. 225, et. seq.; Starke, op. cit., pp. 117, 121; Whiteman, Digest of International Law, Vol. 5, (1965), p. 1077 et. seq.

[198a] Boutros-Ghali, Contribution a Une Theorie Generale des Alliances, (Paris: 1963), p. 34.

sider, first, the legal duty to consult. This duty arises if, in the opinion of one of the signatories, a threat of armed attack or a danger to the integrity of the territory and political independence of any signatory party exists.[199] The purpose of consultation is not necessarily to agree on the measures which should be taken for common defence. For instance, the constitutional law of the North Atlantic defence system establishes no precise legal duties beyond consultation.[200] This is the position under the ANZUS Treaty[201] and the Manila Treaty. The latter calls upon member states to consult immediately "to prevent and counter subversive activities directed from without against their territorial integrity and political stability"[202] without indicating obligation beyond consultation, although the American commentary on the text expresses the view that the purpose of consultation is "to agree on measures to be taken for the

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[199] Manila Treaty, Art. 2; North Atlantic Treaty, Art. 3; Warsaw Pact, Art. 3; ANZUS Treaty, Art. 3; Rio Treaty, Art. 7.

[200] Cmd. 7692, Events Leading up to the Signature of the North Atlantic Treaty with a Commentary on the Text, (London: 1949), p. 5; Goodhart, "The North Atlantic Treaty of 1949", Hague Recueil, Vol. 79, 1951 (II), pp. 221-222; Schwarzenberger, "The North Atlantic Pact", W.P.Q., Vol. 2, No. 3, 1949, p. 312.

[201] Art. 3; Starke, op. cit., pp. 110, 112.

[202] Art. 2, 4. See Ralph Braibanti, "The Southeast Asia Collective Defense Treaty", Pacific Affairs, Vol. 30, 1957, pp. 321-341. M.M. Ball, "SEATO and Subversion", Political Science, (Wellington: N.Z.), Vol. 11, 1959, pp. 25-39.

common defense".[203] Under the Rio Treaty, when a signatory state faces threats to the integrity of its territory or political independence consultation is obligatory "in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression".[204] It is not clear from the language of Article 3 of the Warsaw Pact whether consultation in the event of a threat of armed attack on a signatory state leads to obligation to agree to do something. The Article states that consultation is "with a view to providing for their joint defence and maintaining peace and security".[205] It should be emphasized that the duty to consult when aggression is threatened, as well as preparation for self-defence, is within the letter of Article 51 of the U.N. Charter.

The commitment of members to come to the assistance of their allies which have been attacked appears to be much stronger in some treaties than in others.[205a] In none of the collective defence systems examined in this study is the obligation to assist a victim of armed attack as strong as it is under the Brussels Treaty which provides for automatic "military and other aid and assistance" to any signatory sub-

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[203] R.I.I.A., Documents on International Affairs 1954, p. 164.

[204] Art. 6.

[205] Art. 3.

[205a] Boutros-Ghali, Contribution a une Theorie general des Alliances, (1963), p. 59, et seq.

ject to an armed attack in Europe.[206] Under the Manila and ANZUS Treaties, for instance, each party merely recognizes that an armed aggression against any of the parties to the treaties constitutes a danger to its own peace and security, and undertakes, in that event, to act to meet the common danger in accordance with its constitutional processes.[207] The Treaties leave it to each member to decide for itself whether aggression has in fact occurred and what measures it will take.[208] The absence of a legal duty to aid a victim of attack may have created defence systems on which members cannot comfortably rely, nevertheless it serves the important purpose of bringing both treaties into consistency with Article 51 of the U.N. Charter.[209] It should be noted that unlike the Warsaw Pact[210] or the Rio Treaty,[211] neither the Manila nor the ANZUS Treaty contemplates _collective_ action to meet a common danger presented by an armed attack on one

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[206] Art. 4; Cmd. 7599, (London: H.M.S.O., 1949); Beckett, _op. cit._, p. 23.

[207] ANZUS Treaty, Art. 4; Manila Treaty, Art. 4(1).

[208] R.I.I.A., _Collective Self-Defence in South-East Asia_, (London: 1956), p. 13; Starke, _ANZUS Treaty Alliance_, (1965), p. 124.

[209] Starke, _Ibid._, pp. 120-121.

[210] Art. 4.

[211] Art. 3(2).

of its signatories beyond and subsequent to the initial measures already taken individually.

The formulation of the casus foederis in the North Atlantic Treaty, the Rio Treaty and in the Warsaw Pact appears to create a legal duty for the signatory states to go to the defence of a state which has been attacked and which has requested assistance. To the extent that this is the case, these multilateral treaties may have created obligations beyond the scope of the U.N. Charter obligation under Article 51.[212] As was indicated before, the legal duty to assist a victim of armed attack cannot be read into Article 51 of the U.N. Charter. This is not, however, the same as saying that a legal obligation in a regional treaty to assist a victim of armed attack is contrary to the law of the United Nations.

Like the Arab League's Collective Self-Defence Pact, these three collective security systems regard an armed attack on any of their members an attack against them all, and, in the event of such an attack, obligate members, in the exer-

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[212] See Kunz, "The Inter-American Treaty of Reciprocal Assistance", A.J.I.L., Vol. 42, 1948, pp. 114-120; Garcia-Mora, "The Law of the Inter-American Treaty of Reciprocal Assistance", Fordham Law Review, Vol. 20, 1951, pp. 7-14; Thomas and Thomas, Non-Intervention: The Law and Its Import in the Americas, (1956), p. 185; F.B. Schick, "Peace on Trial: A Study of Defence in International Organization", W.P.Q., Vol. 2, No. 1, 1949, pp. 29, 33; Grzybowski, The Socialist Commonwealth of Nations, (1964), p. 192.

cise of the right of individual or collective self-defence under Article 51 of the U.N. Charter, to go to the assistance of the victim or victims of attack.[213] What is left to the discretion of member States is the nature of assistance they are willing to offer.[214] Under each treaty the obligation to assist is individual, joint and collective. Since the judgement of whether or not the casus foederis has arisen is individual, assistance to a victim of attack is not automatic, and, certainly, no member can be drawn into a war automatically against its will.[215] Of the three only the Rio Treaty explicitly contemplates the use of the regional defence system against an aggressor signatory to the treaty.[216]

Finally, in conformity with the constitutional requirements of Article 51 of the U.N. Charter, the law of these regional defence arrangements provides that measures taken in self-defence shall not only be reported to the Security Council but also be terminated as soon as the Security Council takes the necessary action to restore and maintain inter-

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[213] North Atlantic Treaty, Art. 5; Rio Treaty, Art. 3; Warsaw Pact, Art. 4.

[214] Thomas and Thomas, The Organization of American States, (1963), p. 254; Cmd. 7692, (London: 1949), p. 5; Beckett, op. cit., pp. 28-29; Grzybowski, The Socialist Commonwealth of Nations, (1964), pp. 190-193.

[215] Beckett, op. cit., p. 29; R.I.I.A., Atlantic Alliance, (1952), p. 47; Schwarzenberger, "The North Atlantic Pact", W.P.Q., Vol. 2, No. 3, 1949, p. 312.

[216] Beckett, op. cit; Boutros-Ghali, Contribution a une Theorie Generale des Alliances, (1963), p. 64.

national peace and security.[216a] As the U.N. Charter does not require regional organizations carrying out the function described in Article 51 to keep it informed of activities "in contemplation",[217] it is difficult to understand the logic of the provision of Article 5 of the Rio Treaty under which the regional organization undertakes to report to the Security Council full information concerning the activities contemplated in the exercise of the right of self-defence.

7. Concluding Comments

The foregoing comparative examination of the constitutional law of some selected regional organizations throws some light on two problems of relevance to this study. First, it reveals how similar are the principles and rules of international law embodied in the legal framework of those regional organizations; second, it also shows a striking similarity with and restates the principles of international law codified in the U.N. Charter. The constitutional documents of these regional organizations do not differ substantially in the norms of international law they enunciate,[218] even though

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[216a] See Daniel Vignes, "La Place des Pactes de Defense dans la Societe internationale actuelle", A.F.D.I., Vol. 5, 1959, p. 69; Bowett, "Collective Self-Defence under the Charter of the United Nations", B.Y.B.I.L., Vol. 32, 1955-56, pp. 149-150.

[217] Beckett, op. cit., pp. 16-18; Stone, op. cit., pp. 249-250; Starke, op. cit., p. 78.

[218] Compare the conclusion of the Panel discussion on "Diverse Systems of World Order Today", Proceedings, A.S.I.L., 1959, pp. 21-45; Howard S. Levie, "Some Constitutional Aspects of Selected Regional Organizations: A comparative Study", C.J.I.L., Vol. 5, No. 1, 1966, pp. 14-67.

the goals of society sought by these organizations may be, and, indeed, are different. It does not come as a surprise that the constitutional law of regional organizations should, generally speaking, be compatible with that of the United Nations.

If international law is properly understood not as a system of neutral rules but as a continuing process of specialized decision-making[219] in which, whether we like it or not, it is used by foreign offices as an instrument of national policy,[220] then, there is no need to express great surprise that there does exist perhaps an unbridgeable gap between what is desirable de lege ferenda and what in fact exists de lege lata. This observation should not be interpreted as meaning that in their international relations states are always prone to disregard the law of nations.[221]

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[219] See generally, McDougal, "Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Enquiry", Journal of Conflict Resolution, Vol. 4, 1960, pp. 337-354; "International Law, Power and Policy", Hague Recueil, Vol. 82, 1953 (I), p. 137 et. seq.; R.A. Falk, "New Approaches to the Study of International Law", A.J.I.L., Vol. 61, 1967, pp. 477-495. For the view that the great majority of British international lawyers regard international law as a set of neutral rules, see Rosalyn Higgins, "Policy Considerations and the International Judicial Process", I.C.L.Q., Vol. 17, 1968, pp. 58-84.

[220] See H.C.L. Merillat (ed.), Legal Advisers and International Organizations, (New York: Oceana, 1966), also Legal Advisers and Foreign Affairs, (New York: Oceana, 1964).

[221] See L.C. Green, "The Nature of International Law", U. of T. Law Journal, Vol. 14, 1961, pp. 176-193; Louis Henkin, How Nations Behave: Law and Foreign Policy, (New York: Praeger, 1968); "International Law and the Behavior of Nations", Hague Recueil, Vol. 114, 1965 (I), pp. 171-279.

International law is usually interpreted in the light of national policy considerations and in support of particular lines of foreign policy. In the final analysis, therefore, it is not very important whether the principle of international law embodied in the legal framework of these regional organizations are a re-statement of the well-known principles of the law of the United Nations and of general international law. What is more important is how state practice and behaviour do in fact reflect the acceptance by states of these principles of law and the obligations arising therefrom. It can hardly be doubted that the practices of regional organizations are bound to modify or even repudiate some of the principles of this regional constitutional law. This is to be expected in international politics where nations do not always use their international organizations to prosecute the purposes and principles of those organizations but rather use the organizations to advance particular national interest.[222] In so far as the consistency of regional obligations with those of U.N. membership cannot and is not intended to be judged a priori, it becomes necessary to examine the operational conduct of these regional organizations in order to determine the extent to which regional obligations lead to duties compatible with those of U.N. membership.

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[222] See, for instance, Jacob Robinson, "Metamorphosis of the United Nations", Hague Recueil, Vol. 94, 1958 (II), pp. 514-530.

CHAPTER VII

REGIONAL ORGANIZATIONS: A UNITED NATIONS PROBLEM

1. Introduction

The extent to which the operational conduct of regional organizations synchronizes with or disregards the law and obligations of the United Nations Charter is a matter of empirical determination. In formulating the provision of Article 103 of the U.N. Charter, the delegates at San Francisco assumed the substance of this assertion. It should be recalled that the Report of the Rapporteur of Committee IV/2, as approved by the Committee, rejected the judging of consistency of obligations *a priori*. The Report stated *inter alia*: "It has deemed preferable to have the rule depend upon and linked with the case of a conflict between two categories of obligations. In such a case, the obligations of the Charter would be preeminent and would exclude any others".[1] It is for this reason that the compatibility of a regional treaty with the U.N. Charter depends not so much on the mutual consistency of obligations undertaken as on the con-

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[1] Doc. 933, IV/2/42(2), *U.N.C.I.O. Doc.*, Vol. 13, p. 707. Compare Article 20 of the League Covenant. See Chapter II above.

sistency of duties deriving from the two sets of obligations.[2]

It will not be possible to examine all the regional organizations considered in the last chapter largely because, outside the context of comparative constitutional analysis, there is little or nothing in the activities of some of them that lends itself to a consideration of their compatibility or otherwise with the legal order of the United Nations. We propose to devote special attention to the Organization of American States, the Warsaw Treaty Organization and the Organization of African Unity, while treating other regional organizations in a general way. The selection of these three regional organizations is governed by one overriding consideration, namely, the need to represent the three major political global divisions - the "capitalist" West, the "socialist" East and the largely "non-aligned" new states. In the Western camp, the choice is largely among the ANZUS Treaty Alliance, the Southeast Asia Treaty Organization, the North Atlantic Treaty Organization and the Organization of American States all of which are led by the United States. Preference has been given to the OAS not just because it is the oldest of the existing politically relevant regional organizations but, more importantly, because its record provides the raw material for the study of dynamics

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[2] Bentwich and Martin, op. cit., p. 180; Goodrich and Hambro, op. cit., pp. 518, 519; Kelsen, The Law of the United Nations, (1964), pp. 323, 324.

of universal-regional relationship. The position of the Soviet-led Warsaw Pact as the dominant international regional defence organization of the communist world assures it of a place in this study. The choice of the OAU over both the largely abortive League of Arab States and the recently established Association of Southeast Asian Nations has much to do with the contemporary relevance of the activities of the OAU to the changing functional image of the United Nations. There is no doubt that a functional metamorphosis has taken place in the universal organization. The United Nations has been transformed from an organization of great power hegemony concerned primarily with peace and security into an organization dominated by the new states of Asia and Africa whose primary interest is decolonization.[3] The propelling forces behind this transformation of the character of the United Nations are the numerical superiority of the anti-colonial forces and the idea that peace and security are, in the final analysis, derivative. Since it is in Africa that the battle for decolonization is still largely being fought, the selection of the OAU enables us to examine the Northwest-South axis of contemporary international politics and assess its impact, if any, on universal-regional relationship.

A selection criterion or a procedure which excludes an organization like the North Atlantic Treaty Organization from

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[3]Inis L. Claude Jr., <u>The Changing United Nations</u>, (New York: 1967), Ch. 3.

consideration is admittedly rather arbitrary. In order to reduce the scope of this arbitrary decision, it is considered appropriate to comment briefly on those organizations which have not been selected for an intensive study in the context of universal-regional relationship.

2. The League of Arab States

International regionalism in the Arab world of the Middle East antedated the founding of the United Nations Organization.[4] Its institutional expression - the League of Arab States - aims at strengthening international relations among the Arab States and at coordinating their political activities without prejudice to the independence and sovereignty of each contracting state.[5] The Pact of 1945 may be properly described as a regional arrangement designed to operate within the rules of behaviour postulated under Articles 52-54 of the U.N. Charter.[6] That the Pact was conceived in the context of Chapter VIII of the U.N. Charter

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[4] See generally Fayez Sayegh, Arab Unity: Hope and Fulfillment, (New York: Devin-Adair Company, 1958); M.F. Anabtawi, Arab Unity in Terms of Law, (The Hague: Martinus Nijhoff, 1963), Ch. 1, 2; Majid Khadduri, "Towards an Arab Union: The League of Arab States", A.P.S.R., Vol. 40, 1946, pp. 90-100.

[5] See M. Khalil, The Arab States and the Arab League: A Documentary Record, 2 Vols., (Beruit: Khayats, 1962).

[6] Khadduri, "The Arab League as a Regional Arrangement", A.J.I.L., Vol. 40, 1946, pp. 756-777; Macdonald, op. cit., Ch. 1. See the League Resolution of 1950 in Khalil, op. cit., Vol. 2, Doc. 57, p. 147.

should not come as a surprise in view of the type of definition of regional organization unsuccessfully urged by the Egyptian delegation at San Francisco.[7] With the establishment in 1950 of a defence organization which specifically invoked Article 51 of the U.N. Charter, the Arab League members may be said to place their regional arrangement in the same constitutional position as the OAS which explicitly envisages action in the context of both Articles 51 and 52-54.

It may be said with ample justification that the Arab League, despite the existence of "enemy" Israel, has proved abortive as a system of collective action.[8] Disregarding the obligation of U.N. membership to refrain 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 U.N. purposes, the Arab states attacked Israel and suffered a humilating defeat.[9] Internally, the League has persistently experienced dissensions stemming

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[7] Doc. 2, G/7(q)(1); U.N.C.I.O. Doc., Vol. 3, p. 461; Egyptian Society of International Law, Egypt and the United Nations, (1957), p. 21. See Chapter IV above for the Egyptian definition of a regional organization.

[8] B. Boutros-Ghali, "The Arab League: 1945-1955", International Conciliation, No. 498, 1954; R.W. Macdonald, The League of Arab States, (1965), Ch. 4; Sayegh, op. cit., Hassan Saab, "The League of Arab States: An Innovation in Arab Institutional History", World Justice, Vol. 7, 1965-1966, pp. 449-470.

[9] Trygve Lie, In the Cause of Peace, (New York: Macmillan Company, 1954), p. 174.

largely from conflict of interests among member states and especially from the competitive struggle for Arab leadership between Egypt and Iraq.[10] The recrimination attending the Iraqi membership in the Baghdad Pact of 1954[11] probably accelerated the wave of "fragmentation politics" within the Arab world manifesting itself in the formation of a union between Egypt and Syria (1958),[12] a federation of Iraq and Jordan and a movement in favour of greater collaboration among the North African Arab States.[13] The Arab League states lack a common and concerted policy towards the Palestine refugeee problem. The Jordan annexation of the West Bank in 1950 notwithstanding the opposition of other Arab States, and the Egyptian assumption of the administration of the Gaza on behalf of the Palestine Arabs reflected, partly, the inability of the Arab States to agree on the formation of a unified provisional government for the Palestine Arabs. The competitive intervention of Egypt and Saudi Arabia in Yemen and the Syrian-Lebanese conflict over the reluctance

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[10] Macdonald, op. cit., p. 73.

[11] See R.I.I.A., Documents on International Affairs 1955, p. 319 et. seq.; George Farah Nasr, The Policy of Lebanon in the Web of Inter-Arab Cold War Politics 1951-60, (Unpublished Ph.D. dissertation, University of Alberta, Edmonton, Fall, 1969), pp. 159-176.

[12] The union dissolved in 1961. See L.C. Green, "The Dissolution of States and Membership of the United Nations", Saskatchewan Law Review, Vol. 32, No. 2, 1967, pp. 93-112.

[13] For a discussion of this "sectional" cooperation, see Sayegh, op. cit., Ch. 12, 13.

of the Lebanese Government to permit the Palestine Liberation Organization to use the Lebanese territory for operations against Israel are evidences of continuing dissensions within the ranks of the Arab League. Probably no event has dramatized disunity among the fourteen-member League of Arab States as the abortive collapse of the Rabat Summit in December 1969. It proved impossible to achieve the immediate adoption of "a mobilization plan" that would have fixed a zero hour for war against Israel. Algeria, Saudi Arabia, Morocco and Tunisia proposed a further study of the plan while Kuwait and Saudi Arabia were unwilling to provide financial resources to the war efforts against the "enemy" state of Israel. Embittered and disappointed, some delegations failed to show up for the final session of the Summit while President Nasser of the United Arab Republic walked out of the Conference.[14] The conclusion seems inescapable that the Arab League has not been a successful regional organization.

3. The ANZUS Treaty Alliance and the Southeast Asia Treaty Organization

These two regional defence organizations can be conveniently treated together. Both implicitly define their

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[14] The Times (London), December 23, 1969, p. 1; The New York Times, December 25, 1969, p. 3.

relationship to the U.N. Charter in terms of Article 51.[15] The signatories to the ANZUS Treaty - the United States, Australia and New Zealand - undertake to cooperate for defensive purposes "pending the development of a more comprehensive system of regional security in the Pacific Area". With the subsequent establishment of the SEATO to which the ANZUS signatories belong, it may be asked whether the ANZUS Treaty has not, in effect, been rendered unnecessary. The answer is indeed the practical one that the ANZUS Powers themselves have consistently emphasized that the Treaty has not been made obsolete.[16] Australia and New Zealand cannot ignore the fact that, under the ANZUS Treaty, the obligation assumed by the United States is not limited to communist aggression whereas it is so limited under the American annex to the Manila treaty.[17]

Neither Treaty envisages the use of the organization for pacific settlement among its member states. While explicitly recognizing the need for economic cooperation among its members, the Manila Treaty failed to create the

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[15] J.G. Starke, The ANZUS Treaty Alliance, (1965); George Modelski (ed.), SEATO: Six Studies, (Melbourne: Cheshire, 1962); R.I.I.A., Collective Defense in South East Asia, (London: 1956).

[16] Starke, op. cit., p. 221 et. seq.

[17] R.I.I.A., Documents on International Affairs 1954, p. 161 et. seq.; R.I.I.A., Collective Defense in South East Asia, p. 171.

necessary machinery. This was not unintentional. There has been a marked reluctance on the part of the three major powers, namely, the United States, Britain and France, to stress the economic aspect of the regional organization; the argument being that the Colombo Plan[18] already exists for economic cooperation among the states concerned and for channelling foreign economic assistance to the area.[19] Whatever economic aid exists within the framework of the SEATO is intended to compensate the small states, in particular, Thailand, for the military and other expenditures arising from the implementation of the Manila Treaty itself.[20]

The ANZUS Treaty Organization has had largely a passive existence. The Suez episode in 1956 saw Australia and New Zealand critical of the U.S. condemnation of the Anglo-French action in Egypt but this hardly affected political cooperation within the Alliance.[21] At the time of the Formosan crisis in 1955 and 1958 involving the United States, the Australian and New Zeland quite correctly took the view that,

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[18] See J.R. Carr-Gregg, "The Colombo Plan", International Conciliation, No. 467, 1951.

[19] L.P. Singh, The Politics of Economic Cooperation in Asia: A Study of Asian International Organization, (Columbia: University of Missouri Press, 1966), pp. 212-215.

[20] R.I.I.A., Collective Defense in South East Asia, (1956), p. 130.

[21] Harper and Sissons, Australia and the United Nations, (1959), p. 134.

within the context of the ANZUS Treaty, they were under no obligation to come to the aid of the United States as Formosa is not within the Treaty Area.[22] It is probably true to say that the United States, around whom the ANZUS Treaty was built, does not appear to place great value on it especially as SEATO provides a larger framework for collaboration for the security of Southeast Asia.

The SEATO,[23] denounced by the neutral Asian nations because extra-regional "imperialist" powers are associated with it,[24] and now half-heartedly supported even by some of its members,[25] is far from being an important international actor in the Southeast Asian political scene.[26] An authori-

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[22] Starke, op. cit., pp. 181-187.

[23] For an analysis of the origin and history of negotiation leading to the signing of the Manila Pact, see Charles O. Lerche, "The United States, Great Britain, and SEATO: A Case Study in Fait Accompli", Journal of Politics, Vol. 18, 1956, pp. 459-478.

[24] R. Brissenden, "India's Opposition to SEATO: A Case Study in Neutralist Diplomacy", Australian Journal of Politics and History, November, 1960, pp. 210-232; R.I.I.A., Collective Defense in South East Asia, (1956), pp. 91-103; M.L. Thomas, "A Critical Appraisal of SEATO", W.P.Q., Vol. 10, 1957, pp. 926-936.

[25] George Modelski, (ed.), SEATO: Six Studies, (1962), Part 1; Kenneth Young in Tondel (ed.), The Southeast Asian Crisis, (New York: Oceana, 1966), pp. 59-60; K.B. Sayeed, "Southeast Asia in Pakistan's Foreign Policy", Pacific Affairs, Vol. 41, 1968, pp. 230-244; Peter Lyon, "SEATO in Perspective", Y.B.W.A., Vol. 19, 1965, p. 113.

[26] D.E. Kennedy, The Security of Southern Asia, (New York: Praeger), Ch. 7.

tative commentator noted that "[t]he dominant note of SEATO's activities is caution, a caution attributable to the modesty of its resources, the supremacy of governmental interests within it, and to its sensitivity to criticism from member and non-member countries alike. On occasion, caution has verged on timidity".[27] Thus, while the SEATO Council in 1964 expressed "great concern about the continuing Communist aggression against the Republic of Vietnam"[28] which is a "Protocol" state, it has not acted as an organization; whatever aid South Vietnam receives comes principally from the United States. It is true, that, under the constitutional law of SEATO, the obligation to "act to meet the common danger" resulting from "aggression by means of armed attack"[29] is both individual and collective, and, hence, the SEATO members which have troops in South Vietnam may justify such aid under the Manila Treaty if South Vietnam had actually made a request.[30] With France, Britain and Pakistan critical of American involvement in South Vietnam it is difficult to see how SEATO could be the central actor in the defence of

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[27] Modelski (ed.), op. cit., pp. 27-28.

[28] U.S. Dept. of State, Bulletin, Vol. 50, No. 1297, May 4, 1964, p. 692.

[29] Manila Treaty, Art. 4.

[30] R.A. Falk (ed.), The Vietnam War and International Law, (Princeton: 1968), pp. 229-233.

South Vietnam.

The staunchest supporter of SEATO, Thailand, has since the early 1960's had doubts about the Organization's willingness, if not capacity, to deal with communist subversive aggression. Strategically located and vulnerable to communist subversion, Thailand unsuccessfully persuaded the regional organization to get involved in Laos in 1960-1961.[31] Thailand has found it expedient to seek a special guarantee from the United States to the effect that "an American obligation to assist Thailand in the case of Communist armed attack would be observed irrespective of whether there was prior agreement of all other parties to the [SEATO] Treaty".[32] It is hardly an exaggeration to say that the Manila Treaty has largely become "primarily a bilateral undertaking between Thailand and the United States but with the participation of other flags... in the operation. Without this interpretation

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[31] Bernard B. Fall, Anatomy of a Crisis: The Laotian Crisis of 1960-1961, (New York: Doubleday, 1969), p. 217; Modelski (ed.), SEATO: Six Studies, (1962), pp. 12-15; Norman Padelford, "SEATO and Peace in Southeast Asia", Current History, Vol. 38, No. 222, February 1960, pp. 95-101, 109.

[32] Cited in R.C. Nairn, "SEATO: A Critique", Pacific Affairs, Vol. 41, No. 1, 1968, p. 16. See also Peter Lyon, "SEATO in Perspective", Y.B.W.A., Vol. 19, 1965, p. 119; Donald E. Neuchterlein, "Thailand and SEATO: A Ten-Year Appraisal", Asian Survey, Vol. 4, No. 12, 1964, pp. 1174-1181.

SEATO would probably have collapsed".[33] In trying to appraise the Southeast Asia Treaty Organization one should bear in mind that it is operating in the most troubled part of the world. As one commentator puts it: "In such an environment it is no wonder that SEATO has not grown great and popular. The wonder is that it has lasted at all".[34]

4. The Association of Southeast Asian Nations

In recent years, Asia has witnessed the establishment of indigenous multilateral organizations largely confined to the field of economic cooperation. At the initiative of the Malayan Prime Minister, the Association of Southeast Asia (ASA) was set up in 1961 as an intergovernmental machinery for economic cooperation among Malaya, Thailand and the Philippines.[35] Confronted with the Philippines-Malaysian dispute over Sabah, ASA proved largely impotent, existing only as a symbol of multilateral cooperation in an area where indigenous regional cooperation has been slow to

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[33] Kenneth Young, Jr., "The Southeast Asia Crisis" in L.M. Tondel Jr. (ed.), The Southeast Asia Crisis, (New York: Oceana, 1966), p. 59; D.E. Kennedy, The Security of Southern Asia, (New York: Praeger, 1965), p. 237.

[34] Peter Lyon, "SEATO in Perspective", Y.B.W.A., Vol. 19, 1965, p. 136.

[35] Singh, op. cit., p. 215; B.K. Gordon, The Dimensions of Conflict in Southeast Asia, (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1966), p. 165 et. seq.; M.P. Gopalan, "The Launching of ASA", Far Eastern Economic Review, Vol. 33, No. 12, 1961, pp. 548-552; Georges Fischer, "Une Nouvelle Organisation Regionale: L' A.S.A.", A.F.D.I., Vol. 8, 1962.

develop. The Association of Southeast Asian Nations, consisting of Indonesia, Singapore, Malaysia, Thailand and the Philippines, may be said to be a successor organization to A.S.A. It should be pointed out that Indonesia declined invitation to join ASA in 1961 on the ground that the proposed regional organization was "Western" inspired.[36] With Sukarno overthrown and "confrontation"against Malaysia[37] subsequently terminated, Indonesia was, in 1967, in a position to collaborate with the pro-Western states of Asia in a regional economic organization. The ASEAN Declaration[38] of August 8, 1967 established a regional organization whose purpose is largely economic. It was hoped, however, that the acceleration of economic growth, social progress and cultural development would strengthen the foundation of peace and stability in Southeast Asia. Although members express a determination "to ensure their stability and security from external interference in any form and manifestation in order to preserve their national identities", there is hardly any

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[36] Singh, op. cit., p. 217; Gordon, Ibid., p. 171.

[37] Gordon, Ibid., p. 68 et. seq.; George Modelski, "Indonesia and Malaysia Issue", Y.B.W.A., Vol. 18, 1964, pp. 128-149; Mezerik (ed.), "Malaysia-Indonesia-Conflict", International Review Service, Vol. 11, No. 86, 1965; L.C. Green, "Indonesia, the U.N. and Malaysia", Journal of Southeast Asian History, Vol. 6, No. 2, 1965, pp. 71-86; F.B. Weinstein, Indonesia Abandons Confrontation, (Ithaca, New York: Modern Indonesia Project, 1969).

[38] Text in International Legal Materials, Vol. 6, 1967, p. 1233 et. seq.

doubt that the intention of the signatories was not to establish a collective security organization. Whether ASEAN will develop into a collective security organization cannot be ruled out in view of the announced military withdrawal of Britain from Southeast Asia by 1971.[39] From an organizational point of view, ASEAN is rather deficient. It would seem that member states were unwilling to create institutions which each one of them cannot control. Aside from the ASEAN Ministerial Council composed of Foreign Ministers of member states, and meeting once a year, the Declaration established a Standing Committee composed of the accredited Ambassadors of member states in any country playing host to the annual Ministerial Meeting for the purpose of carrying out the work of the Association between Meetings of the Foreign Ministers. Rather than establish a central secretariat, the Declaration provided for the creation of national secretariat in each member country to service both the Standing Committee and the ASEAN Ministerial Meeting.

What remains to be commented upon is whether ASEAN, an economic organization, can be considered a regional organization in the context of the United Nations Charter. The U.N. Charter takes cognizance of regional organizations

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[39] See Werner Levi, The Challenge of World Politics in South and Southeast Asia, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1968), p. 69 et. seq.; Peter Lyon, "Substitute for SEATO?", International Journal, (Toronto), Vol. 24, No. 1, 1968-69, pp. 35-46.

explicitly only from a political and security point of view.[40] It permits the existence of regional arrangements for the purpose of dealing with "matters relating to the maintenance of international peace and security as are appropriate for regional action". Regional organizations functioning under the behavioural rules of Article 51 are collective defense systems. It will be rather superficial to conclude that ASEAN is not a regional organization for two reasons. First, such conclusion ignores the important fact that international peace and security is derivative; in so far as economic and social cooperation is an essential element in the maintenance of peaceful relations among states, the formulation of Article 52(1) of the U.N. Charter may not be interpreted as excluding economic matters. A problem immediately arises in connection with this interpretation. If the U.N. Charter cannot be interpreted as excluding regional economic organizations, are the rules of behaviour of such regional organizations defined in the U.N. Charter either under Article 51 or Chapter VIII? To admit that no such rules exist is not to deny that regional economic organizations are legitimate under the Charter but to emphasize the fact that at San Francisco the subordination of economic to political relations among states was assumed. Second, it should be pointed out that as the U.N. Charter contains no explicit prohibition

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[40] See Chapters I and IV above.

against an economic organization what should determine the consistency of such organization with the U.N. Charter is whether its purposes and principles are compatible with those of the United Nations. With particular reference to ASEAN it is well to remember that the ultimate goal of its member is to "promote regional peace and stability through... adherence to the principles of the United Nations".

5. <u>The North Atlantic Treaty Organization</u>

NATO, one of the living symbols of an ideologically polarized international system, is a multilateral security alliance among fifteen non-communist countries situated in Western Europe, the Mediterranean Sea and North America.[41] The central purpose for which NATO was created was the defence of the "North Atlantic Area" against any possible Soviet aggressive attack, although the North Atlantic Treaty does not specifically mention the Soviet Union.

Our discussion of NATO will be confined to a brief consideration of whether it is a regional organization, and to an analysis of some of the problems and crises the organization has experienced.

Speaking before the plenary meeting of the General Assembly in April 1949, Gromyko made the following comments

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[41] Members are Britain, France, West Germany, the United States, Belgium, Denmark, Norway, Greece, Turkey, Canada, Portugal, Italy, Iceland, Luxembourg and Netherlands.

on the North Atlantic Treaty:

> The character and the text of the Pact show that this is not a regional arrangement of the kind permissible under the United Nations Charter. It comprises states located in two different continents. Its signatories have not set themselves the task of settling any regional questions. Members of even a truly regional arrangement made in accordance with the Charter have no right to take military action without an authorization from the Security Council. Article 51 of the Charter gives the right to take action in self-defence only in the event of an armed attack against a Member of the United Nations. None of the signatories to the North Atlantic Pact has been subjected to an armed attack, and no such attack threatens, especially from the Soviet Union.[42]

From a juridical standpoint, the claim that the North Atlantic Treaty setting up a limited-membership organization of states is not "permissible under the United Nations Charter" is without foundation.[43] As we have consistently maintained preparation in advance of self-defence is not itself an act of self-defence and is not excluded by the formulation of Article 51.[43a] Moreover, membership in NATO by Western Germany, a non-member of the United Nations, is equally not precluded under Article 51 in so far as the inherent right of self-defence is available to both members and non-members of the United Nations. Those who drew up the North Atlantic Treaty took pains to emphasize that the Treaty is not a regional arrangement of the type contemplated under Chapter

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[42] U.N. Bulletin, Vol. 6, 1949, p. 410. For the U.S.S.R. Statement on NATO, see R.I.I.A., Documents on International Affairs, 1949-1950, pp. 14-33 esp. pp. 28-29.

[43] B. Boutros-Ghali, "Le Pacte de l'Atlantique Nord", Revue Egyptienne de Droit International", Vol. 6, 1950, pp. 45-81.

[43a] See Chapter VI above.

VIII of the U.N. Charter in so far as it does contemplate the use of force without Security Council authorization as recognized under Article 51.[44] The legal question, then, is not whether the Treaty is consistent with the U.N. Charter, for it is, but whether or not it can be considered a regional organization in the context of Articles 52-54 of the U.N. Charter.[45]

We have expressed the view that the North Atlantic Treaty is a regional organization under the Charter but that it was designed primarily to carry out the function of collective defence against armed attack described in Article 51 of the U.N. Charter. The point is well taken that the North Atlantic Treaty does not provide for the organization to be used for pacific settlement; but, from the point of view of the U.N. Charter, there is no prohibition against a collective defence organization being used for pacific settlement of disputes under Articles 52-53. Sir Eric Beckett who advanced the view that the North Atlantic Treaty

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[44] G. Schwarzenberger, "The Atlantic Pact", W.P.Q., Vol. 2, No. 3, 1949, pp. 309-316; F.B. Schick, "The North Atlantic Treaty and the Problem of Peace", Juridical Review, Vol. 62, 1950, pp. 26-70; A.L. Goodhart, "The North Atlantic Treaty of 1949", Hague Recueil, Vol. 79, 1951 (II), pp. 187-235; Salvin, "The North Atlantic Pact", International Conciliation, 1949, pp. 375-424.

[45] Sir Eric Beckett, The North Atlantic Treaty, The Brussels Treaty and The Charter of the United Nations, (1950); Hans Kelsen, The Law of the United Nations, (1964), p. 918 et. seq.; D.W. Bowett, Self-Defence in International Law, (1958), p. 220 et. seq.

is not a regional organization in the context of Chapter VIII of the Charter admitted that the NATO "[C]ouncil and its subsidiary bodies might... deal with the settlement of international disputes".[46] No problem arises if, in discharging this function, the regional defence organization conforms with the rules prescribed in Articles 52-54. It seems superfluous to define any limited membership organization in relation to the U.N. Charter by citing specific constitutional provisions. A functional analysis and interpretation of Articles 51-54 demand that the relationship between a regional organization and the United Nations be automatically defined in accordance with the specific function the regional organization is carrying out.[47] Thus, the determination of the dividing line between regional organizations under Articles 52-54 and collective self-defence arrangements of a regional nature under Article 51 must depend on what actions are taken.[48]

As to the regional or non-regional nature of NATO, Sir Eric Beckett has correctly stated that "in so far as there

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[46] Beckett, op. cit., p. 33. The 1957 NATO Council resolution on pacific settlement urged members to use good offices procedures within the NATO framework before resorting to any other international organization.

[47] See Chapter IV; Bowett, op. cit., p. 220 et. seq.

[48] N.J. Padelford, "Recent Developments in Regional Organization", Proceeding, A.S.I.L., 1955, p. 27.

is a regional character at all in the North Atlantic Treaty, it lies in a common interest in the peace and security of a certain area, and not necessarily the possession of territory within a certain area".[49] The absense of geographical contiguity among NATO member states need not cast doubt on the regional character of the organization not only because oceans may be regarded as connecting continents rather than separating them,[50] but also because the concept of regionalism in international relations has always been politically defined.[51]

NATO does not lend itself to a consideration of the operating relationship between it and the United Nations. It is for this reason that a scholar seeking to examine the relationship between an American-led "western" regional organization and the United Nations is compelled to discuss the OAS notwithstanding the fact that, in terms of high pressure international politics involving East-West relations, NATO is of greater significance than the OAS. For our purpose here, what may further be usefully commented upon are

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[49] Beckett, _op_. _cit_., p. 30.

[50] Eugene Stanley, "The Myth of the Continents", _Foreign Affairs_, Vol. 19, No. 3, 1940-41, pp. 481-494.

[51] N.J. Padelford, "Recent Developments in Regional Organization", _Proceedings_, _A.S.I.L._, 1955, pp. 23-41; E.N. Van Kleffens, "Regionalism and Political Pacts with Special Reference to the North Atlantic Treaty", _A.J.I.L._, Vol. 43, 1949, p. 669; Robert Strausz-Hupé, "Regionalism in World Politics", _International Conciliation_, No. 419, 1946. See Chapter I above.

the problems of political consultation within the organization and the impact of the Suez and Cyprus crises on the organization.

The central problem of political consultation[52] which has been much debated within NATO arises largely from the fact that the North Atlantic Alliance has not remained a simple multilateral guarantee pact of 1949,but rather has evolved into a semi-integrated military organization.[53] The existence of a NATO integrated command distinguishes the Atlantic Alliance from any other western defence arrangement - Rio Treaty, the ANZUS Treaty and the Manila Treaty. While the existence of an integrated military command in advance and anticipation of armed attack cannot be said to be incompatible with the provision of Article 51 of the U.N. Charter, it has been a source of political problem within the alliance culminating in the recent withdrawal of France from the organization.[54] NATO is an organization of sovereign states

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[52] See generally, Patterson and Furniss, NATO: A Critical Appraisal, (Princeton: 1957), Ch. 4; Report of the Committee of Three on Non-Military Cooperation in NATO, in NATO Facts and Figures, (Brussels: 1969), p. 303 et. seq.; J.W. Holmes, "Fearful Symmetry: The Dilemmas of Consultation and Coordination in the North Atlantic Treaty Organization", International Organization, Vol. 22, No. 4, 1968, pp. 821-840.

[53] For an account of this evolution, see Lord Ismay, NATO - The First Five Years 1949-1954, (1955), p. 31 et. seq.; R.I.I.A., Atlantic Alliance, (1952), p. 49 et. seq.; Robert E. Osgood, NATO: The Entangling Alliance, (Chicago: 1962), p. 23.

[54] See Eric Stein and Dominique Carreau, "Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization", A.J.I.L., Vol. 62, 1968, pp. 577-640; Jean Charpentier, "Le Retrait Francais de L'O.T.A.N.", A.F.D.I., Vol. 12, 1956, pp. 409-433.

which are legal equals under international law; but no one could ignore the preponderant American military power which creates a _de facto_ United States leadership of a predominantly European organization. The unwillingness of the United States to multilateralize the formulation of strategic nuclear policy, the belief among some Europeans that NATO legitimizes American hegemony in Europe, the suspicion that the United States may be more concerned with maintaining stability in Soviet-American relations than with the security of its European allies, and the different interpretation of the political situation in Europe, especially in respect of the Soviet intention, have all combined to create a sense of disarray within the regional organization.[55] The argument concerning the irrelevance of NATO today[56] has, at least for propaganda reasons, been thrown into the background in the wake of the Soviet-led invasion of Czechoslovakia.[56a] The important point that this event illustrates is that no organization of states can be insulated from its environment;

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[55] See, for instance, Henry Kissinger, _The Troubled Partnership_, (New York: McGraw-Hill Book Company, 1965), Ch. 2; G. Patterson and E.S. Furniss, Jr., _NATO: A Critical Appraisal_, (Princeton: Princeton University Conference on NATO, 1957), Ch. 4; Alastair Buchan, "The Future of NATO", _International Conciliation_, No. 565, 1967; Stanley Hoffmann, "The North Atlantic Area as a Partial International System", _International Organization_, Vol. 17, 1963, pp. 521-549.

[56] Contrast the German with the French view on the relevance of NATO. See _International Legal Materials_, Vol. 5, 1966, pp. 426, 681.

[56a] See the Brussels Communique of the N.A.T.O. Ministerial Council (Nov. 16, 1968), in U.S. Dept. of State, _Bulletin_, Vol. 59, No. 1537, Dec. 9, 1968, pp. 595-597.

this is especially so with organizations which have been created in response to some perceived external threat to member states.

A major political crisis within the Atlantic Alliance was the failure of the United States to support and defend its allies during the Anglo -French military intervention in Egypt in 1956.[57] Anglo-French military intervention in Egypt was planned and executed without consultation with the United States eventhough the American President had made it known to the British Prime Minister, Anthony Eden, all along that the American public opinion was averse to the use of force.[58] As the Suez canal is outside the North Atlantic Area, Britain and France probably have no legal obligation to consult with any NATO member including the United States, but this is a rather oversimplified view of the whole situation. With the Soviet Union threatening to intervene on the Egyptian side, and with the dependence of Britain and France on American military power in any Anglo-

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[57] L.C. Green, "The Double Standard of the United Nations", Y.B.W.A., Vol. 11, 1957, pp. 104-137; R. St. J. Macdonald, "Hungary, Egypt and the United Nations", Canadian Bar Review, Vol. 35, 1957, pp. 38-71; Quincy Wright, "Intervention 1956", A.J.I.L., Vol. 51, 1957, pp. 257-276; Stanley Hoffman, "Sisyphus and the Avalanche: The United Nations, Egypt and Hungary", International Organization, Vol. 11, 1957, pp. 446-469.

[58] Sir Anthony Eden, The Memoirs of The Rt. Hon. Sir Anthony Eden: Full Circle, (London: Cassell, 1960), pp. 463-464.

French military clash with Soviet-Egyptian forces, consultation with America becomes desirable. In the Security Council, the United States was openly critical of the Anglo-French action and demanded a prompt withdrawal of the interventionist forces from Egypt. The British and French Governments certainly resented the "betrayal" of an important ally - the United States - which joined the "enemy" - the U.S.S.R - to frustrate a policy deemed essential to their vital interests in the Middle East.[59] As Anthony Eden put it: "[W]e had no reason... to suppose that the United States would oppose us at the United Nations upon almost every point".[60] The important point for our purpose is that there was no NATO front <u>against</u> the United Nations, although the American rejection of the Soviet proposal for a U.S.-Soviet military action against France and Britain under the authority of the Security Council as unthinkable may be interpreted as setting the limit to which a NATO member is willing to offend its allies in the name of the integrity of the law of the U.N. Charter.

A final problem to be discussed is the tripartite conflict over Cyprus and its consequence not only for NATO as an organization but also for the law of universal-regional

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[59] <u>Ibid</u>., pp. 528, 540 <u>et</u>. <u>seq</u>.; Geoffrey Crowther, "Reconstruction of an Alliance", <u>Foreign Affairs</u>, Vol. 35, 1957, pp. 173-183 at p. 181.

[60] Sir Anthony Eden, <u>Full Circle</u>, p. 528.

relationship. The Cyprus problem has been the most divisive of disputes within the Atlantic Alliance since the 1950's.[61] Cyprus is composed of two ethnic groups - Greek Cypriots and Turkish Cypriots - the former constituting eighty percent of the total population. Two NATO members, Greece and Turkey have been specially interested in protecting the rights of their kith and kin. Greece has always urged a solution based on the principle of self-determination, majority rule and internationally guaranteed minority right while making it clear that it would respond forcefully in the event of invasion by Turkey.[62] Turkey seems to prefer a solution based on the principle of partition along ethnic lines and would have intervened militarily but for the restraining influence of the United States.[63] The British Government was especially interested in preserving its strategic military bases on the island.[64] The NATO members

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61 See R.I.I.A., Cyprus: The Dispute and Settlement, (London: Oxford University Press, 1959); Stephen G. Xydis, Cyprus: Conflict and Conciliation, 1954-1958, (Columbus: Ohio State University Press, 1967); Sir Anthony Eden, Full Circle, (1960), p. 394 et. seq.; Thomas Ehrlich, "Cyprus, the "Warlike Isle": Origins and Elements of the Current Crisis", Stanford Law Review, Vol. 18, 1965-1966, pp. 1021-1098.

62 Theodore A. Couloumbis, Greek Political Reaction to American and NATO Influences, (New Haven: Yale University Press, 1966), p. 176 et. seq.; S. Calogèropoulos-Stratis, Le Greece et les Nations Unies, (1957), pp. 147-156.

63 University of Ankara, Turkey and the United Nations, (New York: 1961), pp. 195-196.

64 Anthony Verrier, "Cyprus: Britain's Security Role", World Today, Vol. 20, March 1964, pp. 136-137.

are concerned with the fact that conflict between Turkey and Greece may impair the cooperation of both members within the Alliance. For some time, efforts to settle the problem diplomatically within NATO proved abortive.[65] In late 1963, a civil war broke out between the two groups in Cyprus. NATO was confronted with a major crisis.

Archbishop Makarios, the Cypriot leader, resisted Anglo-American pressure to keep the crisis within the NATO framework. For instance, a NATO peace-keeping force proposed by Britain and the United States was rejected by the Cypriot leader who insisted that the United Nations was the proper organization to deal with the situation.[66] Even if Cyprus were a NATO member it would still have been within its constitutional right to have a direct access to the United Nations. Thus, it is not surprising that Archbishop Makarios' preference for solution through the United Nations was not openly challenged by any member. The rest of the Cyprus problem in the United Nations is not relevant for the purpose of this study.[67] It is sufficient to emphasize that the

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[65] Cmnd. 566, Discussion on Cyprus in the North Atlantic Treaty Organization September - October 1958, (London: 1958).

[66] Linda B. Miller, Cyprus: The Law and Politics of Civil Strife, (Cambridge, Mass.: Harvard University Press, 1968), p. 27 et. seq.; World Order and Local Disorder: The United Nations and International Conflicts, (Princeton: Princeton University Press, 1967), p. 116 et. seq.

[67] See James A. Stegenga, The United Nations Force in Cyprus, (Columbus: Ohio State University Press, 1968); Linda B. Miller, Cyprus: The Law and Politics of Civil Strife, (Cambridge, Mass.: Harvard University Center for International Affairs, 1968).

Cyprus problem shows that there is a lack of consensus among NATO members on how to go about resolving Greek-Turkish conflict which threatens collaboration and cooperation of those two vital members within the Atlantic Alliance. The crisis found NATO solidarity wanting.

NATO is a regional organization but it is global in its significance. This did not escape the attention of the Committee of Three on Non-Military Cooperation in NATO. The committee commented as follows in its 1957 Report:

> NATO should not forget that the influence and interests of its members are not confined to the area covered by the Treaty, and that common interests of the Atlantic Community can be seriously affected by developments outside the Treaty area. Therefore, while striving to improve their relations with each other, and to strengthen and deepen their own unity, they should also be concerned with harmonising their policies in relation to other areas taking into account the broader interests of the whole international community; particularly in working through the United Nations and elsewhere for the maintenance of international peace and security and for the solution of the problems that now divide the world.[68]

If the above statement is interpreted as applying to consultation among members over any matter that affects international peace or the extra-regional interests of some members of NATO,[69] it may not be argued that NATO is, in effect, more

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[68] Report of the Committee of Three on Non-Military Cooperation in NATO. Text in U.S. Dept. of State, Bulletin, Vol. 36, No. 915, 1957, pp. 18-28 at p. 20.

[69] For such interpretation, see Cmd. 7692, Events Leading Up to the Signature of the North Atlantic Treaty With a Commentary on the Text, (London: 1949), p. 5; Boutros-Ghali, "Le Pacte de l'Atlantique Nord", Revue Egyptienne de Droit International, Vol. 6, 1950, p. 54; Bastid, "L'Obligation de Consultation Politique pour de Etats Parties au Traite de l'Atlantique Nord", A.F.D.I. Vol. 1, 1955, pp. 464-470.

than what it claims to be - an organization for the defence of the "North Atlantic Area". Any group of states can consult on any matter of interest to the group. This is clearly recognized in the Warsaw Pact[70] and the ANZUS Treaty.[71] The situation is complicated when a regional organization like NATO or the Warsaw Pact plans globally for "Western" or "Eastern" world security. When the Soviet Union and the United States, both leaders of the two world major camps organized politically and military around NATO and the Warsaw Pact, negotiate, the subject-matter of such negotiations is so politically weighty that it cannot but have consequences that are world-wide in scope. It may, then, be said that while NATO is 'regional' in membership, and has so far remained "regional" in its area of operation, it is universal in its significance.[72]

6. The Organization of American States and the United Nations

(a) Historical Introduction

The OAS is perhaps the regional organization most closely

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[70] Warsaw Pact, Art. 3. See below.

[71] For such interpretation, see Starke, op. cit., pp. 152-153, 166.

[72] For these three dimensions of regionalism, see Potter, "Universalism versus Regionalism in International Organization", A.P.S.R., Vol. 37, 1943, p. 854. See Ch. I (Introduction) above.

studied by scholars concerned with problems of universal-regional relationship. Hence, interpretation and conclusions regarding the shifting balance of importance between universal and regional organizations have been drawn in the light of the experience of U.N.-OAS relationship in the political and security field.[73]

The literature on the history of the Inter-American System is extensive[74]. While it is hardly necessary to deal

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[73] See, for instance, Inis L. Claude Jr., "The OAS, the U.N. and the United States", International Conciliation, No. 547, March 1964; R. St. J. Macdonald, "The Developing Relationship between Superior and Subordinate Political Bodies at the International Level: A Note on the Experience of the United Nations and the Organization of American States", C.Yb.I.L., Vol. 2, 1964, pp. 21-54; Dona Baron, "The Dominican Republic Crisis of 1965: A Case-Study of the Regional vs. the Global Approach to International Peace and Security", in Andrew W. Cordier (ed.), Columbia Essays in International Affairs, Volume III: The Dean's Papers, 1967, (New York: Columbia University Press, 1968), pp. 1-37; M. Eduardo Jimenez de Arechaga, "La Coordination des Systèms de L"ONU et de L'Organisation des Etats Americains Pour le Reglement Pacifique des Differends et la Sécurité", Hague Recueil, Vol. 111, 1964(1), pp. 423-520. Akehurst, in B.Y.B.I.L., Vol. 42, 1967, pp. 175-227.

[74] Probably the most complete bibliographical reference is D.F. Trask, M.C. Meyer and R.R. Trask, A Bibliography of United States - Latin American Relations Since 1810, (Lincoln: University of Nebrasca Press, 1968). Outstanding among the numerous works on the Inter-American System (OAS) are Arthur P. Whitaker, The Western Hemispheric Idea: Its Rise and Decline, (Ithaca, New York: Cornell University Press, 1954); Margaret Ball, The Problem of Inter-American Organization, (London: Oxford University Press, 1944); Thomas and Thomas, The Organization of American States, (Dallas: Southern Methodist University Press, 1963); F.V. Garcia Amador, The Inter-American System, (New York: Oceana, 1966); Gordon Connell-Smith, The Inter-American System, (London: Oxford University Press, 1966); R. St. J. Macdonald, "The Organization of American States in Action", U. of T. Law Journal, Vol. 15, 1963-64, (continued on page 341)

with it here, it is not inappropriate to recall some of its highlights in so far as these are relevant to an understanding of the organization in its relations with the United Nations.

Two attempts at international cooperation on a multilateral basis among the Latin American Republics preceded the formal establishment of the Inter-American System in 1890. The Panama Congress (1826) and the Lima Congress (1864-1865) envisaging Latin American defence and economic cooperation proved abortive.[75] Hispanic Americanism subsequently merged with Pan Americanism following the successful establishment of the Inter-American System in 1890. The new organization operated primarily on the basis of Conference resolutions and declarations until 1948 when it was given a formal constitutional structure.[76]

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74 (continued) pp. 359-429; S. Inman, Inter-American Conferences, 1826-1954: History and Problems, (1965). A documentary record of resolutions and declarations of the various Inter-American Conferences is produced in J.B. Scott (ed.), The International Conferences of American States, 1889-1926, (New York: 1931), The International Conferences of American States, First Supplement, 1933-1940, (Washington: 1940).

75 G.H. Stuart, "Simon Bolivar's Project for a League of Nations", Southwest Political and Social Science Quarterly, Vol. 7, 1926; R.W. Frazer, "The Role of the Lima Congress, 1864-1865, in the Development of Pan Americanism", H.A.H.R., Vol. 29, No. 3, 1949, pp. 319-349.

76 C.G. Fenwick, "The O.A.S.: The transition from an unwritten to a written constitution", A.J.I.L., Vol. 59, 1965, pp. 315-320.

In the early years of the Pan American Union when the organization was primarily concerned with the promotion of commercial relations and dissemination of commercial information,[77] the United States hardly appreciated the value of the new organization, and, in fact, resisted attempts to endow it with political functions. It should be remembered that, in her relations to European Powers, the United States was isolationist. She did not then need the Inter-American System as an instrument of foreign policy. In her relations with Latin American Republics, the United States embarked upon an active policy of "preventive" intervention much to the persistent resentment of the Latin American Republics.[78] While the Latin American Republics welcomed the anti-European interventionist image of the Monroe Doctrine, they sought to persuade the United States to formally renounce her interventionist foreign policy in Latin America.[79]

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[77] Paul S. Reinsch, Public International Unions, (1911), Ch. 3.

[78] Thomas and Thomas, Non-Intervention: The Law and Its Import in the Americas, (Dallas: Southern Methodist University, 1956), Ch. 2; D.A. Graber, Crisis Diplomacy: A History of U.S. Intervention Policies and Practices, (Washington, D.C.: Public Affairs Press, 1959).

[79] Thomas and Thomas, Non-Intervention, p. 55 et. seq.; S.G. Inman, "The Monroe Doctrine and Hispanic America", H.A.H.R., Vol. 4, No. 4, 1921, pp. 635-676. The Clark Memorandum stated: "The [Monroe] Doctrine states a case of United States vs. Europe, not of United States vs. Latin America", See U.S. Dept. of State, Memorandum on the Monroe Doctrine, (Washington: G.P.O., 1930), p. XIX.

Trends in twentieth century international politics - the assumption by the League of Nations of constitutional competence to settle disputes between its Latin American members, and the demonstrated need for political allies in an increasingly competitive international system, to mention just a few - forced qualitative changes in the perception of the potentialities of the OAS by the U.S. foreign policy makers. Many Latin American Republics had participated in the League of Nations partly in the belief that the Geneva organization would act as a counterweight to the preponderant influence of the United States in the Western Hemisphere.[80] However irritating Latin American membership of the League was to the United States, the latter was comforted by the fact that, although a few Latin American Republics appealed to the League for the settlement of their disputes,[81] most of them continued to show strong preference for settling their disputes within the Inter-American System.[81] It was thus possible for the United States to formally abandon her policy of unilateral intervention in favour of one of

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[80] W.H. Kelchner, Latin American Relations Withe the League of Nations, (Boston: World Peace Foundation Pamphlets, Vol. 12, No. 6, 1929), pp. 13-14; Stephen P. Duggan, "Latin America, The League, and the United States", Foreign Affairs, Vol. 12, 1933-34, p. 290.

[81] See Chapter III above.

[82] F.P. Walters, A History of the League of Nations, (London: 1967), p. 395.

good neighbourliness in 1936.[83] As a corrollary to this new development, Washington successfully sold the concept of inter-American collective responsibility for continental security and collective action culminating in the Rio Treaty of 1947.[84]

It is impossible to divorce changes in the Inter-American System from the changing kaleidoscope of the international system at large. The constitutional formalization of the Inter-American System in 1948 reflected an urgent need for strengthening regional power structures in the face of deepening ideological polarization of international life. For the United States and the Latin American Republics, the East-West rift poses two conflicting policy problems. As far as the United States is concerned, the problem is how to use the OAS for the collective legitimation of its national policy objectives *vis-a-vis* its ideological adversaries with-

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[83] Thomas and Thomas, *Non-Intervention*, pp. 63-64; Bryce Wood, *The Making of the Good Neighbour* Policy, (New York: Columbia University Press, 1961).

[84] *Convention for the Maintenance, Preservation and Re-establishment of Peace*, Buenos Aires, December 23, 1936, *A.J.I.L.*, Vol. 31, 1937; Havana Declaration:U.S. Dept. of State *Bulletin*, Vol. 127, 1940, p. 137; *A.J.I.L.*, Vol. 35, 1941. The 1940 Declaration states: "any attempt on the part of non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered as an act of aggression against the States which sign this declaration". The Rio Treaty simply states that any armed attack on a signatory to the Treaty would be considered an attack on all member states.

out, if possible, appearing to offend unduly the political sensibilities and national pride of the Latin American allies.[85] For the Latin American Republics, the most pressing policy problem posed by membership in the OAS (and, indeed, one might say their geographical situation in the Western Hemisphere) is how to safeguard their political independence *vis-a-vis* their powerful northern neighbour, how to demonstrate to the whole world that the United States is only *a* and not *the* major factor in their international relations, and finally, how to shift the priority of the organization from excessive preoccupation with security to economic development of the poor member states.

These two sets of policy considerations combine to determine the nature of the relationship between the OAS and the U.N., and of the political dynamics within the regional organization. It is common knowledge that successive administration in Washington have tended to look at the OAS first as a collective instrument for the isolation of the

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[85] C.N. Ronning, *Law and Politics in Inter-American Diplomacy*, (1963), pp. 158-162; Joseph S. Nye, "United States Policy Toward Regional Organization", *International Organization*, Vol. 23, No. 3, 1969, pp. 719-740 esp. at pp. 723-725; Jerome Slater, *The OAS and the United States Foreign Policy*, (Columbus: Ohio State University Press, 1967); also "The Limits of Legitimization in International Organizations: The Organization of American States and the Dominican Crisis", *International Organization*, Vol. 23, No. 1, 1969, pp. 48-72; Jorge Castaneda, "Pan-Americanism and Regionalism: A Mexican View", *International Organization*, Vol. 10, 1956, pp. 382-386. Inis Claude, Jr. (ed.), "The OAS, the U.N., and the United States," *International Conciliation*, No. 547, March 1964.

Western Hemisphere from the infectious political disease of international communism even when such a policy implies the shutting off of the United Nations from dealing with intra-hemisphere crisis. The OAS is seen only secondarily as a tool for the rapid economic development of Latin America. President Kennedy's pet project, the Alliance for Progress[86] and President Johnson's support for the creation of a Latin American Common Market and his promise to pursue a more liberal trade policy towards the Latin American Republics[87] have by no means changed the conception by the U.S. policy makers of the OAS as basically an anti-communist security organization; they merely reflect thinking in Washington that economic development of Latin America may help to lessen the political appeal of communism to the poor nations of Latin America. Whether the Charter of Punta del Este is truly "the first great agreement between Latin America and the United States in the economic and social field"[88] remains to be seen.

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[86] U.S. Dept. of State, Bulletin, Vol. 44, No. 1136, April 3, 1961, p. 471; Ibid., Vol. 45, No. 1159, September 11, 1961, p. 459.

[87] U.S. Dept. of State, Bulletin, Vol. 56, No. 1454, May 8, 1967, pp. 712-721; OAS Official Records OEA/Ser.C/IX.1 (English) 1967, Meeting of American Chiefs of States, Punta del Este, Uruguay, April 12-14, 1967, (Washington: 1967).

[88] Jose A. Mora, From Panama to Punta del Este: Past Experience and Future Prospects, (Washington, D.C.: General Secretariat of the OAS, 1968), p. viii. See also J. Dreier, "New Wine and Old Bottle: The Changing Inter-American System", International Organization, Vol. 22, No. 2, 1968, pp. 477-493.

The concrete demands made by the Latin American Republics are basically economic. These states would like the U.S. to pay greater attention to the economic development of Latin America. They are not just satisfied with a Latin American "Marshall Plan", they want freer entry into the U.S. markets.[88] The New York Times recently drew attention to "the kinds of American practices and attitudes so little noted in this [the U.S.] country, that cool off Latins on the Alliance for Progress and on Washington's inflated rhetoric about Pan-Americanism". It commented editorially on June 15, 1969:

> Americans need to be disabused of the notion that the Alliance for Progress has failed because lazy Latins simply squandered billions provided an over-generous Uncle Sam. In the Alliance's first seven years, the United States furnished $5.8 billion mostly in loans, and the Latins had paid back $2.8 billion of it before the end of that period. Also, most of the money had by law to be spent in this country. Americans need reminding that despite many setbacks, Latin America managed in those seven years to invest $115 billion in development against an Alliance target for the first decade of $80 billion. And Latin self-help provided nearly 90 per cent of that investment total. Americans also need to be reminded that Washington's actions in Latin America are sometimes contradictory and often at variance with its official message. Colombia's example is by no means unique: Trying valiantly to lessen its dependence on coffee exports, Colombia increased rice and corn production,

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[89] This complaint permeated the speeches of the Latin American leaders at the 1967 Punta del Este meeting. See OAS Official Records OEA/Ser.C/IX.1 (English), Meeting of American Chiefs of State, (Washington, D.C.: Pan American Union, 1967). See also The Rockefeller Report on Quality of Life in the Americas: Text in U.S. Dept. of State, Bulletin, Vol. LXI, No. 1589, December 8, 1969, pp. 495-540, esp. at p. 519.

> partly through American credits. Then it found it could not export these products in competition with American rice and corn or it would imperil an agreement by which it got American wheat on deferred-payment terms.[90]

Latin American critique of United States' OAS policy is solidly based and well founded.[91] In the political field, fear persists generally and among many Latin American states that the United States may continue to use the pretext of communist infiltration to intervene in the domestic affairs of some Latin American Republics. To these states collective intervention is U.S. intervention under a different name.[92]

In order to explain this difference in emphasis concerning the foremost task of the OAS and the general problem of U.S.-Latin American relations, it is necessary to put

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[90] The New York Times Review, Sunday, June 15, 1969, p. 16. President Nixon recently indicated that his Administration would adopt a new approach to the Latin American problems "without any of the prejudices that we may have had in the past and without being imprisoned by the policies of the past or without perpetuating the mistakes of the past". See U.S. Dept. of State, Bulletin, Vol. 60, No. 1558, May 5, 1969, p. 385. It is doubtful if the Latin Americans take him seriously as can be seen from the hostile reception given to the Presidential emissary, Rockefeller, during his tour of Latin America in 1969.

[91] The Rockefeller Report on Quality of Life in the Americas, U.S. Dept. of State, Bulletin, Vol. LXI, No. 1589, December 8, 1969, pp. 495-540.

[92] C.N. Ronning, Law and Politics in Inter-American Diplomacy, (New York: 1963), p. 82; Castaneda, Mexico and the United Nations, (New York: 1958), p. 183.

the domestic problem of the regional organization into a broader international perspective. Led by one of the two military giants of the century, the OAS cannot avoid being drawn into the drama of world politics. Numerically dominated by economically poor nations, the OAS cannot escape being a development agency. In fact, it has got to be so because communism cannot be effectively quarantined or liquidated in a region of abject poverty which happens to be situated at the door step of the most affluent society the world has ever known.

Enough has been said to highlight the history and problems of the OAS. It is not our intention to deal with the "internal politics" of the organization any more than is necessary to throw some light on its relationship with the United Nations.[93]

In this study, we propose to examine the operation of the Charter law of universal-regional relationship focusing

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[93] For a synopsis of intra-hemispheric crises which never came before the Security Council and which were either successfully resolved or prevented from escalating to dangerous proportions, see Pan American Union, Inter-American Treaty of Reciprocal Assistance Applications Volume 1, 1948-1959, (Washington: 1964); Inter-American Treaty of Reciprocal Assistance Applications Volume II, 1960-1964, (Washington: 1964); Jose Mora, From Panama to Punta del Este: Past Experience and Future Prospects, (Washington: 1968), pp. 45-53; Thomas and Thomas, Non-Intervention, (1956), pp. 189-195; John Dreier, The Organization of American States and Hemisphere Crisis, (New York: 1962), pp. 58-73; J.L. Mecham, The United States and Inter-American Security, 1889-1960, (Austin: 1961), Ch. 13.

on two broad constitutional issues: (1) the alleged priority of regional organizations in the field of pacific settlement of disputes and the related right of a member state to have access to the Security Council, (2) the scope of control of the Security Council over regional enforcement action.

(b) Pacific Settlement of Disputes

[A] The proposition that members of the OAS are obligated to resort to the regional organization for the purposes of pacific settlement of disputes arising among them before appealing to the United Nations

This proposition was debated in the Security Council in connection with the Guatemalan affair (1954), the Cuban complaint against the United States (July, 1960), and with the Dominican Crisis (1965).[94] The constitutional issues raised by these cases relate to the right of a U.N. member to have recourse to the Security Council and the competence of the United Nations to deal with disputes and situations among two or more of its members wherever such disputes may occur.

(i) The Guatemalan Affair (1954)

Faced with subversive intervention by insurgent forces crossing from the Honduran-Nicaraguan frontier and aiming at

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[94] See generally, L.B. Miller, World Order and Local Disorder: The United Nations and Internal Conflicts, (Princeton: 1967), pp. 149-165, 180-181.

the overthrow of his allegedly communist-dominated government,[95] Colonel Arbenz of Guatemala appealed to both the OAS and the United Nations to prevent the "open aggression on the part of the Governments of Honduras and Nicaragua, instigated by the interests of foreign monopolies" against Guatemala from continuing.[96] The Arbenz request to the OAS was subsequently suspended and finally withdrawn. When the Security Council first convened, it considered a Brazilian-Colombian draft resolution urging the Guatemalan complaint to be referred to the OAS and the Security Council kept informed of the OAS activities.[97] A Soviet veto, however, prevented the adoption of this draft resolution. As the Security Council was unable to adopt an agenda when it con-

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[95] For a background account of events leading to the crisis, see Cmd. 9277, Report on Events leading up to and arising out of the change of Regime in Guatemala, (London: 1954); F.B. Pike, "Guatemala, the United States, and Communism in the Americas", Review of Politics, Vol. 17, 1955, pp. 232-261; P.B. Taylor Jr., "The Guatemalan Affair: A Critique of United States Policy", A.P.S.R., Vol. 50, 1956, pp. 787-806; J.E.S. Fawcett, "Intervention in International Law: A Study of Some Recent Cases", Hague Recueil, Vol. 103, 1961(II), pp. 344-423, esp. at pp. 372-383; L.C. Green, "The Double Standard of the United Nations", Y.B.W.A., Vol. 11, 1957, pp. 104-137.

[96] Doc. CIP-88/54 (English). Text of this document, as well as other OAS Documents to be further cited can be found in Report of the Inter-American Peace Committee on the Controversy Between Guatemala, Honduras and Nicaragua, (Washington: 1954); Cmd. 9277, (London: 1954); U.N. Doc. S/3232; S.C.O.R., 9th Yr., Supp. April - June 1954.

[97] U.N. Doc. S/3236; U.N. Doc. S/PV.675, (1954), p. 15.

vened a second time on June 25, the Guatemalan complaint of aggression against Honduras and Nicaragua could not be further examined, and a member of the United Nations was, in effect, denied recourse to the Security Council. The Arbenz Government was thus compelled to deal with a regional organization determined to indict it as an agent of international communism rather than consider the complaint against the two members of the organization. The indictment of the Arbenz Government was, however, made unnecessary because of the replacement of the government by an anti-communist Government acceptable to the United States.

(a) <u>Interpretation of the Charter Law of Universal-Regional Relationship</u>

The simultaneous appeal by the Arbenz Government to the OAS and the United Nations brought into sharp focus the problem which agitated Peru at San Francisco in 1945 - the problem of concurrent consideration of a dispute or situation by both the regional organization and the United Nations.[98] The problem in June 1954 was, however, fundamentally more serious than this in as much as it involved an organized and determined attempt by a regional organization led by a most powerful state to deny the United Nations competence to deal with the matter. Equally important is the

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[98] Doc. 576, III/4/9; <u>U.N.C.I.O. Doc</u>., Vol. 12, p. 685. See Chapter IV above.

fact that the way the Guatemalan affair was handled by the Security Council provided a powerful precedent which was to be referred to in subsequent cases.[99]

The legal and political battle in the Security Council was over what Ambassador Lodge aptly characterized as "the fundamental question of venue",[100] involving, as it did, interpretation of the relevant provisions of the U.N. Charter. The Guatemalan affair should be seen not only as a confrontation between the principles of universalism and regionalism but also, and perhaps more importantly, as a confrontation between the United States and the Soviet Union concerning how the powers of the United Nations should be exercised. The latter dimension of this confrontation is crucially important to a clear understanding of the nature of, and trends in, the universal-regional relationship.

In terms of the international law of the U.N. Charter, Security Council debate centred on the competing claims of Articles 33(1) and 52(2) on the one hand, and of Articles 34, 35 and 39 on the other. It is possible to identify three positions.

First, it was urged by the "Try-OAS-First-and-Keep-the U.N.-Out" spokesmen, namely, the representatives of the United States, Brazil and Colombia that, in accordance with

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[99] See below.

[100] U.N. Doc. S/PV.675 (20 June, 1954), para. 1.

Articles 33(1) and 52(2) of the U.N. Charter, Article 23 of the OAS Charter and Article 2 of the Pact of Bogota, Guatemala was under legal obligation to seek redress first with the OAS.[101] As was pointed out in the preceding chapter, if an OAS member goes to the United Nations first, it is only in breach of the constitutional law of the OAS[102] and not of the United Nations, which is what would concern the world organization.

While it is true that the U.N. Charter requires members of the regional organization to use regional machinery to settle local disputes before referring them to the Security Council and, indeed, urges the Security Souncil to encourage regional pacific settlement of disputes,[103] the right of a United Nations member - any state for that matter - to have recourse to the Security Council is specifically reserved.[104] Thus, those who invoked Article 52(2) not only to justify the hypothesis of regional priority but also to support their denial of the competence of the United Nations[104a] overlooked the fact that Article 52(4) extricates Articles 34 and

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101 Ibid., para. 63, 65, 156, 157; U.N. Doc. S/PV.676, para. 19, 27.

102 OAS Charter, Art. 23. 103 Art. 52(2) and (3).

104 Art. 35(1), 52(4).

104a For this view, see Yepes, in Hague Recueil, Vol. 71, 1947, (II), p. 279, "La solution pacifique des conflicts entre les Etats membres d'un organisme regional est de l'exclusive competence de ce dernier [organisme regional]... L'intervention du Conseil de securite, s'il y a lieu, ne viendra qu'apres, et deulement si l'organisme regional a echoue. Le $4 de l'article 52 ne saurait avoir d'autre signification".

35(1) from the implications of Article 52.[105] The argument of the OAS members in the Security Council amounts to the claim that Guatemala, by joining the OAS, has restricted, if not forfeited, her right under Article 35(1) of the U.N. Charter. More serious and legally invalid is the related claim that once a regional organization is seized of a dispute between two or more of its members, a strict interpretation of the U.N. Charter requires the United Nations to stand aloof. The advocates of the supremacy of the OAS were at fault not so much in their contention that the OAS be tried first as in their determination to keep the United Nations out at all cost. This is the more unacceptable and anti-Charter in as much as Guatemala's complaint was one of aggression.

The second position in the debate was that the "Try-OAS-First-But-Keep-the U.N.-In" advocates like Sir Pierson Dixon (Britain), Munro (New Zealand), and Hoppenot (France). This position reflects and combines a shrewd political analysis of the situation with some due respect for the Charter law of universal-regional relationship. Hoppenot declared that France would not object to the proposal to refer the matter to the OAS but wanted it clearly understood that such a procedure neither amounted to nor was it intended to imply that the Security Council was "unloading its res-

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[105] See Chapter IV above. See also, Jimenez de Arechaga, "Le traitement des differends internationaux par le Conseil de Securite", Hague Recueil, Vol. 85, 1954 (I) pp. 81-82.

ponsibilities on the [OAS] Committee", for "it will rest with the Security Council to take its final decision".[106] While maintaining that the proposal to use the OAS was "both reasonable and constructive", Dixon recognized that "there is a state of affairs to which the Security Council certainly cannot remain indifferent since it raises a problem concerning the maintenance of peace and security".[107] Monro believed Guatemala was "fully entitled to have immediate recourse to [the] Council in the situation which has given rise to this application".[108] However, by not voting in support of the adoption of the agenda on June 25, 1954, these three Western Powers demonstrated that political loyalty to the United States overrides loyalty to the law of the United Nations. Commenting on the way the British representative voted, Sir Anthony Eden wrote: "If allies are to act in concert only when their views are identical, alliances have no meaning".[109] In so far as a Security Council member can base its vote on any consideration,[110] the U.N. Charter does

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[106] U.N. Doc. S/PV.675, para. 75.

[107] Ibid., para. 86, 89.

[108] Ibid., para. 92; Sir Leslie Munro, The United Nations: Hope for a Divided World, (New York: 1960), pp. 54-56.

[109] Sir Anthony Eden, Full Circle, 1960, p. 138.

[110] Join Dissenting Opinion of Judges Winiarski, Basdevant, McNair and Read in the Conditions of Admission case, I.C.J. Reports, 1947-1948, p. 57 at p. 85.

seem to permit the strategy of denying a member of the United Nations access to the Security Council; but it should be understood that it was not intended that this should be so by the draftsmen at San Francisco.[111]

The third position which may be described as "Keep-OAS-Out-as much as possible-and-Retain-the U.N.-all the Way", was held by Guatemala and the Soviet Union. Both countries treated the problem as a case of aggression rather than a dispute. The Security Council made no attempt to determine the nature of the complaint which was variously described as a "dispute", a "situation", an "invasion" and an "aggression". Treating the complaint as one involving an act of aggression, Guatemala and the Soviet Union drew attention to the provisions of Articles 24, 25, 39 and 42. The Soviet Union denied the competence of the OAS, arguing that a situation involving acts of aggression is a field of Security Council competence for it has primary responsibility for the maintenance of international peace and it would look like an abandonment of that responsibility if it did not act. Although Guatemala subsequently reluctantly accepted the investigatory role of the OAS, the Arbenz Government let it be known that "this will not in any way affect the action of the Security Council with regard to the

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[111] See the British commentary on the U.N. Charter. Cmd. 6666 (1945), para. 86.

case of aggression against Guatemala".[112]

In terms of the jungle law of international behaviour under which considerations of legal niceties are subordinated to those of power and power calculations, Security Council debate was essentially whether what the United States, the local hegemonial power, perceived to be the dangerous forces of international communism would be permitted to find a beachhead in the United States' power frontier. To the Soviet Ambassador, Tsarapkin, Lodge said: "Stay out of this hemisphere and do not try to start your plans and conspiracies over here".[113] What Lodge was really saying was that in Western Hemisphere issues, the United Nations of which the U.S.S.R. is a member has no role. The message was not lost on the Soviet Union. At the time of the Soviet armed intervention in Hungary in 1956 and of the Soviet-led Warsaw Pact invasion of Czechoslovakia in 1968, the Soviet representative likewise took the position that it was no business of the United Nations of which the United States is a member to try to interfere in the affairs of the socialist commonwealth of Eastern Europe.[114] In the Guatemalan case, the Soviet Union was a vigorous defender of an effective universal organization; the United States

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[112] OAS Doc. CIP-103/54 (English).

[113] U.N. Doc. S/PV.675, para. 172.

[114] See below.

the leading advocate of the supremacy of the regional organization. The reversal of roles in Hungary and Czechoslovakia simply shows that international political behaviour is too closely tied to considerations of national interests and political convenience.

A possible way out of the host of legal and political problems raised in the Security Council would have been to accept the suggestion of the Representative of Lebanon, Malik. Referring to the Brazilian-Colombian draft resolution which urged the Security Council to refer the matter to the OAS, Malik proposed amendments as follows:"Leave unimpaired the fact that the Organization of American States would be seized of this matter, but without the Council explicitly referring it to the organization. At the same time, the jurisdiction of the Council would be maintained as it would still be seized of the question".[115]

The first part of the proposed solution is politically unavoidable, for there was nothing stopping the United States from exercising her veto power to prevent action by the Security Council. The second part of the Malik formula sought to discourage the impression that the Security Council was abandoning its responsibility to a lesser body. It may be asked whether it would have been legally correct for the Security Council to refer the Guatemalan complaint to the

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[115] U.N. Doc. S/PV.675, para. 130.

OAS as the Security Council has primary responsibility for the maintenance of peace and security. If the complaint was a dispute between Guatemala and her neighbours, Article 52(3) would certainly have provided legal support for the referral of the dispute to the OAS especially as Guatemala had herself gone first to the OAS.[116] Furthermore, there is nothing in Article 36(1) to indicate that the Security Council cannot recommend that the dispute be referred to the OAS. Similarly it may be argued that even if the case was one of aggression, the decision or recommendation which the Security Council is competent to make under Article 39 does not exclude the referral of the complaint to the OAS, although such a procedure might not have been intended by the delegates at San Francisco.[117] It should, however, be borne in mind that, as the Security Council is a political body, decisions and recommendations are based on political considerations. As each U.N. organ has been left to interpret its power,nothing prevents the Security Council from recommending under Article 39 that the complaint of Guatemala be referred to the OAS. It is nevertheless politically desirable that impression should not be left that an organ which

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[116] See D.W. Bowett, "The United Nations and Peaceful Settlement", in Report of a Study Group on the Peaceful Settlement of International Disputes, (London: 1966), pp. 169-172.

[117] Fawcett, "Intervention in International Law: A Study of Some Recent Cases", Hague Recueil, Vol. 103, 1961 (II), p. 382.

has primary responsibility for the maintenance of international peace and security is abandoning this responsibility. Finally, the last part of the Malik formula would probably have soothed the anger of those who demanded the application of Articles 39 and 42 of the Charter.

Two conclusions can be drawn from the Guatemala affair. First, the law of universal-regional relationship has been interpreted in the light of the policy considerations of the major ideologically antagonistic world power systems. Second, the case represents a victory for the view that a member of a regional organization should go to the regional organization before appealing to the Security Council. By closing its door to a U.N. member exercising its constitutional right of access to the United Nations, the Security Council established a precedent which represents a distorted interpretation of the Charter law of universal-regional relationship.[117a]

(ii) The Cuban Case (1960)

The constitutional question of the right of recourse of a U.N. member to the Security Council was again raised in 1960 when Cuba, an OAS member complained of repeated threats, harassment, intrigues and aggressive acts against her by the United States, and asked the security Council for action. Cuba charged that the international behaviour of the United States *vis-a-vis* the former "constitutes political

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[117a] See Jimenez de Arechaga, "Le traitement des differends internationaux par le Conseil de Securite", Hague Recueil, Vol. 85, 1954 (I), pp. 83-85.

intervention and economic aggression, which are expressly condemned in Articles 15 and 16 of the Charter of the Organization of American States".[118]

Some preliminary comments on the term economic aggression are in order at this juncture. It may be noted that while the use of the term "aggression" in the U.N. Charter does not necessarily exclude forms of intervention other than the use of armed force, economic aggression is nowhere explicitly mentioned. In fact, the authors of the U.N. Charter deliberately avoided placing any construction or definition on the term "aggression".[119] The OAS Charter explicitly states: "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind".[120] It is not surprising that the constitutional law of the OAS should specifically characterize economic coercion as a form of aggression. The Latin American Republics are generally vulnerable to severe economic coercion by the United States, and they have, with the active support of the Afro-Asian states in similar situation, attempted to characterize economic pressure and coercion as forms of aggression within

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[118] U.N. Doc. S/PV.874, para. 69.

[119] Stone, _Aggression and World Order_, (Berkeley: 1958), p. 41 _et. seq_.

[120] OAS Charter, Art. 19.

the context of the U.N. Charter.[121] No consensus has yet emerged on the meaning of economic aggression and also on whether economic pressure constitutes a form of aggression.[122]

At the Security Council in July 1960, the Cuban argument was the legal one that if Article 52(2) of the U.N. Charter was invoked in support of the legal obligation of Cuba to have recourse to the OAS before going to the Security Council, such contention ignores the important reservation of Article 52(4); furthermore, that an appeal to Article 23 of the OAS Charter overlooks the provisions of Article 137 of the OAS Charter and Article 103 of the U.N. Charter.[123] The Cuban position, which is believed to be legally correct, denies that a regional organization like the OAS has exclusive jurisdiction over a dispute that may arise among the OAS members. While the OAS may be a proper forum for the discussion of any Cuba-U.S. controversies, it is by no means the only forum, and "[w]ere it otherwise we would be obliged to reach the sad conclusion that the American States, upon forming a regional agency, suffered an impairment of their rights, that they renounce their rights under the United

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[121] Stone, Aggression and World Order, (1958), pp. 58-77.

[122] See the 1964 and 1966 Reports of the U.N. Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States. U.N. Doc. A/5746, (16 November, 1964); Doc. A/6230, (17 June, 1966).

[123] U.N. Doc. S/PV.874, para. 6-9.

Nations Charter, whereas there can be no question that what they did was to supplement their rights under the United Nations Charter with those which they enjoy under the regional agency".[124]

The argument of those who claimed that Cuba should have sought redress from the OAS before going to the Security Council rested not so much on legal as on practical grounds. Ambassador Lodge let it be known that the United States "does not think that a theoretical and legal analysis of this question is indispensable".[125] In support of the proposal urging the Security Council to desist from acting on the Cuban complaint, Lodge offered this explanation: "If we look at the matter from a practical standpoint - and since it is generally recognized that no country can be denied access to organizations of which it is a member - we find one circumstance which cannot but affect our decision. That circumstance is that the situation with which we are dealing is already under consideration by the Organization of American States; and this is a fact we cannot overlook".[126] It is sufficient to recognize that this argument has no legal support in so far as the constitutional right of appeal of a U.N. member to the Security Council and the com-

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[124] Ibid., para. 8.

[125] U.N. Doc. S/PV.874, para. 134.

[126] Ibid.

petence of the United Nations to investigate any complaint are in no way qualified by the condition that when a matter is already before a regional organization a party to the dispute can no longer exercise its constitutional right under Article 35 or that the United Nations must await the result of regional investigation and action before discharging its responsibility.

A final point worth commenting upon is the proper interpretation that should be placed on the decision of the Security Council to adjourn pending the receipt of a report from the OAS.[127] Does it represent a victory for the pro-regional alliance of the Latin American and Western Powers? The Soviet representative forcefully argued that "from the legal standpoint, the proposal to refer the complaint to the Organization of American States is contrary to the United Nations Charter. From the political standpoint, whether or not the sponsors so intend, the effective purpose of the proposal is to prevent the Security Council from taking the requisite effective measures to protect the national independence and political and territorial integrity of Cuba, a purpose that suits the convenience of the United States".[128]

The first part of Sobolev's argument is not legally

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[127] U.N. Doc. S/4392; U.N. Doc. S/PV.876, para. 128.

[128] U.N. Doc. S/PV.876, para. 89.

incontrovertible. Cuba on this occasion was not denied access to the United Nations. However, the manner in which the Cuban complaint was dealt with leaves much to be desired in as much as the Security Council discharged its responsibility too speedily and in a rather casual way that smacked of capitulation to the OAS. As was pointed out earlier in connection with the Guatemalan affair, it is perfectly within the competence of the Security Council to decide for itself how to deal with a dispute or a complaint. In the Cuban case, the Security Council decided to adjourn consideration of the complaint while reserving to itself the right to take up the complaint at a later time. As the Ceylonese representative pointed out, the proposal to adjourn amounted to "only an interruption of the discussion that is now proceeding in this Council.... It cannot be construed as an attempt to deny Cuba the right to have its case heard and decided here. It is not in any sense, therefore a kind of manoeuvre to put off consideration".[129] Whether it was desirable that the Council should have resorted to that procedure is another question which cannot be answered by reference to the law of the Charter. Thus, the Ecuador-Argentine draft resolution adopted by the Security Council can be said to support not so much the legal but the political doctrine of OAS priority. The effect of the Security Council

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[129] U.N. Doc. S/PV.875, para. 32.

resolution was, however, essentially the result desired by the Latin American and Western Powers, and it is from this angle that the second part of Sobolev's statement may be regarded as a politically valid interpretation of the decision of the Security Council.

In conclusion it may be said that there was a general agreement that the right of a member of the United Nations to access to the Security Council cannot be denied, but disagreement seemed to exist on the question whether the United Nations can be said to be discharging its functions by merely reviewing the work of a regional organization. The decision of the Security Council to refer the Cuban complaint to the OAS constituted a precedent. It has been said that "once a decision is rendered by an authoritative body, it has entered into the stream of decisions that will normally be looked to as a source of law. Considerations of equity and equal treatment will tend to favor its application in "equivalent" situations; moreover, the reasons which impelled its adoption in the one case are likely to have some influence in other cases".[130] As we shall see in later cases, there was an appeal to this precedent.

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[130] Oscar Schachter, "The Quasi-Judicial Role of the Security Council and of the General Assembly", A.J.I.L., Vol. 58, 1964, pp. 960-965 at p. 965.

(iii) The Dominican Crisis (1965)

The major constitutional issue raised by the Dominican crisis concerns the respective competence of the United Nations and the OAS to deal with the military intervention of the United States in the internal affairs of a sovereign member of both the United Nations and the OAS. The 1965 crisis can be examined first as a case study of the U.S. foreign policy of unilateral intervention and as an illustration of the practice of hegemonial intervention which has become very much part and parcel of international life - what Schwarzenberger calls "a matter of world camp policy";[131] second, as a case of institutional innovation by the OAS. This innovation consists of the creation, for the first time, of an Inter-American Peace Force, and of the specific assignment of political functions to the OAS Secretary General; and, third, as a case study of institutional interaction between the OAS and the U.N. and of the interpretation of the relevant provisions of the U.N. Charter dealing with universal-regional relationship. While our main focus is on the problem of universal-regional relationship, we shall seek to integrate these three dimensions in our analysis.

Briefly, the sequence of events is as follows. Civil

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[131] G. Schwarzenberger, "Hegemonial Intervention", Y.B.W.A., Vol. 13, 1959, p. 265. See also Fawcett in Hague Recueil, Vol. 103, 1961(II), p. 348.

war broke out in the Dominican Republic in April 1965.[132] The United States intervened militarily ostensibly to protect American life. The subsequent escalation of the number of the interventionist forces was considered necessary to forestall an alleged communist takeover in Santo Domingo.[133] The OAS grappled with the crisis first by despatching its Secretary General on a peace mission to Santo Domingo and later by establishing a five-man Special Committee[134] with a broad political mandate to help establish peace in the strife-torn Republic. The mandate of the Special Committee was at one stage transferred to the Secretary General and, subsequently, to a three-man _Ad Hoc_ Committee through which peace was finally achieved. The OAS, for the first time, constituted an Inter-American Peace Keeping Force consisting of contingents from Brazil, Costa Rica, El Salvador, the United States, Honduras, Nicaragua and Paraguay under a

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[132] See Tad Szulc, _Dominican Diary_, (New York: Delacorte Press, 1965); Theodore Draper, _The Dominican Revolt: A Case Study in American Policy_, (New York: Commentary, 1968).

[133] U.S. Dept. of State, _Bulletin_, Vol. 52, No. 1351, May 17, 1965, p. 738; State Department Memorandum: "Legal Basis for United States Actions in the Dominican Republic" in Abram Chayes _et al._, _International Legal Process_, Vol. 2, (Boston: 1969), pp. 1179-1182.

[134] Members were from Argentina, Brazil, Colombia, Guatemala and Panama.

Brazilian commander.[135]

Whereas the OAS convened under Article 59 of the amended OAS Charter "to consider the serious situation created by the armed struggle in the Dominican Republic",[136] the Security Council was called into session "to consider the question of the armed interference by the United States in the internal affairs of the Dominican Republic".[137] As will be demonstrated shortly, the United Nations played only a peripheral role in the resolution of the crisis.[138]

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[135] For the role of the OAS, see OAS Official Records, OEA/Ser.D/III.16 (English), Annual Report of the Secretary General 1965, (Washington, D.C.: Pan American Union, 1965); John Carey (ed.), The Dominican Republic Crisis 1965, (New York: Oceana, 1967), pp. 36-38; Dona Baron, "The Dominican Crisis of 1965: A Case-Study of the Regional vs. the Global Approach to International Peace and Security", in Andrew Cordier (ed.), Columbia Essays in International Affairs Volume III: The Dean's Papers, 1967, (New York: Columbia University Press, 1968), pp. 1-31.

[136] The Tenth Meeting of Consultation was neither convened under Article 6 of the Rio Treaty which deals with aggression which is not armed attack nor under Article 3 concerning armed aggression, but under Article 59 of the OAS Charter "in order to consider problems of an urgent nature and of common interest to the American States". Thus, from the beginning, the OAS did not treat U.S. intervention as a case of aggression in violation of Article 18 of the OAS Charter.

[137] U.N. Doc. S/6316; S.C.O.R., 20th Yr., Supp. April - June, 1965, p. 70.

[138] For a concise summary of the Security Council debate, see U.N.Y.B., 1965, pp. 140-155; Report of the Security Council 16 July 1964 - 15 July 1965; G.A.O.R., 20th Sess., Supp. No. 2 (A/6002), Ch. 8; U.N. Monthly Chronicle, Vol. 2, No. 6, June 1965, pp. 3-31; Ibid., No. 7, July 1965, pp. 3-11; Ibid., No. 8, August - September, 1965, pp. 10-16. See also L.B. Miller, World Order and Local Disorder: The United Nations and Internal Conflicts, (1967), p. 149 et. seq.

The U.N. representative in Santo Domingo was given a very restricted mandate; he was to secure a cease-fire, observe and report to the Security Council. It remains significant, however, that, for the first time in the history of the United Nations, both the U.N. and the OAS interacted institutionally at the scene of action in the adjustment of a situation threatening the maintenance of peace in the backyard of the United States.

(a) Interpretation of the Charter Law of Universal-Regional Relationship

Although the proposition advanced in 1954, 1960 and 1962 that the United Nations should not consider disputes simultaneously with their review by the OAS collapsed in the 1965 Dominican crisis, the universalist claim for primary competence to deal with a situation of aggressive armed intervention was rejected in favour of a less important role of maintaining a rather passive universalist presence. In Santo Domingo, the symbol of the universal organization, U. Thant's Representative, was, in fact, playing a minor, though independent, role *vis-a-vis* the United States and the U.S.-led Organization of American States. The rest of the section of the chapter is devoted to an analysis of the rival claims of the principles of universalism and regionalism, and to the legal and political argument marshalled in defence of each principle.

The Representative of Jordan, Rifai, rightly cast the problem faced by the Security Council in this pertinent qeustion: "Are we, in the world today, trying to establish a strong international system for world peace and order, or are we tending to substitute for it a regional system for the same objectives? On the answer to that question depends the course of action we should adopt".[139] As we shall see, the decision of the Security Council, while making concession to the first, leans more heavily on the second alternative.

The armed intervention by the United States in the domestic affairs of the Dominican Republic, a sovereign state and a member of the United Nations would be a violation of the fundamental principle of the U.N. Charter, and of the universally recognized rules of general international law unless a request for foreign assistance has actually been made by the legitimate constitutional authority in Santo Domingo. In the Dominican situation, as in the Hungarian situation almost a decade before, the authenticity of the purported request for foreign assistance is highly questionable.[140] Thus, as a case of armed intervention without an authentic request, it was correctly urged by the Soviet representative, Fedorenko, that "[t]he Security Council is...

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[139] U.N. Doc. S/PV.1215, para. 12.

[140] Theodore Draper, The Dominican Revolt: A Case Study in American Policy, (New York: 1968), p. 121.

not only within its rights, but is in duty bound to give urgent consideration to the question".[141] In such a situation faced in 1965, to deny that the United Nations has constitutional competence to act, as it was similarly denied by the Soviet Union in Hungary (1956) and in Czechoslovakia (1968), is juridically unsupportable: the legal competence of the United Nations rests firmly on the provisions of Articles 24, 25 and 39 of the U.N. Charter.

The central thesis of the pro-regional argument was the practical one that action by the Security Council was unnecessary. It was not that the competence of the Security Council was denied but that the superior competence of the OAS was vigorously asserted. It was urged that the OAS was already seized of the matter, and that, in the light of the action that body had already taken, commonsense dictated that no further independent procedure be initiated. In obvious reference to the Guatemalan and Cuban cases, Ambassador Stevenson of the United States said: "[I]t would be constructive and in keeping with precedents established by this Council to permit the regional organization to deal with this regional problem".[142] What Stevenson was saying is that, as the Security Council had abdicated its role in the previous cases and, hence, set a precedent, there was no

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[141] U.N. Doc S/PV.1198, para. 143.

[142] U.N. Doc. S/PV.1196, para. 88.

reason why such precedent could not be followed in the present case. Advocates of regional supremacy would admit the necessity and relevance of U.N. intervention <u>only</u> when it could be proved that the OAS was acting improperly or deficiently. They contended that this position would by no means "deprive the Security Council, as a matter of its own responsibility, of the possibility of action in other situations at earlier stages, or of resuming its activities in this case if it became necessary to do so", and, finally, that any U.N. intervention would encourage a concurrent and independent consideration of the matter by both organizations.[143] It was claimed, as one might expect, that support for this argument rests upon the provisions of Articles 33(1) and 52 of the U.N. Charter.

In the first place, as it was never intended at San Francisco that a regional organization operating under the behavioural rules of Articles 31(1) and 52 should deal with a case of armed aggressive intervention, it was inappropriate to cite those Articles because, in the Dominican crisis, charges of aggression were made.[144] In the second place, even if one were to assume that the U.S. armed intervention was not a case of aggression in violation of the sovereignty

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[143] U.N. Doc. S/PV.1204, para. 91-92; S/PV.1217, para. 26-32.

[144] Representative of Uruguay, U.N. Doc. S/PV.1204, para. 20.

of a U.N. member, the contention that the interposition of the Security Council would encourage "concurrent and independent considerations" by both the OAS and the U.N. ignores the fact that this is exactly what a proper interpretation of Articles 33-38 and 52-54 amounts to.[145] The pro-regional attempt to reduce the essence of universal-regional relationship to the provision of Article 54 which requires a regional organization to keep the Security Council informed of its activities leaves much to be desired. In a situation where charges of armed intervention have been made, merely keeping the Security Council informed of the activities of a regional organization is indeed a very poor substitute for the direct cognizance of the situation by the Security Council which has primary responsibility for international peace and security.[146]

The Security Council's decision to send a representative to Santo Domingo "for the purpose of reporting to the Security Council on the present situation" represents a minimalist interpretation of the competence of the United Nations. The United States, the local hegemonial power, could not tolerate any meddling of the Soviet Union in the Western Hemisphere. To forestall this it was necessary to

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[145] See Chapter IV above.

[146] Representative of Cuba. U.N. Doc. S/PV.1198, para. 68.

prevent the Security Council of which the Soviet Union is a permanent member from taking cognizance of the situation. While the United Nations was not completely shut off (and this is in contrast to the refusal of the Soviet Union to consider favourably the eight-power draft resolution urging the U.N. Secretary-General to send a representative to Prague for the purpose of reporting on the Czechoslovak situation in 1968),[147] the coalition in favour of the supremacy of the OAS conceded only a restricted competence to the United Nations. In effect, it can be said that, eventhough the acceptance of the resolution authorizing the despatch of a U.N. mission to Santo Domingo broke a new ground in as much as it marked the first time United Nations and the OAS have actually been present simultaneously at the scene of a situation threatening peace, the resolution represents only a very hesitant and mild challenge to the thesis of regional (OAS) superiority.[147a]

A final point of legal interest relates to the nature of the Inter-American Peace Force. It was contended before the Security Council that the Inter-American Peace Forec was an "enforcement" force carrying out enforcement action which a regional organization has no power to undertake without

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[147] See below.

[147a] Rene-Jean Dupuy, "Les Etats-Unies, L'O.E.A. et L'O.N.U. a Saint-Domingue", A.F.D.I., Vol. XI, 1965, pp. 71-110.

the prior authorization of the Security Council.[148] The scope of the term "enforcement action" in Article 53 has been a subject of considerable dispute between those who contend that "enforcement action" refers to both measures contemplated in Articles 41 and 42 of the U.N. Charter and those who would confine its application to only those measures contemplated in Article 42. Since the following section of this Chapter is devoted to the interpretation given to this term in the U.N. practice and jurisprudence, it suffices to merely indicate at this juncture that a restrictive interpretation of the term has tended to favour the enlargement of the autonomy of regional organization vis-a-vis the United Nations. The only preliminary comment pertinent at this point concerns the need to distinguish between an enforcement and a peace-keeping force.

This distinction was made by the World Court in Certain Expenses case with particular reference to U.N.E.F. and O.N.U.C. in 1962.[149] The International Court of Justice held that O.N.U.C. and U.N.E.F. were peace-keeping and not enforcement forces because they were stationed in the host countries with the latter's positive consent and, further,

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148 Representative of the U.S.S.R.: U.N. Doc. S/PV. 1203, para. 87, 93, 94; Representative of Jordan: S/PV.1221, para. 22; Representative of Uruguay: S/PV.1221, para. 41-45.

149 I.C.J. Reports, 1962, p. 151.

because their purpose was not coercion against the will of any state but interpository, that is, to separate combatants and maintain law and order. It is generally agreed that coercive action on the part of a peace-keeping force strictly in self-defence cannot be considered as enforcement measures.[150]

In the light of the above comments, we may now examine the claim that the Inter-American Peace Force was an enforcement force requiring the prior authorization of the Security Council. From the point of view of purpose, it may be said that the May 6 Resolution[151] recommending the establishment of an Inter-American Force clearly indicated that the purpose of such a Force was not coercive. While it is true that the U.S. interventionist force constituted the largest single national unit in the new collectivity, the Inter-American Peace Force, in law, has to be differentiated from the original U.S. interventionist forces. It is, however, entirely a different question to ask whether the so-called Peace Force was deployed and used in ways consistent with its declared purpose. The debate in the Security Council was full of

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[150] Georg Schwarzenberger, Report on Problems of a United Nations Force, I.L.A., Report of the 50th Conference, Hamburg, 1960, pp. 130-152; See also his "Problems of a United Nations Force", C.L.P., Vol. 12, 1959, pp. 247-268.

[151] Text in International Legal Materials, Vol. 4, 1965, p. 594.

charges that the OAS forces continued to carry out the type of activities associated with the U.S. interventionist forces, that is to say, they were giving logistic support to General Imbert of the National Government of Reconstruction. The spokesman for the Constitutionalist Government under Colonel Caamano questioned the neutrality of the Peace Force before the Security Council. All this was denied by the spokesman for the General Imbert Government.[152] To a large extent, the Inter-American Peace Force was, throughout the crisis, an indispensable moderating influence.

The Inter-American Peace Force was deployed without the consent of the Government of the Dominican Republic but this is not quite the same as saying that the Peace Force was deployed <u>against</u> its will. The point is that there was no such thing as <u>the</u> authority in Santo Domingo at that time. However, it needs to be recalled that one of the two terms of the temporary cease-fire negotiated by the Papal Nuncio on April 30, 1965 was that "an Organization of American States Commission shall agree to serve as arbitrator in the conflict",[153] that even the constitutionalists under Colonel Caamano promised "to accept the mediation of the [OAS] Special

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[152] U.N. Doc. S/PV.1212 (19 May, 1965).

[153] See First Report of the OAS to the U.N. Secretary-General: U.N. Doc. S/6364, <u>S.C.O.R.</u>, 20th Yr., Supp. for April, May and June 1965, p. 133.

Committee",[154] and finally that in paragraph 7 of the Act of Domingo, "the Parties declared that they accept and recognize the full competence of the Special Committee... for the purposes of the faithful observance of what is agreed to in [the Santo Domingo] Agreement".[155] In effect, both sides to the civil war recognized the competence of the OAS; as the Inter-American Peace Force was one of the functionaries and instrumentalities of the OAS, it is not surprising that neither faction asked why and by whose authority the Force was in Santo-Domingo but merely complained about how the Force was being used. It can be concluded that both sides to the civil war tacitly conceded the presence of the Peace Force.

A legitimate constitutional question that can be raised in connection with the formation of the Inter-American Peace Force is that there is no provision in the constitutive documents of the OAS specifically authorizing the establishment of such a Force. Article 3 of the Rio Treaty certainly cannot provide the legal foundation for the Force in as much as the OAS was not exercising a collective right of self-defence. Article 6 of the same Treaty could not be invoked without first admitting that the U.S. action violated, in the first place, the territorial integrity and political

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[154] U.N. Doc. S/6364.

[155] Ibid.

independence of the Dominican Republic. It may be said, however, that the Organization of American States confronted in May and June 1965 a type of problem it never faced before and its response was tailored to the needs of the situation. The Inter-American Peace Force was not illegal eventhough one cannot point to a specific constitutional provision in the constitutional law of the OAS authorizing its creation.[156] It may be noted that in the Reparations for injuries case, the International Court of Justice enunciated the principle that "[u]nder international law, the [U.N.] Organization must be deemed to have... powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential for the performance of its duties".[157] The concept of implied powers of an international organization supports the view taken here. We must conclude that there is no basis for characterizing the Inter-American Force as an enforcement force requiring the prior authorization of the Security Council.

Any assessment of the impact of the Dominican crisis

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[156] Thomas and Thomas in John Carey (ed.), The Dominican Crisis 1965, (New York: Oceana, 1967), pp. 56-59; John McLaren, "The Dominican Crisis: An Inter-American Dilemma", C.Yb.I.L., Vol. 4, 1966, p. 186.

[157] Reparations for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1948, p. 121 at p. 182. See also Fin Seyersted, "International Personality of International Organizations", I.J.I.L., Vol. 4, 1964, pp. 1-74, pp. 233-268; United Nations Forces, (1966), p. 299 et. seq. For a dissenting view, see G.I. Tunkin, "The Legal Nature of the United Nations", Hague Recueil, Vol. 119, 1966 (III) pp. 23-25.

on the Charter law of universal-regional relationship should not ignore the fact that the universal-regional problem has arisen in connection with an acute political crisis which was hardly favourable to an impartial and objective consideration of the respective competences of both the United Nations and the OAS. The United States behaved as the local dominant and hegemonial power in the Western hemisphere. She found it politically convenient to be more regional than the original regionalists in 1945.

(c) Enforcement Action

> [B] The proposition that "enforcement action" under Article 53 encompasses only measures involving the use of armed force by a regional organization.

(i) Introduction

Among international legal scholars there is a general agreement that the terms "enforcement action" and "enforcement measures" as used in the United Nations Charter are the same.[158] However, on the question of the scope and content of enforcement action under Article 53, two lines of argument are usually advanced.[159] First, it is claimed that

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[158] See Sir Eric Beckett, *op. cit.*, p. 7; Kelsen, *The Law of the United Nations*, p. 724.

[159] F.V. Garcia Amador, *The Inter-American System*, (New York: Oceana, 1966), p. 189 *et. seq.*; Manuel Canyes, *The Organization of American States and the United Nations*, (Washington: Pan American Union, 1963), p. 49 *et. seq.*

enforcement action includes all measures contemplated in Articles 41 and 42 of the U.N. Charter. Thus, Kelsen writes:

> There are two kinds of such measures: measures not involving the use of armed force, and measures involving the use of armed force. Both are 'enforcement measures' or 'enforcement action' as they are sometimes called in the Charter... although only the measures determined in Articles 42 to 47 involve the use of 'armed' force. The measures determined in Article 41 are especially: "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations". This purpose is defined in Article 41 as follows: "to give effect to its [the Security Council's] decisions"; that means to enforce the decision upon a racalcitrant state. Hence these measures, too may be considered to be "enforcement measures" or "enforcement action" referred to in various Articles of the Charter.[160]

A second interpretation, more restrictive than the first, is that the term "enforcement action" in Article 53 includes only measures contemplated under Article 42. In support of this interpretation, it is sometimes argued that, under Article 52(1), the limitation to the activities of a regional organization is the use of force, that the authorization principle in Article 53, being a relative and not an absolute limitation on regional action, cannot be interpreted without taking into consideration the relational interest between the desire for regional autonomy and for a dominant Security

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[160] Kelsen, _op_. _cit_., p. 724; Beckett, _op_. _cit_., pp. 8, 10-11.

Council position.[161] Garcia Amador asks: "If the expression "enforcement action" were understood to apply to all measures contemplated in the U.N. Charter, in what would regional action consist? In other words, why authorize regional arrangements or agencies to take up matters relative to the maintenance of international peace and security susceptible of regional action, if that action must be authorized by the Security Council?".[162] This view deserves two preliminary comments. In the first place, if the U.N. Charter intended that the activities of regional organizations relating to the maintenance of international peace and security other than those of pacific settlement and of collective self-defence under Article 51 should be exempt from the authorization principle of Article 53 it would have said so. A possible argument that what international law does not prohibit it permits[163] overlooks the history of Articles 51 and 53 at San Francisco. It is relevant to remind ourselves that Article 51 was adopted at San Francisco largely at the insistence of the Latin American leaders who

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[161] Marvin G. Goldman, "Action by the Organization of American States: When is Security Council Authorization Required under Article 53 of the United Nations Charter", U.C.L.A. Law Review, Vol. 10, Part 2, 1962-1963, pp. 837-869.

[162] Garcia Amador, op. cit., p. 191.

[163] The SS Lotus: Judgment No. 9, September 7, 1927, Hudson, World Court Reports, Vol. 2, 1927-1932, (1935), p. 20 et. seq.

reasoned that the "authorization principle" of the Dumbarton Oaks Proposals seriously compromised the autonomy of regional organizations in all fields of activities except the pacific settlement of disputes.[164] In the U.N. Charter, enforcement measures are illustrated in Articles 41 and 42. Since Chapter VIII which contains the authorization principle of Article 53 comes after Chapter VII, it was understandably considered unnecessary to illustrate or define what enforcement measure means under Article 53. If a restrictive interpretation was intended for the authorization principle of Article 53, it is reasonable to suggest that the Charter would have said so. Our second comment is that, at San Francisco, it was hoped that big power cooperation would endure and that the United Nations would act as an "imperial" government of the Great Powers, a government capable of taking effective measures to deal with breaches of the peace or acts of aggression. Apart from the compromise formula represented by Article 51 permitting regional self-defence organizations to resort to force on their own initiative in self-defence until the Security Council is in a position to act, collective measures against the will of a state was considered to be the prerogative of the Security Council. Any contrary interpretation is nothing but an <u>ex post facto</u> rationalization of the changes that have subsequently taken place in the international system and which have affected

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[164] See Chapter IV above.

the proper working of the United Nations. Seen in this light, the interpretation which limits the scope of the authorization principle of Article 53 to only those measures contemplated in Article 42 is nothing but a political and practical response to the actute problem of the organization of peace in a highly competitive and ideologically antagonistic international system.

The two conflicting interpretations of the scope and content of enforcement action in Article 53 were advanced at the time the Security Council was considering the OAS sanctions against the Dominican Republic in September 1960, and against Cuba in 1962. Our immediate purpose here is to examine the legal arguments advanced by both sides and to consider the particular interpretation "accepted" by the Security Council.

On establishing the complicity of the Dominican Republic in the attempted assassination of the President of Venezuela, the OAS members collectively decided in August 1960 to sever diplomatic relations with the Dominican Republic and to apply partial economic sanctions including the suspension of trade in arms and implements of war.[165] In January 1962, similar measures were adopted against Cuba for allegedly introducing international communism into the Western Hemi-

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[165] Pan American Union, Inter-American Treaty of Reciprocal Assistance Applications Volume II 1960-1964, (Washington: 1964), p. 9.

sphere, and violating the fundamental principles of the Inter-American system.[166] It should be pointed out that the OAS resolutions to this effect constitute a binding obligation under the Rio Treaty.[167] Later in October, 1962, the OAS recommended that members take "all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the [American] Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent".[168] In each of these three cases the OAS did not secure the prior approval of these measures by the Security Council but merely kept the latter body informed of them pursuant to Article 54 of the U.N. Charter.

(ii) The San Jose and Punta del Este Sanctions

The Security Council convened in September 1960 at the

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[166] Ibid., p. 78. See R. St. J. Macdonald, "The Resort to Economic Coercion by International Political Organizations", U. of T. Law Journal, Vol. 17, 1967, pp. 86-169 esp. at p. 134 et. seq.

[167] Rio Treaty, Article 20.

[168] For text of the Resolution see Garcia Amador, op. cit., p. 162 et. seq.; Robert F. Kennedy, Thirteen Days: A Memoir of the Cuban Missile Crisis, (New York: Norton and Company, 1969), p. 176 et. seq.

Soviet request. The Soviet Union urged the Council to "approve the decision of the Organization of American States, so as to give it legal force and render it more effective".[169] In view of the fact that Article 53 speaks of prior authorization rather than subsequent approval of a regional enforcement measure, the attempt to apply Article 53 to this anti-Trujillo sanction is difficult to understand.[170] In any case, it was urged before the Council mainly by the Representatives of the U.S.S.R., Poland and Ceylon that the measures imposed on the Dominican Republic were enforcement measures within the meaning of Article 53 in as much as those measures contemplated in Article 53 embrace measures enumerated in Article 41.[171] An opposing view which seems more generous to the autonomy of regional organization was vigorously defended by the Representatives of Argentina, Ecuador, the United States and the United Kingdom. Rejecting the Kelsen interpretation, it asserted that enforcement measures imposed by a regional organization requires prior Security Council authorization only if those measures called for the use of

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[169] The Representative of the U.S.S.R. U.N. Doc. S/PV. 893, September 8, 1960, para. 24.

[170] This point was made by the Representative of France. Ibid., para. 90.

[171] U.N. Doc. S/PV.894, September 9, 1960, para, 14, 16, 17.

armed force.[172] It should be borne in mind that this interpretation of "enforcement measure" in Article 53 is based upon the nature or character of the regional sanctions rather than on the nature of the resolution under which the regional organization is collectively acting. As we shall see later, it was argued during the Cuban missile crisis that the character of the OAS resolution was sufficient to determine the applicability of Article 53. How did the advocates of a restrictive interpretation of the authorization principle of Article 53 explain their position? A legally untenable line of argument was advanced by the United Kingdom Representative:

> [I]t is common sense to interpret the use of this term [enforcement action] in Article 53 as covering only such actions as would not normally be legitimate except on the basis of a Security Council resolution. There is nothing in international law, in principle, to prevent any State, if it so desires, from breaking off diplomatic relations or instituting a partial interruption of economic relations with any other State. These steps, which are the measures decided upon by the Organization of American States with regard to the Dominican Republic, are acts of policy perfectly within the competence of any sovereign State. It follows, obviously, that they are within the competence of the Organization of American States acting collectively.[173]

It is submitted that the view that a regional organization, whose relationship to a universal organization is explicitly

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[172] U.N. Doc. S/PV.893, September 8, 1960, para. 32, 66, 96.

[173] U.N. Doc. S/PV.893, September 8, 1960, para. 16. For a concurring view, see Michael Akehurst, "Enforcement Action by Regional Agencies, With Special Reference to the Organization of American States", <u>B.Y.B.I.L.</u>, Vol. 42, 1967, pp. 195-197.

defined by a set of behavioural rules, can do collectively what each member of the organization can do singly is too deceptively simple. While it is no doubt true that the lawfulness of the severance of diplomatic relations or of the partial interruption of economic relations undertaken by a state does not require any authorization by the Security Council, the lawfulness of the collective action of a regional organization has to be considered within the context of Charter law of universal-regional relations.[174] The argument of the United Kingdom Representative ignores the importance of drawing a line between what the Ceylonese Representative called "the individual rights of each State which is a member of the regional organization and the rights of States as members of the organization".[175] This distinction may be absurd in its practical effect, but it is significant from the point of view of law. Under the law of the Charter, a regional collective punitive action against the will of a state but distinct from self-defensive measures has the character of enforcement action and, thus, requires the prior approval of the Security Council. In the Dominican case, the Security Council adopted the interpretation advanced by the Latin American and Western Representatives by approving a

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[174] This point was made by the Soviet Representative, Morozov. See U.N. Doc. S/PV.998, March 23, 1962, para. 38.

[175] U.N. Doc. S/PV.894, September 9, 1960, para. 14.

three-power draft resolution urging the Security Council to merely "take note" of the OAS action. The Soviet Union did not press for a vote on its own draft resolution reflecting the interpretation which was intended in 1945. The Security Council said, in effect, that the only regional enforcement action requiring the prior authorization of the Security Council is action which will be illegal under the Charter without it, that is, the use of force not in self-defence. Thus, a precedent was established and it was to be cited in later cases as the authoritative interpretation of Article 53. In view of the fact that under United Nations jurisprudence each organ is the sole interpreter of its authority,[176] the Dominican precedent, though possessing no binding force, must be regarded as authoritative.[177] In February 1962 when Cuba complained to the Security Council that the OAS was in breach of the Charter of the United Nations by excluding the Government of Cuba from the regional organization and by instituting economic sanctions against Cuba, it was argued at the preliminary discussion on whether or not to entertain the complaint that, in so far as the

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[176] Doc. 933, IV/2/42(2); U.N.C.I.O. Doc., Vol. 13, p. 703, 709. See also Pollux (Edvard Hambro?), "The Interpretation of the Charter", B.Y.B.I.L., Vol. 23, 1946, p. 56.

[177] Interpretation by one organ does not bind other organs, and hence, does not prevent a contrary interpretation by other organs.

interpretation of Article 53 adopted by the Security Council in September 1960 remained valid, there was no need to listen to the Cuban complaint. As was the case in 1954 when the Security Council denied right of access to the Security Council to Guatemala, the Security Council similarly denied hearing to Cuba in February 1962 by its failure to adopt an agenda.[178] In March 1962, Cuba requested the Security Council to ask for an advisory opinion of the International Court of Justice on whether the economic measures imposed on her by the OAS amounted to enforcement action under Article 53(1). The arguments advanced were the familiar ones of 1960 which need no repetition here. The Security Council rejected the view that enforcement action under Article 53 of the U.N. Charter includes measures contemplated in Article 41, and further voted against the referral of the Cuban proposal to the World Court for an advisory opinion.[179]

The interpretation of the term "enforcement action" under Article 53 in both the Dominican and Cuban cases amounts to a tacit amendment of the U.N. Charter in favour of the autonomy of regional organizations.[180] Such a restrictive

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[178] U.N. Doc. S/PV.991, February 27, 1962.

[179] U.N. Doc. S/PV.992, 993, 994, 995, 996, 998, March 14-23, 1962.

[180] See for instance, J.W. Halderman, The United Nations and the Rule of Law, (New York: Oceana, 1966), pp. 37 et. seq.; also "Regional Enforcement Measures and the United Nations", Georgetown Law Journal, Vol. 52, No. 1, (continued on page 393)

interpretation seems to have been based on the hypothesis that Article 53 should not be used to make a regional organization's "activities" rigidly dependent upon the authorization of the Security Council which has demonstrated a great deal of ineffectiveness.

(iii) The Cuban Missile Crisis (1962)

We should bear in mind that in the two cases examined above, the interpretation accorded to the term "enforcement action" in Article 53 was based largely on the nature of the measures imposed by the OAS. It was never contended before the Security Council nor did the Council drop any hint that the character of the resolution authorizing any regional enforcement action had any crucial relevance to the legal permissibility of such measures. In order to justify the OAS action directed against the presence of "offensive" weapons in Cuba, it was urged that the non-obligatory nature of the OAS resolution makes the authorization principle of Article 53 inapplicable.

Claiming that the presence of "offensive" weapons secretly introduced by the Soviet Union into Cuba not only

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180 (continued) 1963, pp. 89-119; Inis Claude Jr., "The OAS, the U.N., and the United States", International Conciliation, No. 547, March 1964; G.I.A. Draper, "Regional Arrangements and Enforcement Action", Revue Egyptienne de Droit International, Vol. 20, 1964, pp. 1-44 esp. at pp. 18, 20-23; R. St. J. Macdonald, in C.Yb.I.L., Vol. 2, 1964, p. 54. Asbjorn Eide, in Journal of Peace Research, Vol. 3, No. 2, 1966, pp. 125-145; Michael Akehurst, in B.Y.B.I.L., Vol. 42, 1967, pp. 175-227.

"constitutes an explicit threat to the peace and security of all the America, in flagrant and deliberate defiance of the Rio Pact of 1947", but also amounts to "a deliberately provocative and unjustified change in the status quo which cannot be accepted", President Kennedy ordered "a strict quarantine on all offensive military equipment under shipment to Cuba". This limited naval quarantine was further thought to be warranted "in the defense of our own security and the entire Western Hemisphere".[181] Three points deserve immediate emphasis. First, the naval quarantine was not so much directed against Cuba as against the Soviet Union, which is not a party to the Rio Treaty. Second, the implementation of a naval quarantine involves the use of force. Third, although President Kennedy's statement did not exclude the defence of the measure imposed as an act of self-defence, the legal officers of the State Department tell us that President Kennedy deliberately avoided invoking explicitly the inherent right of self-defence in defence of the legality of the naval quarantine.[182]

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[181] See Robert F. Kennedy, op. cit., p. 163 et. seq., U.S. Dept. of State, Bulletin, Vol. XLVII, No. 1220, November 12, 1962, p. 715; L.M. Tondel, Jr. (ed.), The Inter-American Security System and the Cuban Crisis, (New York: Oceana, 1964), p. 26.

[182] Abram Chayes, "The Legal Case for U.S. Action on Cuba", U.S. Dept. of State, Bulletin, Vol. XLVII, No. 1221, p. 764; also "Law and the Quarantine of Cuba", Foreign Affairs, Vol. 41, 1962 -1963, p. 550 et. seq. at p. 554; Leondard C. Meeker, "Defensive Quarantine and the Law", A.J.I.L., Vol. 57, 1963, p. 515; Lyman Tondel (ed.), Inter-American Security System and the Cuban Crisis, (New York: Oceana, 1964), p. 46.

It is often asked whether the Cuban quarantine was a unilateral policy of the United States or a collective action of the OAS. In so far as the naval quarantine was not proclaimed until after an OAS resolution[183] had recommended individual and collective action, including the use of force to prevent further delivery of offensive weapons to Cuba and to prevent the missiles in Cuba from becoming an active threat to the security of the American continent, it could be said that the quarantine was based on the OAS resolution. One, however, must not ignore the fact that the United States confronted the OAS with a _fait accompli_.[184] In any case, if the OAS had failed to act, the United States would certainly have implemented the naval interdiction order on its own initiative. From the legal point of view the OAS resolution gave a collective character to what originated as a unilateral policy-decision of the United States.[185]

The naval quarantine of Cuba raises problems of general international law as well as of the interpretation of the relevant provisions of the U.N. Charter dealing with the

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[183] Robert F. Kennedy, _op_. _cit_., p. 176 _et_. _seq_.; L.B. Sohn, _The United Nations in Action_, (Brooklyn: The Foundation Press, 1967), p. 326.

[184] R. St. J. Macdonald, "The Organization of American States in Action", _U. of T. Law Journal_, Vol. 15, 1963-64, p. 403 _et_. _seq_.

[185] Abram Chayes in L. Tondel Jr. (ed.), _op_. _cit_., pp. 38-40.

competence of regional organizations.[186] This study is concerned primarily with the validity of two interrelated claims made in defence of the legality of the naval quarantine, claims which are of immediate relevance to the theme of this study: (1) the claim that enforcement action under Article 53(1) cannot include action of a regional organization which is only _recommendatory_ to the members of the organization, (2) the claim that Article 52(1) gives a regional organization the right to use force collectively on its own initiative for the removal of threats to peace in its region of operation _independently_ of the right under Article 51 of the U.N. Charter.

On the first claim, the Deputy Legal Adviser to the U.S. State Department, Leonard Meeker, commented as follows:

> As understood by the United States "enforcement action" means _obligatory_ action involving the use of armed force. Thus, "enforcement action", as the phrase appears in Article 53(1), should not be taken to comprehend action of a regional organization which is only recommendatory to the members of the organization.[187]

In the two cases dealt with before, we noted that the Security Council "accepted" the interpretation that enforcement action by a regional organization which does not entail

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[186] See Larman C. Wilson, "International Law and the United States Cuban Quarantine of 1962", _Journal of Inter-American Studies_, Vol. 7, No. 4, October 1965, pp. 485-492, and especially the bibliographical note on the legal aspect of the crisis compiled therein (pp. 491-492).

[187] L.C. Meeker, "Defensive Quarantine and the Law", _A.J.I.L._, Vol. 57, 1963, p. 515. (Emphasis added).

the use of armed forces could legitimately be undertaken without prior authorization by the Security Council. In the Cuban missile crisis, a greater claim was made to the effect that the collective use of force on the initiative of a regional organization and independently of the right of self-defence falls within the legal competence of a regional organization if the resolution authorizing such common action is merely recommendatory. What, then, is the validity of the argument based on the recommendatory character of the OAS resolution of October 23, 1962? It should be pointed out at the outset that in so far as the implementation of the naval quarantine announced by President Kennedy necessarily involved forceful action, and to the extent that the OAS resolution was intended to give the unilateral U.S. policy-decision multilateral character, the OAS resolution could not have taken any other form but a recommendation to member states. Under the constitutional law of the OAS it would have been illegal to make it a mandatory duty for the OAS members to resort to the use of force for the maintenance of hemispheric peace and security.[188] It thus seems the argument resting on the hypothesis of the recommendatory character of the OAS resolution was based upon convenience. The argument used in its support was legally questionable. It was contended that the International Court

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[188] Rio Treaty, Article 20.

of Justice in the Expenses case[189] rejected the characterization of the UNEF and ONUC as enforcement forces on the ground that the resolutions constituting them were merely recommendatory to the participating states. The World Court certainly said this, but it further emphasized the importance of consent of the host country as the basis for the deployment of a peace-keeping force. The argument of the legal officers of the State Department ignores this important fact of consent. Meeker, for instance concludes: "Thus, in the context of United Nations bodies, it may be persuasively argued that "enforcement action" does not include action by a United Nations body which is not obligatory on all the Members. As used in Article 53(1), "enforcement action" refers to action by a regional organization rather than to action by an organ of the United Nations, but the words are properly given the same meaning in this context".[190] The question is whether the relationship between organs of the same organization can be considered in analogous terms with that between a superior and a subordinate organization. Specifically, is the U.N.-OAS relationship identical with the General Assembly-Security Council relationship? The

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[189] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151.

[190] Meeker, "Defensive Quarantine and the Law", A.J.I.L., Vol. 57, 1963, p. 521.

UNEF and ONUC were not enforcement action largely because they were stationed in the Middle East and the Congo respectively on the basis of the positive consent of the host states.[191] It was not considered sufficient that Egypt and the Congo Republic have consented to the procedures and processes of the United Nations as members of the Organization. If the analogy employed by Meeker is to be valid it has to be further explained whether Cuba ever gave her consent to the naval quarantine.[192] It is not enough to merely state that Cuba was bound by the Treaty of Rio and, consequently, must have consented to the processes and procedures established by that Treaty.

The case for the extensive interpretation of the autonomy of regional organization permitted under Article 53(1) based upon the recommendatory character of the OAS resolution seems to imply implicitly that the measures taken were the individual responsibility of each participating states and outside the Organization rather than the collective responsibility of the regional organization.[193] If the naval

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[191] Rosalyn Higgins, United Nations Peace-keeping 1946-1967 Documents and Commentary, (London: Oxford University Press, 1969), p. 335 et. seq.

[192] Campbell, "The Cuban Crisis and the U.N. Charter: An Analysis of the United States Position", Stanford Law Review, Vol. 16, 1963-64, pp. 160-176 at p. 172.

[193] John W. Halderman, "Regional Enforcement Measures and the United Nations", Georgetown Law Journal, Vol. 52, No. 1, 1963, p. 104.

quarantine was implemented in the context of the OAS resolution and operated under a joint quarantine command,[194] then it was an act of the regional organization. The question of the nature of the OAS resolution seems irrelevant especially in so far as no resolution creating an obligatory duty for the OAS members to use force will itself be legal under the Rio Treaty. The interpretation of the term enforcement action based on the recommendatory character of the OAS resolution is no doubt a calculated attempt to escape the inhibitory clause of Article 53(1). In effect, this interpretation limits the scope of the authorization principle of Article 53(1) much further than the interpretation "accepted" in September 1960 and March 1962 if it does not outrightly abolish the substantive value of that principle. The Security Council did not pass any judgment on this new claim and this has been interpreted as amounting to a tacit acceptance of this view.[195]

Once the applicability of the authorization principle under Article 53(1) is denied, the logic of the second claim appears understandable, if not acceptable. The argument marshalled in support of the second claim is as follows:

The quarantine was based on a collective judgment and

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[194] Chayes in L.M. Tondel, Jr. (ed.), The Inter-American Security System and the Cuban Crisis, (New York: 1964), p. 40.

[195] Abram Chayes, Proceedings, A.S.I.L., 1963. p. 13.

> recommendation of the American Republics made under the Rio Treaty. It was considered not to contravene Article 2, paragraph 4, because it was a measure adopted by a regional organization in conformity with the provisions of Chapter VIII of the Charter. The purposes of the Organization and its activities were considered to be consistent with the purposes and principles of the United Nations as provided in Article 52. This being the case, the quarantine would no more violate Article 2, paragraph 4, than measures voted by the [Security] Council under Chapter VII, by the General Assembly under Articles 10 and 11, or taken by the United Nations Members in conformity with Article 51.[196]

Reduced to its essentials, the above statement contains these interrelated hypotheses, namely, (1) that there is a legal right of collective forceful action by a regional organization independent of the right of legitimate self-defence, (2) that the legality of such regional collective action depends only on whether the action is consistent with the procedures and processes laid down by the constitutional law of the regional organization; (3) and that the prohibition in Article 2(4) is removed in favour of regional organizations seeking to preserve peace and security in their regions as long as the purpose of regional action is consistent with the purpose of the United Nations. It will be seen that these interrelated propositions, if valid, would considerably extend the scope of regional autonomy _vis-a-vis_ the United Nations, if not reduce to sham the Charter law of universal-regional relationship.

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[196] L.C. Meeker, "Defensive Quarantine and the Law", _A.J.I.L._, Vol. 57, 1963, pp. 523-524; Abram Chayes, "The Legal Case for the U.S. Action in Cuba", U.S. Dept. of State, _Bulletin_, Vol. XLVII, No. 1221, 1962, p. 765.

It was urged that, under Article 52(1), regional organizations are established to deal with "matters relating to the maintenance of international peace and security as are appropriate for regional action", that regional action can take the form of activities that are neither of the nature of pacific settlement nor of the application of measures established under Article 53, and, further, that, in carrying out these activities related to the maintenance of regional peace and security, the only obligation imposed on regional organization is that contained in Article 52(4) and 54.[197] Indeed, the U.S. Secretary of State, Dean Rusk, stated before the OAS Meeting on October 23, 1962 that, in so far as the missile threat was to the Western hemisphere, the American Republics had "primary responsibility and duty to act".[198] It is certainly impossible to reconcile this claim with Article 24 of the U.N. Charter, but it is no doubt consistent with the new claim being made for the autonomy of the OAS _vis-a-vis_ the United Nations.

It should be noted that the whole chain of reasoning rests upon the false assimilation of two types of functions, namely, the function of pacific settlement of local disputes

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[197] See, for instance, Garcia Amador, _op. cit._, p. 181; also "The Dominican Situation: The Jurisdiction of the Regional Organization", _Americas_, Vol. 17, No. 7, July 1965, pp. 1-3.

[198] U.S. Dept. of State, _Bulletin_, Vol. 47, No. 1220, November 12, 1962, p. 722.

which a regional organization can perform on its own initiative, and the enforcement function which it can perform as the agency of the Security Council. The U.N. Charter, under Article 2(4), prohibits resort to force but makes some exceptions, namely the use of force in self-defence, the use of force by the Security Council to defeat aggressor states and the use of force against the enemy states. It was not intended that regional organizations operating under the behavioural rules of Chapter VIII should be anything other than pacific settlement agencies. It is inadmissible to contend that a regional organization can act in breach of Article 2(4) if it is legitimately maintaining the peace and security of its region. It is equally unacceptable to argue that as members of the OAS are under obligation under the Rio Treaty to maintain peace and security in the Western Hemisphere the legality of the naval quarantine has to be judged in terms of whether the Rio Treaty permits such action and whether the procedures and processes of the said Treaty have been scrupulously followed.[199] As U. Thant pointed out in 1965, "[i]f a particular regional organization, under the terms of its own constitution, deems it fit to take certain enforcement action in its own region, it naturally follows that other regional organizations should be considered com-

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[199] On the limitation of regional international law created by treaty to the signatories alone, see L.C. Green, "New States, Regionalism and International Law", C.Yb.I.L., Vol. 15, 1967, p. 140. Quincy Wright, "The Cuban Quarantine," A.J.I.L., Vol. 57, 1963, pp. 546, 558-559.

petent, because of the precedent, to take certain enforcement action in their own regions".[200] The possibility of this happening is the danger inherent in the U.S. legal case. We must conclude that unless the use of force is justified under Article 51, and under Articles 53 and 107 vis-a-vis the enemy states which have neither become U.N. members nor signed pace treaties, it will violate Article 2(4) because the prohibition in Article 2(4) is not removed in favour of regional organizations seeking to preserve peace and security in their regions.[201]

The argument for the expanded scope of regional autonomy as advanced by the defenders of the legality of the naval quarantine is not so much a legal as a political one, resting, as it is, on the well-known fact that the U.N. Charter has not operated the way it was intended to operate. In their defence of the naval quarantine implemented under the OAS resolution and without prior authorization from the Security Council, it was argued that the authorization principle under Article 53 is irrelevant because "a lack of agreement among the [Security] Council's permanent Members...

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[200] U.N. Monthly Chronicle, Vol. 2, June 1965, p. 69.

[201] See Draper, "Regional Arrangements and Enforcement Action", Revue Egyptienne de droit International, Vol. 20, 1964, pp. 1-44. Contrast C. Christol and C.R. Davis, "Martime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel, 1962", A.J.I.L., Vol. 57, 1963, pp. 537-539.

has, of necessity, thrown an unexpected responsibility onto other mechanisms provided in the Charter",[202] and that Article 53 "cannot be left as a derelict adrift with no other function but to cause shipwrecks".[203] If the U.S. feared that a Soviet veto might paralyze Security Council action, could not recourse have been made to the Acheson Plan?[204] This Plan, it should be recalled, was designed to deal with a situation in which the Security Council, politically paralyzed by the exercise of the veto power, has been unable to discharge its primary responsibility for the maintenance of international peace and security. Under the "Uniting for Peace" Resolution, an emergency session of the General Assembly could have been called as was the case in 1956, 1958 and 1967. The U.S. foreign policy makers probably doubted the ability of the United States to muster the appropriate majority in the General Assembly for a resolution they would have favoured. In any case, as the U.S. leaders considered the time element crucial, it would have been surprising if they had contemplated invoking the Acheson Plan subsequent to an almost certain impotence of the Security

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[202] Meeker, "Defensive Quarantine and the Law", A.J.I.L., Vol. 57, 1963, p. 519.

[203] Chayes in Proceedings, A.S.I.L., 1963, p. 12; also in Tondel (ed.), The Inter-American Security System and the Cuban Crisis, (New York: Oceana, 1964), pp. 46-47.

[204] See Chapter V above.

Council. The political argument for wanting to increase the autonomy of regional organizations vis-a-vis the lame duck United Nations may be persuasive up to a limit, but the possibility of interpreting the Charter law of universal-regional relationship with a view to justifying and supporting the assumption of increased autonomy for regional organizations, and without upsetting the universal-regional balance established in 1945, cannot but be regarded with considerable doubt.

It has been indicated that the legal justification for the naval quarantine was not based on self-defence argument. In actual fact, the case put forward by the legal officers of the State Department and, indeed, President Kennedy's own statement, cannot be interpreted as excluding collective self-defence as a possible legal basis for the quarantine. Is it, then, possible to make a valid case for the legality of the naval quarantine as an act of self-defense? The view advanced in this study is that the right of self-defence is a customary right in international law and consequently it is auto-definable.[205] Consistent with this view, it may be urged that both general international law of self-defence and the rule of Article 51 of the Charter provide sufficient legal foundation upon which the permissibi-

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[205] See Chapter IV above.

lity of the naval quarantine action may be based.[206] Article 51 overrides the authorization principle of Article 53. The naval quarantine would have been legal although, theoretically, the initial defensive action could be subsequently reviewed by the Security Council if the technicalities of Article 27(3) are met.

Another point of legal interest which is only of peripheral interest to us in this study is that the implementation of the interdiction order entailed the restriction of the rights of states to the free use of the high seas.[207] As a general rule of customary international law, "vessels on the high seas are subject to no authority except that of the

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[206] See J.W. Halderman, The United Nations and the Rule of Law, (Dobbs Ferry: Oceana, 1966), pp. 61, 62; McDougal, "The Soviet-Cuban Quarantine and Self-Defence", A.J.I.L., Vol. 57, 1963, pp. 597-602; McWhinney, "'Co-existence', the Cuba Crisis and Cold War International Law", International Journal, Vol. 18, 1962-63, p. 67; Eustace Seligman, "The Legality of U.S. Quarantine Action Under the United Nations Charter", American Bar Association Journal, Vol. 49, 1963, pp. 143-145; D.G. Partan, "The Cuban Quarantine: Some Implications for Self'Defence", Duke Law Journal, 1963, pp. 696-721. Contrast the view of Quincy Wright, "The Cuban Quarantine", A.J.I.L., Vol. 57, 1963, pp. 546-565; L. Henkin, How Nations Behave, (1968), pp. 231-236.

[207] Text of the Geneva Convention on the High Sea can be found in A.J.I.L., Vol. 52, 1958, p. 830 et. seq. See generally, H.A. Smith, The Law and Custom of the Sea, (London: Stevens, 1959); McDougal and Burke, The Public Order of the Sea, (New Haven: 1962), Ch. 7; Max Sorensen, "The Law of the Sea", International Conciliation, No. 520, 1958; L.C. Green, "The Geneva Conventions on the Freedom of the Sea", C.L.P., Vol. 12, 1959, pp. 224-246.

State whose flag they fly".[208] Assuming that the naval quarantine can be, and has been, justified as an act of the inherent right of self-defence, can it be argued that the right of self-defence may be permitted to restrict the application of the right to the unrestricted use of the high seas? In other words, if two norms of international law are mutually exclusive in a particular situation, which one overrides the other? What are the criteria for judging the norm that is more fundamental than the other? The right of self-defence and the right to the free use of the high seas are both fundamental principles of general international law.[209] It seems reasonable to argue that if the right of self-defence is exercised in good faith in accordance with the doctrines of necessity and proportionality,[210] an incidental breach of the customary rule of freedom of the use of the high seas may be tolerated in the circumstance.[211]

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[208] The SS Lotus, Judgment No. 9, September 7, 1927, in Hudson, World Court Reports, Vol. 2, (1935), p. 40.

[209] Schwarzenberger, "The Fundamental Principles of International Law", Hague Recueil, Vol. 87, 1955(I), p. 358 et. seq.

[210] R.Y. Jennings, "The Caroline and McLeod Cases", A.J.I.L., Vol. 32, 1938, pp. 82-99; Cmd. 6984 (1946), pp. 28-29.

[211] Bowett, Self-Defence in International Law, Vol. 1, (1958), pp. 71-75; Brownlie, International Law and the Use of Force by States, (Oxford: 1963), pp. 305-308; Schwarzenberger, International Law, (3rd Ed., London: 1957), pp. 341-347.

An analysis of the naval quarantine operation in October 1962 indicates that the U.S. interdiction crew combined firmness with caution in dealing with ships on the high sea, and deliberately avoided unduly provoking the Soviet Union against whom the naval quarantine was primarily directed.[212]

In conclusion it must be admitted that the Cuban quarantine represented a high water point in the jurisdictional dispute regarding the proper relationship between the United Nations and regional organizations.[213] The Security Council did not take up the issue of the limit of the authority and competence of regional organizations defined in Chapter VIII of the U.N. Charter.[214] The immediate issue at stake in October 1962 was more weighty than the legal disputation regarding the competence of a regional organization *vis-a-vis* the United Nations. The legal and constitutional question

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[212] Robert Kennedy, *op. cit.*, Louis Henkin, *How Nations Behave: Law and Foreign Policy*, (New York: 1968), Ch. 16; Elie Abel, *The Missile Crisis*, (Philadelphia and New York: 1966), p. 155; H.M. Pachter, *Collision Course: The Cuban Missile Crisis and Co-existence*, (London: 1963), p. 43.

[213] Compare L.M. Tondel Jr. (ed.), *The Inter-American Security System and the Cuban Crisis*, (1964), p. 51 *et. seq.*; Inis Claude, Jr., "The OAS, the U.N., and the United States", *International Conciliation*, No. 547, March 1964, p. 57. For a more restrained view, see Macdonald in *U. of T. Law Journal*, Vol. 2, 1964, p. 54.

[214] See L.B. Sohn, *The United Nations in Action*, (Brooklyn: 1967), Ch. 8; T.J. Kahng, *Law, Politics and the Security Council*, (The Hague: 1964), p. 207 *et. seq.*

is here to stay. It will continue to be considered in the light of concrete cases, and the particular interpretation adopted tacitly or expressly by the Security Council will continue to depend on the political calculations of the members of the Security Council.

(d) Concluding Comments

The relationship between the United Nations and the OAS cannot be fruitfully examined outside the context of the United States' policy of preventing Soviet interference in the affairs of the Western hemisphere, an area regarded as a sphere of American influence. It is rather unfortunate that the United Nations should have been the victim of this policy. As a consequence, the Charter law of universal-regional relationship has been fundamentally revised in favour of regional organizations. As we shall see later, the Soviet Union itself has contributed to this *de facto* revision of the constitutional balance of power between the United Nations and regional organizations.

We should bear in mind the inherent limitation of the United Nations in an ideologically polarized international community. When an issue is cast in the form of whether international communism should be permitted to find a foot-hole in the Western Hemisphere as was the case in the Guatemalan, Cuban and Dominican situations, it is unrealistic to pretend that a major power like the United States in

a competitive struggle with the Soviet Union would want to care much about the legal competence of a universal organization which permits the Soviet Union to "interfere" in the affairs of the American continent.

It is rather instructive to contrast the behaviour of the United States and the Inter-American System vis-a-vis the League of Nations with that vis-a-vis the United Nations. It should be borne in mind that the problems the League was called upon to deal with were mainly boundary disputes involving no ideological factor.[215] The United States could afford not to obstruct the League activities even if Washington was not particularly happy that inter-American problems were being dealt with by a non-American instrumentality. The situation is understandably different in the post 1945 international system. "The world of the Charter", we have been reminded, "differs from that of the Covenant in its political physiognomy and economic and social philosophy".[216] If, as Mackenzie King pointed out in a speech before the League Assembly in 1936, "the difficulty of automatic intervention [by a peace organization] increases rather than decreases when conflicts tend to become struggles between classes, between economic systems, between social philo-

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[215] Wainhouse, International Peace Observation, (Baltimore: 1966), pp. 7, 11-82, 94-101.

[216] Jenks, The World Beyond the Charter, (1969), p. 85.

sophies and, in some instances between religious faiths",[217] then the limitation of the United Nations in the post 1945 world can be understood.

In Guatemala, as well as in Cuba and the Dominican Republic, the United States and some Latin American Republics perceived the danger as international communism's subversive challenge to and frontal assault on democratic capitalist values, and, thus, preferred resort to the regional organization which was certain to indict the alleged communist government for non-conformity to the ideological norms of the Western hemisphere society. It seems beside the point whether such a policy position implies the denial of the constitutional right of a U.N. member to have direct access to the Security Council, whether it implies a restriction and minimalist interpretation, if not outright denial of the legitimate competence of the Security Council as the primary agency for the maintenance of international peace and security, or whether the regional organization arrogates to itself competence it does not possess on a strict legal interpretation of the U.N. Charter. There is no doubt that the OAS is increasingly being transformed from "a <u>regional</u> instrument of defence to an instrument of world policy".[218]

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[217] <u>L.N.O.J.</u>, Sp. Supp. No. 155, (1936), p. 68.

[218] Castaneda, <u>Mexico and the United Nations</u>, (1958), p. 187.

7. The Warsaw Treaty Organization and the United Nations

(a) Introduction

It was suggested earlier in this study that the Soviet-led international regional organization of the socialist states of Eastern Europe combines more attributes of imperial than of voluntary regionalism.[216] The role of the Soviet army both during and after the 1939-1945 war, and the inherent nature of the communist ideology explain the client character of the relationship of many of the socialist states of Eastern Europe to Moscow. There is hardly any doubt that the Soviet Union took the Stalin-Churchill "deal" of October 9, 1944[220] seriously and continued to regard Eastern Europe as her sphere of influence.[221]

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219 See Chapter I above.

220 Churchill proposed a division of the Balkans into spheres of influence during his trip to Moscow in October 1944. Under the Churchill-Stalin "deal," Rumania and Bulgaria were to be largely Soviet spheres of preponderant influence, Greece was to be British (in accord with the United States); both powers, Britain and the Soviet Union, were to "go fifty-fifty" in Yugoslavia and Hungary. Churchill wrote in his memoirs: "Then he [Stalin] took his blue pencil and made a large tick upon it, and passed it back to us. It was all settled in no more time than it takes to set down.... After this there was a long silence. The pencilled paper lay in the centre of the table. At length I said: "Might it not be thought rather cynical if it seemed we had disposed of these issues, so fateful to millions of people, in such an offhand manner? Let us burn the paper." "No, you keep it," said Stalin. See Churchill, Triumph and Tragedy, (Boston: 1953) pp. 227-228.

221 In the Security Council debate over the distribution of non-permanent seats in the Security Council, the U.S.S.R. has usually claimed the right to nominate the East European representative. See L.C. Green, "Gentlemen's Agreements and the Security Council," C.L.P., Vol. 13, 1960, pp. 255-275; "Representation in the Security Council: A Survey," I.Y.I.A., Vol. 11, 1962, pp. 48-75.

The formation of the Warsaw Pact in 1955 was an important landmark in multilateral institution-building within the "Commonwealth of Socialist States."[222] Before 1955, international relations among the states of the socialist commonwealth were largely carried out on a bilateral basis.[223] This was especially so in the political and security field. Moscow was the kingpin of this system of bilateralism.[224]

The post Stalin Soviet leadership under Kruschchev, partly as an anti-Stalinist posture and partly as a response to the perceived danger of insipient polycentrism began a process of multilateral institutionalization

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[222] See Kurt London, "The Socialist Commonwealth of Nations," Orbis, Vol. 3, 1960, pp. 424-442. The phrase "Commonwealth of Socialist Nations" is understood to have been first used officially in 1956. It appeared in the "Declaration of the Government of the U.S.S.R. on the Basic Factors in the Development and Further Consolidation of Friendship and Cooperation among the Soviet Union and other Socialist States," a declaration issued at the height of the Hungarian crisis. See R.I.I.A., Documents on International Affairs 1956, p. 465, et seq. The Moscow Declaration embodying the Brezhnev Doctrine contains related terms like "proletarian internationalism," and "socialist community." See International Legal Materials, Vol. 7, 1968, p. 1323.

[223] See W. Kulski, "The Soviet System of Collective Security. Compared with the Western System," A.J.I.L., Vol. 44, 1950, pp. 453--72; Schapiro, "The Post War Treaties of the Soviet Union," Y.B.W.A., Vol. 4, 1950, p. 130 et seq; Harry N. Howard, "The Soviet Alliance System and the Charter of the United Nations," in Commission to Study the Organization of Peace, Regional Arrangements for Security and United Nations, (New York: 1953), pp. 65-79.

[224] Z. K. Brzezinski, The Soviet Block:Unity and Conflict, (Revised Ed., Cambridge, Mass.; 1967); K. Grzybowski, The Socialist Commonwealth of Nations:Organizations and Institutions, (New Haven; 1964).

of inter-state cooperation and integration among the socialist states. Perhaps the most important catalyst to the process of multilateral institution-building in the military sphere was the formation of the Western European Union with a remilitarized Western Germany as a member. It may be said that the Warsaw Pact, the military face of the socialist commonwealth of Eastern Europe, is largely a political and diplomatic response to the anticipated changes in the political morphology of Europe brought about by the accession of Western Germany into the military alliance of the West.[225]

Multilateral cooperation among the East European socialist states on both economic and politico-military fronts has its attendant domestic (intra-regional) problems: the problems of Soviet control and domination, of polycentrism, of balancing sovereignty and mutual interdependence in a system of political unequals, of the desirable level of integration short of amalgamation, and of the degree of freedom of action of the satellite states _vis-a-vis_ the

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225 See the Preamble to the Warsaw Pact, and Bulganin's speech to the Warsaw Conference in R.I.I.A., _Documents on International Affairs 1955_, (London: 1958), pp. 182-193. See generally Andrzej Korbonski, "The Warsaw Pact," _International Conciliation_, No. 573, May 1969; H.P. Simon, "The Warsaw Pact and East Germany-Provocation or Response?," _Queen's Quarterly_, Vol. 71, 1964, pp. 345-364.

the non-socialist world.[226] Some of these problems are of the nature of any international organization of politically unequal partners; but others are peculiar to the nature of communist organizational theory and practice.

Just as the OAS cannot be understood outside the context of the United States' hegemonial leadership, it may be similarly said that to discuss the Warsaw Treaty Organization is to discuss the Soviet Union. As the local hegemonial power, the Soviet Union cannot tolerate any deviant behaviour by any socialist state in Eastern Europe if such behaviour is perceived as undermining the integrity of the socialist system. The Kremlin never permitted Nagy to become another Tito, that is, another triumphant test case of national communism. When Nagy proclaimed a neutralist foreign policy for Hungary and declared his intention of withdrawing Hungary from the Warsaw Pact[227], he was quickly told by force of arms that Moscow reserved the right to define the

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[226] These problems are discussed in Edward M. Bennett, Polycentrism: Growing Dissidence in the Communist Bloc, (Seattle: Washington State University Press, 1967); W.E. Griffith, Albania and the Sino-Soviet Rift, (Cambridge, Mass.: M.I.T. Press, 1963); Brzezinski, The Soviet Bloc: Unity and Conflict,(1960); Walter C. Clemens Jr., "The Future of the Warsaw Pact," Orbis, Vol. 11, No. 4, 1968, pp. 996-1033; Robert S. Jaster, "The Defeat of Kruschchev's Plan to Integrate Eastern Europe," World Today, Dec. 1963, pp. 514-522.

[227] R.I.I.A., Documents on International Affairs 1956, (London: 1959), pp. 468-469-472, 474-475; Report of the Special Committee on the Problem of Hungary, G.A.O.R., 11th Sess. Supp. No. 18 (A/3592). For a concise account of the Hungarian crisis, see T. Mercy, Thirteen Days that Shook the Kremlin, (New York: Praeger, 1959); Brzezinski, op. cit., Ch. 10.

limits of tolerable diversity.[228] Liberalization was reluctantly allowed to proceed in Czechoslovakia, but when Moscow alleged that liberal reforms provided cover for counter-revolutionary forces seeking to subvert the socialist system,it acted swiftly and decisively.

From the point of view of broader international relations, especially of socialist and non-socialist relations, the emergence of multilateral cooperation and the explicit formulation of legal norms regulating inter-state relations among the socialist states pose two related problems. One is the nature of socialist international law and the relationship to general international law.[229] The other, to be examined shortly, is the relationship of the Warsaw Pact to the UN Charter and the interpretation of the law of universal-regional relationship in the light of the activities of the Warsaw Treaty Organization.

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[228]Schwarzenberger, "Hegemonial Intervention," Y.B.W.A., Vol. 13, 1959, pp. 236-265; L.C. Green, "The Double Standard of the United Nations," Y.B.W.A., Vol. 11, 1957, pp. 104-137; J. E. Fawcett, "Intervention in International Law: A Case Study of Some Recent Cases," Hague Recueil, Vol. 103 1961 (II), pp. 348-421.

[229] See Bernard Ramundo, The Socialist Theory of International Law, (Washington, D.C., 1964); Academy of Sciences of the U.S.S.R. Institute of State and Law, International Law, (Moscow: n.d. (1961?), pp. 20-22, 71-88; J. N. Hazard, "Soviet Socialism as a Public Order System," Proceedings, A.S.I.L., 1959, p. 30 et seq.; Lissityzn, International Law Today and Tomorrow, (1965); Tunkin, "Co-existence and International Law," Hague Recueil, Vol. 95, 1958 (III), pp. 1-81; Grzybowski, The Socialist Commonwealth of Nations: Organizations and Institutions, (1964), pp. 246 et seq.; H. W. Baade (ed.), The Soviet Impact on International Law, (New York: Oceana, 1965).

2. The Warsaw Pact and the U.N. Charter

In relation to the U.N. Charter, the Warsaw Pact is a collective defence organization explicitly invoking the right of self-defence under Article 51. The preamble to the Treaty indicates that the defence agreement is directed against an external European aggressor state; moreover, Article 4 which formulates the *casus foederis* appears to exclude the interpretation that the Treaty created a regional organization for the maintenance of "internal" peace. The "external" orientation of the Warsaw Pact did not escape the attention of the Western Powers at the time the Security Council was considering Soviet armed intervention in Hungary in 1956. On that occasion, France, Britain, Cuba and Peru argued that, as the Warsaw Pact is directed against an extra-regional attack, it could not lawfully be used against a signatory state, and, hence, the Soviet obligation to help any signatory including Hungary in case of an armed attack referred to attack coming from outside the region.[230] This is not the place to examine the merit of this claim in the context of the Hungarian crisis. It suffices to make the point that while the Warsaw Pact sees its role as the defence of the treaty area against external attack rather than as a machinery for maintaining regional peace, there is no reason why, at the legitimate request of a member state, the regional organization cannot be used to maintain peace in a member

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[230] U.N. Doc. S/PV. 746, (October 28, 1956), para. 79, 90, 108, 116.

State.[231]

It is true that the Warsaw Pact does not establish machinery for pacific settlement of disputes among its members, and in the light of the Soviet critique[232] of the North Atlantic Treaty, members of the Warsaw Pact will be the first to admit that the Pact is neither intended nor equipped to operate under Articles 52-54 of the U.N. Charter. As we have emphasized before, there is no legal prohibition against a collective self-defence organization being used for any function provided that the rules of behaviour the Charter prescribed for the performance of that function are scrupulously complied with, and that the regional organization operates in accordance with the purposes and principles of the U.N. Charter.

A final point of interest about the Warsaw Pact should be noted. Like NATO, the Warsaw Treaty Organization has an integrated command.[233] The Warsaw Pact envisages consultation on "all important international questions involving

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[231] In November 1965, the United Kingdom, whose self-governing colony of Rhodesia made a unilateral declaration of independence, asked the Security Council to consider the situation. U.N. Doc. S/6896 (11 Nov. 1965); Ralph Zacklin, "Challenge of Rhodesia: Toward an International Public Policy," International Conciliation, No. 575, Nov. 1969; L. C. Green "Southern Rhodesian Independence," Archiv des Volkerrechts,. Vol. 14, No. 2, 1969, pp. 156-191.

[232] United Nations Bulletin, Vol. 6, 1949, p. 410; R.I.I.A., Documents on International Affairs 1949-1950, pp. 14-33.

[233] Art. 5; Andrzej Korbonski, "The Warsaw Pact," International Conciliation, No. 573, May 1969. Grzybowski, op.cit., pp. 177-190; Brzezinski, "Organization of the Communist Camp," World Politics, Vol. 13, 1961.

their common interests, with a view to strengthening international peace and security."[234] This seems to suggest that a common diplomatic front vis-a-vis the non-socialist world is envisaged.[235] It should be further noted that the Pact considers itself "open for accession by other States, irrespective of their social and political structure,"[236] and declares itself redundant "as from the date on which the General European Treaty comes into force."[237]

3. The Czechoslovak Crisis (1968)

> [A] The proposition that the Soviet-led invasion of Czechoslovakia is a matter that concerns only the Czechoslovak people and the states of the socialist comminity which are bound by appropriate mutual obligations.

(a) Introduction

The corollary of the above proposition is that the United Nations whose organ, the Security Council, has primary responsibility for international peace and security,

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[234] Art. 3; Manfred Lachs, "Le Traite de Varsovie du 14 Mai 1955", A.F.D.I., Vol. I, 1955, pp. 120-122.

[235] The Soviet bloc has operated with a greater degree of cohesion than any other groups of states in the United Nations. See Thomas Hovet, Jr., Bloc Politics in the United Nations, (Cambridge, Mass.: 1960), pp. 47-55; Alker and Russett, World Politics in the General Assembly, (New Haven: 1965), pp. 255-256; H. G. Nicholas, The United Nations As a Political Institution, (3rd Ed. London: 1967), p. 125.

[236] Art. 9.

[237] Art. 11.

is not competent to deal with situations, disputes and cases of aggression that may arise within the socialist commonwealth of nations in Eastern Europe. We propose to examine the Czechoslovak crisis and assess its impact on the law of universal-regional relationship.

The Czechoslovak crisis is a good illustration of the inherent tension between the concept of international duty of socialist states[238] and the principle of national sovereignty which has been the hall-mark of traditional international law. It is also a good illustration of the break down of the Charter law of universal-regional relationship. Events leading to the head-on clash between Czechoslovakia and the Soviet-led Warsaw Pact do not need detailing here.[239] It is sufficient to emphasize that the Soviet Union and its allies firmly believe in what may be called a Soviet Monroe Doctrine multilaterally formulated and applicable to Eastern Europe. The July 15 Warsaw Letter formulated the doctrine explicitly in the following words:

> The frontiers of the socialist world have shifted to the center of Europe, to the Elbe and the Bohemian Forest. And never will we consent to allow these historical gains of socialism and the independence and security of all our peoples be

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[238] For the text of the Brezhnev Doctrine emphasizing the international duty of socialist states at the expense of their sovereignty, see International Legal Materials, Vol. 7, 1968, p. 1323.

[239] See "Chronology of Czechoslovak-Soviet Confrontation, July/August 1968," World Today, Sept. 1968, p. 357 et seq., A. G. Mezerik (ed.), "Invasion and Occupation of Czechoslovakia and the U.N.," International Review Service, Vol. 14, No. 100, 1968.

> jeopardized. Never will we consent to allow imperialism, by peaceful or non-peaceful means from within or without, to make a breach in the socialist system and change the balance of power in Europe in its favor.[240]

There is, furthermore, no doubt that the Soviet Union and its allies were not prepared to see Czechoslovakia become an untrustworthy and reluctant ally. The geographical situation of Czechoslovakia is of acute strategic significance to the security of the Soviet Union, being contiguous with West Germany. Given the fact that the search for security has been the central theme of Russian and Soviet foreign policy[241] and that the Russian Czars and the post 1917 communist leaders have always been acutely sensitive to the vulnerability of their western frontiers,[242] it was not likely the Soviet Union would permit Czechoslovakia to become a security risk if the Soviet leaders had reasons to believe that was the case.

(b) International Law and the Czechoslovak Crisis

Czechoslovakia was invaded by the military forces of the Warsaw Pact members (except Rumania) on August 20, 1968.

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[240] International Legal Materials, Vol. 7, 1968, p. 1265.

[241] See, for instance, Louis J. Halle, The Cold War As History, (London: 1967), Ch. 2.

[242] For an empirical analysis of legal, economic and political interests resulting from the fact of geographical contiguity, see Quincy Wright, "Territorial Propinquity," A.J.I.L., Vol. 12, 1918, pp. 519-561.

The *Tass* statement announcing the invasion made two important claims. The first is that the Warsaw Pact forces were requested by certain "party and government leaders of the Czechoslovak Socialist Republic."[243] It should be noted that Soviet intervention in Hungary in 1956 was defended on similar grounds,[244] a claim which a U.N. Committee was unable to confirm.[245] The second claim in 1968 was that the decision to invade was "fully in accord with the right of states to individual and collective self-defence envisaged in treaties of alliance concluded between the fraternal socialist countries."[246] The second claim is independent of the first.

With respect to the first claim, it is sufficient to point out that the Praesidium of the Czechoslovak Communist Party Central Committee, in its first statement to the nation on August 21, declared that the invasion took place "without the knowledge of the President of the Republic, the Chairman of the National Assembly, the Premier, or the First Secretary of the Czechoslovak Communist Party Central Committee."[247]

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[243] *International Legal Materials*, Vol. 7, 1968, pp. 1283-1284.

[244] U.N. Doc. S/PV. 746, (Oct. 28, 1956), para. 20, 156; S/PV. 754, (Nov. 4, 1956), para. 53.

[245] Report of the Special Committee on the Problem of Hungary, *G.A.O.R.*, 11th Sess. Supp. No. 18 (A/3592), para. 263.

[246] *International Legal Materials*, Vol. 7, 1968, pp. 1283-1284.

[247] *Ibid.*, p. 1285. See also U.N. Doc. S/8765.

As the Warsaw Pact Forces were not invited by the duly constituted legal authorities, the former's presence in Czechoslovakia was, in the very words of the Czechoslovak Praesidium, "contrary not only to the fundamental principles of relations between socialist states but also contrary to the principles of international law."[248]

The second claim cannot be easily dismissed. As the legal authorities in Czechoslovakia did not consider that there existed a threat to the security of their state from what has been called counter-revolutionary forces, and as they asked neither for consultation nor for assistance in accordance with Articles 3 and 4 of the Warsaw Pact, it may be assumed that the Soviet Union and its allies, by invading Czechoslovakia, were acting in their own self-defence and not in the self-defence of Czechoslovakia. It may be objected that such a distinction is not necessary in view of the fact that the language of Articles 3 and 4 suggests that a threat of attack or actual attack against a signatory state is considered as justifying "joint measures necessary to restore and maintain international peace and security." It is suggested that such a distinction be kept for two reasons. First it is doubtful whether the obligation to render assistance

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[248] International Legal Materials, Vol. 7, 1968, p. 1285. According to the Warsaw Pact, inter-state relationship is based on the principle of "respect for each other's independence and sovereignty and non-intervention in each other's domestic affairs." (Art. 8).

to a victim state exists independently of an express request for assistance from the victim state.[249] This was probably why the Tass statement emphasized the alleged invitation from the Prague Government. Second, it is rather difficult to understand why, in the Czechoslovak case, as in that of Hungary in 1956, the victim of collective self-defence action by the Warsaw Pact members should have been the independent personality of a state purportedly being protected from an imminent threat of counter-revolutionary forces.

Military intervention to protect an important power frontier considered necessary for the security of a state or a group of states can possibly be defended under the right of self-defence. Consider now the second claim that action taken by the Warsaw Pact members was in self-defence. The Warsaw Pact members, like any U.N. member, are each competent to define the circumstances justifying the exercise of the right of self-defence. There is, thus, room for the contention that counter-revolution instigated by "Western" powers against "socialist" gains in a strategic state of Czechoslovakia opens the Soviet Union and its allies to threats of aggression and aggressive attack from the "hostile" and "capitalist" states of the West.[249a]

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[249] See generally, Boutros-Ghali, Contribution a une theorie generale des Alliances, (Paris: 1963), p. 67 et. seq.; Daniel Vignes, "La Place des Pactes de Defense dans la Societe internationale actuelle", A.F.D.I., Vol. 5, 1959, pp. 64-65.

[249a] See R. Goodman, "The Invasion of Czechoslovakia: 1968", International Lawyer, Vol. 4, No. 1. October, 1969, pp. 42-79. A similar argument was used in 1956 by the Soviet Union. See U.N. Doc. S/PV. 754 (Nov. 4, 1956), para. 53.

In view of the fact that self-defence of the Soviet Union and of her allies might be involved in the alleged activities of "anti-socialist" forces in Czechoslovakia,[250] and as self-defence may require specific action, it is possible to defend the Warsaw Pact action as an act of self-defence. This argument may be objected to on the ground that the means used were not proportional to the alleged threat; it may not be objected to on the ground that an "armed attack" has not yet occurred if only because the formulation of Article 51 of the U.N. Charter does not exclude the exercise of the right of anticipatory self-defence.[251] The contention may be objected to on the ground that the Warsaw Pact contemplates resort to collective action against an armed attack by "any State or a group of States"; it may not be objected to on the ground that the Security of the Soviet Union and its allies, was not involved in the fate of Czechoslovakia, geographically contiguous, as it is, to West Germany. It is possible to argue that this interpretation makes the line between aggressive and self-defensive use of force rather thin;[251a] but it can also be said that without it the right of anticipatory self-defence will

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[250] Editorial, "In Defence of Socialism and Peace," International Affairs (Moscow), September 1968, pp. 3-6.

[251] See Chapter IV above.

[251a] Georges Fischer, "Quelques problemes juridiques decoulant de l'Affaire Tchecoslovaque", A. F. D. I., Vol.14, 1968, pp. 15-42.

be devoid of meaning. The legal issue is not so much whether the Soviet Union and its allies were acting in self-defence in so far as the right of self-defence is auto-definable as whether the Soviet and Hungarian attempt to exclude the United Nations from dealing with a situation disturbing international peace and security was justifiable under the law of the Charter. It should be remembered that the inherent right of self-defence is available to States only on a temporary basis, "until the Security Council has taken measures necessary to maintain international peace and security," and that it does not "in any way affect the authority and responsibility of the Security Council ... to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

(c) The Security Council and the Czechoslovak Crisis

The Security Council convened on August 21, 1968 at the request of the Western powers led by the United States.[252] In his letter to the Security Council President, the Soviet Representative, Malik, vigorously opposed the consideration of the matter because, according to him, "events in Czechoslovakia are a matter that concerns the Czechoslovak people and the States of the socialist community, which are bound by appropriate mutual obligations."[253] This view was to be

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[252] U.N. Doc. S/8758; Text in International Legal Materials, Vol. 7, 1968, p. 1287.

[253] U.N. Doc. S/8759; Text in International Legal Materials, Vol. 7, 1968, pp. 1288-1289.

repeated many more times in the course of the Security Council debate.[254] This view is by no means new in United Nations' history. Just as in the Guatemalan, Cuban and Dominican crises the Western and Latin American powers, led by the United States, were determined to exclude the Security Council of which the U.S.S.R. is a permanent member from dealing with intra-Western hemisphere issues,[255] the Soviet Union in 1968, as well as in 1956, was not prepared to recognize the competence of the Security Council if only because it would have permitted the United States and Western powers to "intervene" in what the Kremlin considers its sphere of influence. There is no gainsaying the fact that any attempt to exclude the United Nations from considering the situation ignores the fact that Czechoslovakia is a member of the United Nations, that the United Nations is competent, both by right and duty, to deal with acts of military aggression and with other situations threatening international peace, and above all, that the legal representative of the victim of invasion had requested invitation to participate in the deliberations of the Security Council.[256] The Soviet representative chose to ignore these facts not out of ignorance but out of convenience; for in 1954, as well as in 1960 and 1965, it was the Soviet Union championing the right of the

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[254] U.N. Monthly Chronicle, Vol. 5, No. 8, Aug.- Sept., 1968, p. 35 *et seq*.

[255] See above.

[256] U.N. Doc. S/8760.

Security Council to deal with any acts of aggression committed anywhere in the world,[257] and condemning the United States and the U.S.-dominated OAS for attempting to usurp the special competence of the Security Council.

In its determination to prevent "Western" powers from "interfering" in Eastern European affairs, the U.S.S.R. found it necessary to question the competence and jurisdiction of the Security Council of which the United States, Britain and France are permanent members. While the Soviet and Hungarian "vetoes" could not prevent the adoption of the agenda, the Soviet veto effectively killed an eight-power draft resolution condemning the invasion and demanding the withdrawal of the interventionist forces.[258] The Soviet veto, thus, shut off the United Nations from dealing with a case of armed invasion of a member state. For any of the five permanent member of the Security Council, the Charter permits a paradoxical behaviour. A permanent member of the Security Council can exercise a legal veto in the Council in order to frustrate the legitimate Council attempt to review her action

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[257] It should be further noted that the Soviet Foreign Minister, Andrei Gromyko, speaking before the 22nd Session of the General Assembly in 1967, said: "It is the _duty_ of the United Nations to curb all manifestations of the policy of aggression in _all regions_ of the world." See U.N. _Monthly Chronicle_, Vol. 4, No. 9, Oct. 1967, p. 49. (Emphasis added).

[258] Cmnd. 3757, _Security Council Proceedings on Czechoslovakia, 21-23 August 1968_, (London: H.M.S.O., 1968), p. 3; U.N. _Monthly Chronicle_, Vol. 5, No. 8, 1968, p. 35.

outside the Council. This is the implication of Article 27 (3) and of the freedom of states to base their votes on any considerations.

In order "to make it clear to the world that the Communist governments have no special immunity from the requirement of the Charter,"[259] the Western powers further attempted to sponsor a U.N. presence in Prague. The Soviet Representative saw this proposal as a trick "to drag the Secretary-General of the United Nations into a dirty business of intervening in the affairs of a socialist State and in the common cause of fraternal socialist countries,"[260] and declared that this would not succeed. In the language of Security Council diplomacy, this amounts to a warning that the Soviet Union would veto the proposal. Ambassadors Lodge and Stevenson of the United States had behaved in similar manner in the Guatemalan and Dominican crisis, although in the latter crisis, the United States did reluctantly permit a U.N. presence in Santo Domingo.

It may legitimately be asked what legal argument was invoked by the Soviet Union and Hungary in support of the thesis that Czechoslovakia was not a matter proper for

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[259] U.N. Monthly Chronicle Vol. 5, No. 8, 1968, p. 50; U.S. Dept. of State, Bulletin, Vol. 59, No. 1524, Sept. 9, 1968, p. 269.

[260] U. N. Monthly Chronicle, Vol. 5, No. 8, 1968, p. 64.

Security Council consideration. Like Sobolev in 1956,[261] Malik sought legal support for his argument in Article 2 (7). While using legal argument different from that used by the U. S. representatives, Malik was playing a role similar to that played by Lodge in 1954 and Stevenson in 1965. Malik asked:

> But what does all this have to do with the Security Council and with the United States representative here? What relation can the Council have to the internal affairs of Czechoslovakia, what interest in them? The answer to this is to be found in the Charter of the United Nations, Article 2, paragraph 7, and that answer, the only one, is that the Security Council has nothing to do with the internal affairs of Czechoslovakia and the processes going on there. It was not fortuitous that the representative of Czechoslovakia ... did not ask the Council to intervene in the internal affairs of his country. These problems can be settled by the Czechoslovak people and Party and the sound forces in that country, with the support of the fraternal socialist States, and without the participation of the Security Council.[262]

Because this argument is too glaringly false in the Czechoslovak context -- Article 2 (7) does not limit the competence of the Security Council if there is a possibility of action under Chapter VII of the U.N. Charter[263] -- it is not necessary to comment upon it any further than to cite Lord Caradon's effective rebuttal. The British representative thought it

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[261] U. N. Doc. S/PV. 74-6, para. 13.

[262] Cited in International Review Service, Vol. 14, No. 100, 1968, p. 32.

[263] Kelsen, The Law of the United Nations, (1964), p. 786; M. S. Rajan, United Nations and Domestic Jurisdiction, (2nd Ed. London: 1961), pp. 93-97; Bowett, United Nations Forces: A Legal Study, (1964), pp. 196-200, 282-3.

"the height of impudence for the representative of the Soviet Union, after the invasion for which his country was responsible, to lecture the Council about Article 2, Section 7 of the United Nations dealing with the right of any people to maintain their own sovereignty and to order their own life."[264]

4. Concluding Comments

In conclusion the following observation can be made. The claim that the Czechoslovak situation was a "regional" matter for the socialist countries of Eastern Europe and the corollary claim that the United Nations has no jurisdiction to deal with the situation have no foundation whatsoever under the United Nations Charter. In a situation involving a great power like the Soviet Union, the law of the United Nations becomes, as it was intended to become, of secondary importance. The Soviet Union was doing nothing more than following the previous example of the United States. It was nevertheless an example which represents a distorted interpretation of the Charter law of universal-regional relationship. While the action of the Warsaw Pact members could conceivably be defended on the ground of self-defence one must express regret that the attempt of the Security Council to review that action and deal with the situation was effectively stopped. It is further regrettable that the Warsaw Treaty Organization, while purportedly operating

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[264] U. N. Monthly Chronicle, V ol. 5, No. 8, 1968, p. 48.

under the behavioural rules of Article 51 of the United Nations Charter, failed to report measures taken to the Security Council. It should be noted that, whereas in 1956, the Western powers responded to the exercise of the Soviet veto by transferring the Hungarian situation to the General Assembly under the "Uniting for Peace" formula,[265] no such procedure was resorted to in 1968. The simple explanation is that in 1956 the action of the General Assembly was abortive, and there was no reason to believe that such procedure would be productive in 1968.

8. The Organization of African Unity and the United Nations

1. Introduction

The politics of African unity and that of anti-colonialism must be recognized as the two sides of the same coin. Historically, Pan-Africanism draws its primary driving force from the opposition of African nationalist leaders to the political and economic subjugation of Africa by European powers.[266] While the strategy of African unification

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[265] See Chapter V above.

[266] See generally, George Padmore (ed.), History of the Pan African Congress, (London: William Morris House, 1947): Pan-Africanism or Communism: The Coming Struggle for Africa, (New York: Roy Publishers, 1956); Colin Legum, Pan Africanism: A Short Political Guide, (Revised Edition, New York; Praeger, 1962); Kwame Nkrumah, Africa Must Unite, (London: Heinmann, 1963); I Speak of Freedom, (London: Heinmann, 1961).

and the particular form the continental organization should take for a long time divided the "radical" Casablanca from the "moderate" Monrovia powers,[267] both found common unity of commitment in their opposition to colonialism in all its manifestations.

Drafted in 1963, the OAU Charter is a living symbol of an institutionalized continental opposition to colonialism. It is certainly correct to describe the AOU Charter as "a charter of liberation"[268] -- liberation from colonialism and neo-colonialism.[269] After committing themselves to the total emanicipation of dependent African territories and to the eradication of all forms of colonialism from Africa, the OAU

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[267] For a discussion of the ideological schism within the Pan-African movement between 1958 and 1963, see Legum, op. cit., Ch. 3, 4; Doudou Thiam, The Foreign Policy of African States, (London: Phoenix House, 1965), p. 43 et seq. Compare Nkrumah's works (already cited) with those of the Nigerian leaders, for example, Nnamdi Azikiwe, Zik: Selected Speeches of Nnamdi Azikiwe, (Cambridge: Cambridge University Press, 1961), p. 72; Obafemi Awolowo, Awo - The Autobiography of Chief Obafemi Awolowo, (Cambridge: Cambridge University Press, 1960), pp. 310-312; Sir Ahmadu Bello, My Life: The Autobiography of Sir Ahmadu Bello, Sardauna of Sokoto, (Cambridge: Cambridge University Press, 1962), p. 234.

[268] See C.J.R. 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," I.C.L.Q., Vol. 16, 1967, pp. 157-190 at p. 158.

[269] The Third All-African Peoples' Conference held in Cairo in March 1961 defined neo-colonialism as "the survival of the Colonial system in spite of formal recognition of political independence in emerging countries ..." See Colin Legum, op. cit., p. 272.

members, in a well-known Resolution on Decolonization, established.

> (a) A coordinating committee consisting of Ethiopia, Algeria, Uganda, U.A.R., Tanganyika, Congo-Leopoldville, Guinea, Senegal, and Nigeria, with headquarters in Dar es Salaam, responsible for harmonizing the assistance from African States and for managing the special fund to be set up for that purpose;
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> (b) A special fund to be contributed by member states ... to supply the necessary practical and financial aid to the various African national liberation movements.[270]

The Addis Ababa Resolution on Decolonization considered it "the duty of all African independent states to support dependent peoples of Africa in their struggle for freedom and independence." It should be pointed out that while the Resolution stops short of an explicit endorsement of the use of force, there is no doubt that the use of force was contemplated. What do the terms "assistance," and "the necessary practical and financial aid" mean? The members of the Liberation Committee left no one in doubt that the use of force against regimes in Africa which deny the right of self-determination to their African majority was implied in the Resolution. On the eve of the inaugural meeting of the Liberation Committee in Dar es Salaam, the Egyptian delegate, Mohamed Fayek, was quoted as saying: "We shall decide on ways of sending to the [liberation] movements in the colonial

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[270] Organization of African Unity, Basic Documents of the Organization of African Unity, (Addis Ababa, Provisional Secretariat of the OAU, 1963), p. 18.

territories the material aid and armaments .... We shall also have to make decisions on military training for fighting members and on the place where this training is to be carried out."[271] When asked whether all means included armed aggression, the first Chairman of the Liberation Committee, Oscar Kambona of Tanzania, replied: "We mean all means. What did Britain do when she failed to make Hitler see reason?"[272] We know that Britain resorted to war. The use of force to liquidate colonial regimes is apparently not considered illegal by many African states. The use of force in this instance is considered a form of self-defence. We shall return to this claim later.

A description of the activities of the Liberation Committee is not our concern here.[273] Our purpose is to consider the implication and validity of the claim that it is legitimate to resort to the use of force to liquidate colonialism. It has been pointed out that, under the UN Charter, the use of force is legal only in three instances: the use of force in self-defence, the use of force by the major powers against the enemy states, and the use of force by the

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[271] Cited in Africa, South of the Sahara, A.F.P., No. 979, June 27, 1963, p. 11.

[272] Cited in Africa South of the Sahara, A.F.P., No. 982, July 8, 1963, p. 1. (Emphasis added).

[273] See, for instance, Immanuel Wallerstein, Africa: The Politics of Unity, (New York, Random House, 1967), Ch. 9.

Security Council to restore and maintain international peace and security.[274]

Since the activities of the Liberation Committee cannot be characterized as <u>both</u> collective self-defence <u>and</u> enforcement action -- the U.N. Charter recognizes a fundamental distinction between both -- what is required is either the argument that the activities of the OAU's Liberation Committee are <u>not</u> enforcement action because they are in self-defence or that they are enforcement measures because they <u>cannot</u> be in self-defence. The representatives of African States in the United Nations have usually justified the use of force against colonial regimes directly or indirectly as a legitimate form of self-defensive action. They argue that colonialism is, to paraphrase Krishna Menon of India, permanent aggression, and that, in defending the right of self-determination, they are defending a principle of contemporary international law.[275]

Our discussion will be organized around three sets of interrelated questions: (1) Is self-determination a principle of international law? Are resolutions of the General Assembly on human rights and de-colonization legally binding? (ii) Is colonialism a form of aggression? Does the use of force against colonial regimes constitute an act of self-

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274 See Chapters IV and VI.

275 See below.

defence within the context of the U.N. Charter? (iii) Is the use of illegal means by a regional organization to carry out a purpose of the United Nations which the latter organization has been unable to fulfil because of the vested interests of some of its politically important members culpable?

2. The OAU and the Use of Force

[A] The claim that self-determination has become a principle of modern international law.[276]

The view that self-determination is a political right, and that customary international law does not recognize it as a legal right has a respectable intellectual support.[277] It is also true to say that neither the League Covenant nor the United Nations Charter is the place to find self-determination recognized as a legal right. No one can read Article 22 of the League Covenant and conclude that self-determination has become a right under international law.[278] The U.N. Charter, it is true, makes references to the "principle" of self-determination. According to Article 1 (2), one of the four purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle

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276 Brownlie, Principles of Public International Law, (Oxford: 1966), p. 484; M.K. Nawaz, "The Meaning and Range of the Principle of Self-Determination," Duke Law Journal, No. 1, 1965, pp. 82-101. Lachs, "The Law in and of the United Nations," I.J.I.L., Vol. 1, 1961, pp. 429-442.

277 M. Whiteman, Digest of International Law, Vol. 5, pp. 38-86.

278 Hans Kelsen, "Legal Technique in International Law: A textual Critique of the League Covenant," Geneva Studies, Vol. 10, No. 6, Dec. 1939, p. 157.

of equal rights and self-determination of peoples." Article 55 which has no legal or even political significance, indicates that "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations [is] based on respect for the principle of equal rights and self-determination of peoples." One should not be misled by the terminology employed in the formulation of Article 1 (2). Using the language of democratic ideology, the Charter appears to have defined "states" as "nations" or "peoples," and "independence" as "self-determination." Thus, self-determination of peoples in Article 1 (2) appears equivalent to sovereignty of states.[279] These two references cannot be considered to have given rise to a legal right to self-determination,[280] although "[a]ny construction of the Charter according to which members of the United Nations are, in law, entitled to disregard -- and violate -- human rights and fundamental freedoms is destructive

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[279] Kelsen, The Law of the United Nations, pp. 50-53.

[280] See Alf Ross, Constitution of the United Nations, (1950), p. 135; R. Higgins, The Development of International Law Through the Political Organs of the United Nations, (1963), p. 90 et seq.; Kelsen, The Law of the United Nations, (1964), p. 27 et seq.; Raghubir, Human Rights and the United Nations, (Calcutta: Progressive Publishers, 1958), p. 104 et seq.; M. A. Shukri, The Concept of Self-Determination in the United Nations, (Damascus: Al Jadidah Press, 1965), p. 43 et seq.; N. Bentwich and A. Martin, Commentary on the Charter of the United Nations, (London: 1969), p. 7.

of both the legal and the moral authority of the Charter as a whole."[281] It should be remembered that treaties are always drawn up by those in existence at the time and, more importantly, in the light of their own interests. In 1945, as well as in 1919, the colonial powers were judges in their own case, and what else could one expect from those colonial powers who were at that time reluctant, if not outrightly unwilling, to preside over the liquidation of their overseas empires. It is, therefore, not enough merely to deny that the U.N. Charter recognizes a legal right to self-determination; it is important and relevant to add why this was the case in 1945.

Neither classical international law nor the international constitutional law of the League of Nations and of the United Nations supports the contention that self-determination has become a principle of modern international law. Can the same be said of the practice of the United Nations? This is not the place to survey the activities of the United Nations in the field of de-colonization, and especially the various resolutions and declarations of the General Assembly dealing with fundamental human rights and self-determination.[282] An appraisal of the argument that

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[281] H. Lauterpacht, International Law and Human Rights, (London: Stevens, 1950), p. 149.

[282] See for instance, Whiteman, Digest of International Law, Vol. 13, (1968), p. 679 et seq.; Johnson, Self-Determination Within the Community of Nations, (Leyden: 1967), pp. 34-58; R. J. Barros, African States and the United Nations Versus Apartheid, (New York: Carlton Press, 1967); C.J.R. Dugard, "Legal Effects of United Nations Resolutions on Apartheid," South African Law Journal, Vol. 83, 1966, pp. 44-59.

the practice, resolutions and declarations of the United Nations in the field of de-colonization have transformed self-determination into a legal right[283] calls for a critical analysis of the legal nature of the resolutions and declarations of the General Assembly in the field that is of immediate relevance to us in this study -- self-determination. It may be asked whether these resolutions and declarations on colonialism achieve what the U.N. Charter never contemplated, that is, do they provide ample justification for the claim that self-determination has become a principle of contemporary international law? The question is pertinent in view of the preposterous assertion that "[t]he principle of self-determination is well established in the United Nations doctrine and practice, as the principle that the use of force is prohibited in the resolution of disputes between states."[284]

There seems to be a consensus of legal opinion around the view that except in a few instances, namely, budgeting,

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[283] G. Osnitskaya, "The Downfall of Colonialism and International Law," International Affairs (Moscow), January 1961, p. 39; Nawaz, "The Meaning and Range of the Principle of Self-Determination," Duke Law Journal, No. 1, 1965, pp. 82-101; Higgins, The Development of International Law Through the Political Organs of the United Nations, pp. 90-106; Brownlie, Principles of Public International Law, (1960), pp. 482-485.

[284] The Ambassador, "Future United Nations in the Maintenance of International Peace and Security," in R. N. Swift (ed.), Annual Review of United Nations Affairs, 1965-1966, (1967), pp. 117-118.

appointment of the Secretary-General, admission, suspension and expulsion of members,[285] the powers of the General Assembly are recommendatory. This being so, resolutions of the General Assembly outside the limited areas mentioned above do not constitute legally binding obligations on member States.[286] Legal scholars usually emphasize, however, that, while General Assembly resolutions are not binding per se, they do possess legal values and effects.[287] As Judge Lauterpacht put it in 1955: "International interest demands that no juridical support, however

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[285] U. N. Charter, Articles 4 (2), 17, 97.

[286] Higgins, op. cit., p. 5; Sloan, "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations," B.Y.B.I.L., Vol. 25, 1948, pp. 1-33; Dugard, "Legal Effects of United Nations Resolutions on Apartheid," South African Law Journal, Vol. LXXXIII, 1966, pp. 44-59; Johnson, "The Effect of Resolutions of the General Assembly of the United Nations," B.Y.B.I.L., Vol. 32, 1955-1956, pp. 97-122 Vallat, "The Competence of the United Nations General Assembly," Hague Recueil, Vol. 97, 1959, p. 203; F. S. Northedge, "The Authority of the United Nations General Assembly," International Relations (London), Vol. 1, No. 8, Oct. 1957, pp. 349-361, 376. Louis Henkin, How Nations Behave: Law and Foreign Policy, (N.Y. Praeger, (1968), p. 164 et seq.; G.I. Tunkin, Droit International Public: Problemes Theoriques, (Paris; 1965), p. 101 et seq.

[287] Leo Gross, "The Role of International Law in World Order," World Peace Through World Law, (Edmonton, 1964), pp. 13-14; Obed Y. Asamoah, The Legal Significance of the Declaration of the General Assembly of the United Nations, (The Hague, Martinus Nijhoff, 1966), p. 6; Separate Opinion of Judge Lauterpacht on Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa. (Advisory Opinion of June 7th, 1955), I.C.J. Reports, 1955, p. 67 at pp. 90-123, especially pp. 115-120.

indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence."[288]

The assertion by the new African States that the right of self-determination has become a principle of modern international law seems to be based on the tendency of post 1945 international politics to take an anti-colonial direction. This point of view, however, ignores the importance of state practice and acceptance of declarations and resolutions in the evolution of any rule of international law. The extent to which resolutions and declarations are in fact observed by states is of greater importance than the votes in support of a particular resolution or the phraseology of a specific declaration. It should be noted that the major colonial powers abstained from voting on the Declaration on Colonialism[289] and have been behaving as if the 1960 Declaration is of no consequence.[290] Thus, while one cannot deny that the principle of self-determination has become a very powerful political force in contemporary international politics, it is doubtful whether one

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[288] I.C.J. Reports, 1955, p. 67, at p. 122.

[289] Text in Brownlie (ed.), Basic Documents in International Law, (Oxford: Clarendon Press, 1967), pp. 176-177.

[290] See, for instance, Introduction to the Annual Report of the Secretary-General on the Work of the Organization, June 16, 1966 - June 15, 1967 in U.N. Monthly Chronicle, Vol. 4, No. 9, 1967, pp. 122-123; Franco Nogueira, The United Nations and Portugal, (London: Sidwick and Jackson, 1963); Patricia Wohlgemuth, "The Portuguese Territories and the United Nations," International Conciliation, No. 545, Nov. 1963.

can deduce from this the existence of a legal obligation to de-colonize. To express doubt on the proposition that self-determination has become a recognized modern principle of international law is not to accept the view that a member of the United Nations is entitled to simply ignore an overwhelmingly approved resolution of the General Assembly. Article 2 (2) of the U. N. Charter is a powerful limitation on the discretion of members of the U.N. to refuse compliance with the resolution on decolonization or any other resolution of the General Assembly.

[B] The proposition that colonialism is permanent aggression and that there does exist a legitimate right of self-defence against colonialism in the exercise of the right of self-determination.

The alleged relationship between colonialism, aggression and self-defence has been asserted on many occasions by the Afro-Asian and Soviet-bloc members of the United Nations.[291] Before this relationship is examined, it is necessary to comment on the traditional view of colonialism. Our first remark is that, strictly speaking, the situation in South Africa and Rhodesia is not now a "colonial" situation. Under a "colonial" system, the "overseas" ruler has usually been represented in the colony by a handful of people who regard the mother country as "home." South Africa and Rhodesia, on the contrary, are governed by people who have no other "home."

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[291] See the 1964 and 1966 Report of the U.N. Special Committee on the Principles of International Law concerning Friendly Relations and Cooperation among States, U.N. Doc. A/5746, 16 Nov. 1964; A/6230, 27 June 1966.

It is, therefore, essential to avoid an unnecessary confusion between colonialism and a governmental system which puts a minority of people in an especially privileged position and which refuses to recognize, let alone apply, the principle of "one-man-one-vote." Second, traditional international law defends the colonial system not only by recognizing the legal claims of the metropolitan power over its colonies[292] but also by considering interference by another state in the affairs of the colony as violating the sovereignty of the imperial power. For a long time, the relationship between a colonial power and its colonies has been strictly a "domestic" matter governed by the laws of the metropolitan power. It follows that "colonial" wars have always had the character of "domestic" strife. A metropolitan "white" State resorting to the use of force against "non-white" majorities in its overseas colony is not considered as committing any act of aggression although it may, in the process incur world opprobrium for an inhuman treatment of its subject peoples. This traditional view of colonialism has come under heavy attack by the Soviet[293] and the new States

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[292] S. McCalmont Hill, "The Growth and Development of International Law in Africa," Law Quarterly Review, Vol. 16, 1900, pp. 249-268; C. H. Alexandrowicz, "The Afro-Asian World and the Law of Nations (Historical Aspects)" Hague Recueil, Vol. 123, 1968, (1), Part II, p. 169 et seq.

[293] G. Osnitskaya, "The Downfall of Colonialism and International Law," International Affairs, (Moscow), Jan. 1961; pp. 38-43; George Ginsburgs, "Wars of National Liberation" and the Modern Law of Nations - The Soviet Thesis," in Hans W. Baade (ed.), The Soviet Impact on International Law, (Dobbs Ferry: Oceana, 1965), pp. 66-98.

of Asia and Africa[294] which have recently been liberated from the yoke of colonialism.

The proposition that colonialism amounts to aggression has become an important component of the "ideological" beliefs of the Afro-Asian states.[295] It is inferred from this proposition that "[c]olonized peoples may legitimately resort to arms to secure the full exercise of their right to self-determination and independence if the colonial powers persist in opposing their natural aspirations."[296] What legal support

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[294]See for instance, the Joint proposal by Algeria, Burma, Cameroon, Dahomy, Ghana, India, Kenya, Lebanon, Madagascar, Nigeria, Syria, the U.A.R. and Yugoslavia presented to the U.N. Special Committee on the Principles of International Law concerning Friendly Relations and Cooperation among States. U.N. Doc. A/6230 June 27, 1966. It states in part: "Territories under colonial domination do not constitute parts of the territories of States exercising colonial rule," (p. 205); "[T]he use of force by a colonial Power against such territories should be regarded as an international and not domestic matter" (p. 223). See generally, Dugard, "The Organization of African Unity: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism," I.C.L.Q., Vol. 16, 1967, pp. 157-190; Green, "The Impact of the New States on International Law," Israel Law Review, Vol. 4, Jan. 1969, pp. 27-60 esp. at pp. 48-53; "Issues Before the 24th General Assembly, International Conciliation, No. 574, Sept. 1969, pp. 181-184; V. M. Krishnan, "African State Practice Relating to Certain Issues of International Law," I.Yb.I.A., Vol. 14, 1965, pp. 196-241.

[295] See generally G. H. Jansen, Afro-Asia and Non-Alignment, (London: Faber and Faber, 1966); Carlos Romulo, The Meaning of Bandung, (Chapel Hill: 1956); George M. Kahin, The Asian-African Conference, (Ithaca: 1956).

[296]Indian Society of International Law, Asian-African States: Texts of International Declarations, (New Delhi: 1965), p. 82.

is there for this claim by members of the OAU? We must remind ourselves again that the use of force, except in permitted circumstances already noted, is not lawful even in defence of the worthiness of a given cause. In order to put the argument in this section into a proper perspective, it is relevant to refer to the Security Council debate on Portuguese indictment of India for "condemnable act of aggression" in Goa.[297]

In connection with the Goa case, two points are to be noted. First, India, admitting the use of naked force, based her defence on the legally questionable ground that the use of force to put an end to colonialism does not amount to aggression because colonialism is illegal.[298] It is true that any colonial power which refuses to decolonize will not be acting in good faith under the celebrated 1960 General Assembly Declaration on Colonialism. But this is not quite the same as saying that the colonial power will be in breach of a rule of international law. A second comment on the Goa incident concerns the claim made by the representatives of Liberia, Ceylon, the United Arab Republic and the Soviet Union that when a case of the use of force against a colonial regime occurred, the question before the Security Council

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[297] See T. R. Reddy, India's Policy in the United Nations, (Rutherford: Fairleigh Dickinson University Press, 1968), p. 82 et seq.; Quincy Wright, "The Goa Incident," A.J.I.L., Vol. 56, 1962, pp. 617-632; R.I.I.A., Documents on International Affairs 1961, (1965), p. 709, et seq.

[298] U.N. Doc. S/PV. 987, (Dec. 18, 1961), para. 61. See Maurice Flory, "Les implications juriduques de l'affaire de Goa", A.F.D.I., Vol. 8, 1962, pp. 476-491.

should not be one of aggression but one of violation by the colonial regime of the 1960 Declaration on Colonialism.[299] This view is grossly mistaken. As the United States representative, Stevenson, pointed out on that occasion,

> [R]esolution 1514 (XV)does not authorize the use of force for its implementation. It does not and it should not and it cannot, under the Charter. If it did, the resolution would lead to international chaos, not to national progress. Resolution 1514 (XV) does not and cannot overrule the Charter injunctions against the use of force.... It gives no licence to violate the Charter's fundamental principles that all Members shall settle their international disputes by peaceful means, that all Members shall refrain from the threat or use of force against another State.[300]

It has been necessary to digress a little because it is believed that the argument used by India and her supporters in the Goa incident inspired the argument of the OAU members in defence of their military campaign against colonial regimes in Africa.

The OAU has not been formally charged with aggression but it is unlikely to be successfully indicted by the United Nations. In assessing the compatibility of the actions of the Liberation Committee with the obligations of U.N. membership, the high probability that no U.N. resolution condemning actions of the OAU is likely to be adopted should not be allowed to determine a priori the legal consistency of actions of the OAU with the U.N. Charter.

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[299] U.N. Doc. S/PV. 987, para. 95-99, 105. See also U.N. Doc. S/5032.

[300] U.N. Doc. S/PV. 988, para. 93.

As the military activities of the OAU's Liberation Committee in aid of armed bands operating against the colonial regimes of Southern Africa have not been authorized by the Security Council, they can only be lawful under the U.N. Charter as acts of legitimate self-defence. The question, then, is whether it is legitimate to resort to the use of force as an act of self-defence against regimes whose only "crime" is that they practice colonialism. In the first place, only an over-extended interpretation of the word aggression will tolerate the characterization of colonialism as permanent aggression. After all, classical international law did defend colonialism; while the new international morality calls it anachronistic and demands its termination it falls short of equating it with aggression. The Charter prescribes sanctions against acts of aggression, but the 1960 Declaration did not authorize the use of force against failure to decolonize. The case for the African position cannot be properly based on the characterization of colonialism as aggression within the meaning of the U.N. Charter.[301] Can any case be made at all for the African position based on self-defence but without equating colonialism with aggression?

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[301] 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," I.C.L.Q., Vol. 16, 1967, p. 157

It can be argued that, in order to keep the black majority in Mozambique, Angola, Rhodesia, South Africa and South-West Africa politically subservient and powerless, the Portuguese metropolitan authorities, the Smith and the South African white minority regimes have resorted to the most despicable form of political repression that offends the moral, political and human sensibilities of the leaders of the black African States. Against the counter-argument that the treatment of one's subjects is a matter of domestic jurisdiction,[302] it is possible to advance the argument that, insofar as the practice of colonialism is likely to strain or endanger relations between states, to provoke one's own people to revolt against government for inaction and to create an intolerable situation largely through the activities of refugees, a situation, charged as it is with the possibility of a major racial explosion, constitutes a potential threat to African peace and to international peace in general if only because peace is indivisible.[303] This

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[302] Nogueira, The United Nations and Portugal, pp. 70-74; Wohlgemuth, "The Portuguese Territories and the United Nations," International Conciliation, No. 545, Nov. 1963.

[303] See R. F. Taubenfeld and H. J. Taubenfeld, "Race, Peace, Law and Southern Africa," in John Carey (ed.), Race, Peace, Law, and Southern Africa, (Dobbs Ferry, New York: Oceana, 1968); McDougal and Reisman, "Rhodesia and the United Nations, The Lawfulness of International Concern," A.J.I.L., Vol. 62, 1968, pp. 1-19; L. C. Green, "Rhodesian Oil: Bootleggers or Pirates," International Journal (Toronto), Vol. 21, No. 3, 1965-66, pp. 350-358. For a contrasting view, see C. G. Fenwick, "Where is there a threat to the Peace? -- Rhodesia," A.J.I.L., Vol. 61, 1967, pp. 753-755.

being the case, the OAU members can claim that the situation created by the colonial regimes demands responsive actions on their part.[304]

It is also equally possible to contend that in taking certain measures -- arms build-up and political repression-- the colonial regimes are, in fact, responding in part to the perceived threat represented by the anti-colonial institution, the OAU, and, further, that, in actually responding in kind as Portugal recently did against Zambia and Senegal,[305] the colonial regimes are themselves acting in self-defence against the intrusion of powerfully organized armed bands into their territories. Any state which is a victim of subversive intervention by armed bands operating from some neighboring state is entitled to the right of self-defence within the meaning of Article 51 of the U. N. Charter.[306] This is precisely what Israel[306a] is doing in relation to the activities of the Palestine Liberation Organization operating

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[304] See V. M. Krishnan, "African State Practice Relating to Certain Issues of International Law," I.Y.I.A., Vol. 14, 1965, p. 200.

[305] It should be noted that the Security Council censured Portugal for these particular incidents. See U.N. Monthly Chronicle, Vol. 5, No. 8, 1969, pp. 34, 56; The Times (London), Dec. 10, 1969, p. 5; The New York Times, Dec. 10, 1969, p. 18.

[306] Ian Brownlie, "International Law and the Activities of Armed Bands," I.C.L.Q., Vol. 7, 1958, pp. 712-735 Contrast Manuel Garcia-Mora, International Responsibility For Hostile Acts of Private Persons against Foreign States, (The Hague 1962), pp. 115-120. "There can of course be no doubt that allowing the formation of irregular bands would justify resort to the Security Council, though resort to self-defence would clearly be unlawful" (p. 120).

[306a] Theodore Draper, Israel and World Politics, (New York: 1968), p. 16, 32, 37.

from bases in Lebanon and Syria.[307] Here the situation is, of course, rather aggravated and complicated by the existing state of armed conflict, and by problems of military occupation. The OAU members do not hide the fact that they have financed and are financing the activities of armed bands operating from the territories of some of them. Even if they claim ignorance of the existence of such armed bands or inability to control the latter's activities, the presumption under international law is that they bear criminal responsibility for such activities.[308] The 1965 Declaration on Non-Intervention prohibits "subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State,"[309] and when it is recalled that the Declaration was largely inspired by the small new states the presumption that it exempts activities in support of the battle for de-colonization is nothing but an evidence of double standard on the part of the OAU members.

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[307] On the activities of the Palestine Liberation Organization, see Michael Hudson, "The Palestinian Arab Resistance Movement: Its Significance in the Middle East Crisis," The Middle East Journal Vol. 23, No. 3, 1969, pp. 291-307.

[308] Garcia-Mora, op.cit., p. 113; Fawcett in Hague Recueil, Vol. 103, 1961 (1), p. 353 et seq., Thomas, Thomas and Salas, The International Law of Indirect Agression and Subversion, (Dallas: 1966), pp. 313-331.

[309] G.A. Res. 2131 (XX) Dec. 21, 1965. Text in International Legal Material, Vol. 5, 1966, pp. 374-376. See also the Accra Declaration of the OAU on Subversion, International Legal Materials, Vol. 5, 1966, pp. 138-139.

The question then arises as to which side is acting in self-defence. The U.N. Charter does not offer any clear-cut guide; hence, the answer to the question depends largely upon one's political perspective.

It should be emphasized that, when considering the role of the OAU in the international politics of anti-colonialism, it is indeed necessary to disabuse our minds of the tendency to subordinate the question of the use of force in breach of the U.N. Charter to that of liquidation of Colonialism demanded by the 1960 Declaration. It is not inconsistent to maintain that it is illegal to resort to forceful action in order to liquidate colonialism and that contemporary trend in international politics is anti-colonial. It is only by over-stretching the meaning of self-defence that the activities of the Liberation Committee of the OAU can be categorized as self-defensive measures. Even if one were to assume that the activities of the OAU's Liberation Committee are legitimately in self-defence, the question then arises concerning whether the OAU is conforming to the rules of behaviour laid down for the exercise of the right of self-defence. Under Article 51, measures taken in self-defence are to be reported to the Security Council. No such report has been made by the OAU.

[C] The claim that the OAU, in its frontal attack on the institution of colonialism, is doing what the United Nations aims at doing but has not been able to do effectively because of the vested interests of some of its politically and economically important members.

One further consideration that needs commenting upon is the argument that, in the field of decolonization, the OAU is something of an agency of the United Nations carrying out functions which the United Nations has been unable to do for political reasons. This argument, then, is that the legality of the activities of the OAU must be assessed in the light of the goals and purposes of the United Nations in the functional issue-area of decolonization. On a purely superficial consideration this argument is appealing. In actual fact, it is, however, mistaken and unacceptable. It is mistaken because it presumes a pernicious doctrine that ends justify means; unacceptable because it reduces the Charter law of universal-regional relationship to sham.

Judged in terms of the amount of time spent on various issues in the United Nations and also in terms of the intensity of feeling on specific issues, it is safe to say that there is, as Sir Alex Douglas Home, speaking in 1961, observed, "an apparent difference of aim and purpose between the 51 founder members and many of the 53 newly independent countries which were elected to membership subsequently to the United Nations' foundation."[310] It is no exaggeration to say that decolonization has become the number one concern

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[310] Text of Speech in R.I.I.A., Documents on International Affairs 1961, (1965), p. 516.

of the United Nations.[311] This is hardly surprising given the composition of the General Assembly. The fact that decolonization is very high on the agenda of both the U.N. and the OAU is significant, but cannot by any stretch of imagination justify the claim that it is legitimate to resort to the use of force inconsistent with the law of the Charter. The contrary argument that so long as the OAU is implementing the 1960 Declaration of the U.N., its activities cannot be illegal bears striking resemblance and similarity to the legally questionable but perhaps politically wise reasoning of the International Court of Justice in the Expenses case. In that case, the World Court was called upon to give an opinion on whether certain expenditures authorized by the General Assembly to cover the costs of the U.N. operations in the Middle East and the Congo constituted "expenses of the Organization" within the meaning of Article 17 (2) of the U.N. Charter. Relying principally on the doctrine of effectiveness in the interpretation of multilateral treaties,[312] the Court, in its majority opinion, enunciated the principle that

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311 Inis Claude Jr., The Changing United Nations, (1967); David A. Kay; "The Politics of Decolonization: The New Nations and the United Nations Political Process," International Organization, Vol. 21, No. 4, 1967, pp. 786-811; "The Impact of African States on the United Nations," International Organization, Vol. 23, No. 1, 1969, pp. 20-47; Yturriaga, "Non-Self-Governing Territories: The Law and Practice of the United Nations," Y.B.W.A., Vol. 18, 1964, pp. 178-212.

312 Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," B.Y.B.I.L., Vol. 26, 1949, pp. 48-85.

"[w]hen the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization."[313] If the reasoning of the World Court, based on the presumption of validity or legality, is "not an irrebuttable one"[314] within the context of the relationship between two organs of the same Organization, argument based on similar reasoning is even more questionable in the context of the relationship between a universal and a regional organization. A variant of this argument was used by the United States in defence of the legal validity of the naval quarantine against the U.S.S.R. and Cuba in 1962. The U.S. argument was partly that Article 2 (4) prohibits only force or the threat of force which is inconsistent with the purposes of the United Nations; that it does not purport to forbid resort to force not only in support of the aim of the United Nations -- the maintenance of international peace and security -- but also consistent with the role of a regional organization as contemplated under Article 52 (1). If this argument were

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313 I.C.J. Reports, 1962, p. 151 at p. 168. For a criticism of this majority opinion, see the dissenting opinion of Judges Winiarski, (pp. 227-234), and Koretsky, (pp. 253-287).

314 E. Lauterpacht, "The Legal Effects of Illegal Acts of International Organization" in Cambridge Essays in International Law: Essays in honour of Lord McNair, (London: Stevens and Sons, 1965), p. 117; G.I. Tunkin, "The Legal Nature of the United Nations", Hague Recueil, Vol. 119, 1966 (III), pp. 5-66, at p.20-25.

to be legally incontrovertible, the OAU can similarly claim that the use of force to prosecute and realize a purpose of the United Nations -- de-colonization and promotion of human rights and fundamental freedoms -- is not illegal under the U.N. Charter. The claim that the use of force against colonial regimes can be justified on the ground that it is intended to expedite the achievement of what has become a major political goal of the United Nations -- de-colonization -- cannot be entertained unless such use of force is not itself unlawful under the U.N. Charter.

There is a further reason why what amounts to the "U.N. Agency" argument cannot validate the OAU activity. The conception of the OAU as an agency of the United Nations in the functional area of decolonization suggests that the regional organization automatically defines its relationship to the United Nations in terms of Articles 52-54. As the use of force by the Liberation Committee against colonial regimes and in support of armed bands operating against such regimes has not been authorized by the Security Council or recommended by the General Assembly acting under the "Uniting for Peace" Resolution,[315] it is in breach of Article 53 of the U.N. Charter.

3. The OAU and Pacific Settlement of Disputes

We have already noted that the OAU members deliberately

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[315] See Chapter V above.

reject juridical method of pacific settlement of intra-African disputes[316] and accept the traditional view that no state can be compelled to submit its dispute with another state to a third party without its consent.

The OAU has been confronted with two types of disputes, namely, those between African States which arise largely out of problems of artificial boundaries created by the cononial powers, and intra-state disputes arising out of civil war and secession. In both types of disputes members of the OAU have advanced the thesis that solutions should be found within the framework of the principles and institutions established by the OAU Charter.

Consider the Morocco-Algeria border dispute of 1963 which first put to test the peaceful settlement machinery and capability of the OAU.[317] Morocco, feeling rather reluctant to have an OAU mediation, brought the dispute to the attention of the U.N. Secretary-General but did not

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[316] See Chapter VI above.

[317] See generally, A. O. Cukwurah, The Settlement of Boundary Disputes in International Law, (Manchester: Manchester University Press, 1967), pp. 155-156; A. S. Reyner, "Morocco's International Boundaries: A Factual Background," J.M.A.S., Vol. 1, No. 3, 1963, pp. 313-326; Zartman, "The Politics of Boundaries in North and West Africa," J.M.A.S., Vol. 3, No. 2, 1965, pp. 155-173; I. Wallerstein, "The Early Years of the OAU: The Search for Organizational Preeminence," International Organization, Vol. 20, 1966, pp. 774-787; P.B. Wild, "The Organization of African Unity and the Algerian-Morroccan Border Conflict: A Case Study of New Machinery for Peaceful Settlement of Disputes," International Organization, Vol. 20, 1966, pp. 18-36; S. Touval, "The Organization of African Unity and African Borders," International Organization, Vol. 21, 1967, pp. 102-127.

request the meeting of the Security Council. Algeria, on the other hand, preferred recourse to the OAU. The OAU members urged both sides to seek a settlement within the principles and institutions of the regional organization. This seemed to be the view of the Western powers which persuaded King Hussain of Morocco to seek a regional settlement in order to prevent a possible East-West confrontation over the African dispute.[318] When both parties to the disputes jointly urged the creation of an OAU Committee of Arbitration for a definitive settlement of the dispute, the jurisdictional issue regarding the respective competences of both the United Nations and the OAU in the pacific settlement of "local" disputes was averted. Although it failed to secure a solution to the border dispute, the OAU Special Committee of Seven was a constructive influence insofar as it kept reminding both parties of the necessity to negotiate and avoid the use of force in the settlement of disputes.

In 1964 the OAU again found itself faced with the boundary disputes between Ethiopia and Somalia, and between

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[318] Hazel Fox, "The Settlement of Disputes by Peaceful Means and the Observation of International Law--African Attitudes," International Relations (London), Vol. 3, No. 6, Oct. 1968, pp. 389-440, 443.

Somalia and Kenya.[319] Like Morocco, Somalia showed great reluctance to go before the OAU because the regional organization was politically loaded against the revision of international boundaries in Africa. It should be remembered that although the OAU Charter refrains from making any explicit reference to the maintenance of the territorial boundaries in Africa beyond saying that "respect for the Sovereignty and territorial integrity of each state and for its inalienable right to independent existence" is a purpose of the organization, a majority of African leaders at Addis Ababa in 1963 were in favour of the preservation of the present boundaries until states mutually agree to make any adjustment.[320] It should further be noted that, in 1964, a resolution of the First Assembly

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[319] See generally, D.J.L. Brown, "The Ethiopia-Somaliland Frontier Dispute," I.C.L.Q. Vol. 5, 1956, pp. 245-264; "Recent Developments in the Ethiopian Somaliland Dispute," I.C.L.Q., Vol. 10, 1961, pp. 167-178; I. M. Lewis, "Developments in the Somali Disputes; African Affairs, Vol. 66, No. 263, 1967, pp. 104-112; Castagno, "The Somali-Kenya Controversy," J.M.A.S., Vol. 2, No. 2, 1964, pp. 165-168; M. W. Mariam, "The Ethio-Somalian Boundary Dispute," J.M.A.S., Vol. 2, No. 2, 1964, pp. 189-219; J. Drysdale, The Somalia Dispute, (New York: Praeger, 1964); S. Touval, Somali Nationalism, (Cambridge, Mass.: Harvard University Press, 1963).

[320] Boutros-Ghali, "The Addis Ababa Charter," International Conciliation, No. 546, 1964, pp. 29-30; Elias, "The Charter of the Organization of African Unity," A.J.I.L., Vol. 59, 1965, pp. 243-267; Padelford, "The Organization of African Unity," International Organization, Vol. 18, 1964, pp. 521-542.

of the Heads of States and Government explicitly supported the maintenance of the present boundaries[321] notwithstanding the obvious fact that the boundaries are notoriously artificial, paying, as they do, little or no respect to ethnic homogeneity and human geography. As the OAU is politically loaded against revision of territorial boundaries with mutual consent of states concerned, it is not surprising that Ethiopia and Kenya should have preferred the OAU to the United Nations as a third party in the adjustment of the dispute.

Following the clash between the Ethiopian and the Somalian military units in January 1964, the Somalian Government request for an urgent meeting of the Security Council to consider "[c]omplaint by Somalia against Ethiopia concerning acts of aggression infringing the sovereignty and security of Somalia and threatening international peace and security,"[322] went largely unanswered. The U.N. Secretary-General and most of the members of the United Nations, including the major powers, seemed to prefer a regional solution within the framework of the OAU. When the OAU Council of Ministers considered the boundary disputes at the request of Ethiopia, Somalia and Kenya in February 1964, a great majority of African States did not

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321 Colin Legum, Pan Africanism, (1965), p. 303, et seq.

322 U.N. Doc. S/5536; S.C.O.R., 19th Yr., Supp. Jan. - March 1964, p. 60.

hide their disapproval of the Somalian appeal to the Security Council. The legal right of Somalia to have recourse to the Security Council was not questioned: it was felt that procedures existed at the regional level through which the settlement of the dispute could be effected. The Dar es Salaam meeting of the OAU Council of Ministers successfully persuaded Somalia to withdraw her request to the Security Council. Somalia subsequently notified the Council President that the Somali Government did not wish to raise the Ethiopian - Somali dispute before the Council "while the problem is in the hands of the OAU."[323] This second request appears to have been interpreted by the Somali Government as calling for the suspension of Security Council action rather than a withdrawal of the request of February 10, 1964. In her subsequent communication with the Security Council President, Somalia continued to emphasize that the Security Council was "virtually seized with the Somalia - Ethiopian question."[324] Insofar as the request of February 10, 1964 was neither put on the agenda of the Security Council nor debated by the Security Council, it cannot be said that the Council was seized of the matter.

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[323] U.N. Doc. S/5542; S.C.O.R., 19th Yr., Supp. Jan. - March 1964, pp. 75-76.

[324] U.N. Doc. S/5557, S/5558; ibid., pp. 77, 82.

The Dar es Salaam resolution of the OAU Council of Ministers formulated explicitly for the first time, a doctrine of OAU priority in the pacific settlement of disputes. The resolution stated: "African unity requires that a solution of all disputes between member States be sought first within the Organization of African Unity."[325] If African unity also requires that an OAU member cannot have recourse to the United Nations of which it is a member, then the above resolution may have impaired the right of OAU members under Article 35 (1) of the U.N. Charter. However, since Article 35 (1) is a privilege rather than a duty, there is nothing inconsistent with the U.N. Charter if members of a regional organization agree to limit their right under Article 35 (1). This was what the NATO Council resolution on Pacific Settlement in 1957 purported to do.[326]

The claim that intra-African disputes should be settled by African States or under the auspices of the OAU has been successfully maintained not in spite of, but because of, the willingness of African states not to insist on having direct access to the United Nations, also because of the reluctance of the U.N. members, especially the big powers, to be drawn competitively into African disputes

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[325] Cited in U.N. Doc. S/5558; ibid., p. 82.

[326] Text in NATO Facts About the North Atlantic Treaty Organization, (Paris: 1962), pp. 277-278.

which are not considered by them to have reached a major proportion as to threaten international peace and security. The suspension of the Somali request for action saved the Security Council the embarrassment of not entertaining a request from a member state in exercise of her right under Article 35 (1) of the U.N. Charter. It may be assumed that the big powers, interpreting the general sentiments of most African states as favouring a regional solution, were not anxious to use the U.N. forum to discuss a dispute which also falls within the jurisdiction of the OAU and in which the disputants themselves had not only accepted the competence of the regional organization, but have been dissuaded from seeking a solution through a non-African body.

The capability of the OAU to adjust intra-state disputes involving civil war and secession has been tested in the Congo and Nigeria. In both situations, the OAU failed. In the case of the Congo, the OAU inherited a problem of great international dimension -- a problem in which the United Nations, at the invitation of the Lumumba Government,[327] had been extensively embroiled much before

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[327] U. N. Doc. S/4382; Miller, "Legal Aspects of the United Nations in the Congo," A.J.I.L., Vol. 55, 1961, pp. 1-28.

the regional organization was founded.[328] As there was no common and generally acceptable view among the OAU members as to how to deal with such major crisis which temporarily shifted the centre of the cold war to Africa, it is not surprising that the thesis of regional priority was not canvassed with all seriousness.[329]

The OAU dealt with the Nigerian civil war through its _ad hoc_ six-member Consultative Committee on Nigeria. There is nothing in the constitutional law of the OAU that permits the regional organization to intervene without invitation from and consent of the Lagos Government. Unless a civil war is considered a threat to international peace and security and, thus, rightly deserving action on the part of the Security Council, the United Nations is excluded by its Charter from intervening in the domestic affairs of the member states.[330] One should not, however, overlook the fact that the scope of domestic jurisdiction

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[328] L. M. Tondel, Jr. (ed.), _The Role of the United Nations in the Congo_, (Dobbs Ferry, New York: 1963); King Gordon, _The United Nations in the Congo_: _A Quest for Peace_, (New York: Carnegie Endowment for International Peace, 1962); Ernest W. Lefever, _Crisis in the Congo_: _A United Nations force in Action_, (Washington, D.C., Brookings Institution, 1965); L. B. Miller, _World Order and Local Disorder_: _The United Nations and Internal Conflicts_, (Princeton: 1967), p. 66 et. seq.

[329] See L. B. Miller, "Regional Organization and the Regulation of Internal Conflict," _World Politics_, Vol. 19, No. 4, 1967, pp. 582-600.

[330] Art. 2 (7); Kelsen, _The Law of the United Nations_, (1964), p. 769.

now depends largely on the political interpretation of a two-thirds majority of the General Assembly, and that the determination by the Security Council of whether or not a situation endangers international peace is itself a political decision governed largely by political considerations. To hope for a strict juridical interpretation of the U. N. Charter and, in particular, of Article 2 (7) is to disregard the important fact that the United Nations is "a political body, charged with political tasks.[331] The history of the United Nations hardly encourages reliance on Article 2 (7) as inhibiting in any absolute way U.N. "action" in the domestic affairs of member states.[332] It seems safe to say that it was not possible to get the United Nations involved politically in the Nigerian civil war not so much because Article 2 (7) prohibits such intervention but because the United

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331 Reparations for Injuries Case, I.C.J. Reports 1948, p. 121 at p. 179. See also Clyde Eagleton, "The United Nations: A Legal Order?" in Lipsky (ed.), Law and Politics in the World Community, (1953), pp. 129ff; J. R. Robinson, "Metamorphosis of the United Nations, Hague Recueil, Vol. 94, 1958, pp. 560-581; Bin Cheng, "International Law in the United Nations," Y.B.W.A., Vol. 8, 1954, p. 170 et. seq. R. Higgins, in I.C.L.Q.; Vol. 17, 1968, p. 58 et. seq.; A.J.I.L., Vol. 64, 1970, p. 1 et. seq.

332 Rajan, United Nations and Domestic Jurisdiction, (1961), Ch. 4; Higgins, The Development of International Law through the Political Organs of the United Nations, (1963), pp. 58-130; Thomas and Thomas, Non-Intervention, (1956), pp. 142-152; Miller, World Order and Internal Disorder, (1967).

Nations was willing to defer to a majority of African states which not only supported the Lagos Government but also consistently warned the world body not to intervene politically in the crisis.[333] Committed world powers seeking support from the new states[334] are not likely to take lightly or ignore the fact that thirty-nine African states did not want a United Nations intervention. The OAU "diplomatic" support for the Lagos Government was the basis of the consistent view of the U.N. Secretary-General that the OAU should be the most appropriate instrumentality for the promotion of peace in Nigeria.[335] It would thus appear that the thesis that African problems must receive African solution has received the acquiescence, if not the positive support, of a vast number of the U.N. members.

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[333] R. Nagel and R. Rathbone, "The OAU at Kinshasa," World Today, Vol. 23, No. 11, 1967, pp. 473-483; Report of the OAU Consulative Mission to Nigeria, (Apapa, Lagos: 1967), pp. 1-2; K. Whiteman, "The OAU and the Nigerian Issue," World Today, Nov. 1968, pp. 449-453; African Research Bulletin, Vol. 5, No. 9, Oct. 1968, p. 1174; I.L.M., Vol. 6, 1967, p. 1243.

[334] See Zbigniew Brzezinski (ed.), Africa and the Comminist World, (Stanford: 1963); David Morrison, The U.S.S.R. and Africa, (London: 1964); Arnold Rivkin, Africa and the West, (London: 1962); Calvocoressi, World Order and New States, (London: 1962); pp. 37-38.

[335] Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1967 - 15 June 1968 in U. N. Monthly Chronicle, Vol. 5, No. 9, 1968, pp. 98-99; See also U.N. Monthly Chronicle, Vol. 6, No. 9, 1969, p. 56.

The OAU Consultative Committee on Nigeria proved abortive mainly because the rebel government, while it existed, never accepted the premise of O.A.U.'s mandate which was to promote a solution on the basis of a United Nigeria.[335a] There are reasons to doubt the appropriateness of the OAU in the type of situation Nigeria found herself. Concerned with the maintenance and preservation of the status quo with respect to territorial frontiers, and politically loaded against the right of self-determination of minority ethnic groups on the grounds that self-determination is a right of self-government and independence from foreign imperialist white domination,[336] the OAU could not have been expected to act as a neutral conciliatory agency. When it is remembered that almost every OAU member is potentially vulnerable to disintegrating forces of ethnic secession, and that African states believe that balkanization can only serve the interests of neo-colonial powers, the political commitment of a vast majority of the OAU members to a united Nigeria is not difficult to understand.

[335a] C. Odumegwu Ojukwu, Biafra, Vol. 2, (New York: Harper and Row. 1969), pp. 183-190.

[336] The former President of Indonesia, Sukarno, held this view of self-determination and used it in his dispute with The Netherlands over West Irian. See L. C. Green, "Indonesia, The United Nations and Malaysia," Journal of Southeast Asia History, Vol 6, No. 2, 1965, pp. 71-86.

4. Concluding Comments

The obligation assumed under the OAU Charter to eradicate colonialism by all means has led the OAU members to duties inconsistent with those expected from membership of the United Nations. The validity of the proposition that it is legitimate to resort to force in order to eradicate colonialism is very questionable. The proposition rests, mistakingly it is believed, on the characterization of colonialism as aggression, and on the over-extended interpretation of the concept of self-defence as to permit and concede the right to colonial peoples struggling for independence from an unwilling white master. Aggression is illegal under the U.N. Charter, but while contemporary international politics is anti-colonial in its direction, colonialism is not an illegal institution, there being no legal obligation to de-colonize. The 1960 Declaration on Colonialism does purport to create a binding obligation to de-colonize, but it is no more than a recommendation of the General Assembly. While recommendations of the General Assembly demand "due consideration in good faith,"[337] they have no obligatory force. In any case, the 1960 Declaration has been consistently ignored by those very states whose acceptance and compliance are necessary for the evolution of the legal right to self-determination.

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[337] Judge Lauterpacht in I.C.J. Reports, 1955, p. 67 at p. 119.

There is something disconcerting about the interpretation placed on self-determination by the new Afro-Asian States. There is a tendency to use the term self-determination only within context of de-colonization.[338] The OAU members are willing to argue that the right to self-determination exists under international law for African majorities under white rule while the same right is denied to significant minorities under African rule even when African states are generally nothing but artificial creations of the imperial powers.[339] The OAU frowns at subversion by one black African state of another black African state,but inconsistently organizes under its authority and finances through the Liberation Committee the activities of armed bands against authorities in colonial states. It justifies the activities of its Liberation Committee as an act of legitimate self-defence against what it calls the aggressive forces of colonialism,but it would very likely have condemned an open military intervention by Gabon and Ivory Coast on the side of the rebels in Nigeria as a breach of the Charter of

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[338] See generally Rupert Emerson, Self-Determination Revisited in the Era of Decolonization, (Cambridge, Mass: 1964) pp. 35-36; "Problems of Self-Determination and Political Rights in the Developing Countries," Proceedings A.S.I.L., 1966, pp. 127-150; Benjamin Rivlin, "Self-Determination and Dependent Areas," International Conciliation, No. 501, 1955; Johnson, Self-Determination Within the Community of Nations, (Leyden: 1967), p. 53; Ali A. Mazrui, Towards a Pax Africana, (London: 1967), p. 23.

[339] See Sir E. Hertslet, Map of Africa by Treaty, 3 Vols. (3rd Ed., London: 1967).

the OAU. This phenomenon of double standard has, unfortunately, but understandably, become a "law" of international politics of expediency.[340] The conclusion seems inescapable that, in its relations to non-"African" members of the organization, the OAU has been behaving in ways inconsistent with the obligations of U.N. membership. To say that the environment of international politics leaves the OAU members no other means with which to realize their overriding purpose at the earliest possible time is to beg the question of the legality of the OAU action and of the consistency of the activities of the OAU in the field of decolonization with the law of the United Nations.

The constitutional issue involving the respective jurisdiction of the United Nations and the OAU in the field of pacific settlement of dispute has not been raised in a very acute form because no party to an intra-African dispute has adamantly insisted on ignoring the OAU and on having a recourse to the United Nations. Morocco and Somalia, in effect, bowed down to African and non-African pressures by seeking regional solutions to their boundary problems with Algeria and Ethiopia and Kenya respectively. There seems to be a tacit support among non-African powers for the view that, as much as possible, the machinery of the OAU should be used for the settlement of intra-African disputes.

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[340] See, for instance, Green, "The Double Standard of the United Nations," Y.B.W.A., Vol. 11, 1957, pp. 104-137.

CHAPTER VIII

CONCLUSION

REFLECTIONS ON REGIONALISM

1. Universal-Regional Relationship: Retrospect

We set out in this study to examine problems arising from the simultaneous application of the principles of universalism and regionalism to the organization of international peace and security. The choice of universal organizations requires no elaborate justification as international society has known only two universal peace organizations - the League of Nations and the United Nations. The selection for study of the Little Entente, the Locarno regional arrangement and the semi-formal Inter-American System has been largely dictated by the desire to test the operation of the law of universal-regional relationship in situations involving (i) a regional organization of small states, (ii) a regional organization of powerful states, and (iii) a regional arrangement composed mostly of small states politically affiliated to the League of Nations but dominated by a powerful non-League member state. The overriding consideration behind our choice of regional organizations under the United Nations - based international society has been the need to represent the broad tripartite division of the global society - the "capitalist" West, the "socialist" East and the largely "non-aligned" third world of the new states. The selection

of any specific regional organization for intensive study depends largely on whether the activities of the regional organization provide the raw material for testing the operation of the Charter law of universal-regional relationship.

The relationship between universal and regional organizations has been examined on three main levels, namely, theory, law and practice. Theoretical formulation of universal-regional equilibrium models has not been a very productive exercise. By its very nature, any theory of universal-regional equilibrium cannot but have a static bias. A theoretical model of equilibrium postulated without regard to the level of integration of international society and, in particular, to the important fact of East-West cleavage is not very helpful. It makes little difference to recognize the peculiar structure and ideological configuration of the international society but build models of universal-regional equilibrium independently of this fact. A model, after all, is a structural analogue, a symbolic representation of reality. The usefulness of any theoretical model depends on whether it enables one to better understand the real world it purports to represent. It may also be said that the proposition that regionalism is a necessary transition from nationalism to universalism equally ignores the peculiar structure of contemporary international political landscape.

In both Chapters II and IV where the law of universal-regional relationship was discussed, it has been found

relevant and illuminating to examine the records of the Crillon Commission which drafted the Covenant, and the UNCIO Documents on the UN Charter. There is much to gain - and nothing to lose - from placing the formulation of the law of universal-regional relationship in the political context of constitution-making. It does not come as a surprise that the law of universal-regional relationship was more systematically formulated in the UN Charter than in the League Covenant. The most plausible explanation is that regionalism entered the political calculation of the statesmen at Paris in 1919 only as an afterthought. The record shows that no one was thinking about the question of regional organizations until some United States Senators confronted the Paris draftsmen, through President Wilson, with a demand for an explicit Monroe Doctrine reservation in the constitutional law of the new organization. In contrast, international constitution-making in 1945 could not ignore the fact that the war-time leaders of Britain and the United States had seemed at some time to favour the organization of international peace along regional lines, that the Latin American Republics were desirous of protecting the integrity of the Inter-American System which, since 1940, had assumed the function of collective security against acts of aggression on the part of any non-American state, [1] and that the Arab States had just

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[1] Pan American Union, Report of the Second Meeting of the Ministers of Foreign Affairs of the American Republics, Habana 1940, (Washington: 1940), p. 35.

constituted a regional organization for the regulation of internal peace in the Middle East. Perhaps more importantly, the delegates at San Francisco could not ignore the implication of the Yalta voting formula for the operation of the collective security system under the direction of the Security Council.[2]

The extensive use of the record of the Crillon Commission should be understood in the context of the peculiar problem of interpreting the model of universal-regional relationship in a multilateral treaty where such relationship lacks specificity, explicitness and functional differentiation.[3] In view of the fact that the Monroe Doctrine is a unilateral United States policy declaration, and, further, in view of the fact that Article 21 of the Covenant was basically an attempt to recognize the relevance of Monroe Doctrine and other regional understandings for the maintenance of international peace, no scholar can ignore the Crillon Commissions debate on the relationship between the Monroe Doctrine and the League Covenant. One may express regret

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[2] A. L. Camargo, "Regionalism and International Community," Carnegie Endowment for International Peace, Perspectives on Peace 1910-1960, (New York: Praeger, 1960), pp. 107-119; Ward P. Allen, "Regional Arrangements and the United Nations," U. S. Dept. of State, Bulletin, Vol. 14, No. 361, June 2, 1946, p. 925; Hanna Saba, "Les Accords Regionaux dans la Charte de L'O.N.U., Hague Recueil, Vol. 80, 1952 (I) pp.639-716.

[3] Foreign Policy Association, "The Monroe Doctrine and Latin America," Information Service, Vol. 4, No. 20, Dec. 1928, pp. 397-408.

at the fact that the formulation of Article 21 does not sufficiently reflect the model of universal-regional relationship that emerged in the course of the discussion in the League Commission, but, then, one should always bear in mind that there is no reason to believe that the problem of universal-regional relationship can be solved by superb legal draftmanship. We have argued that the proposition that the Monroe Doctrine limits the geographic scope of League competence disregards not only the record of the Crillon Commission and Article 20 of the Covenant but also the power of the League under Articles 3 (3), 4 (4), 11, 16 and 17.[4] Perhaps the best argument in support of our position is the practical one that the United States did not put unnecessary obstacles in the way of the League adjustment of disputes between Latin American Republics.[4a]

It was pointed out in Chapter IV that the delegates at San Francisco found it necessary to introduce expressly the concept of collective self-defence in order to mediate the rival claims of universalism and regionalism, and to redress in favour of regionalism the imbalance in the universal-regional equilibrium created by the authorization principle of Article 53. In attempting to solve the political problem of universal-regional relationship in this constitutional manner, it was assumed that aggression

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[4] See Josef Kunz, "L'Article XI du Pacte de la Societe des Nations", Hague Recueil, Vol. 39, 1932 (I), pp. 483-787.

[4a] See Chapter III above.

would not occur and, if it did, the collective might of the major powers acting together would be more than sufficient to deal with it. If this assumption proved rather optimistic, it was not too obvious in 1945. We have adopted a functional interpretation of the provisions of Articles 51 - 54[5] in order to demonstrate that while certain regional organizations have been established with a view to performing some specific function within the context of Articles 51 - 54, there is no legal prohibition against their performing other functions. All that is required is that they conform to the behavioural rules postulated for the performance of those other functions. There is thus no reason why a limited-membership organization cannot operate under both Articles 51 and 52 - 54. This "dual basis" conception of regional organization is made plausible not only by a functional interpretation of Articles 51 - 54 but also by the actual tendency of various regional organizations to be multifunctional in their activities. There is much to be said in favour of the view that there is no compelling reason for a regional organization to expressly define its relations to the UN Charter by citing specific constitutional provisions. Consistency with the UN Charter depends on whether a specific organization in performing a particular function obeys the Charter rules prescribed for

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[5] See Chapter IV above.

such activity, and whether or not the law of the regional organization imposes obligations which lead members of the regional organization to undertake duties inconsistent with those of U.N. membership.

A scholar surveying the law of universal-regional relationship and the way it operates in practice should at least give some thoughts to the question concerning whether there is congruence between the constitutional model of universal-regional relationship and the sociological character of the international society. The relevant question is whether the law of universal-regional relationship in both the Covenant and the Charter reflects the stage of the development of the international society. There seems to be no doubt that the international law of the League Covenant and of the U.N. Charter is a law of coordination, and the universality of both the League and the United Nations has been of the cooperative type.[6] It is for this reason that neither the Covenant nor the Charter adopted a model of universal-regional relationship in which regional organizations could only be created or approved by the universal organization. Having said

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[6] Sir John Fischer Williams, Some Aspects of the Covenant of the League of Nations; (1934), p. 38 et seq.; Sir Alfred Zimmern, The League of Nations and the Rule of Law 1918-1935, (1936), pp. 277-285; Schwarzenberger, The League of Nations and World Order, (1936); also Power Politics, (1964), p. 227 et seq.; Alf Ross, Constitution of the United Nations: An Analysis of Structure and Function, (New York: 1950), p. 189 et. seq., Cmd. 151 (1919), p. 12; J. L. Brierly, "The Covenant and the Charter," B.Y.B.I.L., 1946, pp. 83-94 at p. 87; G.I. Tunkin, "The Legal Nature of the United Nations", Hague Recueil, Vol. 119, (III), pp. 1-66.

this, it is necessary to point out that, in 1919 as well as in 1945, the relevance of regional arrangements was admitted because they were conceived as supplementary adjuncts to the universal organization. While one cannot but be struck by the fact that the relationship between the universal and the regional organization was more systematically worked out in the U.N. Charter than in the League Covenant, there is no reason to make much of this fact. The logic behind this assertion is that the problem of regionalism <u>vis-a-vis</u> universalism is not so much constitutional and legal as it is political and sociological. To the extent that legal norms regulating relations among political units in a quasi-organized international society of decentralized power cannot be properly understood as neutral rules but as policy-oriented behavioural rules, to the extent that the United Nations is essentially a political body discharging political functions, and finally, to the extent that the interpretation of the respective constitutional competences of major U. N. organs has been deliberately left to individual organs, one should be more concerned with the manner in which the Charter law of universal-regional relationship has been interpreted than with whether the relationships between the two forms of organization have been minutely defined in precise legal terms. It is by no means denied that it is necessary to pay some attention to the formulation of the constitutional foundation

of universal-regional relationship. One cannot, however, ignore the fact that states, especially the powerful ones, are not merely content to be armed with only the international lawyer's brief. As Dean Acheson realistically, if unpalatably, remarked in connection with the Cuban missile crisis, "law simply does not deal with ... questions of ultimate power-power that comes close to the sources of sovereignty .... No law can destroy the state creating the law. The survival of states is not a matter of law."[7]

With this important understanding in mind, we recog- that any realistic examination of the relationship between universal and regional organizations demands that we move beyond the rather sterile constitutional analysis into the realm of concrete policy decisions and actions, and analyse critically the impact of such developments on the operation of the law of universal-regional relationship. It may be said that in the League of Nations' days, members were unwilling to accept certain obligations of the Covenant relating to the collective maintenance of international peace. This unwillingness manifested itself in the form of interpretative resolutions whose effect was to emasculate the force of Articles 10 and 16. We do not accept the view that this could be termed as amounting to the abandonment of the League in favour of regional organizations. Regional arrangements were in

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[7] Proceedings, A.S.I.L., 1963, p. 14. See generally, Lissitzyn, "Western and Soviet Perspectives on International Law - A Comparison", Proceedings, A.S.I.L., Vol. 53, 1959, pp. 21-30.

most cases explicitly placed whithin the League's system, processes and procedures.[7a]

At the centre of our study is the empirical examination of the operation of the law of universal-regional relationship. The method of analysis is that of case study. The major advantage of a case study approach is that it permits us to look at the specific points of interaction between the universal, regional and national actors in terms of what the respective competences of these actors are both in legal theory and political practice, and to understand those considerations governing the preference of one organization over the other in the adjustment of specific disputes or situaticns.

The operating relationship between universal and regional organizations examined in Chapters III and VII leads us to conclusions which can be understood meaningfully only in the context of the international conditions of the particular epoch. The world of the Covenant differs from that of the Charter. Limiting our choice of regional arrangements in the League days to the Little Entente, the Locarno Pact and the semi-formal Inter-American System and examining their relationship to the League of Nations, we reached the conclusion that (i) international relations between 1920 and 1939 cannot be meaningfully examined in terms of the rival claims of universalism and regionalism in the organization of peace and security, (ii) that while no regional organization successfully challenged

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[7a] See Jose Ramon de Orue y Arregui, "Le Regionalisme dans l'Organisation Internationale", Hague Recueil, Vol. 53, 1935 (III) pp. 1-93.

the competence of the League of Nations, the League itself, paradoxically, cannot be said to have been the dominant instrumentality for peace especially as its obligations were disregarded largely by the big powers in the 1930's, (iii) that the conflict at Geneva was neither among regional organizations nor between the League and regional arrangements, but among the great powers themselves concerning how the powers of the League were to be exercised, and (iv) finally, that considerations which guided the major powers in their foreign policy were first and foremost those of national interest. As the international community was not ideologically polarized as it is now in the world of the Charter, a predisposition to maintain at all cost, the integrity of any regional arrangement, if need be, at the expense of the League of Nations was not manifest. The compatibility of the Little Entente with the League of Nations hardly comes as a surprise given the fact that both organizations were mutually committed to the preservation of the territorial status quo on the basis of the peace settlement of 1919.[8] What may be surprising is that although there were indications in the early 1920s that the United States would not permit the League to intervene in the Western Hemisphere in order to deal with threats to peace, the policy of the United Sates was

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[8]Stefan Osusky, "The Little Entente and the League of Nations," International Affairs (London), Vol. 13, 1934, pp. 379-393.

rather flexible insofar as Washington cooperated, sometimes reluctantly, with the League efforts to adjust disputes between its Latin American members. A possible explanation for this flexibility on the part of the United States is that the senior members of the League were themselves politically sensitive to the American views without abdicating the responsibility of the League.[9] As to the compatibility of the text of Locarno Pact with the League Covenant, there can be no doubt. If the Locarno Pact based itself so completely on the League procedures, why was it necessary in the first place? This question, it is believed, goes to the very root of the motive behind the advocacy of and restort to regional security pacts in the League days. All evidence points to the conclusion that experiments in regionalism were seen in the context of implementing certain obligations of the Covenant which every state could not realistically assume in every case of aggression. In any case, it cannot be said that the experience of the League was a clear victory for regionalism conceived as an alternative to universalism.[9a] It is of interest to bear in mind that when the League of Nations proved incapable of dealing with big power aggression in the 1930s, the political fortunes or regional organizations were not enhanced. In fact, regional

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[9] F. P. Walters, A History of the League of Nations, (London: 1967), p. 525 et seq.

[9a] Jose Ramon de Orue y Arregui, "Le regionalisme dans l'Organisation internationale", Hague Recueil, Vol. 53, 1935 (III), pp. 1-93.

organizations -- the Little Entente, the Balkan Entente and Locarno Pact -- were themselves victims of the situation created by German and Italian aggression.[10] This observation contrasts with the experience of the United Nations in its first decade. As was demonstrated in Chapter V, when the East-West rift confronted the Security Council with political impotence and paralysis, an answer to the security problem was found in a system of regional defence organizations.

With regard to the relationship between the United Nations and regional organizations we reached the following conclusions: (i) the constitutional law of regional organizations is, generally speaking, consistent with that of the United Nations; the law of both forms of international organization have contributed to the elaboration and progressive development of general international law; (ii) in practice, the Charter law of universal-regional relationship has not operated in the manner it was intended it should; the mal-functioning and mal-interpretation of Articles 52-54 in favour of the _de facto_ superiority of regional organizations have not really been the cause

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[10] For details see L. S. Stavrianos, _Balkan Federation: A History of the Movement Toward Balkan Unity in Modern Times_, (Hamden, Connecticut: Archon Books, 1964), pp. 224-258. "[T]o inquire why the third Balkan alliance system disintegrated is to ask why the League of Nations proved ineffectual and why the second World War broke out" (p. 258).

but only represent symptoms and effect of the political pathology of the international community; and (iv) the problem of universal-regional relationship cannot be meaningfully examined outside the context of the cold war, and especially outside the context of the United States and the Soviet policy of excluding each other from what each considers to be its sphere of influence. The victim of this policy has been the United Nations.

In an international society which has a loose bi-polar structure of power configuration[11] and in which the principal regional power systems have been built along ideological lines, it would have been quite surprising if the United Nations had been able to maintain the dominant role the 1945 Charter assigned to it.[12] The

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[11] The structure of the international system has received scholarly attention in recent years. See, for instance, Schwarzenberger, Power Politics, (1964), Ch. 28; also "From Bipolarity to Multipolarity? A Basic Hypothesis Re-examined," Y.B.W.A., Vol. 21, 1967, pp. 179-185; Kenneth Waltz, "The Stability of a Bi-polar World," Daedalus, Summer 1964, pp. 881-909; Morton Kaplan, System and Process in International Politics, (New York: 1957); Karl Deutsch and J. D. Singer, "Multipolar Power Systems and International Stability," World Politics, Vol. 16, No. 3, 1964, pp. 390-406; R. D. Masters, "A Multi-Block Model of the International System," A.P.S.R., Vol. 55, 1961, pp. 780-789; Richard Rosecrance, "Bipolarity, Multi-polarity, and the Future," Journal of Conflict Resolution, Vo. 10, 1966, pp. 314-321; Kurt London, The Permanent Crisis, (New York: 1962), Ch. I; Raymond Aron, War and Peace: A Theory of International Relations, (New York: 1966), pp. 94-149.

[12] For possible roles for the U.N., especially the Secretary-General, in regulating and managing inter-bloc crises, see Oran Young, The Intermediaries: Third Parties in International Crises, (Princeton: 1967), p. 159 et seq.

weakening of the influence and effectiveness of the United Nations results largely from both the U.S. policy of excluding the Soviet Union from the affairs of the Western Hemisphere, and the similar policy of the Soviet Union that seeks to shut off the United States and Western powers from Eastern Europe. A convenient method of achieving this objective has been to deny that the Security Council of which both leading powers are members has competence to deal with a specific situation, and to be ready either to organize enough obstentions on a resolution or to exercise the veto power in order to paralyze the Security Council.[13] This behavioural pattern seems to bear out the validity of the sixth rule of action postulated by Kaplan in his loose bipolar model of the international system: "All bloc members are to subordinate objectives of universal actors to the objectives of their bloc but to subordinate the objectives of the rival bloc to those of the universal actor."[14] In Guatemala and Dominican Republic, it was the U.S.S.R. emphasizing the competence of the U.N.; in Hungary and Czechoslovakia, the role was reversed. It was the U.S. and the Western allies which asserted the competence of the U.N. while the Soviet Union took a rigid "regionalist" posture.

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[13] See Chapter VII above.

[14] Kaplan, <u>op. cit</u>., p. 38.

In the light of the practice and jurisprudence of the Security Council, it may be confidently asserted that the authorization principle of Article 53, an original symbol of the subordination of regional organizations to the United Nations, has become inoperative.[15] The trend in the direction of greater regional autonomy vis-a-vis the United Nations cannot be understood except in the context of the balance of power and security policy of both the East and the West. While it cannot be said that the future of regionalism in international organization will be determined by the Soviet and American policy towards each other, the future relationship between the United Nations and regional organizations will be considerably influenced by trends in East-West relations.

One further consequence of the loose bi-polar structure of the international society is that it inadvertently permits some measure of recklessness on the part of regional organizations composed of militarily weak and economically dependent states.[16] To the extent that the leaders of the major world camps are competitively seeking the allegiance and political support of the new states of Asia, the Middle East and Africa, and

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[15] See Chapter VII above.

[16] Speech by Lord Home to the Berwick-on-Tweed branch of the United Nations Association, 28 December 1961. Text in R.I.I.A., Documents on International Affairs 1961, pp. 514-519.

to the extent that these new states numerically dominate the U.N. General Assembly, there would appear to be opportunities for anti-Charter behaviour without the corresponding liability to Charter sanctions. It is worth mentioning that regional organizations consisting of small states enjoy today comparative advantage over the Little Entente and the Balkan Entente insofar as the balance of power politics in the present international society operates in such a way as to tolerate legally questionable actions on the part of the League of Arab States and the OAU.

The Little Entente and the OAU provide an illuminating study of how the difference in the political world of the Covenant and the Charter has tended to exercise powerful influence on, if not determine, the extent to which certain categories of regional organizations can operate compatibly with the universal organization. As successors to the Austro-Hungarian Empire, the "new" states of Czechoslovakia, Rumania and Yugoslavia were scrupulously committed to the defence of the Treaty of Versailles of which the League Covenant was an integral part. Though constituted before the League began to function, these three states played no part in the drafting of the law of the Covenant. A vast majority of the OAU members were born into the world of the U.N. Charter. While it could be said that, having voluntarily applied for U.N. membership, these new states have undertaken to

accept the obligations and rights of membership, there does not seem to be any doubt that they regard obligations imposed by the OAU Charter to liquidate colonialism by any means as superior to any U.N. obligation enjoining peaceful cooperation and relations with all member states. Our analysis shows that the obligation to end colonialism at all cost has led the OAU members to duties hardly consistent with the obligations of U.N. membership, and if the Goa case teaches any lesson at all, it is that it is highly improbable that the use of force to liquidate colonialism in Africa would be successfully censured by the world body. It seems reasonable to suggest that if the major powers were not competitively engaged in seeking the political support and votes of these new states, it might have been possible for the Security Council to act "disinterestedly" and do what it was established to do -- to punish illegal use of force. It can, of course, be argued that as the Treaty of Versailles served the interests of the members of the Little Entente, there was little need for a deviant behaviour on the part of the regional arrangement, and that as the U.N. Charter does not recognize and declare self-determination as a legal right,[17] the anti-colonial OAU members cannot nearly be expected to be fully devoted to it in practice. The point is that neither the Little Entente nor the OAU could defy the Covenant and the Charter respectively if the major powers were united behind the maintenance and application of the law of both universal organizations.

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[17] See Chapter VII above.

2. Problem areas in the study of international regionalism

A study of regionalism in international organization cannot lightly dispose of three broad issues which significantly affect both the "internal" and "external" operation of regional organizations.

(a) The problem of regional domination by powerful states

Allusions have already been made to the consequences resulting from membership of very powerful states with _global_ interests in _regional_ organizations. At the extreme, the presence of a world power in a regional organization of small powers will tend to result in the problem of hegemonial leadership. When a regional organization includes all the key leaders of the universal organization or is dominated by some world power, problems do arise concerning the functioning of the regional organization _vis-a-vis_ the universal organization. In the case of the Locarno regional security system whose members included the leading League members, the problem was not so much whether the regional organization would develop as an alternative to the League as whether the universal organization might adapt itself and operate, in practice, within the framework of the Locarno regional arrangement. Where senior members of the universal organization are fundamentally divided into ideologically hostile camps, problems of a different nature arise. In regional organizations like the Warsaw Pact which includes the Soviet

Union, the NATO and SEATO of which the United States, Britain and France are members, and the OAS and ANZUS dominated by the United States, the relationship between the major powers especially between the United States and the Soviet Union cannot but influence the role of the United Nations, more accurately, the Security Council, as an effective universal actor. Furthermore, a regional organization which includes a major power is more likely to be used as a cold war instrument than useful as an instrument for the maintenance of regional peace with justice.[18] It is well known that the United States tends to see the OAS as an anti-communist agency and that the Kremlin does not see the Warsaw Pact other than as a cold war instrument vis-a-vis the West. The Kennedy[19] and Brezhnev[20] Doctrines convey identical message to the Latin American Republics and the countries of the Warsaw Pact. What this means in the final analysis is

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[18] Young, op. cit., pp. 105-109.

[19] U. S. Dept. of State, Bulletin, Vol. 44, No.1141, 1961, p. 659, R.I.I.A., Documents on International Affairs 1961, (1965), pp. 23-24. "[L]et the record show that our restraint is not unexhaustible. Should it ever appear that the inter-American doctrine of non-interference merely conceals or excuses a policy of nonaction--if the nations of this hemisphere should fail to meet their commitments against outside Communist penetration--then I want it clearly understood that this Government will not hesitate in meeting its primary obligations, which are to the security of our Nations."

[20] International Legal Materials, Vol. 7, 1968, p. 1323, See Chapter VI above for extensive comments on this Doctrine.

is that internal peace cannot be impartially maintained and managed if one of the parties to a dispute or a situation is alleged to challenge the regional ideological consensus.[21]

(b) Coordination among regional organizations

A problem to which attention has not been given in this study concerns the relationships between regional organizations themselves especially between those in the same geographical region. This problem is only a part of the larger question of coordination in international organization which has become one of the key problems of international organization.[22] We noted in Chapter V that there is a multiplicity of international organizations within Western Europe, Western Hemisphere and Africa. It can neither be said that the fact of interlocking membership in these regional organizations reduces the important question of proper inter-organizational relationships to irrelevance nor maintained that a study of universal-regional relationship need ignore the

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[21] On the importance of "independence," "impartiality" and "salience" as essential characteristics of any third party mediation and ajudication, see Young, op. cit., pp. 81-84.

[22] C. W. Jenks, "Coordination: A New Problem of International Organization," Hague Recueil, Vo. 77, 1950 (II), pp. 157-301; also "Coordination in International Organization: An Introductory Survey," B.Y.B.I.L., Vol. 28, 1951, pp. 29-89; R. J. Dupuy, "Le Droit des Relations entre les Organisations Internationales", Hague Recueil, Vol. 100, 1960 (II), pp.457-589.

relationship between the most inclusive multi-purpose international organization in a particular geographical region and the more restrictive organizations in the same region. In terms of our analysis in this study, the relevant question to ask is this: What is the relationship between the Council of Europe and other organizations in Western Europe, between the Organization of African Unity and various sub-continental groupings of States, and between the Organization of American States and the two most important intra-hemispheric organizations?

The first observation to make is that the constitutional law of the Council of Europe, of the Organization of African Unity and of the Organization of American States does not expressly purport to constitute the "higher law" for the more limited groupings of states in Western Europe, Africa and the Western Hemisphere respectively. The law of these organizations is even silent on the subject of their relationship to other "regional" organizations.[23] Thus, in the absence of any formal constitutional law of inter-organizational relationship at the regional level, the manner in which the problem has been faced does not admit of any generalization.

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[23]For exceptions see ANZUS Treaty, Art. 8. Article 19 of the 1945 Pact of the Arab League contemplates amendment to the regional treaty for a number of reasons including the need "to regulate the relations of the League with any international bodies to be created in the future to guarantee security and peace."

Consider, first, the "solution" recommended by the Organization of African Unity. Following the successful establishment of the OAU in May 1963, the question arose concerning whether the 'old' rival sub-continental groupings, namely the "Casablanca," the "Monrovia," and the "Brazaville" organizations,[24] should cease or continue to exist vis-a-vis the new continental organization. Meeting in Dakar in August 1963, the OAU Council of Ministers engaged in an acrimonious debate on the future of sub-continental regionalism.[24a] The Council, recognizing the need for sub-regional groupings to evolve "with a view to their adaptation to the Charter of the OAU," took cognizance of these intra-continental organizations largely in the context of the functional field of economic and social cooperation. The Council resolution urged sub-regional groupings to meet the following criteria: (a) geographical realities and economic, social and cultural factors common to states, and (b) coordination of economic, social and cultural activities peculiar to the states concerned. Finally, and most importantly, the resolution not only urged member states "to contemplate the integration of already existing bodies into the specialized institutions of the OAU," but also requested them

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[24] See generally, Colin Legum, Pan Africanism: A Short Political Guide, (New York: Praeger, 1965), pp. 38-80.

[24a] Francois Borella, "Le Regionalisme Africain et l'Organisation de l'Unite Africaine", A.F.D.I., Vol. 9, 1963, p. 857.

"to deposit the statutes of the said groupings at the seat of the OAU before their entry into force."[25]

On a purely superficial consideration, it appears that the problem of mutual relations among international organizations in Western Europe is extremely acute.[25] Without denying that the problem of coordination does exist, it should be pointed out that it has, to some extent, been mitigated by two devices. The first is the "adoption" of the principle of partial functional differentiation and specialization by various limited-membership organizations. The Statute of the Council of Europe, for example, has deliberately excluded matters relating to defence from the competence of the organization,[27] and, furthermore, has taken over social and cultural functions performed by the West European Union.[28] The North Atlantic Treaty Organization, which, from the point of view of membership, is largely European, undoubtedly has been much less concerned with economic cooperation than with matters of defence. It should be recalled

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[25] All quotations are from the OAU Council of Ministers Resolution 5 (1), 10 August 1963, Text in Basic Documents of the Organization of African Unity, (Addis Ababa: 1963), p. 33.

[26] For a survey of European organizations, see Michael Palmer, John Lambert et al, European Unity. A Survey of the European Organizations, (London: 1960), A. H. Robertson, European Institutions, (London: 1966), also The Law of International Institutions in Europe, (Manchester: 1961).

[27] Art. 1 (d).

[28] Robertson, The Council of Europe, (1961), p. 227.

that the Report of the Committee of Three on Non-Military Cooperation in NATO warned that it would not serve the interest of NATO "to duplicate the operating functions of other international organizations designed for various forms of economic cooperation."[29] In the eyes of many states the performance of the function of economic cooperation should be and has been the primary, though not the exclusive responsibility of the European Economic Community, the Organization for European Economic Cooperation, the European Free Trade Association and the Nordic Council. Given this partial application of the principle of functional differentiation and specialization, it has been possible for Greece, faced with expulsion from the Council of Europe, to withdraw from that organization[30] while retaining its membership in NATO. Spain and Portugal belong to OEEC but are excluded from the Council of Europe. Portugal, a NATO member, is excluded from Western European Union even though the amended Brussels Treaty of 1954 stipulates that the WEU organs "shall work in close cooperation with the North Atlantic Treaty Organization."[31]

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[29] U.S. Dept. of State, Bulletin, Vol. 36, No. 915, Jan. 7, 1957, p. 18 at p. 23.

[30] The Times (London), December 13, 1969, p. 1.

[31] Art. 4. Text of the amended Brussels Treaty (1954) in Peaslee, op. cit., Vol. 2, p. 1866. On the relationship of WEU to NATO, see R.I.I.A., Britain in Western Europe: WEU and the Atlantic Alliance, (London: 1956), p. 67, 72.

This principle of functional specialization minimizes to some extent the danger of duplication of functions inherent in a system of anarchy of international institutions. The second device adopted is the policy of "rationalization of institutions" pursued by the Council of Europe. This policy has two interrelated aspects. The first is the assumption by the Council of Europe of the role of a coordinating institution. As Jenks pointed out: "When claiming to act as a co-ordinating body for all forms of Western European regional co-operation, including co-operation in respect of matters entrusted previously to other bodies, the Consultative Assembly [of the Council of Europe] relies on its parliamentary character as justifying its claim to review the action of inter-governmental bodies."[32] It is so arranged that members of the Consultative Assemblies of other organizations also represent their states in the parliamentary organ of the Council of Europe. For instance, when the Assembly of the Western European Union was created in 1954, it was stipulated that it should be composed of "representatives of the Brussels Treaty Powers to the Consultative Assembly of the Council of Europe."[33] The other related aspect of the policy of "rationalization of institutions" is the custom developed whereby the OEEC, the EEC, and the WEU have undertaken to send

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[32] C.W. Jenks, "Coordination: A New Problem of International Organization," Hague Recueil, Vol. 77, 1950 (11), p. 169.

[33] Art. 9. Text of Brussels Treaty in Peaslee, op. cit. Vol. 2, p. 1866.

their reports to the Consultative Assembly of the Council of Europe.[34] It should be pointed out that this policy of "rationalization of institutions" has not fully materialized because of the differences in membership, structure of various organizations and the political orientation of members of these institutions.[35]

The Western Hemisphere, whose dominant regional organization is the Organization of American States, is not faced with any acute problem of regional inter-organizational co-ordination. As the most important groupings of states, the Latin American Free Trade Association (LAFTA), composed of Mexico and all of South America excluding Guyana, and the Central American Common Market (CACM) made up of Guatemala, Honduras, Nicaragua, El Salvador and Costa Rica,[36] were created largely at the initiatives of the United Nations Economic Commission for Latin America rather than of the OAS, it is necessary to comment on the relationship between them and the OAS.

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[34] Robertson, The Council of Europe, (1961), p. 221, et seq.

[35] M. M. Ball, NATO and European Movement, (London: 1959), p. 405 et seq.

[36] See Robert W. Gregg, (ed.), International Organization in Western Hemisphere, (Syracuse: Syracuse University Press, 1968); J. S. Nye, Jr., "Central American Regional Integration," International Conciliation, No. 562, March 1967; M. S. Wionczek, "Latin American Free Trade Association," International Conciliation, No. 551, Jan. 1965; K. R. Simmonds, "The Central American Common Market: An Experiment in Regional Integration," I.C.L.Q., Vol. 16, 1967, pp. 911-945.

The 1961 Charter of Punta del Este, the legal framework for the Alliance for Progress which represents a multilateral approach to regional economic development under the OAS, expressly takes cognizance of both the CACM and LAFTA. It declares that one of its objectives is "[t]o stregthen existing agreements on economic integration, with a view to the ultimate fulfilment of aspirations for a Latin American common market."[37] It considers the Montevideo Treaty creating LAFTA and the Managua Treaty establishing CACM as "appropriate instruments for the attainment of these objectives,"[38] that is, those of the creation of a Latin American Common Market. The Economic Charter adds further: "In order to facilitate economic integration in Latin America, it is advisable to establish effective relationships between the Latin American Free Trade Association and the groups of countries adhering to the Central American Economic Integration Treaty, as well as between either of these groups and other Latin American countries."[39] The 1967 Punta del Este Declaration of the Presidents of American States laid plans for the creation, beginning from 1970, of a Latin American Common Market "based on the complete development and progressive convergence of the Latin American Free Trade Association and of the Central American Common Market, taking into account

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[37] Text produced in R. W. Gregg, _op. cit._, p. 239. The quotation here is on p. 241.

[38] _Ibid._, p. 247.

[39] _Ibid._

the interests of the Latin American countries not yet affiliated with these systems."[40] It seems reasonable to suggest that, insofar as the Latin American economic policy of the United States can determine the success or failure of the Alliance for Progress and of the integration efforts of the Latin American republics, inter-organizational relationship and coordination will depend on the character of that policy.[41] For our purpose in this study, it is sufficient to note that the problem of cooperation among organizations has not been ignored in the Western Hemisphere.[42]

(c) Problem of regional non-member

The third issue in international regionalism relates to the problem of regional non-members. The way in which the League of Nations and the United Nations attempted to "solve" the problem of non-members has not been free of legal controversy.[42a] Nowhere does the constitutional law of regional organizations examined in this study impose obligations on members to see that regional non-members conduct

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40 OAS Official Records OEA/Ser. C/IX.I (English), Meeting of African Chiefs of State, Punta del Este, Uruguay, April 12-14, 1967, (Washington: 1967), p. 58.

41 Thus, Governor Rockefeller, in his Report on Quality of Life in the Americas, recommended the appointment of Assistant Secretaries of Western Hemisphere Affairs for the CACM nations, LAFTA and the Caribbean nations. See U.S. Dept. of State, Bulletin, Vol. LXI, No. 1589, Dec. 8, 1969, p. 512.

42 See F. . Garcia Amador,"The Developing Law of Latin American Integration", Rutgers Camden Law Journal, Vol. 1. No. 2, 1969, pp.202-228 at pp.219-221.

42a See Chapter I above.

relations among themselves in a peaceful manner. However, Thomas and Thomas, placing an unnecessarily broad interpretation on the competence of regional organizations, have expressed the view that "[b]y ratification of the United Nations Charter, a nation falling within a region in which there is a regional arrangement or agency has indirectly given its consent to intervention by that arrangement or agency in matters in its region relating to the maintenance of international peace ... Thus if two nonsignatory nations falling within the area of a regional arrangement or agency engage in illegal warfare, collective self-defense might come into play."[43] It may be said that the UN Charter offers no juridical support for the first claim. A regional treaty is valid only among its signatories.[44] Chapter VIII of the U.N. Charter can in no sense be construed as suggesting a contrary view. If a regional non-member were to attack or threaten with attack a signatory to a regional collective self-defence arrangement, members of the regional organization would be justified in exercising their right of self-defence declared in Article 51 of the U.N. Charter. In the event of a dispute between a regional non-member and a signatory to a regional organization, the former cannot be compelled to submit the dispute to the mediation or adjudication of the regional organization. Thus, for instance,

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[43] Non-Intervention, (1956), p. 160. See also Akehurst, loc. cit., pp. 219-221.

[44] Green, "New States, Regionalism and International Law," C. Yb. I. L., 1967, p. 140. Quincy Wright, "The Cuban Quarantine", A.J.I.L., Vol. 57, 1963, p. 546, 558-559.

the League of Arab States, though permitted under Article 5 of its constitutional law to mediate in a dispute between its members and non-members, cannot do so unless the third party consents to have its dispute referred to the regional organization.[45] As to the second claim made by Thomas and Thomas, it is sufficient to comment that while, in the event of a conflict between two non-signatory states situated in geographical region of a regional organization, members of the regional organization may freely consult, they can legally intervene only under two conditions: (i) if one of the combatants requests the assistance of members of the regional organization; and (ii) if the conflict were considered by any of the signatories to the regional treaty as constituting a threat to its legal interest and security. In such a case the regional organization may act in self-defence. The claim implicit in the view of Thomas and Thomas that there is a regional counterpart to or version of Article 2 (6) which permits a regional organization to maintain peace not only among its members but also the general peace of the entire "region" cannot be read into the formulation of Chapter VIII of the U.N. Charter. The proper interpretation to be placed on the phrase "appropriate for regional action" which appears in Article 52 (1) is that the competence of a regional organization should not go beyond the

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[45] M. F. Anabtawi, Arab Unity in terms of Law, (1963), p. 85.

parties' legitimate sphere of interests.[46]

While it is true that no law of regional organization imposes any obligation on member states to see that regional non-members conduct their external relations in a peaceful manner, there is always the danger of regional enforcement action against a regional non-member state that opposes the regional "ideological" consensus fundamentally. In the League days Hungarian revisionism was considered an affront to the consensus of the Little Entente members in favour of territorial status quo. On at least two occasions, the possibility of collective action against Hungary was raised: first, in connection with the attempted monarchical restoration in 1921,[47] and, second, at the time of the assassination of the Yugoslav King allegedly with the connivance of Hungary.[48] The attitude of the OAU to South Africa, Portugal and Rhodesia, of the League of Arabs States to Israel, of the OAS to Cuba, and, to some extent, of SEATO to Communist China have determined or may in future determine the

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[46] Bentwich and Martin, A Commentary on the Charter of the United Nations, (1968), pp. 109-110.

[47] Foreign Policy Association, "The Little Entente," Information Service, Vol. 4, No. 14, Sept. 1928, pp. 278-295; Robert Machray, The Little Entente, (London: 1929), pp. 145-152, 163-179.

[48] H. F. Armstrong, "After the Assassination of King Alexander," Foreign Affairs, Vol. 13, No. 2, 1935, pp. 204-225.

extent to which members of regional organizations are likely to accept the paramountcy of obligations imposed by membership in the United Nations.

3. Universal-Regional Relationship: Prospect

Unless we are willing to accept the principle of imperial universality, that is to say, the universal organization of the international society on a hierarchical line,[49] the problem of universal-regional relationship is here to stay. The precise relationship between the United Nations and regional organizations will continue to be worked out as cases arise in the light of policy considerations deemed relevant and of the need for effective action. The U. N. Charter, especially the law of universal-regional relationship, will continue to be interpreted in the light of contemporary political conditions. The increasing reliance on regional organizations for security and the expansive construction of the powers of regional organizations should be a constant reminder that international society is not yet ready for an effective universal organization even though some of its problems are best approached on the global level. Incongruity between the law of universal-regional relationship and the behaviour of regional organizations does exist.

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[49] Schwarzenberger, The League of Nations and World Order, (1936); p. 4, 7-9; see also his Power Politics, (1964), p. 337; Morton Kaplan, System and Process in International Politics, (New York: 1957), p. 48 et seq.

We must recognize this fact. Beyond this, we can either hope that the long-run interest of global peace will prevail over the short-run interest of national and regional exclusiveness and help to revitalize the Security Council, or, if we are pessimistic, begin to adjust our thinking about international security to the problem of stabilizing inter-regional relationships paying little attention to universal-regional relations. There is much to be said in favour of retaining the principle of the universal and dominant authority of the Security Council "against the happier day when it might be less affected by the strains of Great Power conflict of interest."[50]

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[50] Sir Leslie Munro, United Nations: Hope for a Divided World, (New York: 1960), p. 56.

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