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CONSTITUTIONAL CRISIS AT THE UNITED NATIONS: THE PRICE OF PEACE- KEEPING*

NATHANIEL L. NATHANSON†

SPEAKING TOWARDS THE CLOSE of the General Debate of the Nineteenth General Assembly, Ambassador Stevenson sought to put in broader perspective the specific constitutional issues underlying the current financial crisis of the United Nations. "The issue," Mr. Stevenson said, "is in essence whether or not we intend to preserve the effective capacity of this Organization to keep the peace. It is whether to continue the difficult but practical and hopeful process of realizing in action the potential of the Charter for growth through collective responsibility, or turn toward a weaker concept and a different system."¹

In support of his analysis, Mr. Stevenson invoked a passage from the famous "last will and testament" of Dag Hammarskjöld, the Introduction to the Secretary-General's Annual Report to the General Assembly on the Work of the Organization, June 16, 1960—June 15, 1961. After referring to "different concepts of the United Nations, the character of the Organization, its authority and its structure," Mr. Hammarskjöld had gone on to describe those different concepts in the following terms:

On the one side, it has in various ways become clear that certain members conceive of the Organization as a static conference

* The first of a three-part article. The other two parts will appear in volume 33 of the *University of Chicago Law Review* and will focus respectively on the policies for administering peace-keeping operations and on alternative means of financing such operations. The first part concentrates on the constitutional basis for peace-keeping.

† Professor of Law, Northwestern University; Visiting Research Scholar, Carnegie Endowment for International Peace, 1964-65.

¹ U.N. GEN. ASS. OFF. REC. 19th Sess., Plenary 1323 (A/PV.1323), at 54-55 (1965).

machinery for resolving conflicts of interests and ideologies with a view to peaceful coexistence, within the Charter, to be served by a Secretariat which is to be regarded not as fully internationalized but as representing within its ranks those very interests and ideologies.

Other members have made it clear that they conceive of the Organization primarily as a dynamic instrument of Governments through which they, jointly and for the same purpose, should seek such reconciliation but through which they should also try to develop forms of executive action, undertaken on behalf of all members, and aiming at forestalling conflicts and resolving them, once they have arisen, by appropriate diplomatic or political means, in a spirit of objectivity and in implementation of the principles and purposes of the Charter²

When Mr. Hammarskjöld wrote those words in 1961, the problem of financing peace-keeping operations had not yet approached critical proportions. The Secretary-General had, however, just been subjected to a blistering attack by the Soviet Union and its allies for his conduct of peace-keeping operations in the Congo, culminating in the proposal for a "troika" or three-headed Secretariat designed to reflect an assumed three-way division of the membership into a Western bloc, a Socialist bloc, and a neutralist bloc.³ Although the "troika" has become, for the time being at least, a dead issue, echoes of the conflict between the Secretary-General and the Soviet Union still haunt the debate on how the financial obligations of the past are to be finally liquidated and on how similar operations are to be initiated, directed, and financed in the future. That debate has continued during the past four years at various levels of the United Nations—on the floor of the Assembly itself, in successive committees or working groups specially created to deal with the problem, before the International Court of Justice and in innumerable backstage consultations. Despite all of these efforts, no solution in the form of a working agreement amongst the principal disputants has been achieved. On the contrary, so apparently unbridgeable was the gulf that a move to invoke in this context Article 19 of the Charter, which denies the right to vote in the General Assembly to any member "if the amount of its arrears equals or exceeds the amount of the contributions

² Introduction to the Secretary-General's Annual Report to the General Assembly on the Work of the Organization, June 16, 1960—June 15, 1961, U.N. GEN. ASS. OFF. REC. 16th Sess., Supp. No. 1A (A/4800/Add.1), at 1 (1961).

³ See Khrushchev speeches, U.N. GEN. ASS. OFF. REC. 15th Sess., Plenary 345 (A/PV.882), at 318-21 (1960). See generally BAILEY, *THE SECRETARIAT OF THE UNITED NATIONS* 44-59 (rev. ed. 1964).

due from it during the preceding two full years," resulted in the virtual paralysis and ultimate suspension of the parliamentary processes of the General Assembly.⁴

It is too early to say whether the temporary suspension of the Nineteenth Assembly will go down in history as the beginning of gradual atrophy or debilitation or more happily as the pause that refreshes. Before suspending until September 1, 1965, the Nineteenth Assembly was at least able to give birth to still another committee, the so-called Committee of Thirty-Three, "to undertake as soon as possible a comprehensive review of the whole question of peace-keeping operations in all their aspects, including ways of overcoming the present financial difficulties of the Organization."⁵ While it is unlikely that the Committee will discover aspects of the question which have not been fully explored by its

⁴ In order to avoid a confrontation on the issue of the application of Article 19 the General Assembly proceeded in accordance with the suggestion of the Secretary-General that no matters would be brought before the Assembly except those which could be disposed of by acclamation or unanimous consent until a more fundamental resolution of the underlying controversy could be accomplished. U.N. GEN. ASS. OFF. REC. 19th Sess., Plenary 1286 (A/PV.1286), at 3-5 (1964). But behind the scenes some decisions were taken by the rather transparent device of informal voting in the office of the President of the Assembly followed by formal ratification through consensus in the Assembly itself. The Assembly also adopted resolutions establishing subordinate bodies which were permitted to carry on the work without any restrictions on voting procedures. Particularly notable was Resolution 1995, "Establishment of the United Nations Conference on Trade and Development as an Organ of the General Assembly." A/RES/1995 (XIX) (1965). This created the Conference itself, the Trade and Development Board to be elected by the Conference, and a special division of the Secretariat to be headed by a Secretary-General of the Conference who would be appointed by the U.N. Secretary-General and confirmed by the Assembly. Both the Board and the Conference's Secretary-General were duly installed, the Board held a series of meetings and elected committees, and arrangements were made for the continuing work of the Conference.

A challenge to this means of avoiding an open confrontation was made on February 16, 1965, by the Albanian representative, who called for a return to normal procedures. U.N. GEN. ASS. OFF. REC. 19th Sess., Plenary 1329 (A/PV.1329), at 11 (1965). After a two day adjournment, the President of the Assembly ruled the Albanian proposal out-of-order. This ruling was challenged by Albania, but sustained by the Assembly by 97 to 2 with 13 abstentions. The roll call was preceded by a United States statement that a vote on a challenge to the President's ruling did not involve the question of the applicability of Article 19.

See generally Greenfield, *The Lost Session at the U.N.*, The Reporter, May 6, 1965, p. 14; Cohen, *Using the U.N.*, The New Republic, May 8, 1965, p. 13.

⁵ A/RES/2006 (XIX) (1965). The President of the General Assembly was authorized to establish the Committee with the collaboration of the Secretary-General and to announce its composition after appropriate consultations. On March 2, 1965, its composition was announced as follows: Afghanistan, Algeria, Argentina, Australia, Brazil, Canada, Czechoslovakia, El Salvador, Ethiopia, France, Hungary, India, Iraq, Italy, Japan, Mauritania, Mexico, Netherlands, Nigeria, Pakistan, Poland, Romania, Sierra Leone, Spain, Sweden, Thailand, Union of Soviet Socialist Republics, United Kingdom, United States, Venezuela and Yugoslavia. A/RES/2006/Rev. 1 (xix) (1965).

predecessors⁶ or by academic commentators,⁷ it may yet be hoped that the necessity for a resolution of the immediate paralysis has become sufficiently apparent to mother the invention of at least a face-saving formula which will enable the General Assembly to function normally without entirely sacrificing potential capacity to meet the emergencies which undoubtedly lie ahead. In order to help evaluate the success or failure of the Committee in achieving its assigned objective the following topics will be considered: (1) the constitutional basis for peace-keeping operations; (2) the principles of law or policy which have been evolved to govern their administration; and (3) the various methods of financing which have been tried or canvassed.

I. THE CONSTITUTIONAL BASIS OF PEACE-KEEPING

It is a commonplace of United Nations lore, though one not fully accepted by all the Members, that the kind of peace-keeping operations which have precipitated the "financial crisis"—particularly the establishment of UNEF (United Nations Emergency Force) and ONUC (United Nations Force in the Congo)⁸—were foreshadowed neither in the specific

⁶ Working Group of Fifteen, *Report*, U.N. GEN. ASS. OFF. REC. 16th Sess., Annexes, Agenda Item No. 62, at 1-11 (A/4971) (1961); Working Group on the Examination of the Administrative and Budgetary Procedures of the United Nations, U.N. GEN. ASS. OFF. REC. 4th Spec. Sess. Annexes, Agenda Item No. 7, at *56 (A/5407) (1963).

⁷ See, e.g., BOWETT, *UNITED NATIONS FORCES* (1964); BURNS & HEATHCOTE, *PEACE-KEEPING BY UN FORCES—FROM SUEZ TO THE CONGO* (1963); FRYDENBERG, *PEACE-KEEPING: EXPERIENCE AND EVALUATION—THE OSLO PAPERS* (1964); HOSKINS, *THE CONGO SINCE INDEPENDENCE* (1965); LEFEVER, *CRISIS IN THE CONGO* (1965); ROSNER, *THE UNITED NATIONS EMERGENCY FORCE* (1963); RUSSELL, *UNITED NATIONS EXPERIENCE WITH MILITARY FORCES: POLITICAL AND LEGAL ASPECTS* (1963); STOESSINGER, *FINANCING THE UNITED NATIONS SYSTEM* (1964); *International Force—A Symposium*, 17 INT'L ORGANIZATION 321-485 (1963); SEYERSTED, *United Nations Forces: Some Legal Problems*, 37 BRIT. YB. INT'L L. 351 (1961).

⁸ I have mentioned in the text only those operations which have contributed substantially to the "arrears" of the recalcitrant members. The Soviet Union had also announced, "From 1963 onwards, [it] will not make any contributions to cover the following items of expenditure in the regular budget of the United Nations, where funds are allocated for measures taken in violation of the Charter or taken unnecessarily: the United Nations Commission for Unification and Rehabilitation of Korea; the Memorial Cemetery in Korea; the United Nations Truce Supervision Organization in Palestine and the so-called United Nations Field Service." U.N. GEN. ASS. OFF. REC. 4th Spec. Sess., Plenary 1205 (A/PV.21) (1963).

As of December 31, 1964, a report by the Secretary-General showed a total of arrears of \$29,550,285.50 in the Special Account for UNEF and \$81,755,398.99 in the Congo *ad hoc* Account. Of these, \$15,638,166.00 and \$36,984,971.00 were accounted for by the U.S.S.R. and \$16,143,83.00 by France. U.N. Doc. ST/ADM/Ser. B/194, Jan. 14, 1965.

The most recent report of the Committee on Contributions listed ten Member States whose arrears exceeded the amount of assessed contributions for 1962 and 1963 as of October 5, 1964. The ten were Bolivia, Byelorussian S.S.R., Czechoslovakia, Hungary, Paraguay, Poland, Rumania, Ukrainian S.S.R., U.S.S.R. and Yemen. A separate opinion by Mr. S. Raczkowski pointed out that in only one case, that of Paraguay, did the arrears in the regular budget assessments, as distinguished from

provisions of the Charter nor in the deliberations of the Founding Fathers at Dumbarton Oaks and San Francisco.⁹ Hence, the peace-keeping operations have prompted a prolonged and apparently endless debate on what, if any, Charter rationale can justify the operations and on whether peace-keeping operations are indeed constitutionally distinguishable from that type of "action by air, sea or land forces" which the Security Council alone is explicitly authorized by Article 42 of Chapter VII of the Charter to take in order to "maintain or restore international peace and security." The debate does not, however, hinge entirely on whether the particular operations are sired in the first instance by the Security Council or the General Assembly.¹⁰ This is evident from the fact that the Soviet Union and its satellites have refused to pay either for UNEF or for ONUC, although the first was authorized by the General Assembly and the second by the Security Council, while France, the other major defaulter, pays cheerfully for UNEF but refuses to contribute one cent for ONUC. These rather curious combinations of apparently inconsistent positions have nonetheless a kind of "inner logic" of their own which can perhaps best be understood through examination of their intellectual evolution, rather than by a strictly logical analysis.

Uniting for Peace

This evolution commenced with the debate on the Uniting for Peace Resolution of 1950. In introducing to the General Assembly the proposals which gave birth to the Uniting for Peace Resolution,¹¹ Secretary

peace-keeping assessments, amount to the assessed contributions for 1962 and 1963. U.N. Doc. G.A. Off. Rec. Nineteenth Sess., No. 10(A/5810) 1964, pp. 10-11.

⁹ See GOODRICH & HAMBRO, *CHARTER OF THE UNITED NATIONS* 237-308 (2d ed. 1949); RUSSELL & MATHER, *A HISTORY OF THE UNITED NATIONS CHARTER* 457-77, 657-84 (1958). Commenting on Article 40, Goodrich & Hambro say: "Provisional measures envisaged by this Article may include the cessation of hostilities, withdrawal of armed forces from specified areas, the acceptance of some form of international policing arrangement within a specified area, and the termination of retaliatory measures which have been taken in connection with a particular dispute or situation." *Op. cit. supra* at 273.

During the discussions of the Committee of Thirty-Three the representative of Brazil "recalled the proposal made by the Foreign Minister of Brazil during the General Debate at the nineteenth session of the General Assembly that the Charter should be amended to include a new chapter, entitled 'Peace-keeping Operations,' between the present Chapters VI and VII. That chapter would set out the conditions under which peace-keeping operations would be undertaken and would provide in more precise terms for a method of financing such operations." U.N. Doc. No. A/AC.121/SR.4, at 11 (1965).

¹⁰ See Excerpts from Remarks by President de Gaulle, N.Y. Times, Feb. 5, 1965, p. 12; Boyd, *The U.N. At Twenty*, The Economist, April 3, 1965, pp. 39, 43.

¹¹ U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20 (A/1175) at 10-12 (1950). The

of State Acheson stated succinctly what has been the position of the United States ever since. He said:

Article 24 of the Charter gives the Security Council primary responsibility for the maintenance of peace and this is the way it should be. But if the Security Council is not able to act because of the obstructive tactics of a permanent member, the Charter does not leave the United Nations impotent. The obligation of all Members to take action to maintain or restore the peace does not disappear because of a veto. The Charter in Articles 10, 11, and 14, also vests in the General Assembly authority and responsibility for matters affecting international peace. The General Assembly can and should organize itself to discharge its responsibility promptly and decisively if the Security Council is prevented from acting.¹²

The Uniting for Peace resolution undertook to implement this philosophy through four specific measures. It resolved in Part A, that

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making the appropriate recommendations to Members for collective meas-

Resolution was adopted by 52 votes to 5, with 2 abstentions. France was an enthusiastic supporter and co-sponsor of the Resolution.

12 U.N. GEN. ASS. OFF. REC. 5th Sess., Plenary 279 (A/PV.279), at 24 (1950). Articles 10, 11 and 14, upon which Mr. Acheson relied, in pertinent part, read as follows:

Art. 10: "The General Assembly may discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Art. 11, para. 2: "The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations . . . in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the state or states concerned or to the Security Council or both. Any such questions on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion."

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

Article 12 provides, in part: "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

ures, 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.

This part of the Resolution also provided for the calling of an emergency special session of the General Assembly, if it was not then in session, upon the request of the Security Council by vote of any seven members of the council or by vote of a majority of the Members of the United Nations. In Part B the Resolution established a Peace Observation Commission composed of fourteen member nations "to observe and report on the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security." In Part C the Resolution invited member nations to survey their resources to determine the nature and scope of assistance they might be able to render in support of recommendations of either the Security Council or the General Assembly for the restoration of international peace and security and recommended that "each 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." Finally, the Resolution in Part D established a Collective Measures Committee of fourteen Members to study and report in consultation with the Secretary-General on methods which might be used to maintain and strengthen international peace and security. Apart from directly requesting the Secretary General to provide the necessary staff and facilities for the work of the Peace Observation Commission and Collective Measures Committee and also to appoint a panel of military experts who could be made available to member states wishing to obtain technical advice on the establishment and training of United Nations units, the Resolution did not specify what role the Secretary-General should play in the actual direction and use of the national armed units which might thus be made available to the United Nations. The Resolution was, of course, presented in the shadow of the Korean hostilities, and its sponsors may well have had in mind the Korean example of delegating to a particular nation or group of nations the responsibility for providing a unified United Nations command for the military units assembled pursuant to the Resolution, or they might have considered the nature of the command as one of the principal subjects of study for the Collective Measures Committee.¹³ Neither did the

¹³ In its first Report the Collective Measures Committee suggested that until such time as arrangements contemplated by Chapter VII could be used, "the United Nations whenever it determines upon the use of collective force, must provide some

Resolution advert specifically to the problems of financing United Nations military action.

In the debate on the Resolution, Mr. Vyshinski for the U.S.S.R. was not bashful in directing attention to what he regarded as the dangerous lacunae in the Resolution. Section C drew the brunt of his attack.

The USSR delegation could not agree to the proposal because it constituted an attempt to usurp the right of the Security Council and violated Chapter VII of the Charter which provided for armed forces to be put under the control not of the General Assembly but of the Security Council through its Military Staff Committee. The proposal would call upon Member States to earmark armed elements to await orders. But whose orders? They would be subject to the orders not of the Security Council, as provided in the Charter, but of the General Assembly. Mr. Dulles had contended that the General Assembly would not order but would merely recommend. Various representatives, however, had pointed out in the Committee, that a recommendation, morally speaking, was tantamount to an order. But where did the Charter endow the General Assembly with the function of recommending troop movements . . . Article 11 stipulated that any question on which action was necessary must be referred to the Security Council. The movement of armed forces would obviously be for the purpose of taking action. Therefore, Section C of the joint draft resolution was basically and fundamentally incompatible with the Charter.¹⁴

The representative of the United Kingdom, one of the co-sponsors of the Resolution, assumed the burden of answering Mr. Vyshinsky's arguments on the technical level:

The United Kingdom delegation attached the greatest importance to the problem of the conformity of the draft resolution with the letter of the Charter. In legal questions, the British were if anything too formalistic, and in the case in point they would not have supported the United States proposals had they

agency to be responsible for the direction and conduct of its military operations." The most specific suggestion along this line was that "the Organization should authorize a State or group of States to act on its behalf as executive military authority, within the framework of its policies and objectives as expressed through such resolutions as it may adopt at any stage of the collective action." Collective Measures Committee, U.N. GEN. ASS. OFF. REC. 6th Sess., Supp. No. 13, at 25 (A/1891) (1952).

¹⁴ U.N. GEN. ASS. OFF. REC. 5th Sess., 1st Comm. 375 (A/C.1/375), at 85 (1950). Mr. Vyshinski also objected to paragraph 9 of the draft resolution on the ground that the military experts and advisors would be under the orders of the Secretary-General. *Ibid.* See also his remarks in the plenary session, U.N. GEN. ASS. OFF. REC. 5th Sess., Plenary 301, at 324-35 (A/PV.301) (1950).

not been convinced that they were based on the letter of the Charter

His delegation recognized that the Charter did not give the General Assembly the power to take coercive action. The Assembly could only make recommendations, but experience had shown that the recommendations of the General Assembly carried great force, in the same way as the Security Council recommendations had done on the Korean question in virtue of Article 39.

If therefore a General Assembly recommendation implied positive action by a Member State it was perfectly lawful for the Member State to exercise the powers it already possessed under international law, including the right to defend itself and to assist friendly powers in the face of unjustified aggression. The Charter did not diminish those rights; it merely provided in Article 51 that when the Security Council intervened nations had to obey its decision. But there was also no violation of the Charter when the General Assembly, acting within its power, recommended to governments that they should exercise their right of self-defense, and the latter complied.¹⁵

The United Kingdom analysis, in effect, defended the ultimate action in response to a recommendation of the General Assembly, not so much as United Nations action, but as action by member nations individually or collectively exercising their right of self-defense under the Charter. This theory has also been advanced in academic circles as necessary for rationalizing the Korean action under the Charter, even though the Security Council recommended the action and purported to treat the United States commanding officer as a United Nations commander and the combined allied forces as United Nations forces.¹⁶ Similarly the

¹⁵ U.N. GEN. ASS. OFF. REC. 5th Sess., 1st Comm. 364 (A/C.1/364) (1950). The Representative of the United Kingdom also paid particular attention to Article 11, which requires questions on which action is necessary to be referred to the Security Council: "The word 'action' was not defined and it was natural to think that it meant coercive action which only the Security Council was authorized to take." However, even if the word were given a wider meaning, if the procedure of referring the matter to the Security Council were followed, "and if the Security Council did not make use of its powers, Article 11 would not in any way preclude the General Assembly from exercising in such a situation, the powers conferred upon it by Article 10." *Id.* at 129-130. For a similar view see Andrassy, *Uniting for Peace*, 50 AM. J. INT'L LAW 563 (1956).

¹⁶ See STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* (rev. with supp. 1959) 234-237. Kelsen, on the other hand, argues that the Korean action could not be regarded as individual or collective self-defense under Article 51 "since it was entered upon after the Council had taken the measures necessary to maintain international peace and security." KELSEN, *THE LAW OF THE UNITED NATIONS* 936 (1964). Nevertheless, Kelsen also doubts whether the Korean action can be considered as United Nations action because the Council did not purport to place members under an obligation to assist in

Uniting for Peace Resolution (Part C) urged each Member to prepare armed forces "for service as a United Nations unit or units . . . without prejudice to [and thus presumably also in contradistinction to] the use of such elements in exercise of the right of individual or collective self-defense recognized in Article 51 of the Charter."¹⁷ It seems, therefore, that reference to Article 51 alone is insufficient to provide a satisfactory Charter rationale for the kind of action contemplated by the Resolution.¹⁸

UNEF and ONUC

While the exact substantive legal relationship, if any, between the Uniting for Peace Resolution and the establishment of UNEF by the First Emergency Special session of the General Assembly in 1956 is a nice subject for academic speculation,¹⁹ the procedural relation was

the defense of South Korea. Bowett rejects both of these positions and concludes, "The better view is to regard the Korean action as enforcement action authorized by recommendations under Article 39." BOWETT, *op. cit. supra* note 7, at 34. Even Kelsen concedes that this is a possible view. See KELSEN, *op. cit. supra* at 937.

17 Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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 the Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

18 It should be noted that in other remarks the United Kingdom representative indicated that he was relying upon Article 51 as a guide to, or support for, an interpretation of Articles 10, 11 and 12 which would permit the General Assembly to establish "collective defence measures approved by a truly international organization expressing the will of nations." U.N. GEN. ASS. OFF. REC. 5th Sess., 1st Comm. 360, at 101 (A/C.1/360) (1950). Professor Stone seems to go further than this by treating Article 51 as the principal, if not sole, constitutional basis for the Uniting for Peace Resolution. See STONE, *op. cit. supra* note 16, at 272-278. Kelsen rejects this view, partly on the ground that "a resolution by which the General Assembly recommends to members to exercise their right of individual or collective self-defense by using armed force against a definite state, implies that the Assembly determines the existence of an armed attack, which is an act of aggression, and that the Assembly determines that the state against which it recommends the use of armed force is the aggressor. This is a function which the Charter does not confer upon the General Assembly, but in Articles 39 and 51—exclusively upon the Security Council." KELSEN, *op. cit. supra* note 16, at 979. Stone rejects this argument on the ground that the Assembly does not necessarily make any such determination when it recommends collective measures. See generally COHEN, *THE UNITED NATIONS* (1961), ch. 1 on Charter interpretation in general and on the particular application of the Charter to Uniting for Peace.

19 See BOWETT, *op. cit. supra* note 7, at 296, emphasizing that Uniting for Peace was intended to authorize "enforcement measures," while UNEF was designed for more limited purposes.

reasonably clear despite objections presented by the United Kingdom and France. The United States presented a draft resolution calling for an immediate cease-fire between Israel and Egypt, for a withdrawal of Israeli forces behind the established armistice lines, and for all members to refrain from the use of force in any manner inconsistent with the purposes of the United Nations. After this had been vetoed by France and the United Kingdom, the Council adopted a Yugoslavian resolution calling for an Emergency Special Session of the Assembly pursuant to the Uniting for Peace Resolution.²⁰ The U.S.S.R. voted in support of the Council's Resolution, but abstained on the Assembly's key resolution establishing the United Nations force.²¹ The Soviet representative explained that he regarded the resolution as inconsistent with the Charter because "Chapter VII of the Charter empowers the Security Council and the Security Council only, not the General Assembly, to set up an international armed force and to take such action as it may deem necessary, including the use of such a force, to maintain or restore international peace and security." Nevertheless, the U.S.S.R. abstained rather than opposed, "in view of the fact that . . . the victim of aggression has been compelled to agree to the introduction of an international force," and "in the hope that this may prevent any further extension of the aggression"²² This was substantially the only reference to the constitutional question during the General Assembly's consideration of the establishment of UNEF.

Since ONUC was established and governed by resolutions of the Security Council, its creation did not present the basic constitutional question of division of powers between the General Assembly and the Security Council. Nevertheless, there has been considerable speculation and difference of opinion on the exact Charter provision under which the Council acted.²³ As usual the initial Resolution did not refer to any particular provision; neither did it make any determination as required by Article 39 on "the existence of any threat to the peace, breach of peace, or act of aggression." It did, however, refer to the "report of the Secretary General on a request for United Nations action in relation to the Republic of the Congo" and to "the request for military assistance addressed to the Secretary General by the President and the Prime Minis-

²⁰ U.N. SECURITY COUNCIL OFF. REC. 11th year, 751st meeting 22 (S/PV.751) (1956). The point of the procedural objections of the U.K. and France was that there had been no vote on the Egyptian complaint directed specifically against them.

²¹ U.N. GEN. ASS. OFF. REC. 1st Emergency Spec. Sess., Plenary 565 (A/PV.565) (1956).

²² U.N. GEN. ASS. OFF. REC. 1st Emergency Spec. Sess., Plenary 567, at 27-28 (A/PV.567) (1956).

²³ See BOWETT, *op. cit. supra* note 7, at 175-80.

ter of the Republic of the Congo.”²⁴ In bringing the matter to the attention of the Security Council under Article 99 the Secretary General had, of course, described it as one “which, in my opinion, may threaten the maintenance of international peace and security.”²⁵ The President and Prime Minister of the Congo had, in connection with their request for military assistance, asserted that “the purpose of the requested aid is not to restore internal situation in Congo but rather to protect the national territory against acts of aggression committed by Belgian metropolitan troops.”²⁶ There was from the outset disagreement within the Council whether this was an appropriate description of the Belgian intervention, but this was never elevated to an objection to the validity or the desirability of the action proposed. The Secretary-General stated in his first submission that he would not “pronounce himself” on the legal and political aspects of the Belgian intervention, but that he did conclude that the “presence of these troops is a source of internal and potentially also of international tension.” He also stated, “it would be understood that were the United Nations to act as proposed, the Belgian Government would see its way to a withdrawal.”²⁷ At the same meeting the Belgian representative confirmed this understanding: “when the United Nations forces have, as the Belgian Government hopes, rapidly moved into position and are able to ensure the effective maintenance of order and the security of persons in the Congo, my Government will proceed to withdraw its intervening metropolitan forces, which are at present alone capable of ensuring the accomplishment of these aims.”²⁸

Thus the stage was set for the introduction of a United Nations force on substantially the same basis as UNEF, namely, entry into the host country with the consent of that country coincident with the gradual withdrawal of unwelcome, if not invading, forces of a foreign country. The initial resolution did not describe the exact functions of the force except as they may be implied from the authorization to the Secretary General: “to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary, until, through the efforts of the Congolese Government with the technical assistance of the United

²⁴ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 16 (S/4387) (1960). The resolution was adopted by 8 affirmative votes with 3 abstentions—China, France and the United Kingdom.

²⁵ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 12 (S/4382) (1960).

²⁶ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 12 (S/4382) (1960).

²⁷ U.N. SECURITY COUNCIL OFF. REC. 15th year, 873d meeting 4-5 (S/PV.544) (1960).

²⁸ *Id.* at 37.

Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks."²⁹ In practical terms the functions of UNEF and ONUC were noticeably different. The primary function of the former was to patrol the borders of two hostile countries in order to discourage the resumption of hostilities; the principal function of the latter was to help in the maintenance of internal order. In more general and abstract terms, however, the objective of both forces was the same, namely, to facilitate by their very presence the withdrawal of foreign forces.

Opinion of the International Court of Justice

The first full dress debate on the constitutional validity of the establishment of UNEF and ONUC occurred in the proceedings of the International Court of Justice in connection with the Advisory Opinion of July 20, 1962.³⁰ The General Assembly had requested an opinion only on the question whether

the expenditures authorized in General Assembly resolutions . . . relating to United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions . . . and the expenditures authorized in General Assembly resolutions . . . relating to the operations of the United Nations Emergency Force undertaken in pursuance of the General Assembly resolutions . . . constitute expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.³¹

There was, in fact, some difference of opinion expressed both in the arguments before the Court and in the individual opinions of the judges of the Court on whether this submission properly raised the issue of the validity of the resolutions authorizing the operations.³² But the reasoning

²⁹ *Op. cit. supra* note 24.

³⁰ CERTAIN EXPENSES OF THE UNITED NATIONS—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS (I.C.J. 1962). See generally Gross, *Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice*, 17 INT'L ORGANIZATION 1 (1963); Hogg, *Peace-Keeping Costs and Charter Obligations—Implications of the International Court of Justice Decision on Certain Expenses of the United Nations*, 62 COLUM. L. REV. 1230 (1962); Simmonds, *The UN Assessments Advisory Opinion*, 13 INT'L & COMP. L. Q. 854 (1964).

³¹ U.N. GEN. ASS. OFF. REC. 16th Sess., Supp. No. 17 (A/Res/1731) (1961).

³² France took the position that the issue should not be answered at all because the phrasing of the request in effect foreclosed its consideration. In support of this position France pointed to the rejection of a French amendment to the Resolution submitting the question, which was apparently intended to present the issue. See CERTAIN EXPENSES OF THE UNITED NATIONS—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 130 (I.C.J. 1962).

The United States argued that the question properly could and should be answered affirmatively without considering the validity of the underlying resolutions although

of the Court, which was approved in its entirety by only five of the fourteen sitting judges, seemed to show no hesitancy in considering fully the arguments addressed to the validity of the underlying resolutions establishing UNEF and ONUC.³³

After noting that Article 24 confers upon the Security Council "primary" but not exclusive responsibility for the maintenance of international peace and security, the opinion indicates that the authority of the General Assembly for effective action in this area might be most clearly and satisfactorily found in Article 14, which provides that the General Assembly may

recommend measures for peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations.³⁴

The members of the Court joining in the opinion were particularly impressed with the applicability of Article 14, because "the word 'measures' implies some kind of action, and the only limitation which Article 14

the Court was not foreclosed from considering their validity. *Id.* at 180, 413. The United States was joined in general support of an affirmative answer to the question by Australia, Canada, Denmark, Ireland, Italy, Japan, the Netherlands, Norway and the United Kingdom. *Id.* at 230 and 372, 210 and 289, 137, 247 and 387, 125 and 322, 223, 166 and 310, 351, 239 and 335, respectively.

The Soviet Union, on the other hand, argued for a negative answer. It addressed itself directly to the validity of the underlying resolutions and asserted that the question could not be answered without such consideration. *Id.* at 270, 397. The negative position was supported not only by the Soviet group (U.S.S.R., Byelorussian S.S.R., Bulgaria, Czechoslovakia and the Ukrainian Republic) but also by Portugal, South Africa, Spain, and Upper Volta. *Id.* at 270 and 397, 275, 276, 177, 277, 227, 255, 245 and 123, respectively. The objections of Portugal and Spain were directed to the powers of compulsory assessment rather than the validity of the operations. The objections of South Africa and Upper Volta were directed primarily to the validity of the Congo Operation.

³³ The Court's opinion does not explicitly direct its attention to the validity of the resolutions. Instead it primarily considers the argument that "one type of expenses, namely those resulting from operations for the maintenance of international peace and security, are not 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fall to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter." Certain Expenses of the United Nations [1962] I.C.J. Rep. In effect the Court telescoped into one question what had been treated in most of the arguments as two separate questions, the validity of the operations themselves and the validity of the method of financing them. This approach tends to focus the opinion generally on the budgetary or financial question rather than on the validity of the underlying resolutions. In its more detailed consideration, however, the Court considers the specific arguments challenging the validity of the resolutions or their implementation by the Secretary-General.

³⁴ *Id.* at 163.

imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so."³⁵ Such "measures" were not to be confused with "coercive action" which was exclusively the province of the Security Council, but neither were they "merely hortatory." "Article 18 deals with 'decisions' of the General Assembly 'on important questions.' These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect."³⁶

The Court also took particular note of the argument that Article 11, paragraph 2, indicates the exclusive authority of the Security Council on any action directed to the maintenance of international peace and security. Special emphasis had been placed on the last sentence of that article, which reads, "Any such question [relating to the maintenance of international peace and security] on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion." The Court responded that

the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action The word "action" must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The "action" which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely, "action" with respect to threats to the peace, breaches of the peace, and acts of aggression Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action.³⁷

The argument as stated is somewhat circular. The action referred to in Article 11 is the kind of action which is solely within the province of the Security Council; that kind of action is only "coercive or enforcement action." But the Court did not rely merely on textual analysis. It

³⁵ *Ibid.*

³⁶ *Ibid.* As examples the Court mentioned suspension of rights and privileges of membership, expulsion of Members, and budgetary questions.

³⁷ *Id.* at 164-65. Chapter VII does not itself use the terms "coercive" or "enforcement." However, Article II, paragraph 5 refers to "preventive or enforcement action" and Article II, paragraph 7 to "enforcement measures under Chapter VII." Article 53 also refers to "enforcement action" authorized by the Security Council through utilization of "regional arrangements."

found in addition that "the practice of the Organization throughout its history bears out the foregoing elucidation of the term 'action' in the last sentence of Article 11, paragraph 2."³⁸ It referred in particular to the Assembly's establishment of various committees, commissions or other bodies as subsidiary organs under Article 22 whose actions of investigation, observation or supervision depended upon the "consent of the State or States concerned."³⁹

In applying these generalizations to the particular operations in controversy, the Court relied heavily upon the description of the functions of UNEF, submitted by the Secretary-General and approved by the General Assembly without a dissenting vote, to demonstrate that its establishment was not in effect enforcement action under Chapter VII. According to the Secretary-General,

it [the force] would be more than an observers' corps, but in no way a military force temporarily controlling the territory in which it is stationed; nor moreover should the force have military functions exceeding those necessary to secure peaceful conditions on the assumption that the parties to the conflict take all necessary steps for compliance with the recommendations of the General Assembly.⁴⁰

On the basis of this description and "the subsequent operations of the Force," the opinion concluded that "these 'actions' may be considered 'measures' recommended under Article 14, rather than 'action' recommended under Article 11."⁴¹

The Court was not quite so explicit in determining under just what article the ONUC would most naturally fall, but it was just as emphatic in concluding that "the operation did not involve 'preventive or enforcement measures' against any state under Chapter VII and therefore did not constitute 'action' as that term is used in Article 11."⁴² It pointed out

³⁸ *Id.* at 165.

³⁹ *Ibid.* The opinion does not give specific examples of such "subsidiary organs." It might have mentioned the United Nations Commission on Korea (UNCOK), established by the General Assembly on Dec. 12, 1948, A/RES/195 (III) (1948), and the United Nations Special Committee on the Balkans (UNSCOB), established by the General Assembly on Oct. 21, 1947, A/RES/109 (II) (1947). See generally, BOWETT, *op. cit. supra* note 7, ch. 4.

⁴⁰ [1962] I.C.J. REP. at 171, quoting from second and final report of the Secretary-General on the *Plan for an Emergency International United Nations Force*, U.N. GEN. ASS. OFF. REC. 1st Emergency Sess., Annexes, Agenda Item No. 5, at 19-22 (A/3302) (1956).

⁴¹ [1962] I.C.J. REP. at 171-72.

⁴² *Id.* at 177. At another point the Court said, "Articles of Chapter VII of the Charter speak of situations and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a state." *Id.* at 167.

that there had been no determination under Article 39 that any state had committed an act of aggression or had breached the peace and that ONUC was not authorized to take military action against any state. Presumably this did not rule out the possibility that there had been an implied determination of a "threat to the peace" under Article 39 and a decision to take provisional measures under Article 40, although it assumes that the establishment of ONUC did not constitute action by air, sea or land forces under Article 42.⁴³

The foregoing passages culled from different parts of the opinion might be constructed into a pattern of Charter interpretation recognizing a type of peace-keeping operation which may be authorized by either the General Assembly or Security Council and which is to be clearly distinguished from the type of enforcement or coercive measures which may be authorized only by the Security Council under Article 42.⁴⁴ It will be recalled, however, that the reasoning of the Court was fully concurred in by only five members of the Court and may in some respects represent only a minority view. Close examination of the concurring opinions indicates that only seven of the nine judges who joined in the conclusion of the Court expressly committed themselves on the validity of the resolutions authorizing the operations.⁴⁵ On the other hand, not all of the five dissenting judges passed explicitly on the issue of the validity of the underlying resolutions. Although Judge Winiarski in his dissent expressed doubt about their validity, he relied principally upon the ground that both the UNEF and Congo resolutions were recommendations rather than binding decisions and that therefore "the resolutions approving and apportioning these expenses are valid and binding only in respect of the Member States which have accepted the recommendations."⁴⁶ Judge Koretsky was more emphatic in his dissent in rejecting as unfounded the distinction between peace-keeping and enforcement measures. He concluded that the resolutions establishing UNEF were clearly invalid in their entirety and those relating to the

⁴³ This conclusion made inapplicable the arguments based particularly upon Article 43, *i.e.*, that only the Security Council could make financial arrangements for defraying the cost of the Congo operations. Compare the submission of the Soviet Union, *supra* note 32, at 273, 404.

⁴⁴ While the Court's distinction between "peace-keeping operations" and "enforcement action" was implicit in the submissions of several states, it was most fully developed in the written statement of Denmark, *supra* note 32, at 156-61.

⁴⁵ Judge Spiropoulos and Judge Sir Percy Spender disassociated themselves from any expression of opinion on the validity of the underlying resolutions. [1962] I.C.J. REP. at 180, 182. Judges Sir Gerald Fitzmaurice and Morelli, while they wrote separate opinions, indicated general agreement with the Court's treatment of the validity of the underlying resolutions. *Id.* at 200, 216.

⁴⁶ *Id.* at 233.

Congo invalid insofar as they sought to bypass Article 43 and to entrust to the General Assembly the authority to apportion the expenses of the operations.⁴⁷ Two other dissenters, while being primarily concerned with the inadequacy of the question presented, expressed skepticism about the arguments advanced in support of the underlying resolutions.⁴⁸

Despite the dissenting opinions, the General Assembly voted to accept the opinion of the court by substantially more than a two-thirds majority, including affirmative votes from a number of countries who had not voted in favor of submission of the question.⁴⁹ In the debate on the Resolution to accept the opinion, however, both France and the Soviet bloc indicated quite clearly that they had no intention of changing their basic positions.⁵⁰ Since then the principal opposing positions on the constitutional questions have been stated again and again with only slight differences in phrasing which would occasionally give rise to speculation on possible shifts of position. The principal forum for the debates has been the successive Working Groups.

Committee Discussions Since the Court's Opinion

In a document first presented to the Working Group of Twenty-One on September 11, 1964,⁵¹ and recirculated to the Committee of Thirty-Three in April 1965, the Soviet Union restated its grounds for insisting on the invalidity of both the UNEF and ONUC operations. The UNEF argument was very simply summarized:

In matters relating to the maintenance of international peace and security, the United Nations Charter clearly delimits the competence of the Security Council and of the General Assembly. According to the Charter, only the Security Council is empowered to decide questions relating to the taking of action to

⁴⁷ *Id.* at 253-87.

⁴⁸ Judges Quintana and Bustamante expressed doubt on the validity and applicability of the distinction between peace-keeping and enforcement operations. *Id.* at 246, 296.

⁴⁹ U.N. GEN. ASS. OFF. REC. 17th Sess., Plenary 1199 (A/PV.1199) (1962); A/RES/1854 (XVII) (1962). The vote was 76 to 17, with 8 abstentions. (The vote on submitting the question had been 52 to 11, with 32 abstentions). Part B of the resolution re-established the Working Group on the Examination of the Administrative and Budgetary Procedures of the United Nations with the same membership as that established by A/RES/1620 (XV) (1961), but with its membership increased from 15 to 21.

⁵⁰ See particularly the discussion in the Fifth Committee, U.N. GEN. ASS. OFF. REC. 17th Sess., 5th Comm. at 275, 279 (A/C.5/SR.961); *id.* at 284 (A/C.5/SR.962); *id.* at 297, 300 (A/C.5/SR.965); *id.* at 311 (A/C.5/SR.967); *id.* at 319 (A/C.5/SR.968); *id.* at 325 (A/C.5/SR.969); *id.* at 337 (A/C.5/SR.971); *id.* at 341 (A/C.5/SR.972); *id.* at 347 (A/C.5/SR.973) (1962); U.N. GEN. ASS. OFF. REC. 17th Sess., Annexes, Agenda Item No. 64, at 4 (A/5380) (1962).

⁵¹ U.N. Doc. No. A/5729 (1964).

maintain international peace and security; the establishment of the United Nations Emergency Force in the Middle East falls into this category.⁵²

The constitutional objection of the U.S.S.R. to ONUC could not, however, be so simply stated. The memorandum of September 11, 1964, summarized the principal objection as follows:

According to the Charter, the Security Council shall determine which States shall take part in carrying out its decisions for the maintenance of international peace and security. Article 48 of the Charter provides that: "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." In violation of these provisions of the Charter, the Secretary-General of the United Nations, bypassing the Security Council, himself determined the group of States which were invited to take part, with armed forces or otherwise, in the United Nations operations in the Congo. As early as the Security Council meeting of 20 July 1960, the USSR representative was compelled to protest against the actions of the Secretary-General which were undertaken in violation of the Security Council resolution of 14 July.⁵³

This paragraph reveals the weakest link in the whole chain of the Soviet argument on the expenses incurred in the Congo operations. The Resolution of July 14, 1960, in which the Soviet Union joined, explicitly authorized "the Secretary-General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary . . ."⁵⁴ Furthermore, there could have been no doubt in the minds of any of the members of the Security Council that the Secretary-General proposed to establish the United Nations force in the same manner as UNEF, *i.e.*, by concluding agreements with nations who were willing to provide forces which he considered suitable for the purposes involved.⁵⁵ Finally,

⁵² *Id.* at 3.

⁵³ *Id.* at 5.

⁵⁴ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 16 (S/4387) (1960).

⁵⁵ The Secretary-General stated that he would base his actions "on the principles which were set out in my report to the General Assembly on the conclusions drawn from the previous experiences in the field." The reference was to the Report entitled, *Summary study of the experience derived from the establishment and operation of the Force: report of the Secretary General*. U.N. GEN. ASS. OFF. REC. 13th Sess., Annexes, Agenda Item 65, at 8 (A/3943) (1958). In that report the Secretary-General mentioned explicitly the principles which would guide him in the acceptance of offers of troops.

even assuming that Article 48 is fully applicable to the nature of the action involved,⁵⁶ it is hard to see why the authorization of the Secretary-General to reach agreements with such individual Members as were willing to provide such forces was not itself a determination by the Security Council that such forces should be provided by some Members of the United Nations, rather than all of them in strict accordance with Article 48. The Soviet assumption that Article 48 means the Security Council must itself decide which Members are to be permitted to supply troops seems to fly in the face of the very principles of strict construction upon which the U.S.S.R. customarily relies. Apart from this somewhat unrewarding kind of textual analysis, there is no reason to assume that Article 48 constitutes an exception to the Security Council's general powers of delegation explicitly mentioned in Article 29, which authorizes the Security Council to establish such subsidiary organs as it deems necessary for the performance of its functions, and again in Article 98, which directs the Secretary-General to "perform such other functions as are entrusted to him by these organs [including the Security Council]." ⁵⁷ In fact the Security Council did exercise some control over the selection of Members to contribute forces by its tacit approval of the Secretary-General's proposals that forces of permanent Members of the Security Council would be excluded and that forces from African states would be particularly welcome.

The truth of the matter is that the real basis of the U.S.S.R.'s objections to ONUC was not the method of its establishment but rather the manner in which its operations were conducted. This is intimated in the U.S.S.R. statement that

it is possible to conceive a situation in which the requirements of the Charter are satisfied as regards the establishment of United Nations armed forces, but the activity of those forces is so directed as to produce results which are diametrically opposed to the purposes set forth in the Charter. This is precisely what happened in the Congo.⁵⁸

⁵⁶ This assumption involves again the question whether the "action" referred to is only "enforcement action" of the type authorized by Article 42 or whether it would include "peace-keeping" operations authorized by the Security Council under some other power.

⁵⁷ The Advisory Opinion of the International Court of Justice also relied upon the Security Council's powers of delegation and its repeated approval, with the Soviet Union's affirmative vote, of the Secretary-General's initial conduct of the Congo operations as grounds for rejecting the U.S.S.R.'s challenge to their validity. [1962] I.C.J. REP. at 175-77.

⁵⁸ U.N. Doc. No. A/5729, at 5 (1964).

Not even the protests against the Secretary-General's conduct of operations, to which the Soviet memorandum refers, contained the slightest hint of constitutional objection to the creation, mandate, or operations of the force.⁵⁹ Even at the height of the U.S.S.R.'s disenchantment with the Congo operation and with the Secretary-General,⁶⁰ Mr. Zorin in the Security Council debate did not challenge the validity of ONUC's mandate or call for its immediate termination.⁶¹ It seems fair to conclude, therefore, that the Soviet Union's objections to the constitutional validity of the Congo operations were really afterthoughts designed to bolster its general position on the invalidity of the assessments.

France also circulated a position paper, dated October 16, 1964,⁶² to the Working Group of Twenty-One to make clear its objection to the validity of the assessments which it was refusing to pay. Although the French refusal applied only to the Congo operations and not to UNEF, its legal position was substantially the same on both. That position was "based first of all on the fact, which is borne out by reference to the Charter, that the General Assembly is not endowed by that document with the powers of a world government and therefore cannot take majority decisions which impose obligations on States that have not accepted them"; and second, "on the fact that, as regards peace-keeping operations, 'there is only one category of binding decisions, those adopted by the Security Council in the cases specified and in the manner prescribed by the Charter.'"⁶³ "The United Nations operations in the Middle East and the Congo were not undertaken in pursuance of binding decisions under Chapter VII of the Charter. Hence, the recommendations of the

⁵⁹ The main gravamen of the Soviet complaint was that the United Nations was not acting with sufficient speed and effectiveness to require the withdrawal of Belgian troops and to "ensure the territorial inviolability and integrity of the country." U.N. SECURITY COUNCIL OFF. REC. 15th year, 877th meeting 34-35 (S/PV.877) (1960).

⁶⁰ This was immediately after the death of Lumumba. As the memorandum of September 21, 1964, states, "The USSR government, in its statement of 14 February 1961, roundly condemned the actions of the Secretary-General of the United Nations and proposed the prompt withdrawal of all foreign troops from the Congo so as to enable the Congolese people to settle their domestic affairs by themselves . . ." U.N. Doc. No. A/5729, at 6 (1964).

⁶¹ Instead the U.S.S.R. submitted a draft resolution which in part directed "the command of the troops that are in the Congo pursuant to the decision of the Security Council immediately to arrest Tshombe and Mobutu in order to deliver them for trial, to disarm all the military units and 'gendarmerie' forces under their control, and to ensure the immediate disarming and removal of all Belgian troops and all Belgian personnel . . ." After accomplishing these drastic measures the United Nations operations in the Congo were to be discontinued. U.N. SECURITY COUNCIL OFF. REC. 16th year, 934th meeting, at 24 (S/PV.934) (1961).

⁶² U.N. Doc. No. A/AC.113/47 (1964).

⁶³ *Id.* at 2-3.

Council and the Assembly in these matters bind only those states which have accepted them."⁶⁴ The application of these principles to UNEF is clear. Since the force was not established by the Security Council, it could not have been created by a binding decision under Chapter VII; therefore, France's contributions to the "Special Account of the Emergency Force" were entirely voluntary. The position on ONUC is not quite so clear. The French memorandum undertook to supply the missing link: "In the opinion of the French delegation it is the Security Council which must prescribe the method of financing and, if necessary, the apportionment of the expenses incurred in connection with a peace-keeping operation which it has authorized."⁶⁵

The French objection in this statement, in essence, went only to the compulsory financing of peace-keeping operations and not to their authorization, whether by the Security Council or the General Assembly. This is also consistent with the position taken by the French representative in the debate on acceptance of the opinion of the International Court of Justice.⁶⁶ This position also seemed to accept the validity of an authorization from either the Security Council or the General Assembly to the Secretary-General to establish peace-keeping forces by agreements with contributing states willing to contribute troops if the financing were by voluntary contributions. It is difficult to see how France could take any more restrictive a position without abandoning its support of UNEF.

Nevertheless, there has been some concern that France is moving closer to the U.S.S.R. position insofar as it denies authority to the General Assembly to authorize peace-keeping operations of a noncoercive character and financed by voluntary contributions. This concern is largely based on remarks made in the Committee of Thirty-Three by the French representative, such as the following:

For its part, the French delegation has never alleged and does not now allege that the Security Council bears exclusive responsibility. My delegation merely notes that the field of respective responsibilities of the Security Council and the General Assembly is clearly defined by the Charter: on the one hand, in the case of the Security Council there is the power—and the exclusive power—to legislate, by means of decision or recommendation, on an action of the United Nations, that is, on any operation involving the use of force, whether or not it is directed against a state; on the other hand, in the case of the General Assembly there is the power to discuss questions relating to the

⁶⁴ *Id.* at 4.

⁶⁵ *Ibid.*

⁶⁶ U.N. GEN. ASS. OFF. REC. 17th Sess., 5th Comm. 284 (A/C.5/SR.962) (1962).

maintenance of peace and to formulate any recommendation that does not infringe the prerogatives of the Council, that is, any recommendation which does not bear on an action but which, pursuant to the provisions of Article 14, could bear on measures appropriate to the peaceful adjustment of the situation under consideration. That—and only that—constitutes what is sometimes described as the “residual power of the General Assembly”. . . .⁶⁷

This statement, particularly in its reference to “any operation involving the use of force, whether or not it is directed against a state,” if taken literally, seems to reject entirely the distinction approved by the majority opinion of the International Court between enforcement or coercive measures and peace-keeping operations. It would also bar operations such as those now being conducted by UNEF under the authorization of the General Assembly even if they were financed on a voluntary basis.

Assuming this to be a correct interpretation of the current French position,⁶⁸ it also rejects the painstaking attempts of several delegates

⁶⁷ U.N. Doc. No. A/AC.121/PV.3, at 17-18 (1965). See also, U.N. Doc. No. A/AC.121/SR.3, at 9-10 (1965) for an abbreviated but official record.

⁶⁸ This interpretation seems to be confirmed by a subsequent statement of the French representative in the Committee of Thirty-Three on May 17, 1965, in which he made a deliberate effort to elaborate the meaning of his previous remarks. After referring to the efforts of some delegations to develop a concept of non-coercive peace-keeping operations based on the opinion of the International Court of Justice, the French delegate continued: “His delegation could not subscribe to such a concept, which did not take the following considerations into account. In the first place, to define, implicitly or explicitly, enforcement actions as only those operations directed against a State was to establish a distinction which was not justified either by the Charter or by experience. Recent history, indeed, showed that internal conflicts easily degenerated into international conflicts, even when in theory they remained internal conflicts. The phenomenon of ‘volunteers’ showed how arbitrary such a distinction could be, and the fact that the official Government of the country principally concerned agreed to the presence of a United Nations ‘force’ on its territory did not suffice to make internal upheavals out of conflicts which for practical purposes were international in character. Furthermore, it was not enough to say that the United Nations force would be authorized to use its weapons only in exceptional circumstances for the action in question not to be an enforcement action. The history of United Nations operations showed that the concept of self-defence could be interpreted in a very broad manner. Moreover, the possibility could not be excluded that a peace-keeping force might itself be tempted to create conditions for its own self-defence or, above all, that there might be risks inherent in a concatenation of uncontrollable circumstances. In more general terms, the scope of the force’s mandate, and sometimes its very nature, were subject to change in the course of the operation. An operation which did not ‘in principle’ involve the use of force could in fact become an enforcement measure, as had been the case in the Congo when the ‘Blue Helmets’ had put down the secession of Katanga. It was therefore wiser to recognize that enforcement action occurred whenever the use of force was provided for, even where it was restricted to certain hypothetical circumstances. Finally, if the concept of enforcement action was to be taken as a criterion for Security Council jurisdiction, the Security

to narrow the area of controversy by suggesting a carefully limited definition of the term "peace-keeping operations." For example, the Swedish representative made these observations:

I should like to submit, first of all, that decisions taken by the Security Council under Chapter VII of the Charter should not be included in the term "peace-keeping operation." Such decisions are binding on Member states. If they involve the setting up of military or police forces, countries may be legally obligated to receive such forces on their territories, to allow passages, and even to put contingents at the disposal of the United Nations to form part of such forces

. . . [I]n the view of the Swedish delegation, we should base ourselves on the practical experiences of the United Nations activities in this field up to now. It then seems reasonable and justified, first of all, to define the concept so as to include only operations that are essentially voluntary, in that they require (a) an invitation from, or at least the consent of, a country on whose territory an operation is to take place, and (b) do not place any obligations on Member States as to contributions in the form of personnel, equipment, logistics, etc. I will revert later to the question of financing.

Beyond what I have now said about the essentially voluntary character of peace-keeping operations, it is possible to delimit their scope and to illustrate their functions pragmatically by citing examples from the practice of the United Nations. Such examples would be: observation of conditions on one side or both sides of a frontier; supervision of a truce or an armistice;

Council and the General Assembly might become involved in serious conflicts of jurisdiction. When the establishment of a United Nations force was contemplated, there could be some doubt at the outset concerning the nature of its mandate, some countries for example considering that an act of aggression had been committed, while others might consider the situation as calling merely for a simple police operation, and lengthy discussions might be necessary to determine the precise nature of the action to be taken.

"For all those reasons, his delegation believed that the action referred to in Article 11(2) included not only the measures provided for in Articles 41 and 42 of Chapter VII of the Charter but also any measure for the establishment of a force, whether military or not, to intervene against a State or within a State, even where the latter consented to the intervention and the effective use of arms was theoretically limited to restricted or exceptional circumstances. That definition did not include operations for the purpose of observation, supervision or inquiry, even if the participants in them were military personnel and even if there were large numbers of them, provided, however, that they were not constituted into units under military command and that they were not responsible for their own security, which was a matter for the local forces. In short, his delegation could support the suggestion made by the representative of India at the fourth meeting that the dispatch of armed personnel otherwise than for the purpose of observation or investigation should be within the exclusive power of the Security Council." U.N. Doc. No. A/AC.121/SR.7, at 5-6 (1965).

missions of mediation or conciliation, possibly connected with some investigation or observation to clarify the factual situation; or assistance to a country to maintain law and order in conditions in which international peace might otherwise be disturbed.

It goes without saying that a peace-keeping operation should not be allowed to constitute or be a pretext for any type of foreign intervention or to infringe on the national sovereignty of any country. If armed personnel is involved, there should be an absolute prohibition of the use of force except in self-defense.⁶⁹

The Swedish statement is significant both in the limitations it would place upon the proper use of peace-keeping forces and also in its assimilation of such forces to other less controversial types of peace-keeping measures, such as truce supervision, observation, investigation, and mediation.

The representative of Canada, a country which like Sweden has taken a leading part in the initiation and actual conduct of peace-keeping operations, expressed "full agreement with the analysis just presented by the representative of Sweden regarding the definition of peace-keeping operations." The Canadian representative also went a step further in stating that his observations would "therefore exclusively apply to operations undertaken under Chapter VI of the Charter, operations which consequently are not of a coercive character."⁷⁰ Particularly in referring to Chapter VI of the Charter the Canadian representative was more explicit than the International Court opinion which had been content to deny that the UNEF and ONUC operations constituted "preventive or enforcement measures" against any state under Chapter VII without foreclosing the possibility that they might be considered as some other type of action under Chapter VII. The Secretary-General, while primarily anxious to make it clear that the Congo operation did not constitute enforcement

⁶⁹ U.N. Doc. No. A/AC.121/PV.3, at 3-5 (1965). See also U.N. Doc. No. A/AC.121/SR.3, at 4-5 (1965).

⁷⁰ U.N. Doc. No. A/AC.121/PV.3, at 12 (1965); A/AC.121/SR.3, at 7 (1965). In referring to "operations undertaken under Chapter VI of the Charter" the Canadian representative did not mean that the provisions of Chapter VI would be the only relevant ones. This is made evident by his subsequent reference to Article 14 as an appropriate basis for the authority of the General Assembly to initiate peace-keeping operations. One might harmonize both parts of his statement by reference to Article 35 of Chapter VI: "Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly." Thus it might be said that Chapter VI implicates all the powers of the General Assembly relevant to the maintenance of international peace and security as well as the powers of the Security Council which do not involve "enforcement" measures.

action under Article 42, had also suggested that it might be regarded as coming within the scope of "provisional measures" mentioned in Article 40 of Chapter VII.⁷¹ The Canadian representative's reference to Chapter VI might have been, therefore, a deliberate choice based more on political than constitutional considerations with the thought perhaps that it might be easier to find a compromise formula on operations entirely outside the ambit of Chapter VII.

A somewhat similar approach was also taken by the representative of Mexico in his presentation to the Committee of Thirty-Three. Although he did not commit himself explicitly to Chapter VI as did the Canadian delegate, he was even more emphatic in disassociating the problem entirely from Chapter VII. He did this by appealing to a concept of customary law designed "to cope with new realities that could not have been foreseen in the Charter." Those realities he defined in part as follows:

Quite properly, for a number of years now we have been witnessing the birth of a new kind of international operations which, under the aegis of the United Nations, are destined to maintain peace. The provisions of the Charter are clear and remain inviolate: all actions provided in Chapter VII and the primary responsibility of the Security Council are not called into question. On the other hand, we have to appraise a new form of customary law which so far has not received the general acceptance of Member States either in its formation, execution or even in its meaning.

....

Perhaps for the time being it is unnecessary to decide each and every one of the characteristic features of these operations; for the time being, it may suffice to spell out that these operations

⁷¹ Speaking in the Security Council on August 8, 1960, the Secretary-General referred to Articles 25, 40, 41 and 49 as all being possibly relevant to the Congo operations and particularly to the obligation of member nations under Article 25 "to accept and carry out the decisions of the Security Council." U.N. SECURITY COUNCIL OFF. REC. 15th year, 884th meeting 4-5 (S/PV.884) (1960). The Secretary-General was apparently linking this obligation to the provision of Article 40 that "the Security Council may, . . . call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable." On December 13, 1960, when the Secretary-General was more concerned with establishing the limits upon his authority, he said, "My own view, which I have expressed to the Council, is that the resolutions may be considered as implicitly under Article 40 and, in that sense, as based on an implicit finding under Article 39. But what I should like to emphasize is that neither the Council nor the Assembly has ever endorsed this interpretation, much less put such endorsement in a resolution. What is even more certain is that the Council in no way directed that we go beyond the legal basis of Article 40 and to the coercive action covered by Articles 41 and 42." U.N. SECURITY COUNCIL OFF. REC. 15th year, 920th meeting 19 (S/PV.920) (1960). See also BOWETT, UNITED NATIONS FORCES 174-80 (1964); Miller, *Legal Aspects of the United Nations Action in the Congo*, AM. J. INT'L L. 1 (1961); Schachter, *The Relation of Law, Politics and Action in the United Nations*, 2 RECUEIL DES COURS 216-25 (1963).

can be carried out only with the consent of the State or States which are parties to the dispute; it is also sufficient to make it plain that this is a question of military operations in which the Member States participate in a manner which is fundamentally different from that provided under Chapter VII of the Charter and, in particular, where the guarantees laid down under Article 43 of the Charter are also considered in a different manner.⁷²

If these and somewhat similar comments by other delegations were designed to narrow the area of controversy and to suggest a possible bridge to agreement through limiting the possible scope of "peace-keeping operations,"⁷³ they did not succeed in evoking any immediate manifestations of support or even interest from the Soviet bloc. The Czechoslovakian representative made the first explicit response in these terms:

There seems to be, in the view of some colleagues, a problem in defining the concept of peace-keeping operations. As my delegation sees it, we are concerned here in this Committee with a specific kind of peace-keeping operation, namely where the use of armed forces by the United Nations is envisaged. As far as the use of armed forces by the United Nations is concerned, there is only one part of the Charter which determines this, and

⁷² U.N. Doc. No. A/AC.121/PV.2, at 32-33 (1965); U.N. Doc. No. A/AC.121/SR.2, at 12-13 (1965).

⁷³ The Indian representative, for example, suggested that "it might be possible to reach an agreement to the effect that the dispatch of armed personnel otherwise than for the purpose of observation or investigation should be within the exclusive power of the Security Council. A convention might then be established that where the parties primarily concerned concurred the great powers might agree, save in exceptional circumstances or for special reasons, not to vote against a proposal involving the dispatch of armed personnel." U.N. Doc. No. A/AC.121/SR.4, at 6 (1965).

The representative of Pakistan emphasized the relation of peace-keeping to the peaceful settlement of disputes under Articles 33 and 34 of the Charter. "The problem would be greatly simplified if the Security Council called upon the parties to a dispute, not merely to negotiate, but to settle the dispute by other peaceful means, such as inquiry, mediation, arbitration and judicial settlement which were mentioned in Article 33, and if the Council carried out the investigative functions laid down in Article 34 of the Charter. It was the disuse of those provisions of the Charter which had necessitated the employment of the palliatives known since 1956 as 'peace-keeping operations'—a rather loose term which might have caused some confusion. It leads one to overlook the fact that those operations were different from the dispatch of a military force with a coercive mission and that United Nations intervention in a situation likely to lead to a breach of the peace might constitute nothing more than either the employment of the peaceful means envisaged in Article 33, at the parties own choice, or the taking of measures for the peaceful adjustment of the situation in accordance with recommendations under Article 14. It had been repeatedly pointed out that the scope of those operations was strictly limited because of their peaceful and voluntary nature; they were undertaken at the request or with the consent of the country involved; the use of force was barred except in self-defence; and they placed no obligation on Member States to contribute to them in either personnel or material." U.N. Doc. No. A/AC.121/SR.6, at 5 (1965).

that is Articles 41 to 47. It cannot be argued that what the Charter provides for in these Articles is only a combat use of these armed forces, a use only in fighting operations. The enumeration of possible actions in Article 42 is *exemplificative*—I would draw your attention to the words “may include”—and those actions that are mentioned, such as demonstrations and blockades, are not fighting operations, not shooting operations. To maintain that so-called police operations by armed forces are not included under Article 42 seems to us not consistent with the logic of the Charter. Neither does it make sense to us to hear that so-called police operations cannot be considered as enforcement actions; for what is a police force for if not for enforcing some behavior or dissuading from some activity? And moreover, in all common sense, military forces, even when armed only with conventional weapons, are certainly a formidable political instrument, especially when operating in a small or not heavily armed country; and it is therefore necessary to use this instrument with the utmost caution and the highest degree of responsibility as strictly defined by the Charter. It is logical therefore that such an instrument be created and manipulated by that organ of the United Nations which has the exclusive competence for using armed force as stipulated under the provisions of Chapter VII.⁷⁴

The Soviet Union was equally explicit in rejecting the suggestion that a Chapter VI or some other restricted definition of “peace-keeping operations” might provide a basis for compromising the financial impasse. The Soviet representative restated the basic position of the U.S.S.R. on the exclusive authority of the Security Council “on all basic issues relating to the creation, utilization and financing, in each individual case, of the armed forces of the United Nations,” and endorsed the statements of France and Czechoslovakia. He then added a specific rejoinder to the proposals of Canada, Mexico and Sweden:

The Soviet delegation would wish, likewise, to express its view with regard to one of the concepts that is being developed by some delegations in our Committee too. This involves the assertion according to which the United Nations is within its right to carry out such operations for the maintenance of peace as distinct from enforcement action. Here, the very posing of the question constitutes total confusion. It proceeds from the premise that some utilization of the armed forces or their dispatch on behalf of the Organization can exist where such action would not come under the effect of Chapter VII of the Charter of the

⁷⁴ U.N. Doc. No. A/AC.121/PV.3, at 46 (1965); U.N. Doc. No. A/AC.121/SR.3, at 17 (1965).

United Nations. And by way of a governing criterion in such a posing of the problem, it is suggested that the agreement of the country to which these troops are to be sent be secured. It is stated that if such an agreement is secured, then if these troops are sent there, the operations cannot be considered as one of the measures connected with the utilization of enforcement action. Such an operation apparently should be considered as coming under the effect of Chapter VI and not Chapter VII of the Charter.

....
None of the provisions of Chapter VI of the Charter shows any signs that the measures included, aimed at the peaceful solution of disputes, could include any action, such as an operation on behalf of the United Nations, that might involve the use of armed forces; and the agreement or disagreement of countries that they should accept upon their territory the armed forces of the United Nations cannot change the character of the operations themselves which, we repeat, lies in the utilization of the armed forces of the United Nations, and on behalf of the United Nations. The governing criterion here is the character of the actions which may be reduced to using the armed forces only in those instances where it is necessary to avert or to halt an act of armed aggression against the territorial independence, integrity and sovereignty of the country concerned.

....
That is why the Soviet delegation fully and categorically rejects any attempts to represent matters as if, on the basis of the provisions of Chapter VI of the Charter, it is possible to take any decisions involving the use of the armed forces on behalf of the United Nations.⁷⁵

Some Tentative Speculations

So long as the Soviet bloc joined perhaps by France continues to be anchored to this position, there is no possibility of an explicit compro-

⁷⁵ U.N. Doc. No. A/AC.121/PV.8, at 13-17 (1965). In responding to a comment by the United States representative which relied in part on the advisory opinion of the International Court of Justice, the Soviet representative also repeated the U.S.S.R.'s complete rejection of that opinion with this explanation: "In drafting the Charter of the United Nations in San Francisco in 1945, it was recognized that no United Nations organ could give an interpretation of the United Nations Charter that would be binding on Member States of the United Nations, and that if differences arose in the interpretation of particular provisions of the Charter, those differences should be overcome by appropriate amendment of the Charter in accordance with the procedure laid down for the purpose: in other words, through negotiation with a view to bringing about agreement. Accordingly, it is obvious that the interpretation of the Charter given in the advisory opinion of the International Court of Justice of 20 July 1962 and in the General Assembly resolution of 19 December 1962 cannot bind anyone to any course of action." *Id.* at 37.

mise solution of the constitutional disagreement underlying the financial crisis of the United Nations.⁷⁶ Furthermore, it is also apparent that the Soviet Union's position is at war, not so much with the language of the Charter, as with the experience which has molded its life—an experience which the U.S.S.R. has itself either affirmatively shared, as in West Irian,⁷⁷ or at least condoned, as in the case of UNEF. In other instances, where the U.S.S.R. has affirmatively joined in authorizing peace-keeping operations through action by the Security Council—in the

⁷⁶ Thus far the United States has not commented specifically on these attempts to define "peace-keeping operations." The Working Paper submitted by the U.S. delegation, first to the Working Group of Twenty-One, U.N. Doc. No. A/AC.113/30 (1965), and recirculated to the Committee of Thirty-Three, U.N. Doc. No. A/AC.121/3 (1965), refers to "United Nations peacekeeping operations involving the use of military forces" but does not otherwise define or limit such operations. It suggests as a guide to future arrangements: "All proposals to initiate such peacekeeping operations would be considered first in the Security Council. The General Assembly would not authorize or assume control of such peacekeeping operations unless the Council had demonstrated that it was unable to take action." *Id.* at 3. Its more particular suggestions are concerned with the principles and methods of financing and apportioning the expenses of such operations. However, the U.S. representative at the second meeting of the Committee of Thirty-Three did say: "The exclusive power given to the Security Council by the Charter in this field is to decide on measures commonly called 'enforcement actions' for the maintenance of international peace and security, decisions which are binding on member states." U.N. Doc. No. A/AC.121/PV.2, at 55 (1965); U.N. Doc. No. A/AC.121/SR.2, at 19 (1965).

It remains to be seen how, if at all, this affects the classic U.S. position as reflected in the Uniting for Peace Resolution. Both the Indian and the Venezuelan representatives concluded explicitly that all "enforcement action" was the exclusive province of the Security Council and that the Uniting for Peace Resolution insofar as it suggested the contrary was itself "unrealistic if not also improper" and contrary to the opinion of the International Court of Justice. U.N. Doc. No. A/AC.121/SR.4, at 4 (1965); U.N. Doc. No. A/AC.121/SR.5, at 11 (1965). It is, of course, conceivable that a considerable sector of opinion in the United States would welcome such a qualification of our Uniting for Peace position. See, e.g., 111 CONG. REC. 5737-43 (daily ed. March 25, 1965) (speech by Senator Aiken).

⁷⁷ Particularly noteworthy is the vote on the resolution establishing UNTEA (United Nations Temporary Executive Authority) for the administration and policing of West New Guinea (West Irian). A/RES/1752 (XVII) (1962). It was adopted by the General Assembly by a vote of 89 to none with 14 abstentions, and every member of the Soviet bloc voted in favor of the resolution without a word of protest. U.N. GEN. ASS. OFF. REC. 17th Sess., Plenary 1127 (A/PV.1127) (1962). The resolution provided for the establishment of a U.N. Civil Administration and Security Force, operating conjointly with the Papuan police force and completely under the authority of a United Nations Administrator who was in turn responsible directly to the Secretary-General. This administration was notably temporary in character, pending only complete transfer of authority to Indonesia. It was financed entirely by Indonesia and the Netherlands, was based on an agreement between them, and represented an arrangement eminently satisfactory to Indonesia. It has even been characterized as a "face-saving" rather than a "peace-keeping" operation. See RUSSELL, UNITED NATIONS EXPERIENCE WITH MILITARY FORCES: POLITICAL AND LEGAL ASPECTS 126 (1963). Nevertheless, its actual authority during the period of its existence exceeded that of any other U.N. peace-keeping operation. See BOWETT, *op. cit. supra* note 71, ch. 7.

Congo and more recently in Cyprus⁷⁸—the constitutional controversy is not so sharply drawn, partly because the great issue of "Security Council vs. General Assembly" is not involved and partly because the theoretical positions are not so clearly delineated. Thus the supporters of peace-keeping operations like those in the Congo and Cyprus are not agreed on what chapter (VI or VII) or on what particular article of either chapter to invoke. The U.S.S.R. on the other hand is clear that authority must be found in Chapter VII, but has difficulty in pointing out where the actual practice departs from constitutional requirements. One key to its position rests on an interpretation of Article 48 which would deny to the Council any room for delegating to the Secretary-General authority to make the practical arrangements for the assembling of United Nations forces. Yet this interpretation is plainly at variance with the Resolutions for which the U.S.S.R. has voted both in the case of the Congo and of Cyprus and is not even supported by textual analysis.

Assuming then that the United Nations is not to turn its back on the whole thrust of its historical development in this area, the question remains whether it is wise to attempt to define more explicitly than has so far been collectively attempted both the nature of the peace-keeping operations at issue and the exact source of their authority. The principal advantage apparently anticipated from a more precise definition of "peace-keeping" is that it may reduce the area of great power concern over possible usurpation of their prerogatives and make agreement easier; the principal disadvantage is that a definition formulated primarily in terms of past experience and tailored towards a solution of the present controversy might turn out to be an embarrassing limitation on the flexi-

⁷⁸ The United Nations Force in Cyprus (UNFICYP) was established by the Security Council Resolution of March 4, 1964, for a period of three months. U.N. Doc. No. S/5575 (1964). It has been extended for similar periods on several successive occasions. The operative language of the resolution "*recommends* the creation, with the consent of the Government of Cyprus, of a United Nations peace-keeping force in Cyprus. The composition and size of the force shall be established by the Secretary General, in consultation with the Governments of Cyprus, Greece, Turkey and the United Kingdom." The resolution also "*recommends* that the function of the force should be, in the interest of preserving international peace and security, to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions." Costs are to be met by the governments providing contingents, by the Government of Cyprus, and by voluntary contributions which the Secretary-General is authorized to accept. The Soviet Union objected to those provisions of the resolution which authorized the Secretary-General to determine the composition of the Force as a circumvention of the Security Council and asked for a separate vote on that part of the resolution. It then abstained in the actual vote, together with France and Czechoslovakia, so that the paragraph was adopted by 8 votes to none. The resolution as a whole was then adopted unanimously. U.N. Doc. No. S/PV.1102 (1964).

bility required for meeting future crises. The considerations involved in weighing the respective advantages and disadvantages might be epitomized by reference to the problems of consent of the host state and the appropriate functions of the force. In each of the past peace-keeping operations involving substantial use of United Nations forces—UNEF in the Middle East, ONUC in the Congo, UNTEA in West New Guinea and UNFICYP in Cyprus—the forces were introduced with the general consent of all the contending parties and with the specific consent of the state upon whose territory the force was to be stationed. This does not mean, however, that the scope of consent was entirely without its problems. Israel, for example, refused consent to the stationing of UNEF on its territory, and the revocable or irrevocable nature of Egypt's consent was the subject of delicate negotiations between the Secretary-General and the Egyptian government which eventuated in the adoption of a formula appropriately shrouded in masterful ambiguity.⁷⁹ Similar problems arise in attempting to define the functions of the force. ONUC was bedeviled throughout a large part of its history by the question whether it was an appropriate part of its functions to assist the Central Government in compelling Katanga to abandon secession.⁸⁰ Theoretically the Force was never used for this purpose, although it is hardly doubtful that ONUC's eventual vigorous exercise of the right of "self-defense" in vindication of its right of "freedom of movement" contributed materially to the collapse of Katanga's secession.⁸¹

⁷⁹ See BOWETT, *op. cit. supra* note 71, at 124-25; GROSS, *THE UNITED NATIONS: STRUCTURE FOR PEACE* 30-33 (1962); Schachter, *supra* note 71, at 210-11; U.N. GEN. ASS. OFF. REC. 11th Sess., Annexes, Agenda Item No. 66, at 9-10 (A/3375) (1956).

⁸⁰ Particularly pertinent were certain basic guiding principles drawn by the Secretary-General from the experience of the UNEF: "[T]he United Nations activity should have freedom of movement within its area of operations and all such facilities regarding access to that area and communications as are necessary for the successful completion of the task The Force should not be used to enforce specific political solution of pending problems or to influence the political balance decisive to such a solution." And "the men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions." See Report of the Secretary-General, *supra* note 55, at 29, 30, 167, 179, respectively. Compare O'BRIEN, *TO KATANGA AND BACK: A U.N. CASE HISTORY* (1962). See also Note by the Secretary-General: *Aide memoire concerning some questions relating to the functions and operation of the United Nations Peace-Keeping Force in Cyprus*. U.N. Doc. No. S/5653 (1964).

⁸¹ See HOSKINS, *THE CONGO SINCE INDEPENDENCE* 447-55 (1964); LEFEVER, *CRISIS IN THE CONGO* ch. 3 (1965). At this point a new resolution had authorized "the Secretary-General to take vigorous action, including the use of a requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action, and/or deportation of all foreign military and paramilitary personnel and political advisers not under the United Nations Command and mercenaries as laid down in part A,

Does this experience suggest that the attempt to define precisely "peace-keeping operations" is a way of robbing the future to serve the immediate present? Probably the only sensible answer to this question must be sought in just how precise the definition is to be, how much it will help to solve the present crisis, and how much it will appear to bind the future. At the present stage of developments the following general definition or statement of principle might be hazarded as being in accord with foreseeable realities as well as past practices: peace-keeping forces may not be introduced into a dispute or threatening situation without the general consent of all the immediate parties and without the specific consent of the state upon whose territory they were to be stationed, and they may not be used for purposes of coercion against any state.⁸² A more ambitious definition, delineating the appropriate functions of such forces and wrestling specifically with such administrative concepts as the right of self-defense and freedom of movement, seems likely to open up a Pandora's box of difficult questions hardly susceptible of abstract solution.⁸³

operative paragraph 2 of the Security Council Resolution of 21 February 1961." U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Oct.-Dec. 1961, at 148-49 (S/5002) (1961).

⁸² It has been suggested, however, that consent may not always be required from the host state for the conduct of peace-keeping operations on its territory when they are authorized by the Security Council and when there has been an express or implied finding under Article 39 of a threat to the peace, breach of the peace, or act of aggression. See BOWETT, *op. cit. supra* note 71, at 413-17. This view assumes that peace-keeping operations more limited than enforcement action under Article 42 may be authorized by a decision of the Security Council under some other provision of Chapter VII and that members are thus obliged to accept and carry them out as provided in Article 25 and 49. This point illustrates one of the risks involved in accepting the Canadian suggestion that all "peace-keeping operations" as distinguished from "enforcement" measures are Chapter VI rather than Chapter VII.

⁸³ The representative of Nigeria in the Committee of Thirty-Three made some interesting observations on the special meaning that might be attributed to self-defence: "The important question obviously was whether one should rule out all use of force, in any form, in the implementing of measures for the pacific settlement of a dispute. His delegation would answer that question in the negative. The use of 'incidental' force might be unavoidable in certain circumstances. Clearly, much must depend on the type of force contemplated. In his own country, a police force was regarded as a peace force, since Nigerian policemen bore arms only in an emergency and were in that case authorized to use them only in order to prevent a felonious breach of peace and to the extent justified by the circumstances. The use of policemen to patrol a cease-fire line or to help a country to maintain internal law and order in an emergency could, and should, be regarded as legitimate action under the Charter's Chapter VI. Since, however, that Chapter only provided for the formulation of recommendations, such a force could be dispatched only at the request, or with the consent, of the countries concerned. Such a police force should not bear arms unless the circumstances patently so required, and it should not be authorized to use those arms except in self-defence or with a view to preventing a felonious breach of law and order. Finally, the United Nations should exercise the utmost caution in acceding

Neither does it seem important to choose among Articles 10, 11 and 14 in seeking specific authority of the General Assembly to initiate peace-keeping operations of the limited character under consideration. All of these Articles may be regarded as relevant, and the authority may properly be regarded as a composite implication from all of them. The more substantial question is whether the careful repetition in all of these articles of the word "recommend" and the omission of any words such as "authorize" or "establish" constitutes a positive bar to the General Assembly's authorizing the Secretary-General to establish and direct a United Nations Force consisting of units voluntarily contributed by Member states. This problem is not peculiar to peace-keeping operations. The functions of the Secretariat are not spelled out in terms of each of the objectives of the Charter, except insofar as Article 99 explicitly provides that "the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." Otherwise the permissible scope of the Secretary-General's authority must be derived from the provision of Article 97 that he shall be "the chief administrative officer of the Organization"; the provision of Article 98 that he "shall perform such other functions as are entrusted to him by" the General Assembly, Security Council, Economic and Social Council and Trusteeship Council; and the provision of Article 101 that the "staff shall be appointed by the Secretary-General under regulations established by the General Assembly." Although, for example, the appropriate role of the Secretary-General in achieving the objectives of Chapter X, "International, Economic and Social Cooperation," is not even mentioned in that Chapter, the Secretariat has been entrusted with the administration under various types of Committee supervision of United Nations funds voluntarily contributed by Member states and others for the purposes of economic development.⁸⁴ This administration now constitutes a very substantial part of the executive responsibilities of the Secretariat. Like peace-keeping operations this development of executive responsibility for economic development may not have been foreseen by the framers of the Charter

to a request for assistance in the maintenance of internal law and order, and should grant such assistance only on terms which ensured that the Organization's aid would not be abused in the interest of maintaining a *status quo* unacceptable to the majority of the population. The Committee should attempt to define clearly the circumstances and conditions in which such aid might be given." U.N. Doc. No. A/AC.121/SR.5, at 5 (1965).

⁸⁴ The two principal programs are the Expanded Program of Technical Assistance, established in accordance with Economic and Social Council A/Res/22A(IX) (1949), as approved by A/Res/304(IV) (1949), and the Special Fund, established by A/Res/1240-(XIII) (1958). For the background of the establishment of the Special Fund see HADWEN & KAUFMAN, *HOW UNITED NATIONS DECISIONS ARE MADE* (1960).

and is certainly not foreshadowed by any explicit provision of the Charter. Yet its constitutional legitimacy is unanimously accepted. Apart from the arguments based on the "primary responsibility of the Security Council for the maintenance of international peace and security," there is no more reason to doubt the legitimacy of the delegation to the Secretariat of authority for the administration of peace-keeping operations.⁸⁵

When such operations are authorized by the Security Council rather than the General Assembly, the question of their exact constitutional basis and the problem of delegation of authority have other connotations. As has already been indicated, it is difficult to take seriously the Soviet Union's insistence that under Article 48 the Council itself must determine which members are to carry out the decisions of the Council and may not delegate any responsibility to the Secretary-General. There is perhaps more ground for uneasiness created by the fact that Article 43 is so explicit in providing that agreements "shall be concluded between the Security Council and Members or between the Security Council and groups of Members" governing the contribution of "armed forces, assistance, and facilities for the purpose of maintaining international peace and security." In order to avoid these specifics of Article 43 as well as the provisions of Article 47 for the direction of armed forces by the Military Staff Committee,⁸⁶ there has been a natural tendency to look for other specific provisions authorizing peace-keeping operations of a different character. As has already been noted, during the Congo operations the Secretary-General suggested the possible application of Article 40, which authorizes the Security Council to "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable." This suggestion is, however, highly artificial as applied to a situa-

⁸⁵ See STONE, *Legal Bases for Establishment of Forces Performing United Nations Security Functions*, PEACE KEEPING, EXPERIENCE AND EVALUATION 277 (Frydenberg ed. 1964); Stein, *Mr. Hammarshjold, the Charter Law and the Future Role of the United Nations Secretary General*, 56 AM. J. INT'L. 9 (1962). The argument developed in the text on the delegation of authority to the Secretary-General does not necessarily answer the original French position on the constitutional requirement of voluntary as distinguished from compulsory financing. This will be discussed in the third part of this article to appear in Volume 33 of the *University of Chicago Law Review*.

⁸⁶ The Military Staff Committee has been quiescent ever since its fundamental disagreement on all crucial issues in April, 1947. See YEARBOOK OF THE UNITED NATIONS 1946-47, at 424-43 (1947); RUSSELL, *op. cit. supra* note 77, at 12-18. At the second meeting of the Committee of Thirty-Three the Soviet representative made some specific suggestions for the reactivation of the Military Staff Committee which apparently aroused some interest. "He strongly recommended that a large number of States—not only the non-permanent members of the Security Council but also States which could provide contingents and other facilities for the United Nations operations—should take part in its work, the purpose of which was to assist the Security Council in all questions relating to the use of armed forces by the United Nations." U.N. Doc. No. A/AC.121/SR.2, at 6 (1965). Apparently these suggestions have not been made in the Military Staff Committee itself.

tion like the Congo.⁸⁷ In its general context Article 40 suggests that the provisional measures contemplated are preliminary steps pending ultimate resolution. Although ONUC was, of course, intended to be temporary in duration, it was also designed to solve the particular difficulty or threat to the peace with which the Council was concerned, *i.e.*, the intervention of foreign forces and the breakdown of internal security in the Congo. In the Cyprus situation the term "provisional" would seem to have a happier application, since the United Nations obviously wants to find a more lasting solution than can be achieved through peace-keeping operations, a concern indicated by the concurrent appointment of a mediator.

As was mentioned earlier, the Canadian delegation has suggested Chapter VI as an alternative basis for peace-keeping authorized by either the Security Council or the General Assembly. This suggestion has the advantage of separating the entire process from the compulsory atmosphere of Chapter VII. It also draws upon the broad language of Articles 34 and 35 which permit the Security Council or the General Assembly to consider any dispute or any situation which might lead to international friction or give rise to a dispute. It would also presumably rely upon Article 36 authorizing the Security Council to "recommend appropriate procedures or methods of adjustment." In this respect it would emphasize the non-compulsory characterization of the type of action involved. It would equate the type of action which the Security Council might take with the kind of "measures" which the Assembly might recommend under Article 14, and would include peace-keeping operations with various other types of voluntary, noncoercive methods

⁸⁷ Bowett at one point seems to share this dissatisfaction with the applicability of Article 40 to the Congo situation: "Hence Article 40, coupled with the power to establish subsidiary organs in Article 29, affords a satisfactory basis for the Force, rather in the way in which these two provisions of the Charter provided a basis for certain of the observer groups which the Council has established. The present writer's difficulty in accepting this as a complete answer to the question of the constitutional basis of ONUC is that, whilst the supervision of compliance with the call for provisional measures was a major part of ONUC's function, it was not the entire function: it is for this reason that a somewhat broader basis in Article 39 is preferred." BOWETT, *op. cit. supra* note 71, at 178. He states the broader basis as follows: "Our conclusion is, therefore, that the establishment of ONUC was by Resolution of the Security Council to achieve the general purpose of the Organization set out in Article I (1), in fulfilment of the Council's 'primary responsibility for the maintenance of international peace and security,' conferred by Article 24; and that, having made an implicit finding under Article 39, the Council acted under Chapter VII of the Charter so as to establish a United Nations Force for the purpose of supervising and enforcing compliance with the provisional measures ordered under Article 40 and for other purposes consistent with the general powers of the Council under Article 39." *Id.* at 180. Later on, however, Bowett seems to find Article 40 more completely satisfactory both as regards ONUC in particular and the establishment of U.N. forces generally. *Id.* at 282-83.

of settling disputes or ameliorating dangerous situations, such as mediation, conciliation, fact-finding, truce supervision, and observation.⁸⁸ This may, of course, tend to downgrade peace-keeping as an effective weapon in the arsenal of the United Nations, but it might also be said that a downgraded weapon is better than no weapon at all.

Despite these attractive features of the Swedish-Canadian exclusive reliance upon Chapter VI, it seems on balance an unfortunate commitment. Experience indicates that peace-keeping operations do not fit neatly into any one particular slot. Even in the same operation a fluid situation may seem to point at different times to different provisions of the Charter as the most suitable and convenient for the purposes at hand. Schachter tells us, for example, that early in the Congo operations the Secretary-General was particularly anxious to assume that the Security Council had acted under Chapter VII rather than under Chapter VI because he "believed that emphasis on the mandatory effect of the Security Council decision would reduce resistance by Belgians and Katangese" and that "in fact subsequent reports from Brussels indicated that this legal point carried weight within the Government."⁸⁹ Later the Secretary-General, when he was more concerned to exclude Article 42 as a possible basis for coercion against Katanga, pointed out that neither the Council nor the General Assembly had ever explicitly endorsed his interpretation of an implied finding under Article 39 of Chapter VII.⁹⁰ These are of course quite speculative considerations, but it is equally speculative to assume that the Russians or French would be any more willing to accept compulsory financing of peace-keeping operations baptised under Chapter VI than they would similar operations justified under Chapter VII. Certainly the preliminary debate in the Committee of Thirty-Three affords scant hope of much progress in that direction. On the other hand,

⁸⁸ In this connection it is interesting to compare UNOGIL (The United Nations Observer Group in Lebanon) with UNEF in its authorization and functions. It was established by a Security Council resolution which decided "to dispatch urgently an observation group to proceed to the Lebanon so as to ensure that there is no illegal infiltration of personnel or supply or arms or other material across the Lebanese borders" and authorized "the Secretary General to take the necessary steps to that end." U.N. SECURITY COUNCIL OFF. REC. 13th year, Supp. April-June 1958, at 47 (S/4023) (1958). This action never gave rise to constitutional or financial objections, although at its height UNOGIL included over 600 personnel. See RUSSELL, *op. cit. supra* note 7, at 71-79; BOWETT, *op. cit. supra* note 71, at 64-65. In the Summary study of the experience derived from the establishment and experience of the force (UNEF), *supra* note 55, at 30, the Secretary-General suggested that UNOGIL was established by the Security Council under Chapter VI and that "a similar action obviously could have been taken by the General Assembly under Article 22." Stone questions whether there was any real distinction in functions between UNEF and an observer group. STONE, *op. cit. supra* note 85, at 288.

⁸⁹ Schachter, *supra* note 71, at 218.

⁹⁰ See statement of Secretary-General quoted *supra* note 71.

that same debate may reflect a little too much anxiety, borne of the frustrations of the current session, to de-emphasize all mandatory aspects of the peace-keeping operations under consideration with the hope of making them more palatable to all concerned. Certainly it would be unfortunate if the Committee were to commit itself to a view of the Charter which inhibits future growth and even disowns past experience without achieving in return any substantial progress towards acceptance of that collective financial responsibility which is the avowed objective of most of its Members.⁹¹

⁹¹ On June 15, 1965, the Committee of Thirty-Three reported to the General Assembly that it had come "to the conclusion that more time is required to complete the consideration of the matters covered by its mandate from the General Assembly and has decided to continue its work." In addition to a history of its proceedings, the closest the Committee came to a substantive recommendation was the statement that its members were "agreed that the United Nations should be strengthened through a co-operative effort and that the General Assembly when it reconvenes must conduct its work according to the normal procedure established by its rules of procedure." Report of the Special Committee on Peace-keeping Operations, U.N. Doc. No. A/5915 at 4 (1965). The report also appended as Annex II a more analytical summary of the issues contained in a Report of the Secretary-General and the President of the General Assembly, U.N. Doc. No. A/AC.121/SR.4 (1965).