

Constitutional Crisis at the United Nations: The Price of Peace Keeping, II

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THE DEVELOPMENT OF ADMINISTRATIVE STANDARDS

As the preceding article in this series has intimated,¹ the administrative problems of U.N. peace-keeping operations cannot be entirely divorced from the constitutional issues pertaining to their authorization. Thus, the International Court of Justice, in reaching the conclusion that neither the operations of United Nations military forces in the Middle East (UNEF) nor in the Congo (ONUC) were "enforcement" measures within the exclusive domain of the Security Council under article 42 of the U.N. Charter, did not hesitate to rely upon statements by the Secretary-General outlining the basic principles which would guide the operations.² Conversely, the Secretary-General, in developing his formulation of working principles of administration, often emphasized that they were partly designed to keep the military operations true to the constitutional distinction between enforcement measures authorized under article 42 and the type of peace keeping represented by UNEF and ONUC. This is not to suggest, of course, that the validity of the constitutional distinction and the viability of the prin-

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¹ 32 U. Chi. L. Rev. 621 (1965). It is contemplated that a third article in the series will focus on the financing of peace-keeping operations.

² Certain Expenses of the United Nations, [1962] I.C.J. Rep. 151, 170-71, 175-76. Perhaps it should be briefly recalled that while UNEF was authorized by the General Assembly and ONUC by the Security Council, the distinction between "enforcement" measures under article 42 and peace-keeping operations under some other unspecified articles was relevant to the validity of ONUC as well as UNEF. This was because the challenge to the validity of ONUC rested partly upon the proposition that military action authorized by the Security Council under article 42 could be carried out only in accordance with agreements between the Security Council and the member nations, as provided for in article 43, under the supervision of a military staff committee responsible to the Security Council, as provided for in article 47, and by such members of the United Nations as are chosen by the Security Council under article 48.

ciples of administration were unanimously accepted either in the opinions of the International Court or in the councils of the United Nations. On the contrary, a profound disbelief in both the soundness of the distinction and the reliability of the principles of administration was advanced by France and the Soviet Union as part of the justification for refusing to accept any sharing with the General Assembly of the Security Council's authority to launch peace-keeping operations or to approve broad delegations of authority by the Security Council to the Secretary-General to conduct such operations.³

The opposition of the Soviet Union, in particular, to broad delegations of authority to the Secretary-General was reflected not only in its constitutional arguments but also in its political attack upon Mr. Hammarskjöld and its demand for a troika, or three-headed secretariat, to reflect the three great divisions of political opinion—the western powers, the socialist states, and the neutralist states—which the Soviet Union professed at that time to see represented in the United Nations.⁴ This proposal led, in turn, to the great philosophical debate between Chairman Khrushchev and the Secretary-General with respect to the independence and impartiality of the international civil service, as represented by the top echelons of the Secretariat.

In elaborating his side of the argument, Chairman Khrushchev broadened his personal attack on Mr. Hammarskjöld and his immediate staff to include the proposition: "We cannot expect any Secretary-General to be the impartial representative of three different groups of states."⁵ In responding to this challenge in his famous Oxford Address, entitled "The International Civil Servant in Law and in Fact,"⁶ Mr. Hammarskjöld presented his own analysis of the problem.

³ See particularly the statements of the French and Soviet representatives in the Committee of Thirty-Three charged with the responsibility for a "comprehensive review of peace-keeping operations in all their aspects." U.N. Doc. No. A/AC.121/SR.7, at 5-6 (1965); U.N. Doc. No. A/AC.121/PV.8, at 13-17 (1965), quoted in Nathanson, *supra* note 1, at 643 n.68, 648-49 respectively. See also the debate on the resolution establishing the U.N. force in Cyprus (UNFICYP). U.N. SECURITY COUNCIL OFF. REC. 19th year, 1102d meeting 21 (S/PV.1102) (1964). Compare debate in Security Council on Secretary-General's implementation of Security Council resolution 211 of Sept. 20, 1965, with respect to the India-Pakistan question. U.N. Monthly Chronicle, Nov. 1965, p. 9.

⁴ See speech by Chairman Khrushchev, U.N. GEN. ASS. OFF. REC. 15th Sess., Plenary 68, 82-83 (A/PV.869) (1960).

⁵ U.N. GEN. ASS. OFF. REC. 15th Sess., Plenary 319 (A/PV.882) (1960). Mr. Khrushchev added: "We could find for the post of Secretary-General a man from the socialist countries, and such a man would reflect the most progressive ideas of mankind today, ideas for the preservation of peace. But we can say in advance that the Western Powers would have no faith in such a man, and that would be understandable." *Ibid.*

⁶ Reprinted in HAMMARSKJÖLD, SERVANT OF PEACE 329 (1962).

He acknowledged that there had been times, particularly in the course of peace-keeping operations, when, due to the generality of the governing resolutions and the inability of the member nations to agree upon any further specification of the mandate, the Secretary-General had been faced with the unhappy choice of either abandoning the implementation of the resolutions or himself making the critical decisions required. In response to such situations he proposed this fundamental thesis:

The answers seem clear enough in law; the responsibilities of the Secretary-General under the Charter cannot be laid aside merely because the execution of decisions by him is likely to be politically controversial. The Secretary-General remains under the obligation to carry out the policies as adopted by the organs; the essential requirement is that he does this on the basis of his exclusively international responsibility and not in the interest of any particular State or groups of States.

This presents us with this crucial issue; is it possible for the Secretary-General to resolve controversial issues on a truly international basis without obtaining the formal decision of the organs? In my opinion and on the basis of my experience, the answer is in the affirmative; it is possible for the Secretary-General to carry out his tasks in controversial political situations with full regard to his exclusively international obligation under the Charter and without subservience to a particular national or ideological attitude. This is not to say that the Secretary-General is a kind of delphic oracle who alone speaks for the international community. He has available for his task varied means and resources.⁷

Mr. Hammarskjöld then went on in his address to discuss in general terms those means and resources. Apart from the various institutional arrangements of the United Nations, he purported to find guidance in the "principles and purposes of the Charter . . . supplemented by the body of legal doctrine and precepts that have been accepted by States generally, and particularly as manifested in the resolutions of UN organs."⁸ He did not assert that such "considerations of principle and law" would "suffice to settle all the questions posed by the political tasks entrusted to the Secretary-General."⁹ Other sources, including

⁷ *Id.* at 346. Hammarskjöld also replied more briefly but more specifically in statements before the General Assembly. U.N. GEN. ASS. OFF. REC. 15th Sess., Plenary 95-96 (A/PV.871) (1960); *id.* at 331-32 (A/PV.883).

⁸ HAMMARSKJÖLD, *SERVANT OF PEACE* 346 (1962).

⁹ *Id.* at 347.

consultations with permanent missions of the member nations and with advisory committees, such as those established for UNEF and ONUC, would provide "an essential link between the judgment of the executive and the consensus of the political bodies." The consultations mentioned by the Secretary-General are, for the most part, shrouded in diplomatic privacy. The extent to which they have actually influenced the decision-making processes of the executive can only be guessed from the general context of the situation and occasional diplomatic indiscretions. The "principles and purposes," "legal doctrine and precepts," on the other hand, have been elaborated, not only in the Charter and the resolutions of the General Assembly and the Security Council, but also in the various reports of the Secretariat on the actual conduct of peace-keeping operations. It is in these reports that we may find the articulation of what might be termed the administrative standards of peace keeping. It will be the task of this discussion to explore in some detail the extent to which those who have borne the major executive responsibilities for peace-keeping operations—particularly in the Middle East, the Congo, and Cyprus—have succeeded in developing and applying such administrative standards as an alternative to the purely political judgments which Chairman Khrushchev asserted could not safely be entrusted to any one man.

The single outstanding document in this voluminous literature is the report of Secretary-General Hammarskjöld to the General Assembly on the early operations of UNEF, entitled, "Summary Study of the Experience Derived From the Establishment and Operation of the Force: Report of the Secretary-General."¹⁰ Because of its unique position as an official attempt to develop generalized guiding principles, drawn from actual experience, to govern subsequent U.N. adventures in peace keeping, the Summary Study will be used as the framework for the analysis of administrative standards, bearing in mind, of course, that this essay in generalization was made at a relatively early stage of the relevant experience and must now be checked against subsequent developments. For purposes of this analysis, the guiding principles suggested by the Secretary-General may be grouped under four main headings: (1) the requirement of consent of the host state, (2) the

¹⁰ U.N. GEN. ASS. OFF. REC. 13th Sess., Annexes, Agenda Item No. 65, at 8 (A/3943) (1958) [hereinafter cited as Summary Study]. It should also be noted that several of the principles developed in the Summary Study were anticipated in the *Second and Final Report of the Secretary-General on the Plan for an Emergency International United Nations Force*, U.N. GEN. ASS. OFF. REC. Emergency Spec. Sess. I, Annexes, Agenda Item No. 5, at 19 (A/3302) (1956), and were restated in the *First Report of the Secretary-General [on the operation in the Congo]*, U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 16 (A/4389) (1960).

necessity for freedom of movement, (3) the limitation of force to the right of self-defense, and (4) the necessity for neutrality or impartiality with regard to political conflicts.¹¹

I. THE REQUIREMENT OF CONSENT OF THE HOST STATE

To the extent that the consent of the host state to the introduction of U.N. peace-keeping forces has been treated as one of the essential indicia distinguishing such forces from enforcement measures under article 42, the requirement of consent may properly be regarded as a constitutional rather than an administrative principle. As such it may be subject to some question or qualification, particularly where the Security Council provides the authorization.¹² However that may be, in the actual conduct of operations the necessity of consent has been accepted as a fundamental assumption from which certain consequences naturally flow. One of those consequences has been that there should be a

¹¹ The major themes mentioned in the text do not exhaust those developed in the Summary Study. Others which might have been mentioned, such as the reservation of criminal jurisdiction over U.N. armed personnel to their home countries rather than the host state, have presented no significant difficulties in application and consequently have been blessed with a quiet or almost nonexistent history. Still others have been concerned with problems of internal housekeeping or administration which do not bear upon the political relations between the United Nations and the host state, between the contending parties, or among the member nations. Finally, any suggestions with regard to financing have been deliberately excluded, partly as a matter of convenience for separate consideration and partly because they concern not so much the responsibilities of the Secretariat as the responsibilities of the member nations vis-à-vis one another.

¹² The Summary Study stated as its very first principle: "As the arrangements discussed in this report do not cover that type of force envisaged under Chapter VII of the Charter, it follows from international law and the Charter that the United Nations cannot undertake to implement them by stationing units on the territory of a Member State without the consent of the Government concerned. It similarly follows that the consent of a Member nation is necessary for the United Nations to use its military personnel or *matériel*." Para. 155. It should be noted, however, that Mr. Hammarskjöld in writing the Summary Study apparently had in mind only action by the General Assembly, rather than the Security Council. This is indicated both by his exclusion of Chapter VII authority and also by his suggestion that the principles suggested "if they were to meet with the approval of the General Assembly, would provide a continuing basis on which useful contacts in a stand-by context might be established with interested Governments, with the aim of being prepared for any requests which might arise from future decisions by the Assembly on a force or similar arrangement to deal with a specific case." Para. 154. Nevertheless, Hammarskjöld did assume that the requirement of consent was equally applicable in the Congo despite the Security Council resolution, so long as the Council did not purport to take action under article 42 of Chapter VII. Bowett suggests that "this particular view of the requirement of consent is ill-conceived and unnecessary, and that it does not automatically follow that every military action short of enforcement measures decided upon by the Security Council requires the consent of the State on whose territory such action occurs." BOWETT, UNITED NATIONS FORCES 414 (1965). See Nathanson, *supra* note 1, at 653 n.89.

formal agreement between the United Nations and the host state which will assure to the U.N. Force certain basic rights and conditions essential to its successful operation.¹³ The standard agreements have included, for example, guarantees of freedom with respect to entry and exit without compliance with passport and visa regulations, freedom of movement within the area of operations, immunity from criminal jurisdiction for offenses committed within the territory of the host state, immunity from civil jurisdiction in matters relating to the official conduct of members of the Force, and many other practical necessities of the Force. Thus far there has apparently been no insuperable difficulty in securing such a formal agreement containing the guarantees deemed essential by the Secretariat. Consequently it has not been necessary to return to the General Assembly or the Security Council for an elaboration of just what is implied by a general request for, or consent to, the introduction of the U.N. forces.

The Revocability of Consent and Completion of the Mission

This does not mean, however, that the negotiation of the details of consent has been entirely without its moments of anxiety. The first concrete problem encountered was whether the consent once given was revocable at any time by the host state at its own option, or whether there was some continuing obligation to cooperate with the U.N. forces until their mission was completed. This problem was encountered in the case of UNEF even before the entry of the Force when the Egyptian government, after inquiring how long it was contemplated that the Force would remain in Egypt and finding the Secretary-General's reply unsatisfactory, suggested that, since Egyptian consent was necessary for entry, it necessarily followed that "if such consent no longer

¹³ In the cases of the UNEF and ONUC this agreement was accomplished in two stages. The first consisted of a brief "basic agreement" reflecting in effect the essential understanding that both parties would be guided in good faith by the governing resolutions. U.N. GEN. ASS. OFF. REC. 11th Sess., Annexes, Agenda Item No. 66, at 9-10 (A/3375) (1956); U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 27-28 (A/4389/Add.5) (1960). The second was a more detailed "Status of Forces" agreement governing the practical problems of the relationship which experience or foresight indicated were likely to arise. 260 U.N.T.S. 61 (1957); 414 U.N.T.S. 229 (1961). In the case of Cyprus, both types of provision were telescoped into a single document, the Status of Forces Agreement. U.N. SECURITY COUNCIL OFF. REC. 19th year, Supp. Jan.-March 1964, at 171 (S/5634) (1964). In the case of UNTEA (the United Nations Temporary Executive Authority in West New Guinea) the only formal agreement was between the parties to the dispute, the Netherlands and the Republic of Indonesia, but this agreement described the functions of the U.N. Force and in effect pledged the cooperation of the two nations concerned with the Secretary-General. U.N. GEN. ASS. OFF. REC. 17th Sess., Annexes, Agenda Item No. 89 (A/5170) (1962); 437 U.N.T.S. 274 (1962).

persists, these forces shall withdraw.”¹⁴ The Secretary-General refused to accept this interpretation on the ground that since the conditions motivating Egypt's consent to the introduction of the Force were presumably the same as those which occasioned the General Assembly's creation of the Force, withdrawal of that consent before the Force had completed its task would be inconsistent with the acceptance by Egypt of the decision of the General Assembly. The impasse was finally broken through intensive personal negotiation between the Secretary-General and President Nasser followed by the adoption of a formula according to which the government of Egypt declared its willingness to “be guided in good faith” by its acceptance of the General Assembly resolution, and the United Nations, “understanding this to correspond to the wishes of the Government of Egypt,” reaffirmed “its willingness to maintain UNEF until its task is completed.”¹⁵

Just how and by whom it would be determined when the task of the Force was completed was left to the determination of another day, should the necessity arise. Thus far it has apparently been the unanimous view of all concerned that the task has not been completed. Should a difference of opinion arise with respect to that question, it is difficult to see how the governing resolutions would help to resolve it. In authorizing the establishment of the Force the General Assembly stated that its objective was to “secure and supervise the cessation of hostilities in accordance with all the terms of General Assembly Resolution 997 (ES-I) of 2 November, 1956.”¹⁶ That resolution called for a cease fire, withdrawal of all forces behind the armistice lines, scrupulous observance of the armistice agreements, reopening of the Suez Canal, and restoration of freedom of navigation.¹⁷ On the surface of events, at least, it would appear that all of these objectives have been substantially accomplished.¹⁸ Nevertheless, the consensus seems to be that

¹⁴ GROSS, *THE UNITED NATIONS: STRUCTURE FOR PEACE* 31 (1962).

¹⁵ U.N. GEN. ASS. OFF. REC. 11th Sess., Annexes, Agenda Item No. 66, at 10 (A/3375) (1956).

¹⁶ U.N. GEN. ASS. OFF. REC. 1st Emergency Spec. Sess., Annexes, Agenda Item No. 5, at 33 (A/RES/394) (1956).

¹⁷ U.N. GEN. ASS. OFF. REC. 1st Emergency Spec. Sess., Annexes, Agenda Item No. 5, at 33 (A/RES/390) (1956).

¹⁸ There might be some difference of opinion as to whether the armistice agreements have been scrupulously observed. Border incidents mentioned in UNEF reports appear to be individual rather than organized derelictions. Reopening of the Suez Canal and restoration of freedom of navigation have been established for all except Israeli shipping and cargoes.

This was the situation before the outbreak of hostilities and was probably all that was anticipated by most supporters of the resolution. Freedom of navigation in the Gulf of Aqaba was probably not within the contemplation of the resolution itself, since the

the situation is not sufficiently stable to permit withdrawal of the Force. That judgment appears to rest on a political evaluation of the entire situation in the Middle East. If a difference of opinion should develop with respect to the desirability of continuing the Force, it would obviously call for a political solution. Perhaps that is all that the Secretary-General meant to establish by the good faith formula embodied in the agreement.¹⁹ Apparently he regarded it as the most explicit formula which could be expected, for he later stated that it was "unlikely that any Government in the future would be willing to go beyond the declaration of the Government of Egypt with regard to UNEF" and that the United Nations should not "commit itself beyond the point established for UNEF in relation to the Government of Egypt."²⁰

In the case of ONUC, the formula followed was substantially the same as that of UNEF, except that the United Nations stated it was "prepared to maintain the United Nations Force in the Congo until such time as it deems the latter's task to have been accomplished."²¹ Conceivably the insertion of the words "it deems" was deliberately intended to emphasize the importance of the judgment of the United Nations, as distinguished from that of the host state, in determining when the mission was completed.²² However that may be, the actual

word "restoration" hardly applied to that situation. Nevertheless, since the establishment of such freedom had been one of the major objectives of the Israeli invasion, it could hardly be divorced from the problem of withdrawal and the take-over by U.N. forces, as developed more fully later on. Concern as to what would happen at Sharm el Sheikh, at the entrance to the Gulf of Aqaba, in the event of the termination of UNEF may be one of the reasons for its continuance.

The most recent examination of the need for continuation of UNEF is to be found in *Survey of the United Nations Emergency Force*, U.N. Doc. No. A/C.5/1049, para. 16, at 10 (1965), which states: "Its observation of the current situation on the Line has led the Survey Team to conclude that little purpose would be served by a redefinition of the mandate of the Force at this time, since UNEF's functioning, as developed in practice over the years, clearly fulfills a still pressing need in acting as an informal buffer between the armed forces of Israel and the United Arab Republic, and the situation on the Line has not in recent years changed in a way which would justify a formal change in the mandate."

¹⁹ Hammarskjöld's way of saying this was: "The consequence of such a bilateral declaration is that, were either side to act unilaterally in refusing continued presence or deciding on withdrawal, and were the other side to find that such action was contrary to a good-faith interpretation of the purposes of the operation, an exchange of views would be called for towards harmonizing the positions." Summary Study, para. 158.

²⁰ Summary Study, para. 159.

²¹ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 28 (S/4389/Add.5) (1960).

²² Cf. BOWETT, *op. cit. supra* note 12, at 420-22. Bowett also suggests that the reason why "the Congolese government was prepared to go further than the Egyptian Government and to relinquish any unilateral right to require withdrawal is probably explained

course of events did not put this particular theory to the test.²³ In point of fact it was neither the host government nor the Security Council which decreed the termination of ONUC. In his final report on the operations of ONUC, the Secretary-General, U Thant, gave three reasons for its withdrawal on June 30, 1964: first, no request had been made by the Republic of the Congo for its extension beyond that date; second, extension would require a special session of the General Assembly, which had thus far authorized expenditure to June 30, 1964, and not beyond; and finally, further extension of the Force would provide no solution of the troubles of the Congo, because the United Nations "cannot permanently protect the Congo, or any other country, from the internal tensions and disturbances created by its own organic growth toward unity and nationhood."²⁴ In short, the withdrawal of ONUC came not so much from any specific determination that its task was completed, as from the growing acceptance of the view on the part of the Secretary-General, the host government, and the supporting powers that its usefulness was largely over.²⁵ In a certain sense it might be said that the particular tasks envisaged at the outset had been completed, namely, the withdrawal of Belgian forces and the assurance of territorial integrity insofar as that was threatened by secession of Katanga. Nevertheless, a considerable measure of internal disorder persisted, both in the form of rather pointless violence by marauding armed bands and of civil strife resulting from organized rebellion against the Central Government.²⁶ While the U.N. Force con-

by the fact that it was not in a position to surrender such a right: it did not possess it." *Id.* at 421-22. This seems to be a rather over-sophisticated rationalization of the change in language.

²³ It was somewhat tangentially involved in a dispute between President Kasavubu and the Secretary-General with respect to the conduct of the operations of ONUC. In rejecting certain conditions on such operations suggested by representatives of the President, the Secretary-General relied partly on the proposition that "only the Security Council can decide on the discontinuance of the operation, and that, therefore, conditions which, by their effect on the operation, would require direct consideration by the Security Council, which obviously could not be counted upon to approve of such conditions unless it were to find that the threat to peace and security had ceased." U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 263 (S/4775) (1961).

²⁴ *Report of the Secretary-General on the Withdrawal of United Nations Force in the Congo and on Other Aspects of the United Nations Operation There*, U.N. Doc. No. S/5784, at 42 (1964).

²⁵ This view may also have been influenced by the deepening financial crisis and concern about the source of the money. Indeed the Secretary-General said quite frankly: "This consideration naturally exerts a very strong influence on my thinking about the question of military disengagement." *Report of the Secretary-General on the Question of Military Disengagement in the Congo (Leopoldville)*, U.N. SECURITY COUNCIL OFF. REC. 18th year, Supp. July-Sept. 1963, at 168 (S/5428) (1963).

²⁶ See U.N. Doc. No. S/5784, paras. 7-64 (1964); Hoskyns, *The Tshombe Regime*, 21

ducted some important rescue operations during its final period, in general the U.N. Command did not seem disposed to take the initiative in courting additional involvement.²⁷ Hostility between the U.N. Command and the commander of Central Government forces may have been partly responsible for this relatively inactive period in the life of the Force, which may suggest that the issue of continuing consent, in certain circumstances, may be quite an academic one, since the usefulness of the force may depend in no small measure upon affirmative cooperation between the host government and the U.N. forces.

The "good faith" formula, with slight variations, was also repeated in the case of Cyprus, in an exchange of letters between the Secretary-General and the government of the Republic of Cyprus.²⁸ No reference was made in this exchange to the completion of the task, and this may well have been a deliberate omission in the light of the fact that the authorizing resolution recommended that "the stationing of the force shall be for a period of three months." This brief authorization was, of course, a practical response to the exigencies of voluntary financing, but it also suggested that the desirability of continuing the Force would be determined periodically by the Security Council in the light of prevailing circumstances. A natural corollary would seem to be that the consent of the host state was also limited to the period mentioned in the resolution and would have to be renewed, explicitly or tacitly, at each renewal of the authorization by the Security Council. In actual practice, the consent of the government of the Republic of Cyprus to the continuation of the Force has been expressed to the Security Council before the adoption of the resolutions extending the life of the Force.²⁹ Thus there has been in effect a consensus among all concerned that the task of the Force has not been completed, in much

WORLD TODAY 43 (1965); Hoskyns, *The Congo as the UN Leaves*, 20 WORLD TODAY 231 (1964).

²⁷ LEFEVER, *CRISIS IN THE CONGO* 132-33 (1965). On the other hand, it should be noted that a request by Prime Minister Adoula for the aid of ONUC in subduing rebellion in Kivu province was refused because of the repatriation schedule of the troops. ONUC supplied arms to the ANC instead. U.N. Doc. No. S/5784, paras. 63-66 (1964).

²⁸ The Secretary-General stated that "I wish to affirm that the activities of the Force will be guided in good faith by the task established for the Force by the Security Council." U.N. SECURITY COUNCIL OFF. REC. 19th year, Supp. Jan.-March 1964, at 181 (S/5634) (1964). In reply the government of the Republic of Cyprus stated that it would also "be guided in good faith, when exercising its sovereign rights on any matter concerning the presence and functioning of the Force, by its acceptance of the recommendation of the Security Council that a peace-keeping force be established in Cyprus." *Id.* at 182.

²⁹ See, for example, the statement of the Representative of Cyprus on June 15, 1965, agreeing to a six month's extension of the Force as proposed by the Secretary-General. U.N. Doc. No. S/PV.1224, at 6.

the same sense as such a judgment has been reached with respect to the continuation of UNEF.

Both the situations in Cyprus and on the Israeli-Egyptian border pose the perplexing questions whether the task of a peace-keeping force can ever be completed in the absence of a settlement of the underlying disagreement and whether the presence of the Force makes any contribution towards the achievement of such a settlement.³⁰ Although these are questions far beyond the scope of this discussion, they are, nonetheless, relevant to the general issue of the role of the Secretary-General in both the initiation and termination of U.N. peace-keeping operations. In the Congo the initiative came very largely from the Secretary-General; in the case of UNEF and Cyprus, primarily from the member nations. In either event the desirability of such an initiative must surely involve political judgments which defy attempts at systematic rationalization of the type here under consideration.³¹ The same might be said almost as categorically of the problem of termination. This does not necessarily exclude the Secretary-General from a significant participation, but it does significantly change the nature of the participation from that of an executive authorized to make decisions to that of an advisor whose judgment may or may not be highly valued. Thus, in developing the "good faith" formula as an answer to the problem of the termination of peace-keeping operations, the Secretary-General was preserving not so much his own authority as that of the General Assembly and the Security Council.

The Composition of the Forces

The Secretary-General in the Summary Study also considered the application of the principle of consent by the host state to the national composition of the U.N. forces, particularly with regard to whether the host state should have a veto over the inclusion of military units from any particular state. The Secretary-General's resolution of this problem was to suggest that "while it is for the United Nations alone to decide on the composition of military elements sent to a country, the United Nations should, in deciding on composition, take fully into account the view of the host Government as one of the most serious factors

³⁰ The Secretary-General himself raises these questions, both in the latest report on Cyprus, U.N. Doc. No. S/7001, paras. 205-07 (1965), and in the *Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1964—15 June 1965*, U.N. GEN. ASS. OFF. REC. 20th Sess., Supp. No. 1A, at 7 (A/6001/Add.1) (1965).

³¹ Compare RUSSELL, UNITED NATIONS EXPERIENCE WITH MILITARY FORCES: POLITICAL AND LEGAL ASPECTS 138 (1963).

which should guide the recruitment of the personnel."³² In order to reduce the possible area of disagreement, the Secretary-General suggested two subordinate principles, namely, that the force should not include units from any permanent members of the Security Council, nor units from "any country which, because of its geographical position or for other reasons, might be considered as possibly having a special interest in the situation which has called for the operation."³³ Another subordinate principle, not developed explicitly in the Summary Study but mentioned later in connection with the Congo, is the inclusion of "an element of universality, natural—and indeed essential—to any United Nations operation."³⁴

In suggesting both the general formula and the subordinate principles, the Secretary-General doubtless had in mind some of the specific problems which had arisen in connection with UNEF. Since England and France were directly involved in the dispute, it was obvious that their troops could not be included, and since one of the primary objectives of the entire operation was to secure the withdrawal of English and French forces, it may have appeared axiomatic that no other great power forces should be introduced into the area. This may have been even more apparent from the suggestion of the USSR that "all States Members of the United Nations, especially the United States of America and the Union of Soviet Socialist Republics" should intervene with their troops to ensure the French and English withdrawal.³⁵ Egypt had also objected to the introduction of Canadian infantry troops on the ground that their resemblance to the British might inflame Egyptian public opinion, and to the contribution of troops by Pakistan and New Zealand because of views expressed by those states in regard to the underlying dispute about the Suez Canal; the Secretary-General had yielded, at least in part, to both of these objections.³⁶

In the case of the Congo, although no Great Power was directly involved, another aspect of the situation militated perhaps just as strongly against the inclusion of Great Power units in the U.N. Force. A primary diplomatic objective in sending a U.N. force into the Congo

³² Summary Study, para. 161.

³³ *Id.* para. 160.

³⁴ *First Report of the Secretary-General*, U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 20 (S/4389) (1960). The principle of universality was developed partly in response to the demand for an all-African force.

³⁵ U.N. SECURITY COUNCIL OFF. REC. 11th year, 755th meeting 7 (S/P.755) (1956); U.N. SECURITY COUNCIL OFF. REC. 11th year, Supp. Oct.-Dec. 1956, at 128-29 (S/3736) (1956).

³⁶ Cf. BOWETT, *op. cit. supra* note 12, at 110-11; ROSNER, *THE UNITED NATIONS EMERGENCY FORCE* 55-56 (1963); Goodrich & Rosner, *The United Nations Emergency Force*, 11 INT'L ORGANIZATION 413, 423-24 (1957).

was to prevent that newly independent country from becoming a cockpit of contention among the Great Powers.³⁷ Under those circumstances, the application of the Secretary-General's principle against the inclusion of units of permanent members of the Security Council seemed all the more imperative. The application of the Secretary-General's other principle, against the inclusion of troops of members having a special interest in the situation, presented a harder problem—to what extent, if at all, this proscription should apply to contributions by neighboring African states. The Secretary-General concluded from the outset that in this situation geographical proximity did not imply "special interest" in the sense mentioned in the Summary Study. Quite the contrary, he indicated in his First Report that ONUC would be "built around a hard core of military units from African States," although other choices would be made with a view toward "maintaining the universal character of a United Nations operation."³⁸

We find the subordinate principles suggested in the Summary Study with respect to the composition of the force bending still further in the case of the United Nations Force in Cyprus (UNFICYP). This was illustrated primarily by the United Kingdom's contribution of the largest unit involved, in clear violation of the injunction against the inclusion of a Great Power contribution and also perhaps in violation of the proscription against participation by a state having a special interest.³⁹ The obvious reason for inclusion of the British unit was

³⁷ See LASH, DAG HAMMARSKJOLD 223-27 (1961); cf. HOSKYNs, *THE CONGO SINCE INDEPENDENCE* 113-15 (1965).

³⁸ *First Report of the Secretary-General*, U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 20, 22 (S/4389) (1960). In accordance with this policy substantial contributions were accepted from Ethiopia, Morocco, Ghana, Nigeria, and Tunisia, but there were also contributions from Europe, South America, Asia, and North America. The largest contribution came from India, and the next largest from Morocco, Ethiopia, and Ghana. However, the Moroccans were withdrawn in whole and the Ghanaians in part before the operation was substantially completed, due to dissatisfaction with its direction; had it not been for the staunch support of India and Ethiopia the whole enterprise would have floundered in midstream. Of course, there was in the Congo the special problem of sensitivity to white troops, as successors to the colonialists, particularly the Belgians, in addition to the Secretary-General's concern with respect to direct involvement of the Great Powers. Here again the Canadian troops were the butt of the attack, both from the Soviet Union, because they represented a NATO power and therefore an ally of Belgium, and from the Congolese government because they were "white." The Secretary-General refused to yield to either objection on the ground that the Canadians provided certain skills which were essential. BOWETT, *op. cit. supra* note 12, at 205-08.

³⁹ *Report by the Secretary-General to the Security Council on the United Nations Operation in Cyprus, for the Period of 26 April to 8 June 1964*, U.N. Doc. No. S/5764, at 2, 16 (1964). There were a total of 1,792 United Kingdom troops out of a total of 6,411 at the close of this period. *Id.* at 2. The delicacy of the issue of composition was emphasized by the requirement in the authorizing resolution of consultation with Cyprus, Greece, Turkey, and the United Kingdom. U.N. Doc. No. S/5575 (1964).

that it was already on the spot and had, with Greek and Turkish forces, been trying to keep the peace for some time before the matter was brought before the Security Council. Furthermore, in the discussions of the Security Council, and so far as appears in informal negotiations preceding the formal decision, there was no suggestion that other great powers would feel the need to be represented if the British unit participated or that its continued presence would increase the difficulties faced by the United Nations in maintaining impartial positions among the contending parties. In a general sense there was certainly a special interest arising from the facts that Cyprus had been a British Crown Colony, that the United Kingdom was a party to the London and Zurich agreements of 1959 which established the basis for Cyprus as an independent nation, and that the United Kingdom reserved a right of intervention under certain circumstances as well as two sovereign base areas on the Island of Cyprus under the terms of another treaty.⁴⁰ Against these apparently substantial items of special interest, it might also be said, however, that the United Kingdom, unlike the two other participating powers, Greece and Turkey, had no special interest in how the conflict between the Greek and Turkish communities was to be resolved and could therefore provide troops who were just as likely to be impartial as those of any other nation. The ultimate test was, of course, the willingness of the contending factions to accept British participation.

It might also be noted that the composition of UNFICYP did not go very far in achieving the element of "universality" which was considered to be at least *prima facie* desirable in the case of UNEF and ONUC, although it was not included as an item of general principle in the Summary Study.⁴¹ The countries represented in UNFICYP were Austria, Australia, Canada, Denmark, Finland, Ireland, New Zealand,

⁴⁰ See *Issues before the Twentieth General Assembly*, Int'l Conc., Sept. 1965, pp. 45-51.

⁴¹ Even more exceptional than UNFICYP was the composition of the United Nations Security Force in West New Guinea (West Irian) in connection with UNTEA, the United Nations Temporary Executive Authority, for that territory, pending its transfer from the Netherlands to Indonesia. The Force consisted almost entirely of Pakistanis, with a smattering of special Canadian and United States personnel. The almost sole reliance upon Pakistanis has been explained on the ground that "it was estimated that about one battalion was all that was needed, and it would have led to unnecessary complications to accept small contingents from several States in order to make up the one battalion required." BOWETT, *op. cit. supra* note 12, at 259. The use of United States Air Force personnel might be viewed simply as more explicit recognition than usual of the large role played by the United States Air Force in providing air transport for all of the U.N. peace-keeping operations, and an indication as well that the unanimity of the Great Powers on the West Irian operation relieved the Secretary-General of any fears of embarrassment on account of "Great Power involvement."

and Sweden. But the reports do not disclose whether there were no African, Asian, or Latin American countries represented simply because no offers of contingents from those areas were made or because the Secretary-General rejected such offers. At the time that UNFICYP was created both UNEF and ONUC were still in operation, although the latter was rapidly drawing to a close. The composition of those units might conceivably have had some influence upon the composition of the new Force, since there is something to be said for distributing the total burden of contributing manpower to existing peace-keeping forces among as many nations as possible so as to broaden both the experience and interest of member nations in operations of this nature. Although some countries were substantially represented in all three forces, there were also some, in addition to the United Kingdom, who contributed to only one of them.⁴²

Obviously the Secretary-General's subordinate principles regarding the composition of U.N. forces have yielded on occasion to the exigencies of circumstances. This should not be surprising since composition is an intensely practical matter depending on a host of variables. Nevertheless, in negotiating with an especially sensitive host state, or in choosing among a profusion of riches from contributing states, it may well be helpful for the Secretary-General to have guidelines, bearing a general stamp of approval from either the General Assembly or the Security Council, to fall back upon. They tend to make it easier for the Secretary-General to refuse to accede to the irresponsible whim of the host state and also to reject without offense the offers of would-be contributors. They also suggest that the choice among offers will not itself be whimsical and that the legislative authority has established some guidelines for the exercise of executive authority in making that choice. The barring of contributions by permanent members may be somewhat questionable as a long run proposition, yet this was plainly a helpful rule in the Congo and may prove to be equally so in other situations where one of the cardinal objectives is to forestall Great Power involvement. Where this consideration is not present, and there

⁴² See *Report by the Secretary-General*, U.N. Doc. No. S/5764, at 2 (1964) (composition of UNFICYP); ROSNER, *op. cit. supra* note 36, at 122-23 (composition of UNEF); BOWETT, *op. cit. supra* note 12, at 206 (composition of ONUC). On September 15, 1957, UNEF consisted of 5,977 officers and men from Brazil, Canada, Columbia, Denmark, Finland, India, Indonesia, Norway, Sweden, and Yugoslavia. By August 22, 1962, the number had been reduced to 5,133 and Columbia, Finland, and Indonesia had withdrawn. During its lifetime ONUC included contributions from Argentina, Austria, Brazil, Burma, Canada, Ceylon, Denmark, Ethiopia, Ghana, Guinea, India, Indonesia, Ireland, Italy, Liberia, Malaya, Mali, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, Sierra Leone, Sudan, Sweden, Switzerland, Tunisia, United Arab Republic, and Yugoslavia.

is real need for Great Power contribution, the rule may of course be waived as it was in Cyprus. Finally, there is something to be said for the general proposition that the smaller nations should provide the manpower while the Great Powers carry the lion's share of the expense. The element of universality is also somewhat questionable as an important desideratum in any particular force. The important consideration would seem to be to spread the total experience of peace keeping among as many nations as possible.

II. FREEDOM OF MOVEMENT

Particularly important and even controversial in the light of future developments was the principle mentioned in the Summary Study that "the 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 successful completion of the task."⁴³ As the Secretary-General explicitly recognized, the principle so stated "requires an agreement on what is to be considered as the area of operations and as to what facilities of access and communications are to be considered necessary."⁴⁴ It was, however, something of an oversimplification for the Secretary-General to add: "On the assumption that, like UNEF, any similar United Nations operation in the future would be of assistance to the nation on whose territory it is stationed, it is not to be expected that the necessary process of agreement will give rise to any serious complications in the interpretation of the principle."⁴⁵

If all the Secretary-General meant by this last remark was that there should be little difficulty in reaching agreement on the verbal formula expressing the concept of freedom of movement, his prediction was borne out by subsequent events. Thus, in the original agreement of July 19, 1960, between the United Nations and the government of the Republic of the Congo, the government did not hesitate to assume the obligation that "it will ensure the freedom of movement of the Force in the interior of the country and will accord the requisite privileges and immunities to all personnel associated with the activities of the Force."⁴⁶ Even more explicit was the provision with respect to "Freedom of Movement" agreed to by the United Nations and the Republic of Cyprus. This provision read: "The force and its members

⁴³ Summary Study, para. 164.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 28 (S/4389/Add.5) (1960).

together with its service vehicles, vessels, aircraft and equipment shall enjoy freedom of movement throughout Cyprus. Wherever possible the Commander will consult with the Government with respect to large movements of personnel, stores or vehicles on roads used for general traffic. The Government will supply the Force with maps and other information, including locations of dangers and impediments, which may be useful in facilitating its movements."⁴⁷ Difficulties came not in the formulation but in the implementation of these understandings.

In the Congo the most notable examples of these difficulties occurred when the U.N. Force was denied entry into Katanga for some time and was, even after entry, strictly confined in its area of operations there until after pitched battles with Tshombe's forces. Here, however, the basis of the original difficulty was not the unwillingness of the Central Government to honor its commitment, but rather its inability to do so. The Central Government was only too willing to "ensure" ONUC's entry into Katanga, if ONUC would fight its way in by force of arms.⁴⁸ Thus, Hammarskjöld was presented with an apparent direct conflict between two of his basic principles—the right to freedom of movement and the commitment that armed force would be used only in self-defense. The Secretary-General's immediate solution of this dilemma was to sacrifice freedom of movement to the principle of self-defense by canceling the projected airlift of U.N. forces into Katanga when, after preliminary reconnaissance, his representative, Ralph J. Bunche, reported that such an operation could not be effected without use of force.⁴⁹ His long-term solution was to preserve both principles by

⁴⁷ U.N. SECURITY COUNCIL OFF. REC. 19th year, Supp. Jan.-March 1964, at 178 (S/5634) (1964). The agreement contained this additional relevant provision: "The Force shall have the right to the use of roads, bridges, canals and other waters, port facilities and airfields without the payment of dues, tolls or charges either by way of registration or otherwise, throughout Cyprus." *Ibid.*

The comparable provision on freedom of movement in the UNEF Status of Forces Agreement read in part: "The Force and its members shall enjoy together with service vehicles, vessels, aircraft and equipment, freedom of movement between Force Headquarters, camps and other premises, within the area of operations, and to and from points of access to Egyptian territory agreed upon or to be agreed upon by the Egyptian Government and the Commander. . . . The Government of Egypt recognizes the right of the Force and its members to freedom of movement across armistice demarcation lines and other military lines in the performance of the functions of the Force and the official duties of its members." 260 U.N.T.S. 78 (1957). There has been no indication of any difficulties experienced in the application of this provision. The Status of Forces agreement eventually reached for the Congo contained substantially the same provision as that for Cyprus.

⁴⁸ HOSKYNS, *op. cit. supra* note 37, at 160; LASH, *op. cit. supra* note 37, at 234-35.

⁴⁹ Hammarskjöld's instructions to Bunche regarding this reconnaissance trip made it clear that the Secretary-General had already decided, in advance of Bunche's report, to

reliance upon painstaking negotiations, coupled with assurance from the Security Council that the U.N. Force would "not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise."⁵⁰ In this approach he was at least partially successful, achieving a token peaceful entry of U.N. forces into Elisabethville and several other places in Katanga.⁵¹ But it was not until sometime after Hammarskjöld's death that ONUC was able to achieve full freedom of movement throughout Katanga. This in turn involved some delicate judgments as to the outer limits of self-defense, which will be further explored later.

It was not only in Katanga, however, that the Secretary-General encountered considerable difficulty in implementing the theoretical

cancel the projected entry if it appeared that force would be required. Hammarskjöld wrote: "Should you arrive at the conclusion that resistance by force represents a serious risk in view of the attitude of leaders, and that for that reason you have to advise against entry of United Nations troops, I shall, upon receipt of your report, ask for the immediate convening of the Security Council to which I shall present a complete report on what has occurred, with a request for instructions." *Second Report of the Secretary-General*, U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 51 (S/4417) (1960). Even when the Secretary-General did present the problem to the Security Council for further instructions, he did not suggest an authorization to use force in order to effect an entry into Katanga. On the contrary his position was strongly against any such authorization, as indicated by the following statement in his Report to the Council: "If the Council, as it is assumed, wishes to maintain its objectives, the Council must, therefore, either change the character of the Force, which appears to me to be impossible, both for constitutional reasons and in view of the commitments to the contributing Governments, or resort to other methods which would enable me to carry through the implementation of its resolution without going beyond my instructions as regards the Force." *Id.* at 52-53.

The Secretary-General then proceeded to outline the "other methods" which might be used to accomplish the U.N. objectives. These were, in effect, reassurance from the Security Council that entry of the U.N. Force into Katanga would not "submit the province to the immediate control and authority of the Central Government" and would not "mean any taking of sides in the conflict" as to whether there was to be a "strictly unitarian" form of government in the Congo or "some kind of federal structure providing for a higher degree of provincial self-government than now foreseen." *Id.* at 53.

Substantially the same views were also expressed by the Secretary-General in his oral presentations to the Security Council on August 8, 1960. U.N. SECURITY COUNCIL OFF. REC. 15th year, 884th meeting 2-6 (A/PV.884) (1960); *id.* 885th meeting 22-23 (S/PV.885). He did, however, in the first oral statement seem to recognize the possibility of Security Council authorization to make a forceful entry "in that case naturally using only contingents representing Governments which would accept such a new stand by the Council." *Id.* 884th meeting 3 (S/PV.884).

⁵⁰ Resolution, Aug. 9, 1960, U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960 (S/4426) (1960). The resolution also called upon the "Government of Belgium to withdraw immediately its troops from the province of Katanga under speedy modalities determined by the Secretary-General" and declared the entry of U.N. forces into Katanga necessary for the full implementation of this resolution. These provisions, also suggested by the Secretary-General, were designed to strengthen his hand in negotiations with both Belgian and Katangese authorities.

⁵¹ HOSKYNS, *op. cit. supra* note 37, at 170-75; LEFEVER, *op. cit. supra* note 27, at 39-40.

agreement with respect to "freedom of movement" embodied in the basic agreement of July 19, 1960, between the United Nations and the Republic of the Congo. This was emphatically illustrated in the exchanges between the Secretary-General and his representatives, on the one hand, and the President of the Republic of the Congo and his representatives, on the other, with respect to the presence of U.N. forces at the Leopoldville (Ndjili) Airport and other key transportation points within the Central Government's area of effective control. This exchange opened with a communication from the Ministry of Foreign Affairs of the Republic of the Congo to the representative of the Secretary-General asserting that "the air force installations at Ndjili must be evacuated without delay by United Nations forces and personnel stationed there. No agreement between the Congolese Government and ONUC exists on the matter."⁵² This communication came at the time immediately following the murder of Lumumba, when relations between the United Nations and the Kasavubu-Mobutu government in Leopoldville were sorely strained. In addition, the Security Council had just passed its Resolution of February 21, 1961, urging the United Nations "to take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including . . . the use of force, if necessary, in the last resort."⁵³ The resolution also urged that Parliament be convened and that "Congolese armed units and personnel should be re-organized and brought under discipline and control."⁵⁴ Because this resolution had apparently been misinterpreted in Leopoldville as indicating the intention of disarming the ANC (*Armée Congolaise Nationale*) and putting the Congo under some kind of trusteeship,⁵⁵ the Secretary-General undertook to allay unfounded apprehension. The Security Council decision, he explained, called for neither the expulsion of foreign technicians from the country nor the disarming of the ANC. Instead, he said, it referred only to "foreign military and paramilitary personnel, political advisers and mercenaries" and the reference to reorganizing the ANC contemplated only "bringing it under discipline and control, and making arrangements with a view to eliminating interference by its units and personnel in

⁵² *Report by the Secretary-General to the Security Council, March 3, 1961*, U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 211 (S/4758) (1961). The ultimatum about the Ndjili airport was followed shortly by reports of interference with U.N. installations at other transportation centers, such as the Moanda airfield and the port of Matadi. *Id.* at 214, 219.

⁵³ Resolution, Feb. 21, 1961, U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 147 (S/4741) (1961).

⁵⁴ *Id.* at 148

⁵⁵ HOSKYNs, *op. cit. supra* note 37, at 338.

the Congo's political life—an aim which most recent events have fully justified.”⁵⁶ But with respect to the demand for the evacuation at Ndjili, the Secretary-General's reply was unyielding: “The air force installations are essential to the entire United Nations operation in the Congo and particularly to the communications required for the Force. Consequently the measures contemplated by the Government would constitute a direct violation of the basic agreement of 27 July 1960 by which the Government undertook to ensure the freedom of movement of the Force throughout the country and to carry out in good faith its obligations under the resolutions with respect to the Force.”⁵⁷

It may be noticed that the Secretary-General in the foregoing passage somewhat improved on the language of the July 27th agreement with respect to “freedom of movement.” In the agreement of July 27th the government had simply promised to “ensure the freedom of movement of the Force in the interior of the Country” and to “accord the requisite privileges and immunities to all personnel associated with the activities of the Force.”⁵⁸ It was not until after the death of Hammarskjöld that the more elaborate agreement of November 27, 1961, spelled out the exact elements of “freedom of movement” in a way comparable to his insistence in the exchanges with the Central Government concerning the air force installations. The November 27th agreement, which was theoretically retroactive to the date of the first arrival of U.N. contingents in the Congo, expanded on the prior agreement by providing: “The Government shall afford the members of the Force and the officials serving under the United Nations in the Congo full freedom of movement throughout Congolese territory and to and from points of access to Congolese territory. This freedom shall extend to the operation of vehicles, aircraft, vessels and equipment in the service of the United Nations.”⁵⁹ But even this provision did not answer the exact question posed by the demand for evacuation of the air force installations at Ndjili—whether the guarantee of freedom of movement included the right to U.N. military control of key facilities of transportation. One can fully support Hammarskjöld's judgment in

⁵⁶ *Report by the Secretary-General*, U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 217 (S/4758) (1961).

⁵⁷ *Id.* at 218. The Secretary-General was equally insistent upon the U.N. right to maintain military installations at the port of Matadi in order to protect the movement of its own supplies. *Id.* at 221, 226.

⁵⁸ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 28 (S/4389/Add.5) (1960).

⁵⁹ 414 U.N.T.S. 245 (1961).

insisting upon that right in the circumstances and yet appreciate the government's concern about surrendering such control to possibly unfriendly hands.⁶⁰

Interference with ONUC's freedom of movement also played a large part in provoking the vigorous but intermittent military actions between December 1961 and January 1963 which finally ended the secession of Katanga. Thus, there seemed no reasonable basis for doubt that by December 1961 ONUC's freedom of movement had been genuinely limited by the establishment of roadblocks which cut the camps off from each other and made it impossible for them to aid one another in case of attack.⁶¹ But ONUC's effort to establish by force its freedom of movement throughout Katanga was suspended short of accomplishing that objective when year-long negotiations began in January 1962 between Tshombe and his supporters, on the one hand, and the Kasavubu-Adoula Central Government on the other, with regard to the exact form of a federal state which was to supplant the *Loi fondamentale*, bequeathed to the Congo by Belgium.⁶² During this period the United Nations also attempted to realize through negotiations its right to freedom of movement throughout Katanga, especially in the neighborhood of Jadotville and Kolwezei, industrial centers of the Union Minière.⁶³ Despite these efforts, the closing days of 1962 revealed no substantial progress on either the political or the military fronts. Instead there was deterioration in ONUC's effective freedom of movement until the U.N. forces launched, between December 28, 1962, and January 3, 1963, their second series of military actions;⁶⁴ thanks partly to a failure of communications between the Secretary-General's offices in New York and the officers in the field, these operations were not halted until the Katanga gendarmerie were

⁶⁰ Kasavubu might have recalled, in this connection, that similar control of the airfields by the United Nations, when used to close them to all but U.N. traffic, had operated very much in his own favor in his struggle with Lumumba. This incident is considered later in connection with the obligation of impartiality. See text accompanying note 170 *infra*.

⁶¹ *Report of the Officer-in-Charge of the United Nations Operation in the Congo Concerning the Situation in Elisabethville*, U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Oct.-Dec. 1961, at 37, 47, 51, 57 (S/4940/Add.16,17,18,19) (1961); Hoskyns, *op. cit. supra* note 37, at 447-55.

⁶² See LEFEVER, *op. cit. supra* note 27, at 99-107; *Report of the Officer-in-Charge of the United Nations Operations in the Congo*, U.N. SECURITY COUNCIL OFF. REC. 17th year, Supp. April-June 1962, at 1-93 (S/5053/Add.10) (1962); *id.* Supp. Oct.-Dec. 1962, at 30 (S/5053/Add.13); *id.* at 141 (S/5053/Add.13/Add.1).

⁶³ U.N. SECURITY COUNCIL OFF. REC. 17th year, Supp. Jan.-March 1962, at 29 (S/5053/Add.7) (1962).

⁶⁴ U.N. SECURITY COUNCIL OFF. REC. 18th year, Supp. Jan.-March 1963, at 1-13 (S/5053/Add.14) (1963).

completely dispersed, the industrial area around Jadotville occupied, and the Tshombe government in full flight.⁶⁵ Then and then only was the Secretary-General able to announce triumphantly:

Full freedom of movement for ONUC personnel throughout Katanga has thus been fully and firmly established. ONUC could never hope to discharge the mandates given to it with regard to law and order, prevention of civil war, and the elimination of mercenaries without freedom of movement. It was with this in mind that freedom of movement for ONUC was provided for in the Plan.⁶⁶

Viewed merely in the light of the specific actions by Katangese and U.N. military forces, there can be little serious question that vindication of ONUC's right to freedom of movement, as well as its right of self-defense, provided an appropriate rationalization for its military actions. But as the Secretary-General's statement itself suggests, the conflict over ONUC's freedom of movement in Katanga cannot be realistically understood without some consideration of the more fundamental objectives of its presence there. This was particularly so after the final Security Council Resolution of November 24, 1961, which 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 advisors not under the United Nations Command, and mercenaries"⁶⁷ The resolution further declared that "all secessionist activities against the Republic of the Congo are contrary to the 'Loi fondamentale' and Security Council decisions" and specifically demanded that "such activities which are now taking place in Katanga shall cease forthwith."⁶⁸ Against the background of those provisions, and the pressure to implement them, it is not surprising that the Katangese leaders should have regarded the presence of ONUC as a threat both to Katanga's independence and their own authority. Yet by yielding to their own fears and interfering with the normal operations of the force the nervous Katangese in effect relieved the United Nations of having to decide whether military action could ever have appropriately been taken to evacuate the mercenaries and terminate secession.

⁶⁵ *Id.* at 13-21; *id.* at 60-78 (S/5053/Add.15).

⁶⁶ *Report of the Secretary-General, Feb. 4, 1963*, U.N. SECURITY COUNCIL OFF. REC. 18th year, Supp. Jan.-March 1963, at 94 (S/5240) (1963).

⁶⁷ Resolution, Nov. 24, 1961, U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Oct.-Dec. 1961, at 148, 149 (S/5002) (1961).

⁶⁸ *Ibid.*

In Cyprus, too, the implementation of the right to "freedom of movement" proved to be a thorny issue, as it came into conflict with rights asserted by the government of the Republic of Cyprus and by the Turkish Cypriot community. Difficulty of implementation was made particularly clear in the September 10, 1964, report of the Secretary-General after the Force had been operational almost six months. After referring to the explicit guaranty of freedom of movement in the agreement, the Secretary-General said: "But the Force has encountered many difficulties in this regard which have greatly hindered its work. In particular, during July and early August there were frequent cases of serious restriction of the movement of UNFICYP by the Cypriot police and the Cyprus National guard."⁶⁹ The report then gave particular details which revealed the underlying cause of the difficulties. One of UNFICYP's principal objectives was "to prevent a recurrence of fighting . . ."⁷⁰ To that end it maintained constant patrols designed to discourage the importation of arms and the building of fortified positions. Yet, according to the report, "precisely at the time when it was believed that large shipments of military equipment were being unloaded from Greek ships, serious restrictions were imposed on the movement of UNFICYP personnel and vehicles at and near the Limasol docks."⁷¹

This was not an isolated incident. In general, "the Government of Cyprus maintained that the entry by UNFICYP into docks and ports or other Government premises, or the stationing of units therein, was not included in the term 'freedom of movement'."⁷² In personal negotiations, the President of Cyprus seemed to qualify this position somewhat by suggesting that "UNFICYP would enjoy complete freedom of movement throughout the territory of the Republic, although, for security reasons, certain sensitive areas could not be visited by ordinary UNFICYP patrols."⁷³ In practice, however, this general assurance appeared to mean that there were to be certain areas "of special importance to the Cyprus Government which may not be visited by *anyone* in UNFICYP"; other areas "which may be visited only by the Force Commander having given due notice to the Cyprus military authorities," and still other areas "which may be visited only by senior UNFICYP officers having given due warning and even then only at predetermined days and hours."⁷⁴ At the same time, the Force was

⁶⁹ U.N. Doc. No. S/5950, para. 14 (1964).

⁷⁰ *Id.* para. 6.

⁷¹ *Id.* para. 15.

⁷² *Id.* para. 16.

⁷³ *Id.* para. 18.

⁷⁴ *Ibid.*

also experiencing some difficulty in areas controlled by Turkish Cypriots, particularly in the immediate vicinity of fortified posts, but these obstacles were apparently yielding to local negotiation.⁷⁵

In his Report of December 12, 1964, the Secretary-General acknowledged that the freedom of movement of the U.N. Force had continued, during the preceding three months, to meet with interference both from the Government of Cyprus side and, less significantly, from the Turkish Cypriot side.⁷⁶ The government had continued to insist that certain areas were out of bounds to all members of the Force and a considerably larger number of areas could be visited only by the Force Commander. After further protests from the Force Commander, an agreement had been reached, on November 10, 1964, reflecting a studied compromise between UNFICYP's insistence upon its freedom of movement and the government's insistence upon the secrecy of its military installations. The agreement provided that the whole of the island was to be free to UNFICYP with the exception of certain stipulated areas which could be visited only by the Force Commander after consultation with the Greek Cypriot commander and certain other stipulated areas which could be inspected by UNFICYP zone or district commanders, not below the rank of Lieutenant Colonel, if prior notice was given to the local National Guard commander. In addition, a solution had been worked out with respect to the restrictions which had been experienced "whenever UNFICYP patrols sought to carry out their duty of observing the unloading of military equipment and stores at the docks." The solution was that "the local authorities would inform the headquarters of UNFICYP Limassol District whenever a shipment of stores was expected at the harbor. The UNFICYP District Headquarters in turn would arrange for the New Zealand civilian police section stationed in the District to be present at the docks at the time of unloading." The report adds, perhaps with a touch of irony: "[B]y and large this agreement has worked satisfactorily whenever advance notification has been forthcoming as had been agreed upon, which was usually the case."⁷⁷

The Secretary-General's Report of March 11, 1965, reflected new developments in the conflict between UNFICYP's freedom of movement and the asserted claims of secrecy of military installations.⁷⁸ As a result of a disagreement between the UNFICYP Commander and the Na-

⁷⁵ *Id.* para. 19.

⁷⁶ *Report by the Secretary-General on the United Nations Operation in Cyprus*, U.N. Doc. No. S/6102, paras. 125-30 (1964).

⁷⁷ *Ibid.*

⁷⁸ U.N. Doc. No. S/6228, paras. 19-28 (1965).

tional Guard commander as to whether the agreement on restricted areas applied to vehicles and personnel on the ground only or to overflights as well, UNFICYP light aircraft flying reconnaissance duty over restricted areas had been fired upon by government troops. Turkish Cypriot armed forces had also begun to bar UNFICYP patrols from entering what the Turkish Cypriot leadership regarded as sensitive areas. This interference from both sides obviously raised fundamental questions with regard to the whole purpose supposed to be served by UNFICYP patrolling. The U.N. Force Commander suggested that "the aim of reconnaissance by UNFICYP was to keep him properly informed, so as to enable him to assess likely future military developments, and so position the Force correctly for its task of keeping the peace."⁷⁹ Nevertheless, the Force Commander ordered a review of UNFICYP reconnaissance procedures "with a view to reducing to a minimum practices which might conceivably give rise to friction or resentment, however unjustified."⁸⁰ In reply the Minister of Interior of the Government of Cyprus informed the Force Commander that "if the revised procedures were followed, there would be no intention on the part of the Cyprus security forces to interfere with United Nations operations on the Island, but the security forces expected UNFICYP not to interfere with their own functions. . . . The Government of Cyprus was facing a threat from outside [presumably invasion from Turkey], and considered that UNFICYP had no valid interest in activities designed to meet that threat."⁸¹ The Secretary-General's report does not reveal how the revised procedures differed from the previous ones, but assures us that they "do not diminish the ability of UNFICYP to keep the Commander properly informed of developments in the Island."⁸²

The Secretary-General's Report of June 10, 1965,⁸³ indicates that the revised procedures led to a considerable decrease in unpleasant incidents involving U.N. Forces and the National Guard; difficulties with the Turkish Cypriots, on the other hand, showed an opposite tendency. The Secretary-General noted that the increased militancy and aggressiveness of the Turkish fighter elements, which caused the difficulties, "coincided with public criticism, both in Turkey and among Turkish Cypriots, of the report of the United Nations Mediator and of the work

⁷⁹ *Id.* para. 25.

⁸⁰ *Id.* para. 26.

⁸¹ *Id.* para. 27.

⁸² *Id.* para. 26.

⁸³ *Report by the Secretary-General on the United Nations Operation in Cyprus*, U.N. Doc. No. S/6426, paras. 18-21 (1965).

of UNFICYP.”⁸⁴ For a while the Turkish Cypriot leaders denied UNFICYP’s right to inspect closed and shuttered shops along streets in Nicosia constituting the so-called “green line,” established by the British before the creation of UNFICYP for the purpose of separating the embattled Turkish and Greek communities. After rather protracted negotiations the Turkish Cypriot leadership finally accepted “the unrestricted and unconditional rights of access and inspection of the United Nations Force (subject to reasonable notice in case of residential premises) in connection with UNFICYP’s function of preventing a recurrence of fighting.”⁸⁵

These disagreements between UNFICYP, on the one hand, and the Greek Cypriots or Turkish Cypriots, on the other, with respect to the exact application of the principle of freedom of movement, suggest, just as did the experience in the Congo, that the principle cannot in realistic terms be divorced from the fundamental objectives of the U.N. operation. In his Report of April 29, 1964, the Secretary-General summarized the general objectives of the U.N. Force as defined by the Security Council to be:

- (a) To prevent a recurrence of fighting.
- (b) To contribute to the maintenance and restoration of law and order.
- (c) To contribute to a return to normal conditions.⁸⁶

As more specific objectives to serve as a program of action designed to accomplish the general mandate, the Secretary-General listed the following steps, among others: achievement of freedom of movement for all the communities on all roads in Cyprus and within the whole town of Nicosia and other cities, under conditions of security; progressive evacuation of and removal of fortified positions held by Greek and Turkish Cypriots; progressive disarming of all civilians other than the regular police gendarmerie and the Cyprus Army by the Cypriot Government and the Turkish community, with UNFICYP assisting in facilitating and verifying the disarming and the storage of arms in security, if requested to do so.⁸⁷ The relation of UNFICYP’s freedom of movement to the accomplishment of these objectives is reasonably clear. The Force could hardly assure freedom of movement to the communities of Cyprus, in security, if it could not maintain it for itself. Neither could it assure the evacuation and removal of fortified posi-

⁸⁴ *Id.* para. 20.

⁸⁵ *Id.* para. 69.

⁸⁶ *Report by the Secretary-General to the Security Council on the Operations of the United Nations Peace-keeping Force in Cyprus*, U.N. Doc. No. S/5671, Annex I, para. 1 (1964).

⁸⁷ *Id.* para. 2.

tions if it could not inspect such positions with uninhibited frequency and intensity. But presumably the desired freedom of movement of the civilian population did not apply to the military installations of the National Guard; nor did the term fortifications apply to such installations. Just what the test of "sensitive area" as propounded by the Government of Cyprus was we are not told by the U.N. reports. Whether it was limited to installations of the National Guard is left to speculation. Even if it were so limited, we are left to wonder whether the recognition of these sensitive areas meant in effect that fortifications designed for the protection of the Turkish community were subject to intensive inspection, while those designed for protection of the Greek Cypriot community could be watched only from afar or by occasional specially arranged visits of the Force Commander. If this was the effect, it is not surprising that the Turkish community responded by establishing its own sensitive areas.

Another objective of UNFICYP patrolling, as indicated in the Secretary-General's reports, was to keep the Force Commander informed of the general conditions in the country. Among those conditions was the general balance of forces. In his Report of June 15, 1964, the Secretary-General said:

The problem of arms in Cyprus is critical. Indeed it may be the decisive factor in determining the ability of the United Nations effort in Cyprus to succeed. There is no question, of course, that the smuggling of arms, whether by Turkish or Greek Cypriots, is illegal and that UNFICYP is entitled to try to check it. It would seem also not subject to question that a sovereign Government normally is entitled to import and/or manufacture arms. With regard to Cyprus, the question is whether at the present time and in the present circumstances, the import and manufacture of arms by the Government of Cyprus is within the letter and/or spirit of the Security Council resolution of 4 March.⁸⁸

This question posed by the Secretary-General was never explicitly answered. The Government of Cyprus insisted upon its right to import arms, and also the necessity for doing so, in view of the threat of invasion by Turkey; it suggested, however, that the type of arms sought were suitable for this purpose only, rather than for use against the Turkish Cypriot community. Presumably this disagreement between the Secretary-General and the Government of Cyprus regarding

⁸⁸ *Report by the Secretary-General to the Security Council on the United Nations Operation in Cyprus, for the period 26 April to 8 June 1964*, U.N. Doc. No. S/5764, para. 120 (1964).

the importation of arms underlay the difficulties experienced by ONUC in exercising its right to freedom of movement in the neighborhood of the Limassol docks. We are never told explicitly by the reports just what purpose the U.N. inspection of the docks served and exactly how that purpose was served by the limited inspection finally permitted. In a "general assessment of the situation with regard to preventing recurrence of fighting," the Secretary-General, in his report of March 11, 1965, did say: "Although UNFICYP has been impeded from time to time in its efforts, particularly by governmental forces with regard to essential freedom of movement, it has, by its deployment in likely trouble spots and by its continuous observation of military movement on the Island, endeavored at all times to ensure that no large-scale preparations for an attack by one side or the other would escape its notice."⁸⁹ On the basis of these somewhat limited observations, the Secretary-General ventured the conclusion that there was thus far no specific evidence either of "preparations for a large-scale attack on the Turkish Cypriot Community" or of "preparations for offensive action by the Turkish Cypriots."⁹⁰ Nevertheless, the report concludes on the point that, because "preparations for a possible resumption of inter-communal hostilities will become more and more difficult to detect," it is "vital that UNFICYP's rights in respect of free movement and observations, both on the ground and from the air, shall continue to be recognized to enable the Security Council to be kept informed about the situation and to dispel unwarranted apprehensions."⁹¹

The principal question with respect to "freedom of movement" suggested by the Congo experience, and by the Cyprus experience thus far, is not whether it is an important right which should be generally insisted upon in U.N. peace-keeping operations. Its importance seems to be overwhelmingly demonstrated in both instances. The more legitimate question is whether experience suggests that the general affirmation of the right, in the terms included in both Status of Forces agreements, is sufficiently realistic. In the Congo effective freedom of movement for ONUC necessarily included effective control of key transportation centers, even if, in that respect, it carried at least a potential threat to the freedom of movement of other forces. In Cyprus complete freedom of movement for UNFICYP came into conflict with the government's asserted right to create and keep substantially secret its own military installations supposedly designed for defense against

⁸⁹ *Report by the Secretary-General on the United Nations Operation in Cyprus*, U.N. Doc. No. S/6228, para. 63 (1965).

⁹⁰ *Id.* para. 64.

⁹¹ *Id.* para. 65.

external attack. Conceivably in future agreements it might be possible to guard against such possible points of tension by more specific provisions. Failing such a solution perhaps the most that can be said by way of generalization is that recognition of the right to "freedom of movement" in the broadest possible terms is an extremely convenient handle for the Secretary-General or the Force Commander to be able to grasp in delicate negotiations over specific problems, as demonstrated so often in both the Congo and Cyprus, even if such freedom may sometimes have to be limited by what the host country regards as its own requirements of national defense or maintenance of internal order. Finally, in the event of an impasse in negotiations, there is always the possibility of returning to the Security Council or the General Assembly, as the case may be, for clarification or modification of the mandate, or even of recommending termination of the operation on account of failure of the host government to cooperate in "good faith" in accordance with the terms of its original commitment.

III. THE USE OF ARMED FORCE AND THE RIGHT OF SELF-DEFENSE

The problem of freedom of movement has been closely associated in actual practice with the limitation upon the use of force to the right of self-defense; frequently they have been opposite sides of the same coin. Put most bluntly, the hard question is whether a U.N. peace-keeping force is ever entitled to take the initiative in the use of force in order to effectuate its right to freedom of movement. It will be recalled that Hammarskjöld, faced with just this question in connection with the original entry into Katanga, shrank from any such use of force without specific authorization from the Security Council and even recommended against such an authorization.⁹² In so doing he was being faithful to his own precepts as developed in the Summary Study, in which he said:

A reasonable definition seems to have been established in the case of UNEF, where the rule is applied that 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 As-

⁹² It might even be said that Hammarskjöld refused in this instance to commit U.N. troops to an operation in which he had good reason to believe that they would have to use arms in self-defense once the operation was launched. It is not clear, however, that the Secretary-General saw the situation in that light or meant to carry his principle of self-restraint quite that far.

sembly and within the scope of its resolutions. The basic element involved is clearly the prohibition against any *initiative* in the use of armed force.⁹³

This formulation of the governing principle does not explicitly answer the question whether troops may use armed force if necessary to assume positions which they are ordered to occupy in order to carry out their mandate under the governing resolutions. But the implication of the statement—particularly in its emphasis upon “the prohibition against any *initiative* in the use of armed force”—appears to be clearly in the negative. It is also significant that the statement was repeated, with the same emphasis, in the Secretary-General’s First Report on the operation in the Congo.⁹⁴ The application of the principle is not limited to vindication of the right to freedom of movement; rather it embraces all the operations of the Force. Consequently the general question presented by this formulation of the principle might be stated as: What is a U.N. peace-keeping force supposed to do if it meets with passive but effective resistance or evasion while attempting to perform its authorized functions?

This question has never been critical in the operations of UNEF; indeed in this respect, UNEF seems to have led a rather charmed life. This may have been partly due to the alacrity with which Nasser moved into the Gaza strip, upon the heels of UNEF, with his own administrative governor, staff officers, and military police, thus relieving U.N. troops of any further responsibility for the maintenance of internal order.⁹⁵ Since then the functions of UNEF have been limited to patrolling the armistice lines and the shores of the Straits of Tiran and the Gulf of Aqaba. In the performance of its duties “UNEF is authorized to apprehend infiltrators and persons approaching the demarcation line in suspicious circumstances. . . . [A]fter interrogation, the persons apprehended are handed over to the local police.”⁹⁶ To accomplish these purposes, apart from one bloodless exchange of fire

⁹³ Summary Study, para. 179.

⁹⁴ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 20 (S/4389) (1960).

⁹⁵ UNEF did have responsibility for the maintenance of internal order within the strip during the first few days after the Israeli withdrawal. A preview of the kind of troubles it might have experienced if this responsibility had continued was provided by one incident during these first few days, when a group of rioters surrounded the U.N. headquarters and attempted to raise the Egyptian flag. UNEF soldiers succeeded in dispersing the rioters by using tear gas and firing over their heads. However, one of the demonstrators was killed by a ricocheting bullet. Apparently this is the only fatality inflicted by UNEF. See ROSNER, *THE UNITED NATIONS EMERGENCY FORCE* 87-92 (1963); Armstrong, *The U.N. Experience in Gaza*, 35 FOREIGN AFFAIRS 600, 616 (1957).

⁹⁶ Summary Study, para. 70.

with an Israeli patrol⁹⁷ which was based apparently upon a misunderstanding, the Force has never had occasion to use its arms seriously, at least so far as the reports show. The periodic reports do show a number of incidents involving firing across the armistice demarcation line, crossing it, and occasional thefts and even kidnappings incidental to such crossings, but they do not tell us just how UNEF has reacted when faced with such incidents.⁹⁸ It apparently relies upon vigorous patrolling, intensive observation, and occasional warning shots to keep them from getting out of hand.

The experience in the Congo presented quite a different story from that of UNEF in respect to the difficulties encountered in applying the principle of never taking the initiative in the use of armed force. The first explicit testing of the principle developed in an exchange of messages between the Secretary-General and the President of Ghana, dated August 18 and 19, 1960, growing out of an incident at the Leopoldville airport, involving Ghanaian officers and soldiers of ONUC, U.N. security people, and armed members of the Force publique (later called the ANC—Armée Nationale Congolaise).⁹⁹ The exact facts of

⁹⁷ ROSNER, *op. cit. supra* note 95, at 248 n.113.

⁹⁸ See U.N. GEN. ASS. OFF. REC. 18th Sess., Annexes, Agenda Item No. 19, at 4 (A/5494) (1963); U.N. GEN. ASS. OFF. REC. 17th Sess., Annexes, Agenda Item No. 32, at 4 (A/5172) (1962); U.N. GEN. ASS. OFF. REC. 16th Sess., Annexes, Agenda Item No. 26, at 24 (A/4857) (1961); U.N. GEN. ASS. OFF. REC. 15th Sess., Annexes, Agenda Item No. 27, at 17 (A/4486) (1960); U.N. GEN. ASS. OFF. REC. 14th Sess., Annexes, Agenda Item No. 28, at 25 (A/4210) (1959); U.N. GEN. ASS. OFF. REC. 13th Sess., Annexes, Agenda Item No. 65, at 6 (A/3899) (1958); U.N. GEN. ASS. OFF. REC. 12th Sess., Annexes, Agenda Item No. 65, at 6 (A/3694) (1957).

The Secretary-General apparently still regards the authority of UNEF to use some measure of force or show of force to stop incidents as essential to the success of its operations. In the recent *Survey of the United Nations Emergency Force*, U.N. Doc. No. A/C.5/1049, paras. 36-37, at 16 (1965), the Survey Team, after mentioning the possibility of substituting more air observation for ground patrols, concluded: "In considering such possibilities, which are at first sight attractive from the point of view of economy, it is necessary to bear in mind the experience of the United Nations with other observation missions The nature of these missions gives them no responsibility for actually preventing incidents and violations Furthermore, the effectiveness of an observer operation requires the presence of observers on both sides of the Line and the observance of a demilitarized zone along the Line by both sides. These considerations have caused the Survey Team to consider that a predominantly observer operation would be inadequate to the fulfillment of the mandate of UNEF at the present time." On this point Rosner makes this comment: "United Nations soldiers possess the right to fire in self-defense—a right which, on occasion, has been used—but the question whether they have authority to fire during darkness at infiltrators approaching the line from either direction is still undetermined. Effective prevention of infiltration across the frontiers would seem to necessitate the right to shoot at marauders, and indeed General Burns requested this right. But only authority to shoot in self-defense was granted by the Secretary-General and the Advisory Committee, though it was understood that self-defense would be broadly interpreted." ROSNER, *op. cit. supra* note 95, at 102.

⁹⁹ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 99-102 (S/4445), 109 (S/4449), 113-15 (S/4451) (1960).

the incident do not appear clearly from the documents; apparently soldiers of the Force publique seized, imprisoned, and to some extent abused U.N. civilian personnel in the presence of the Ghanaian guard who did not immediately secure their release.¹⁰⁰ Complaints about this failure, transmitted to the President of Ghana, elicited an answering blast from Major-General H. T. Alexander, Chief of the Defense Staff of Ghana. General Alexander asserted that the failure of the Ghanaian guard to act immediately and effectively was due entirely to the kind of general orders issued by the U.N. Command. "To say the least of it," said the General, "these orders were neither clear nor did they give United Nations troops any liberty of action even for the use of minimum force. In fact, when specifically asked whether force could be used to release United Nations personnel, Colonel Berthiaume, military aide to the Supreme Commander, answered 'No'."¹⁰¹ Mr. Ralph J. Bunche, then special representative of the Secretary-General in the Congo, said in reply to General Alexander: "The United Nations Command has issued orders to its troops which are very clear on the subject of the employment of force. The operations directive, familiar to everyone associated with the Force, states, under the heading 'Use of arms': 'At all levels, commanders are to be instructed to the effect that, on no account, are weapons to be used unless in cases of great and sudden emergency and for the purposes of self-defence. In such cases, the commander on the spot will ensure that the greatest care and control are used.'"¹⁰² Mr. Bunche also made a spirited defense of this policy, saying, in part: "Obviously, if the Force began to use its arms to wound and kill Congolese its doom would be quickly sealed, for it cannot long survive amidst a hostile public. Indeed, this would defeat its very purpose. I think it not the least exaggeration to say that the Force gained very much in the way of prestige and moral superiority by the remarkable restraint it displayed, under severe provocation earlier this week."¹⁰³

It is a curious aspect of the Alexander-Bunche exchange that while it arose out of criticism by the Secretariat of U.N. soldiers for not having taken more initiative in protecting U.N. personnel, it ended with Alexander urging a more aggressive policy and Bunche a policy of continued self-restraint. We are never told just what Bunche thought the Ghanaian soldiers should have done to protect or secure the release

¹⁰⁰ BURNS & HEATHCOTE, *PEACE-KEEPING BY U.N. FORCES* 41-42 (1963).

¹⁰¹ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 101-02 (S/4445) (1960).

¹⁰² *Id.* at 113-14 (S/4451) (1960).

¹⁰³ *Id.* at 115.

of the U.N. personnel. However, he does mention in passing that U.N. soldiers had been permitted to fire in self-defense when attacked while escorting Congolese civilians.¹⁰⁴ Presumably the same right would apply if they had been attacked while undertaking to protect U.N. personnel. But this did not quite answer the question of what U.N. troops could do to release personnel already apprehended. General Alexander's solution was to take the initiative by disarming potential troublemakers—in this case the undisciplined or unreliable units of the Force publique—apparently using such force as might be required for the purpose.¹⁰⁵ The difficulty with this proposal, according to Mr. Bunche, was that it was plainly not authorized by the Security Council resolution directing the Secretary-General “‘to provide the Government with such military assistance as may be necessary until . . . the national security forces may be able, in the opinion of the Government, to meet fully their tasks.’” “In the light of this resolution,” he said, “our policy in the Congo has been one of seeking to co-operate with the Government and this, admittedly, has not been without difficulties.”¹⁰⁶

These difficulties were compounded when ONUC was faced with feuding local armed forces, loyal to different leaders, some of whom were demanding U.N. assistance or protection. The Hammarskjöld principle of neutrality in internal conflicts did not go so far as to bar protection of local leaders against violence in this situation. But again the problem was how much initiative ONUC could take in affording such protection. Thus, in response to criticism from the President of the Republic, Kasavubu, for not having protected loyal officials of the provincial government of Kivu from arrest and kidnapping by the rebel followers of Gizenga and Lundula, the representative of the Secretary-General reported that the ONUC Commander on the spot had been told by the officials mentioned that ONUC assistance or protection was not desired; that protection had been afforded to other officials who did request it; and that once the arrest had been made of persons not under U.N. protection at the time, “ONUC could not pur-

¹⁰⁴ *Id.* at 113.

¹⁰⁵ General Alexander did say that “everything should be done to persuade the Cabinet of the Congo Republic to co-operate in action taken to retrain and reform this army,” but he added, “whether or not co-operation can be obtained, the United Nations must do its duty.” *Id.* at 101 (S/4445) (1960).

¹⁰⁶ *Id.* at 114 (S/4451) (1960). General Alexander has since repeated and elaborated his criticisms of the U.N. military operation in the Congo, particularly the need for more realistic and explicit military directives, and the desirability of greater delegation of authority to field commanders. He also recognizes, however, the tremendous political difficulties involved and the many accomplishments of U.N. forces and personnel. ALEXANDER, *AFRICAN TIGHTROPE* 61-87 (1965).

sue and join battle with an ANC unit. That would have constituted a military initiative and an act of intervention, both of which are forbidden by the mandate of the force as laid down by the Security Council."¹⁰⁷ This incident together with the explanation of the Secretary-General's representative seems to show an area where the prohibition of any initiative in the use of force worked sensibly and clearly to establish a consistent pattern of conduct. It is not so clear, however, that exactly the same rules should have been applicable to protection of U.N. personnel as to feuding Congolese leaders. It would seem not unreasonable for the United Nations to have reserved to itself the right to take the initiative, by force if necessary, to secure the release of U.N. personnel, at least where their detention was not based upon a formal order of arrest from a recognized governmental authority. This was indeed the position subsequently adopted.¹⁰⁸

As might well be expected in the light of the preceding discussion of freedom of movement, the self-defense limitation received its hardest test in the operations of ONUC in Katanga. This first occurred not so much in connection with the secession of Katanga, but as a consequence of the determination of Tshombe to stamp out what he regarded as rebellion against his authority in northern Katanga, namely the disaffection of the Balubas, many of whom were seeking ONUC's protection. By this time ONUC was operating under the additional authority granted by the Security Council resolution of February 21, 1961, which contained in its first operative paragraph this language: "*Urges* that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort."¹⁰⁹ With this language of the resolution in mind, "the Force commander instructed the commander of the UN troops in north Katanga to oppose and resist any further aggressive moves by the Katanga gendarmerie" and also "warned Mr. Tshombe that the United Nations would oppose and resist any use by him of military force, and that if clashes developed between Katanga forces and the United Nations forces, the United Nations would send sufficient reinforcements to Katanga to deal with the situation."¹¹⁰ This order and warn-

¹⁰⁷ U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 45-46 (S/4630) (1961).

¹⁰⁸ See U.N. Doc. No. S/5653, para. 18 (1964); see also note 140 *infra*.

¹⁰⁹ U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 147 (S/4741) (1961).

¹¹⁰ U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. April-June 1961, at 24 (S/4791) (1961).

ing were only partially implemented. At Manono, one of Tshombe's objectives in north Katanga, Katangese gendarmes successfully avoided contact with ONUC patrols, joined battle with and defeated ANC/Jeunesse in the neighborhood, seized control of the airport, and prevented ONUC planes from landing there. At Kabalo, another one of the objectives, on the other hand, ONUC retained control of the airport, disarmed Katangese gendarmes attempting to land there, and successfully repelled, after suffering some casualties, another group of gendarmes attempting to land at the port of Kabalo. The total effect apparently was that ONUC succeeded in retaining control of Kabalo and providing protection for Baluba refugees in the immediate neighborhood; in other areas of north Katanga, Tshombe's forces more or less successfully carried out his policy of forcible pacification.¹¹¹ So far as appears from the official record, in no particular instance did ONUC fire first. In any event, the effect of the general instructions with respect to the use of force in this situation is very difficult to assess. It has been suggested that there was a substantial division of opinion among U.N. officers as to just what the U.N. forces were supposed to do; that "the attitude of UN forces at Kabalo in early April was quite different from that of UN forces at Manono in late March."¹¹² At this point perhaps general instructions with respect to initiative in the use of force had become irrelevant; what was required were more specific directions regarding the objectives to be served.¹¹³

The Resolution of February 21, 1961, contained another mandate whose accomplishment promised to be difficult without further qualification of the principle limiting the exercise of force to self-defense. It urged that "measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other foreign military and paramilitary personnel and political advisers not under the United Nations Command, and mercenaries."¹¹⁴ The resolution did not say explicitly that this was to be the job of the United Nations; neither did it explicitly authorize the use of force. Nevertheless, the officials of the Secretariat seemed to be satisfied that both terms were implied, if necessary. They hoped, of course, to achieve the announced objectives through negotiation and voluntary action. To this end, elaborate negotiations were conducted with the Belgian government, the offi-

¹¹¹ See O'BRIEN, *TO KATANGA AND BACK* 140-56 (1962).

¹¹² *Id.* at 146 n.1.

¹¹³ There were also in effect at this time somewhat more liberal directives with respect to the use of force. See HOSKYNS, *THE CONGO SINCE INDEPENDENCE* 294-95 (1965).

¹¹⁴ U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 147 (S/4741) (1961).

cials of the Central Government, and the Katangese leaders.¹¹⁵ Lists of foreign military personnel and political advisers who were to be evacuated were drawn up and to some extent agreed upon by all concerned, except, of course, the individuals themselves. Actual accomplishment of the evacuation proved a harder nut to crack. Months passed without any substantial progress in this direction. In the meanwhile, pressure was building up in New York from a significant number of member nations (the Soviet bloc and the Afro-Asians) for more effective implementation of the resolution.¹¹⁶

Decisive action was finally initiated towards the end of August 1961. The Central Government at Leopoldville enacted an ordinance providing for the expulsion of all non-Congolese officers and mercenaries serving in the Katangese forces, not under contract with the Central Government. The Prime Minister of the Republic of the Congo then requested the assistance of the United Nations in the execution of the ordinance. In pursuance to this request, the U.N. forces in Katanga scored their first notable success, "Operation Rumpunch." Profiting by surprise, they took over without resistance temporary control of the post office and radio station in Elisabethville, blockaded key Katangese officials in their homes, and arrested a substantial number of foreign military personnel marked for evacuation.¹¹⁷ After the apparent success of the first bloodless strike, further negotiations followed in which the Belgian consulate and the Tshombe government promised to cooperate in the repatriation of the remaining foreign military personnel and political advisers. Unfortunately, these arrangements did not work out as anticipated by U.N. officers on the spot. For a variety of reasons, a large number of the foreign personnel whose evacuation was anticipated escaped apprehension, sentiment against the U.N. operation in Katanga was again being whipped up to a fever pitch, and hope for peaceful reconciliation between Katanga and the Central Government seemed to wane.¹¹⁸

Under these circumstances the leaders of the Central Government in Leopoldville and the U.N. officers in charge at Leopoldville decided upon another venture in force to bring the situation under control.

¹¹⁵ U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. April-June 1961, at 43 (S/4807) (1961).

¹¹⁶ HOSKYNS, *op. cit. supra* note 113, at 401.

¹¹⁷ O'BRIEN, *op. cit. supra* note 111, at 195-218; U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. July-Sept. 1961, at 99 (S/4940) (1961). Of those listed for evacuation, 273 were repatriated, 65 were waiting repatriation and 104 were missing, according to a U.N. recapitulation as of September 8, 1961, eleven days after the operation was launched. *Id.* Annex III, at 106 (S/4940) (1961).

¹¹⁸ HOSKYNS, *op. cit. supra* note 113, at 413-17.

The official and personal versions of exactly what was intended and authorized as the objectives of the operations which followed still differ materially. For present purposes suffice it to say that the Central Government in Leopoldville issued warrants for the apprehension of Tshombe and other leading officials of the government of Katanga.¹¹⁹ The U.N. representative in Katanga, Conor Cruise O'Brien, unquestionably thought he was authorized to use ONUC to help the Central Government put those warrants into effect and thus bring an end to the secession of Katanga. In order to accomplish these objectives U.N. forces again moved to seize control of the strategic centers of Elisabethville, such as the post office and radio station, and to blockade the Katangese ministers in their homes. Unfortunately this operation, called "Morthor," was not as bloodless or as successful as the previous venture in force, Rumpunch, with its more limited objectives. The post office and radio station were captured, but only after significant casualties on both sides. Only one of the Kantangese ministers marked for arrest was in fact captured. Tshombe and his principal lieutenant, Munongo, regarded by some as the sinister lion under the throne, escaped apprehension and eventually made clear their intentions to continue resistance.¹²⁰ The combination of failure to attain the major objectives of the operation and violent criticism in some quarters of the use of ONUC for "offensive operations" threw the U.N. high command into considerable confusion and dismay.¹²¹ This was increased rather than alleviated by a statement attributed to Mr. O'Brien to the effect that the United Nations was taking action to prevent civil war and that the secession of Katanga was now over.¹²² Hammarskjöld, who had himself arrived in Leopoldville just after the operation was launched, undertook to resolve the situation first, by releasing an official report¹²³ which explained that objectives of U.N. forces in Katanga had been simply to secure their own positions from attack and to continue the evacuation of foreign personnel, in accordance with part of paragraph two of the Security Council's resolution, and second, by arranging for a

¹¹⁹ O'BRIEN, *op. cit. supra* note 111, at 247-49.

¹²⁰ *Id.* at 253-58.

¹²¹ HOSKYNS, *op. cit. supra* note 113, at 420-28.

¹²² O'Brien made this statement at a time when the operation seemed to be going relatively well. He referred to paragraph A.1 of the Resolution of February 21, 1961, in which the Security Council "urges that the United Nations take immediately all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary, in the last resort." U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 147 (S/4741) (1961).

¹²³ U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. July-Sept. 1961, at 99 (S/4940) (1961). See especially *id.* paras. 14-15, at 102-03.

personal meeting with Tshombe in Ndola, Northern Rhodesia. The meeting never occurred because of Hammarskjöld's death.¹²⁴

Whether the objectives of the U.N. operations launched on September 13, 1961, (Morthor) were to secure the U.N. positions and to complete the evacuation of foreign personnel, as officially explained, rather than to arrest Katanga's president and principal ministers and thus to terminate the secession of Katanga, as Mr. O'Brien understood it, is immaterial, so far as the principle of limiting the use of force to self-defense is concerned. As the situation actually developed it soon became apparent that neither of the assumed major objectives, the evacuation of foreign personnel or the termination of secession, could be achieved without overcoming considerable resistance from the Katangese armed forces.¹²⁵ In other words, it seems hardly disputable that ONUC could not have achieved either of the objectives at issue by limiting its actions to self-defense in any usually accepted meaning of that term. It could conceivably act, and in large part did act, upon the principle that in no circumstance, however trying, would U.N. soldiers fire the first shot. This meant that in attempting to achieve specific objectives, whether it was taking control of an airport, a post office or radio station, or apprehending foreign mercenaries, ONUC personnel endured considerable additional risk that might have been avoided if they had been under less restrictive orders regarding withholding their own fire. Indeed, the reports of the Congo operations as a whole seem to indicate that most of ONUC casualties were suffered while enduring hostile fire with exceptional self-restraint, rather than in the course of striking back.¹²⁶ Whether this is an additional risk

¹²⁴ In the preparatory exchanges for that meeting, Hammarskjöld continued to insist that the declared objectives of Tshombe himself and the United Nations were identical, namely, a peaceful reconciliation between the Central Government and Katanga, "within the framework of the constitution of the Republic . . ." Mr. Hammarskjöld also pointed out that if Mr. Tshombe would order a cease-fire, then "the cease-fire will occur automatically on the United Nations side, in view of the fact that according to the instructions given and the rules followed by the Organization, it only opens fire in self-defence." *Id.* at 99, 111-12 (S/4940/Add. 4).

¹²⁵ It should be noted, in this connection, however, that Miss Hoskyns suggests that if it had been clearly stated at the outset of Morthor that the objective was only to expel the mercenaries and that the Katangese ministers were being blockaded rather than arrested, the operation might well have been a success. Her reason for this suggestion is that "put like this even the British Government would have had little legitimate ground for complaint and Hammarskjöld would have had no need to cover up for what had been done." *HOSKYNs, op. cit. supra* note 113, at 435. This analysis seems to underestimate Hammarskjöld's basic commitment to avoid bloodshed and his probable unwillingness to continue full scale hostilities.

¹²⁶ In this connection, it should be recalled that U.N. troops in the Congo suffered a substantial number of serious casualties, including 126 killed in action. U.N. Doc. No. S/5784, Annex III (1964).

which U.N. forces engaged in peace-keeping operations should always be asked to run, in order to live up to Mr. Bunche's distinction between a "peace force" and a fighting force, is one of the most difficult questions presented by the "Hammarskjöld principles."¹²⁷

After the experience in the Congo, the Secretariat was of course acutely conscious of the difficulties and dangers involved in sending to Cyprus a U.N. Force charged with responsibility for keeping the peace between two warring communities, and yet committed to the principle of using force only in self-defense. The very first report of the Secretary-General, issued only one month after UNFICYP had become operational, revealed sharply the horns of the dilemma which the commanding general was supposed to avoid. The Secretary-General said:

General Gyani, in pursuance of my instructions and, indeed, in accordance with his own views, has consistently sought to achieve the desired and defined objectives of the Force in Cyprus by peaceful means, that is without resort to armed force, the arms of the Force being carried only for clear purposes of self-defense. Despite concerted effort by General Gyani and the Force, and my own earlier appeals, fighting persists in Cyprus, with lives of Cypriots—Greek and Turk alike—being needlessly and pointlessly sacrificed. I wish here to emphasize my view that the United Nations Force was dispatched to Cyprus to try to save lives by preventing a recurrence of fighting. It would be incongruous, even a little insane, for that Force to set about killing Cypriots, whether Greek or Turkish, to prevent them from killing each other. Yet, that is exactly the dilemma which is almost confronting General Gyani in Cyprus today.

¹²⁷ Considerations such as these were not entirely absent from the heated debates in the Security Council which followed the operation of September 13th and the death of Hammarskjöld. For example, Krishna Menon, after mentioning the casualties suffered by Indian troops, said: "[T]hese men were not allowed to use their machine guns or other weapons, when they were being fired at when the Post Office was being held. They were trying to persuade these people not to carry on militant action, and they were shot in consequence." U.N. SECURITY COUNCIL OFF. REC. 16th year, 976th meeting 19-20 (S/PV. 976) (1961). The Ethiopian representative expressed a similar opinion: "We must have a balanced view. We cannot say to the troops: 'Do a certain job; do not undertake any police action, and if they shoot at you, just take it and go home.' This point of view is very distressing indeed." *Id.* at 38. On the other hand, the representative of Sweden said: "The United Nations should attempt to keep order in the country and to prevent, if possible, clashes between the forces of hostile parties. But the United Nations is not charged with the task of participating in a real war, in a civil war. Neither the Charter of the United Nations nor the declarations made at the start of the intervention entitle the United Nations to such an extension of its role." U.N. SECURITY COUNCIL OFF. REC. 16th year, 974th meeting 17 (S/PV.974) (1961).

On the other hand, the Force cannot stand idly by and see an undeclared war deliberately pursued, or see innocent civilians of all ages ruthlessly struck down by snipers' bullets.¹²⁸

From the rest of the Secretary-General's report it appears that the commanding General was in fact presented with the dilemma described by the Secretary-General and attempted to meet it in the first instance by personal negotiations rather than by use of forces at his command. After noting the outbreak of serious fighting in the Kyrenia Mountains, the report states: "There was no interposition of the United Nations Force in this situation because the fighting broke out unexpectedly and interposition under heavy fire would be neither feasible nor helpful."¹²⁹ This decision not to interpose was presumably made in accordance with the general principles revealed in an *aide-memoire* released by the Secretary-General on April 11, 1964, which stated: "In certain cases it may be possible to enforce a cease fire by interposing UNFICYP military posts between those involved, but if this is not acceptable . . . or if there is doubt about its effectiveness, it should not normally be done, as it may only lead to a direct clash between UNFICYP troops and those . . . in . . . conflict."¹³⁰

¹²⁸ U.N. Doc. No. S/5671, paras. 5, 6 (1964).

¹²⁹ *Id.* at para. 4.

¹³⁰ U.N. Doc. No. S/5653, para. 21 (1964). The *aide-memoire* deserves particular attention since it spells out in far greater detail than ever before made public instructions governing the use of force. It includes, for example:

17. No action is to be taken by the troops of UNFICYP which is likely to bring them into direct conflict with either community in Cyprus, except in the following circumstances:

- (a) where members of the Force are compelled to act in self-defense;
- (b) where the safety of the Force or of members of it is in jeopardy;
- (c) where specific arrangements accepted by both communities have been, or in the opinion of the commander on the spot are about to be, violated, thus risking a recurrence of fighting or endangering law and order.

18. When acting in self-defense, the principle of minimum force shall always be applied, and armed force will be used only when all peaceful means of persuasion have failed. The decision as to when force may be used under these circumstances rests with the commander on the spot whose main concern will be to distinguish between an incident which does not require fire to be opened and those situations in which troops may be authorized to use force. Examples in which troops may be so authorized are:

- (a) attempts by force to compel them to withdraw from a position which they occupy under orders from their commanders or to infiltrate and envelop such positions as are deemed necessary by their commanders to hold, thus jeopardizing their safety;
- (b) attempts by force to disarm them;
- (c) attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders;
- (d) violation by force of United Nations premises and attempts to arrest or abduct United Nations personnel, civil or military.

19. Should it be necessary to resort to the use of arms, advance warning will be given whenever possible. Automatic weapons are not to be used except in extreme emergency and fire will continue only as long as is necessary to achieve its immediate aim.

20. Whenever a threat of attack develops towards a particular area, commanders

The Secretary-General's Report of June 15, 1964,¹³¹ mentioned several incidents in which UNFICYP units engaged in normal patrols or in escorting Cypriot civilians in dangerous areas were fired upon and returned the fire. In one such incident a UNFICYP soldier was killed. There had, however, been no resumption of large scale fighting such as that which had occurred in April and this the report attributed in part to "the location of permanent UNFICYP posts with the forward troops of both sides" and to the fact that "it has been made clear to both sides that a repetition of such incidents will result in the removal of any post used as a base for fire against troops of UNFICYP, using force if necessary after due warning has been given."¹³² Similarly, according to the Report of September 10, 1964, the timely interposition of UNFICYP troops between the two contending sides when hostilities seemed imminent, but before they actually broke out, apparently succeeded in keeping the peace in some instances.¹³³ Unfortunately, this formula did not always work so well. This was particularly true of the large scale fighting which began on August 6 in the Tylliria area with an attack by government forces upon Turkish Cypriot positions suspected of arms smuggling and continued until the Turkish Air Force intervened on August 8 and the Security Council called for a cease-fire on August 9.¹³⁴ During the course of the battle UNFICYP posts directly in the line of fire were withdrawn because "it was apparent that they had no possibility of stopping the battle by staying there"¹³⁵

After the cease-fire went into effect additional UNFICYP posts were established between the opposing sides; those were "intended not only to observe breaches of the cease-fire, but also to give warning of any

will endeavour to restore peace to the area [and] . . . should approach the local leaders of both communities. Mobile patrols shall immediately be organized to manifest the presence of UNFICYP in the threatened and disturbed areas in whatever strength is available. All appropriate means will be used to promote calm and restraint.

If all attempts at peaceful settlement fail, unit commanders may recommend to their senior commander that UNFICYP troops be deployed in such threatened areas. On issue of specific instructions to that effect from UNFICYP headquarters, unit commanders will announce that the entry of UNFICYP Force into such areas will be effected, if necessary, in the interests of law and order.

If, despite these warnings, attempts are made to attack, envelop or infiltrate UNFICYP positions, thus jeopardizing the safety of troops in the area, they will defend themselves and their positions by resisting and driving off the attackers with minimum force.

Paragraph 18 is substantially similar to the revised instructions for ONUC as reported by Hoskyns, *op. cit. supra* note 113, at 294-95.

¹³¹ U.N. Doc. No. S/5764, paras. 8-12 (1964).

¹³² *Id.* paras. 30-31.

¹³³ U.N. Doc. No. S/5950, paras. 54-58 (1964).

¹³⁴ *Id.* paras. 64-89.

¹³⁵ *Id.* para. 79.

aggressive moves by either side in sufficient time for UNFICYP to take action to prevent a recurrence of fighting."¹³⁶ These efforts were continued and further developed, with apparently increasing success, as described in the next three-month report of the Secretary-General:

During the period under review, the peace-keeping function proper was almost identical with the function of supervising the cease-fire, and included interposition, fixed posts and frequent patrols, intervention on the spot to prevent shooting incidents from snowballing into serious fighting, and demarcation of cease-fire lines where appropriate. With the institution of exclusive UNFICYP control over the Nicosia-Kyrenia roads on 26 October, 1964, functions in this connection were assumed and positions taken over by the United Nations.¹³⁷

Subsequent reports of the Secretary-General for March 11, June 10, and December 10, 1965,¹³⁸ reflected a general satisfaction with the maintenance of the cease-fire, despite the continuance of occasional outbreaks of firing and the deliberate infliction upon UNFICYP of ten casualties during the period covered by all three reports. In general it seems fair to say that the various methods already described of emphasizing the presence of UNFICYP, coupled with practically continuous negotiation with local commanders in troubled areas and with the top officials of the Government of Cyprus and the head of the Turkish Cypriot community, succeeded at least in preserving, for the most part, a precarious state of peace, without the actual use of force by UNFICYP.

¹³⁶ *Id.* para. 90.

¹³⁷ U.N. Doc. No. S/6102, para. 119 (1964). Even this period of relative calm was not without its moments of dangerous confrontation. For example, in the course of marking the front lines of both sides in the neighborhood of the Kokkina bridgehead, the area of the heavy fighting of August 6, 1964, UNFICYP troops were several times obstructed in their task. On one occasion, the occupants of a post refused to move out and adopted a most belligerent attitude. The UNFICYP marking team was obliged to call for reinforcements which were quickly deployed. Fortunately, this show of force was sufficient to resolve the argument." *Id.* para. 157.

¹³⁸ U.N. Doc. Nos. S/6228, S/6426, S/7001 (1965). Even during these periods, there were, however, some disappointing exceptions, especially the outbreak of hostilities in the Lefka-Ambelikou area in March 1964, reported in the U.N. Doc. No. S/6228/Add.1 (1964), and in the Famagusta area in November 1965, reported in U.N. Doc. Nos. S/6881 (1965), S/6881/Add. 1 & 2 (1965), S/7001 paras. 55-56 (1965). The latter incident apparently developed from the insistence of the government, over UNFICYP objections, upon building fortifications immediately adjacent to Turkish Cypriot villages. There was also an outbreak of firing in October 1965 between National Guard and Turkish Cypriot patrols, during which a UNFICYP observation post was withdrawn in order to avoid casualties. U.N. Doc. No. S/7001, paras. 62-68 (1965).

The relative success of UNEF and UNFICYP, as compared with ONUC, in accomplishing their objectives without inflicting casualties upon anyone else or suffering any significant casualties themselves, naturally raises the question whether this was due to the differences in the situations in which the forces operated or to differences in the way those situations were handled. Of course, the difference in the tasks assigned is most noticeable in comparing UNEF with ONUC. UNEF had a definite armistice line to patrol, with a commitment from both sides to respect that line. Despite the various individual incidents reported by the Secretary-General of violations of the line, marauding, firing, stealing and the like, it appears that both governments have generally adhered to that commitment. In the Congo the only two recognized parties to the conflict were Belgium and the Republic of the Congo. Although Belgium did not evacuate its troops as quickly as the Secretary-General and some of the "anti-colonial nations" wished, this delay did not seriously impede the effectuation of ONUC's mission. The serious difficulties came from the unrecognized parties, the government of Katanga, the other secessionists, the feuding elements of the Central Government, and the undisciplined elements of the ANC. The lack of any basic agreement between these feuding elements, plus the undisciplined armed forces and sheer size of the country, presented ONUC with a task immeasurably more difficult than that of either UNEF or UNFICYP. Added to this was the conflict of interest among the Great Powers which constantly circumscribed the Secretary-General's freedom of action and probably made it more difficult either to take decisive action or to rely upon patient and painstaking negotiations.

Nevertheless, despite these basic differences between the situation presented in the Congo, as compared with either Cyprus or the Middle East, there were at least certain similarities between the Congo and Cyprus operations in testing the principles of self-defense in actual operation. In both situations the United Nations was concerned with the maintenance of internal order; in both, in order to accomplish its mission, the U.N. force had to demonstrate that at some point it was prepared to use armed force. ONUC did this on a rather massive scale only after it had been subjected to such harassment that self-defense, as well as freedom of movement, was reasonably involved. Certainly this was true in terms of the more liberalized definition of self-defense reflected in U Thant's subsequent *aide-memoire*.¹³⁹ UNFICYP was never subjected to such direct harassment, although it was occasionally the

¹³⁹ See U.N. Doc. No. S/5653, para. 18 (1964), *supra* note 130.

indirect recipient of fire apparently intended for the opposing side. While in some such cases, it withdrew under fire, and generally avoided interposing in the heat of battle, it apparently did not hesitate, once a cease-fire had been obtained, to place itself in positions between the contending parties directly in the line of fire in case of resumption of hostilities and succeeded for the most part in at least giving the impression that it was prepared to stand its ground. In patrolling the roads entrusted to its care and in escorting civilians, it also was publicly committed to the use of force, if necessary, in carrying out its responsibilities. Presumably a great deal of judgment and tact were exercised in determining when to place the Force in such positions—perhaps more so than was always exercised in the Congo.

In the light of these experiences, it might be said that self-defense in the U.N. lexicon is a word of art with a variety of specialized meanings. In practical terms it means that U.N. troops should not shoot first if they can possibly avoid it; they must be prepared to assume the additional risk of being fired upon before resorting to arms. In a sense they may have to court danger by placing themselves in positions where they will in effect be forced to act in self-defense if there is any interference with the performance of their functions. It would seem to be a necessary implication that force may also be used when necessary to prevent an attack upon those who have properly committed themselves to the protection of the United Nations. Unless the principle of limiting force to self-defense be given some such elastic or Pickwickian meaning, it might reduce the U.N. presence to the state of a useless and unhappy bystander, whenever the unruly or opposing forces are sufficiently sophisticated or simply lucky enough to avoid direct attack upon the U.N. forces themselves.

It is probably fair to say that the above analysis of the use of force is closer to U Thant's elaboration of the principles of self-defense in the *aide-memoire* released for the purposes of UNFICYP than to Hammarskjold's original analysis in the Summary Study of the experience derived from UNEF. For example, Hammarskjold said: "the basic element involved is clearly the prohibition against any *initiative* in the use of the armed force." U Thant, on the other hand, repeated the same prohibition with respect to the "initiative in the use of armed force," but also made public for the first time a more specific description of "those situations in which troops may be authorized to use force," which included "attempts by force to prevent them from carrying out their responsibilities as ordered by their commanders."¹⁴⁰ The

¹⁴⁰ This is not to say that this particular principle was developed for the first time by U Thant rather than Hammarskjold, since it was apparently included in the revised

key issue in applying this principle is likely to be not so much who took the initiative in the use of force, as whether the "responsibilities as ordered by their commanders" were properly within the general mandate of the U.N. forces. Thus, in the exchange between Mr. Bunche and Major General Alexander the basic disagreement seemed to be whether it was properly one of the functions of ONUC to disarm ANC forces even without the consent of the Central Government. Whether Mr. Bunche's objections to such a course were primarily practical or legal, or a mixture of both, the fundamental rationale for disarming the ANC could not be found in deductions from the principle of limiting the use of force to self-defense. Similarly, the only justifiable distinction between the operation called Rumpunch, which the Secretariat happily acknowledged, and Morthor, which it virtually disowned, was that the first was designed to evacuate mercenaries, and the second to terminate secession. As it turned out, nothing more than a show of force was required for the first, while the second was aborted when it became clear that it could not be accomplished without the actual use of force. Nevertheless, if either operation was really within the mandate of the Force, it must follow that the "minimum force" required for its effectuation would have been appropriate.

It should also be noted that Hammarskjöld's original elaboration of the principle of self-defense was related, in his view, to constitutional limitations applicable to the type of authority being exercised. This is made explicit in the Summary Study when he says: "The clear delimitation of the right to use force which has been set out above as a basic rule for the type of operation discussed in this report should dissipate any objections to the suggested stand-by arrangements [ear-marking troops for peace keeping] which would be based on the view that they go beyond measures which the Charter permits the General Assembly to take and infringe upon the prerogatives of the Security Council."¹⁴¹ To the extent that there are constitutional considerations

instructions developed for ONUC, after the Resolution of February 21, 1961, when Hammarskjöld was still Secretary-General. HOSKYNs, *op. cit. supra* note 113, at 294. This is equally true of another example given in the *aide-memoire* of a situation justifying the use of force: "Violation by force of United Nations premises and attempts to arrest or abduct United Nations personnel, civil or military." This last would have clearly justified the use of force in the situation at the Ndjili airport which sparked the Alexander-Bunche exchange.

¹⁴¹ Summary Study, para. 180. Hammarskjöld also suggested that this analysis would put UNEF constitutionally on the same level with UNOCIL, the United Nations Observer Corps in Lebanon, even though that was created by the Security Council. This should not obscure, however, the fact that UNEF was intended to be more than an observer corps, that it did have certain enforcement powers, such as the power of apprehending suspicious characters. Presumably this is what the Secretary-General meant by calling it a para-

limiting the use of force, they probably apply as well to Security Council action outside of article 42, but such considerations would suggest only that force should not be used against any state, or the responsible officials of that state, to compel action which the government of that state has not itself authorized. They hardly apply to the use of force against unruly or dissident elements within the state. It also becomes relevant to consider to what extent the original consent of the host state to the introduction of the U.N. Force for the purposes of its mission implies consent to the use of force against any components of the state resisting the accomplishment of the mission. These ramifications of the problem of consent were not presented in connection with UNEF but they certainly were presented in the cases of ONUC and UNFICYP. They are also indissolubly linked with the problems considered in the next section, regarding insulation of U.N. forces from political conflict.

IV. THE PRINCIPLE OF NEUTRALITY OR IMPARTIALITY WITH REGARD TO POLITICAL CONFLICTS

In addition to the principles thus far considered, the Summary Study suggested that a series of basic rules had been developed in practice which "would appear to merit general application."¹⁴² The first of these was a rather specific rule of thumb which plainly did not survive in its entirety in all subsequent operations. This was "the precept that authority granted to the United Nations group cannot be exercised within a given territory either in competition with representatives of the host Government or in cooperation with them on the basis of any joint operation."¹⁴³ This specific rule was then further

military force. Similarly, the gradually increasing emphasis upon force in the Security Council resolutions with respect to ONUC culminating in the Resolution of November 24, 1961, specifically authorizing the Secretary-General "to take vigorous action, including the use of a requisite measure of force" for the apprehension of mercenaries, did not change the constitutional character of ONUC so long as such action had the approval of the recognized government of the Congo. U.N. Doc. No. S/4985 Rev. 1 (1961).

¹⁴² Summary Study, para. 165.

¹⁴³ *Ibid.* The reason suggested for following this precept was that otherwise "United Nations units might run the risk of getting involved in differences with the local authorities or public or in internal conflicts which would be highly detrimental to the effectiveness of the operation and to the relations between the United Nations and the host government." *Ibid.*

In the situation in which this principle was most radically ignored, the U.N. operation in West New Guinea, it might also be said that the reason for the rule had no application because there was in effect no independent local authority or host government. The United Nations Temporary Executive Authority (UNTEA) "itself became, in effect, the government of the territory for the period of its administration." BOWETT, UNITED NATIONS FORCES 257 (1964). The United Nations Administrator, under the terms of the agreement,

developed into the more general one which "precludes the employment of United Nations elements in situations of an essentially internal nature" and admonishes that "United Nations personnel cannot be permitted in any sense to be a party to internal conflicts."¹⁴⁴ Finally, this rule was in turn related to the case of UNEF where "it was explicitly stated that the Force should not be used to enforce any specific political solution of pending problems or to influence the political balance decisive to such a solution."¹⁴⁵ Thus the controlling principle may be broadly restated as one of impartiality or neutrality with respect to political conflicts of an internal or external nature, subject, of course, to the further obligation to be guided by the applicable terms, if any, of the authorizing resolutions.

With respect to the operations of UNEF, the precept of impartiality

was given "full authority under the direction of the Secretary-General to administer the territory" U.N. GEN. ASS. OFF. REC. 17th Sess., Annexes, Agenda Item No. 89, at 2 (A/5170) (1962). It further provided that the U.N. forces would "primarily supplement existing Papuan police in the task of maintaining law and order" and that the "Papuan Volunteer Corps, which on the arrival of the United Nations Administrator will cease being part of the Netherlands armed forces, and the Indonesian armed forces in the territory will be under the authority of, and at the disposal of, the Secretary-General for the same purpose." *Ibid.*

The situation in Cyprus afforded another example of departure from the principle of strict separation of U.N. forces from local forces in the maintenance of internal order. This has been particularly true of the work of the civilian police units of UNFICYP. The Secretary-General in his report of March 11, 1965, U.N. Doc. No. S/6228, para. 112 (1965), said: "Their functions, wherever possible, are carried out in co-operation with local police personnel." Similarly, in the report of December 12, 1964, the Secretary-General said: "Regarding its investigations of incidents in which the aspect of inter-communal strife may be of significance, UNCIVPOL always bears in mind the fact that the government has the responsibility for the maintenance and restoration of law and order in the country. Accordingly, UNCIVPOL endeavours, whenever possible, to carry out its functions under the Mandate, in co-operation with the local police, with a view to assisting in reaching objective conclusions." U.N. Doc. No. S/6102, para. 121 (1965). One particular aspect of this cooperation was brought out in the Report of June 15, 1964, where it is stated: "The uniformed branch [of the civilian police] has been particularly active in supervising the searches carried out at roadblocks by Greek Cypriot policemen and have, by their presence, prevented excessive and humiliating searches of Turkish Cypriots." U.N. Doc. No. S/5764, para. 54 (1964).

¹⁴⁴ Summary Study, para. 166. This emphasis upon abstinence from internal conflicts apparently reflected the experience in Lebanon and the Secretary-General's concern to separate the problem of outside interference from internal political conflict in that situation. The Congo and Cyprus presented situations in which it was much more difficult to make such a distinction. In any event, it would appear that the decision as to whether a particular case of internal conflict presents a threat to world peace justifying U.N. intervention is a highly political one which must be left to the Security Council or the General Assembly, with such advice as the Secretary-General may provide.

¹⁴⁵ Summary Study, para. 167. This rule was also restated in the first report on the Congo operation. U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 19 (S/4389) (1960).

was relatively easy to apply once the exact nature of the operation was established. In the formative stages, however, it was not quite that simple. As already indicated, there was, for example, the question whether the deployment of the Force in the Gaza Strip implied responsibility in the United Nations for administration of that territory. As the events turned out, the government of Egypt was allowed to take over responsibility for such administration almost immediately following the entry of UNEF.¹⁴⁶ Thus the assumption of military control by the U.N. Force, in place of Israeli military control, led to a political solution in the area which had not been expressly accepted in advance by Israel and which was apparently contrary to its expectations. Perhaps Israel would have been more outraged if it had not been conversely the beneficiary of a temporary political solution, to which Egypt had not explicitly agreed, by the deployment of UNEF in the area of Sharm el Sheikh, on the shores of the Gulf of Aqaba. Israel asked for specific assurances that UNEF would maintain freedom of navigation in the Straits of Tiran and the Gulf of Aqaba and would remain there until other effective means for ensuring such a permanent solution were agreed upon between the parties concerned,¹⁴⁷ but the Secretary-General was reluctant to describe the functions of UNEF so explicitly. He preferred to say that: "[I]n accordance with the general legal principles recognized for the deployment of the United Nations Emergency Force, the Force should not be used so as to prejudge the solution of the controversial legal questions involved. The Force, thus, is not to be deployed in such a way as to protect any special position on these questions, although, at least transitionally, it may function in support of mutual restraint in accordance with the foregoing."¹⁴⁸ This assurance of impartiality was not itself sufficient to induce Israel to turn over control of Sharm el Sheikh to UNEF. It was only after the United States had publicly taken the position that UNEF should be stationed at Sharm el Sheikh until it was clear that Israel's right of free passage in the Gulf of Aqaba had been established in practice, and had assured Israel that it would join with others to secure general recognition of this right, that the transfer of control was accomplished.¹⁴⁹ Since then the effective patrol by UNEF of the land along the straits to the Gulf of Aqaba, assuring the undisturbed entrance of trading vessels through the channel, has been one

¹⁴⁶ ROSNER, *THE UNITED NATIONS EMERGENCY FORCE* 89-91 (1963).

¹⁴⁷ U.N. GEN. ASS. OFF. REC. 11th Sess., Annexes, Agenda Item No. 66, at 45-46 (A/3511) (1957).

¹⁴⁸ *Id.* at 50 (A/3512).

¹⁴⁹ ROSNER, *op. cit. supra* note 146, at 96-97.

of the most important contributions of UNEF to the maintenance of peace in the Middle East. In this area, too, the assumption of military control by the U.N. Force had the effect of imposing a temporary political solution not agreed upon in advance.

The foregoing qualifications of neutrality, if such they may be called, were accomplished once the basic functions of the UNEF were established and did not provide a continuing source of controversy in its operations. Quite the opposite was true in the Congo, where Mr. Hammarskjöld was almost continuously engaged in defending the principle that the United Nations should not be party to internal political conflicts. This first occurred in the controversy with Prime Minister Lumumba over whether U.N. troops should be used in helping the Central Government in Leopoldville to extend its effective control into the province of Katanga and thus to terminate the attempted secession of Tshombe and his supporters. The theoretical aspects of this controversy were most fully developed in an exchange of memoranda between the Secretary-General and the Prime Minister, later circulated to the Security Council, regarding the proper interpretation of the Resolution of August 9, 1960. This resolution, besides calling upon Belgium "to withdraw immediately its troops from the province of Katanga under speedy modalities determined by the Secretary-General," and declaring that "the entry of the United Nations Force into the province of Katanga is necessary for the full implementation of this resolution," contained the following paragraph:

Reaffirms that the United Nations Force in the Congo will not be a party to or in any way intervene in or be used to influence the outcome of any internal conflict, constitutional or otherwise. . . .¹⁵⁰

The Secretary-General interpreted this to mean, in concrete terms applicable to the conflict between the Central Government and Katanga, that once the Belgian troops were withdrawn, "the question between the provincial government and the Central Government would be one in which the United Nations would in no sense be a party and on which it could in no sense exert an influence."¹⁵¹ To this

¹⁵⁰ U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 92 (S/4426) (1960). (Italics in original.) It is probably fair to add that the inclusion of this paragraph was at least partly in response to the Secretary-General's suggestions for clarification of ONUC's mandate so as to smooth the way for a peaceful entrance into Katanga. Thus he said in his Second Report: "The Security Council may wish to clarify its views on the matter and to lay down such rules for the United Nations operation as would serve to separate effectively questions of a peaceful and democratic development in the constitutional field from any questions relating to the presence of the United Nations Force." *Id.* at 53 (S/4417).

¹⁵¹ *Id.* at 65-70 (S/4417/Add.6).

general proposition, the Secretary-General added certain specifics, such as that "the United Nations Force cannot be used on behalf of the Central Government to subdue or to force the provincial government to a specific line of action"; that "United Nations facilities cannot be used . . . to transport civilian or military representatives, under the authority of the Central Government, to Katanga against the decision of the Katanga provincial government"; and that "the United Nations Force has no duty, or right, to protect civilian or military personnel representing the Central Government, arriving in Katanga, beyond what follows from its general duty to maintain law and order."¹⁵² This was, in fact, a specification of the very actions which Lumumba had unsuccessfully demanded of ONUC. For guidance in interpretation the Secretary-General also relied upon the precedent of Lebanon, in which he said the United Nations had carefully limited its observation activities to detecting possible outside intervention on behalf of the rebels and would not have considered giving the constitutional government direct aid in suppression of the rebellion.¹⁵³

In challenging this interpretation, Lumumba pointed both to the original resolution concerning the Congo, which 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 . . .";¹⁵⁴ and also to the provision of the resolution of the Security Council, of July 22, 1960, which called upon all states "to refrain from any action which might undermine the territorial integrity and the political independence of the Republic of the Congo."¹⁵⁵ These resolutions, he argued, provided a continuing mandate, reaffirmed by the Resolution of August 9, to help the Central Government maintain its authority throughout the Republic of the Congo, against both foreign aggression and also internal dissension. In addition, Prime Minister Lumumba suggested that the precedent of Lebanon was not relevant because the U.N. authorizing resolutions were not identical.¹⁵⁶ The controversy was

¹⁵² *Id.* at 70.

¹⁵³ *Id.* at 64-65.

¹⁵⁴ *Id.* at 16 (S/4387).

¹⁵⁵ *Id.* at 34 (S/4405).

¹⁵⁶ *Id.* at 71-72 (S/4417/Add.7). The resolution on Lebanon, Security Council Resolution 128, U.N. Doc. No. S/4023 (1958), in its operative paragraphs read:

1. Decides to dispatch urgently an observation group to proceed to Lebanon so as to insure that there is no illegal infiltration of personnel or supply or arms or other material across the Lebanese border.
2. Authorizes the Secretary-General to take the necessary steps to that end.
3. Requests the observer group to keep the Security Council currently informed through the Secretary-General.

resolved when the Secretary-General submitted it to the Security Council, where his view was vindicated both by expressions of support and agreement by most of the members and by the failure of the Council to adopt any formal resolution disavowing his interpretation.

Despite this vindication, the applicability to the question of Katanga's secession of the principle against taking sides in internal political conflict was hardly as clear as the Secretary-General asserted. The United Nations was already committed to treating the Congo as a single nation whose territory included Katanga. In insisting upon ONUC's right of entry into Katanga, based upon the consent of the Central Government, the United Nations recognized the sovereignty of the Central Government with respect to the entire territory of the Republic of the Congo; to that extent, the United Nations was already in direct opposition to Katanga's assertion of independence. Similarly, later, when the United Nations undertook to evacuate mercenaries in the service of the provincial government, it was impliedly recognizing the sovereignty of the Central Government in Katanga. Otherwise, the government of Katanga would have had just as much right to employ mercenaries and political advisers as did the Central Government—a right which the United Nations did not challenge so far as the Central Government was concerned.¹⁵⁷ In other words, the legal basis for the very presence of ONUC in Katanga and for the most significant initiative which it took there during Hammarskjöld's life constituted

The debate between the Secretary-General and the Prime Minister was in effect continued before the Security Council. There the Secretary-General developed the additional constitutional argument that intervention by the United Nations in an internal conflict, when the Council had not specifically adopted enforcement measures under articles 41 and 42 of chapter VII of the Charter, might well be regarded as a violation of the domestic jurisdiction limitation of article 2 of paragraph 7 of the Charter. U.N. SECURITY COUNCIL OFF. REC. 15th year, 887th meeting 9-10 (S/PV.887) (1960). The Secretary-General's constitutional proposition is open to question as applied to the particular situation. Compare Schachter, *The Relation of Law, Politics and Action in the United Nations*, in II RECUEIL DES COURS, 169, 219 (1963); Sohn, *The Role of the United Nations in Civil Wars*, Amer. Soc. of Int'l Law, Proceedings 208 (1963). See also U.N. SECURITY COUNCIL OFF. REC. 15th year, 888th, 889th meetings (S/PV.888), (S/PV.889) (1960); Halderman, *Legal Basis for the United Nations Armed Forces*, 56 AM. J. INT'L L. 971 (1962).

¹⁵⁷ True, the Resolution of February 21, 1961, urged that "measures be taken for the immediate withdrawal of and evacuation from the Congo of all Belgian and other foreign military and paramilitary personnel and political advisers not under the United Nations command, and mercenaries . . ." U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. Jan.-March 1961, at 147 (S/4741) (1961). But the resolution did not purport to authorize the Secretary-General to take such measures without the consent of the government of the Congo. In this connection, it will be recalled that the purported legal basis for Rumpunch, the operation designed to round up the mercenaries in Katanga, was an ordinance of the Central Government directing their expulsion, yet exempting foreign personnel in the employ of the Central Government itself.

recognition of the Central Government's authority in Katanga and a denial of the right of secession.

The most satisfactory explanation of the apparent inconsistencies in Hammarskjöld's application of the principle of neutrality to the dispute between Katanga and the Central Government is that he did not really mean to apply the principle to the issue of the secession of Katanga. Indeed, his basic attitude on this issue seemed to be to refuse to take the secession seriously. Instead he regarded it more as a bargaining counter designed to strengthen the case for a federal rather than a unitary form of government.¹⁵⁸ He did not regard the exact form of the union, or the specific provisions of the *Loi fondamentale*, on which the Central Government relied, as sacrosanct and looked forward to some sort of accommodation between Katanga's claim of complete independence and Leopoldville's claims of complete domination. Presumably he hoped that the continued presence of ONUC in Katanga, the elimination of the mercenaries and of the most recalcitrant foreign advisers, and pressures from the outside would gradually induce such an accommodation without resort to open warfare by ONUC against Katanga. It fell to U Thant, rather than to Hammarskjöld, to attempt to carry out this policy of mediation and gradual pressures in the hope of eventually inducing a settlement.¹⁵⁹

¹⁵⁸ This is illustrated by the following passage in the Second Report: "Nor is the problem a desire on the part of the authorities of the province to secede from the Republic of the Congo. The question is a constitutional one with strong undercurrents of individual and collective political aims. The problem for those resisting the United Nations Force in Katanga may be stated in these terms: Will United Nations participation in security control in Katanga submit the province to the immediate control and authority of the Central Government against its wishes? They consider this seriously to jeopardize their possibility to work for other constitutional solutions than a strictly unitarian one, e.g. some kind of federal structure providing for a higher degree of provincial self-government than now foreseen. The spokesmen for this attitude reject the unitarian formula as incompatible with the interests of the whole Congo people and as imposed from outside." U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 53 (S/4417) (1960).

¹⁵⁹ *Secretary-General's Report of Feb. 4, 1963*, U.N. SECURITY COUNCIL OFF. REC. 18th year, Supp. Jan.-March 1963, at 93-94 (S/5240) (1963). Commenting specifically upon the principle of noninterference in the internal political affairs of the Congo, this report states: "The United Nations has avoided any intervention in the internal politics of the country, beyond the opposition to secession in general required by the Security Council resolutions and the constitutional suggestions embodied in the Plan for National Reconciliation, which after all, was only a proposal which each party was free to accept or reject.

"The United Nations Operation in the Congo has also adhered to the principle of avoiding the use of force for political purposes, although it is true that the very presence and activity of the United Nations Force in the Congo has been an important factor in giving effective weight to United Nations opposition to secession, whether in Katanga, Kasai, or elsewhere in the country." *Id.* at 103.

Apparently U Thant went so far as to authorize the U.N. Force to give military assistance

Although it may be a little hard to believe that Hammarskjöld would have been as outspoken as U Thant in soliciting and applying such outside pressures, he might well have recognized a difference between requirements of neutrality when applied to nonmilitary as distinguished from military U.N. intervention. The former may take a variety of forms, including the appointment of a mediator, as in Cyprus, or the provision of technical legal assistance and the development of specific constitutional proposals, as in the Congo; with respect to such nonmilitary intervention by the Secretary-General, the principle of neutrality, although generally applicable, may not be quite as limiting as in the case of the use of armed force.

The other great test of the principle of neutrality or impartiality in the Congo operation was provided by the contest between Kasavubu and Lumumba for control of the Central Government.¹⁶⁰ The obligation of the U.N. Force to be neutral in this dispute was never even seriously questioned; the problem was how to preserve such neutrality without practically suspending the entire U.N. operation in the Congo. The problem became particularly serious when the conflict between Kasavubu and Lumumba had reached a virtual stalemate, with each purporting to dismiss the other, and when Mobutu, the Chief of Staff, had undertaken to establish a kind of provisional, nonpolitical government called the College of Commissioners. The dilemma thus presented to the United Nations was graphically described in the First Progress Report to the Secretary-General from his special representative in the Congo, Rajeshwar Dayal:

In this confused situation, with three rival governments jockeying for position, and each demanding as of right the enlistment of ONUC's support to enforce its own particular political solution, any action taken by ONUC in the performance of its disinterested mission has been liable to be seized upon by one or more groups, for reason of political advantage, as a basis for the unfounded charge of intervention in the domestic affairs of the country. In such a situation ONUC has maintained with scrupulous care an attitude of strict

to the Central Government in arresting Gizenga and putting an end to secession in Stanleyville, in January 1962, but such assistance was not actually required or used at that time. HOSKYNs, *THE CONGO SINCE INDEPENDENCE* 459 (1965).

¹⁶⁰ See, for example, the reports of the meetings between the representatives of the Central Government and the representatives of Katanga with respect to a constitutional settlement in March, April, May, and June 1962, including the participation and observations of U.N. representatives, U.N. SECURITY COUNCIL OFF. REC. 17th year, Supp. May-June 1962, at 1 (S/5053/Add.10) (1962); and the March 26, 1965 *Report of the United Nations Mediator on Cyprus to the Secretary-General*, U.N. Doc. No. S/6253 (1965).

neutrality, avoiding any action which could be interpreted, even remotely, as influencing the political balance.¹⁶¹

But not every one agreed that ONUC had been as successful in maintaining strict neutrality as Mr. Dayal implied. Particular criticism was leveled at the closing of the airports and radio station to both sides ordered by Mr. Dayal's predecessor, Andrew Cordier, early in the conflict between Kasavubu and Lumumba. Mr. Cordier ordered the action because he feared that there might be incitement to violence on the radio, and also movement of troops through the airports for purposes of civil war. This enforced damper upon both public appeals and military movements probably worked to the disadvantage of Lumumba, since he was generally more able to arouse popular enthusiasm and also because his most reliable military support was in Stanleyville and had to be flown to Leopoldville to be effective in the struggle for control of the Central Government.¹⁶² This isolation of Lumumba also enabled Mobutu to use the military forces at his disposal to install the College of Commissioners, disperse Parliament, and eventually establish a coalition government with Kasavubu.

The significant question posed by this course of events is how, if at all, it is possible for the United Nations to maintain neutrality in such a political conflict when charged with the kind of responsibilities it had assumed in the Congo. One astute observer has suggested that the fault lay primarily not in what the United Nations did, but in what it left undone.¹⁶³ Having in effect deprived Lumumba of his two principal weapons, popular appeal and military support, was there not some further obligation incumbent upon the United Nations to prevent Kasavubu and Mobutu from forming a coalition against him and freezing him out of the government? Just what those constructive steps should have been is much more difficult to specify. Conceivably the United Nations might have exerted general pressure for a negotiated settlement, which would have included Lumumba in the govern-

¹⁶¹ *Id.* at 184. The contest between rival governments is described with both detail and clarity in Hoskyns, *op. cit. supra* note 159, at 196. It is also reflected in many U.N. documents, including particularly, U.N. GEN. ASS. OFF. REC. 15th Sess., Annexes, Agenda Item No. 85, at 6 (A/4557) (1961); *Report of the United Nations Conciliation Commission for the Congo*, *Id.* at 69 (A/4711); U.N. SECURITY COUNCIL OFF. REC. 15th year, Supp. July-Sept. 1960, at 176 (S/4531) (1960).

¹⁶² LEFEVER, *CRISIS IN THE CONGO* 46-47 (1965).

¹⁶³ As Miss Hoskyns puts it: "The real criticism against Hammarskjöld and his officials at this point is not therefore that they took action to prevent an outbreak of violence, but that they allowed the hostility which they felt for Lumumba and his regime to blind them to the constructive steps which they might have taken." Hoskyns, *op. cit. supra* note 159, at 224.

ment, but the greatest obstacle to such a settlement might well have been Lumumba's own intransigence. If this had proved the case, ONUC might have guaranteed Lumumba's safe return to his own stronghold of Stanleyville, instead of granting him protection only within the U.N. encampment, where he was politically sterile. Whether this would have enhanced or decreased the "agony of the Congo" requires a guess far beyond the compass of this essay. Suffice it to suggest that it would have given more color to the U.N. claim of absolute impartiality and avoided the wave of bitter recriminations which immediately followed Lumumba's murder. Doubtless, too, it would have presented a continuing problem of internal dissension between three basic centers of power, Leopoldville, Stanleyville, and Elisabethville, but this was a problem which still had to be faced whether Lumumba lived on only in person or more vividly in the minds of his countrymen.¹⁶⁴

Turning from the Congo to Cyprus, one might expect, a priori, the principle of neutrality or impartiality to be even more sharply tested in the latter situation, since the basic dispute which triggered the outbreak of violence and eventually required U.N. intervention was clearly a matter of internal political conflict. Indeed, the United Nations might have been confronted from the outset with the very question which developed during the course of operations in the Congo, namely, what was the lawful government of the host state. The government in effective control of most of the island and most of the legal processes of the state was, of course, the government of President Makarios; he was acting, however, without the constitutionally required concurrence of Vice President Kuchuk and other ministers representing the Turkish Cypriot community. Although the validity of much that was done was denied on this ground by the Turkish Cypriot community and by Turkey, these objections were never carried to the point of challenging the credentials of the representative of the government of Cyprus before the Security Council.¹⁶⁵ This very accep-

¹⁶⁴ *Id.* at 317-18; Ansley, *The Congo Rebellion*, 21 *WORLD TODAY* 169 (1965). Entirely apart from such speculations as to what might have been, the conflict as to the lawful government of the Republic of the Congo was eventually determined for the United Nations, at least, by the General Assembly in the seating of the representatives of Kasavubu as opposed to those of Lumumba. See generally U.N. GEN. ASS. OFF. REC. 15th Sess., Plenary 912, 913, 917-24 (A/PV.912), (A/PV.913), (A/PV.917-A/PV.924) (1960).

¹⁶⁵ There were some occasional references to the representatives of the government of Cyprus as the representative of the Greek Cypriot community, but these were never carried to their ultimate conclusion. See, e.g., U.N. SECURITY COUNCIL OFF. REC. 19th year, 1099th meeting 2 (S/PV.1099) (1964). Since Turkey itself, as well as other members of the United Nations, continued to treat the Makarios government as the government of Cyprus, it could hardly ask the United Nations to do otherwise. Nevertheless, in subsequent debates

tance of the government of President Makarios as the government of the Republic of Cyprus for the purposes of the United Nations had a large bearing on the realities of UNFICYP's position as a neutral or impartial keeper of the peace between the two communities.

The inescapable effect of recognition of the Makarios government, favoring the Greek Cypriot position, was demonstrated most sharply in connection with the problem of the buildup of arms by both sides. As mentioned earlier, one of the principal functions assumed by UNFICYP, though its legal basis was never explicitly defined, was to check the smuggling of arms into the country by either Greek or Turkish Cypriots. But the term "smuggling" did not apply to the import or manufacture of arms by the government. So interpreted, a ban on smuggling would mean that the government was free to strengthen its military position while the Turkish Cypriot community did not enjoy a similar freedom. The implications of the situation were recognized by the Secretary-General very early in the operation when he raised the question: "[W]hether at the present time and in the present circumstances, the import and manufacture of arms by the Government of Cyprus is within the letter and/or spirit of the Security Council resolution of 4 March."¹⁶⁶ Unfortunately, there is no indication that the Secretary-General ever received a satisfactory answer to that question.¹⁶⁷ The upshot of this particular issue was that the buildup of arms continued on both sides, on the government side more or less openly, through the importation of arms and an increase in the National Guard, and on the Turkish Cypriot side clandestinely, by smuggling into the areas under its control military personnel and

the representative of Turkey continued to challenge the right of the Makarios government to be treated as the legal government of Cyprus. See, e.g., U.N. SECURITY COUNCIL OFF. REC. 19th year, 1138th meeting 27 (S/PV.1138) (1964). A further complication was that the withdrawal of the Turkish Cypriots from the government was in a sense voluntary, whatever the provocation may have been. Compare Crawshaw, *Cyprus: Collapse of the Zurich Agreement*, 20 WORLD TODAY 338 (1964).

¹⁶⁶ U.N. Doc. No. S/5764, para. 120 (1964).

¹⁶⁷ The Secretary-General referred again to the problem in his Report of September 10, 1964, saying: "My Special Representative and the Force Commander have raised the question of the dangers of the arms build-up several times with the President of Cyprus who, while insisting on the duty and responsibility of his Government to build up its forces, assured them that the heavy weapons imported would be used only for the defense of the country against foreign invasions and not in the internal conflicts." U.N. Doc. No. S/5950, para. 39 (1964). Several members of the Security Council expressed individual views deploring the arms build-up as inconsistent with the resolution, but there was no formal action or informal consensus developed with respect to the problem. See, e.g., statement of United States representative, U.N. SECURITY COUNCIL OFF. REC. 19th year, 1138th meeting 42 (S/PV.1138) (1964).

equipment.¹⁶⁸ The inevitable effect, apart from a general heightening of tension, was a strengthening of the government's military position vis-à-vis both the Turkish Cypriot community and the U.N. Force.¹⁶⁹

UNFICYP's inability to prevent government importation of arms made it more difficult to accomplish another one of the Secretary-General's specific objectives: "Progressive evacuation and removal of all fortified positions held by Greek and Turkish Cypriots."¹⁷⁰ In his Report of September 10, 1964, the Secretary-General indicated a mixed picture of success and failure in the constant endeavor to secure a removal of fortifications, and explained some of the reasons for lack of success:

The Turkish Cypriot fighters, who are substantially outnumbered and outgunned by the National Guard, have been opposed to giving up fortified positions on two main grounds: they control little territory and have therefore no place to withdraw; moreover, they contend that UNFICYP has not the capability to resist an organized attack, if such an attack were mounted by the Government on interposed UNFICYP positions. If these positions were to be overrun, the situation of the Turkish Cypriots might become well nigh untenable. The Turkish Cypriots have therefore insisted on maintaining their fortified posts and have even extended some of their fortifications in Nicosia.¹⁷¹

Another, even more realistic fear, might have been the eventuality of a termination of the UNFICYP operation entirely, before the achievement of a peaceful solution of the basic dispute. Under these circumstances, it is not surprising that the Secretary-General reported on March 11, 1965, that "there has been virtually no reduction in the scale of fortifications, and in fact in Kokkina, Nicosia and Famagusta a number of additional barricades, trenches and sandbagged fortifications have been dug or erected."¹⁷² UNFICYP tried to overcome this reluctance, especially of the Turkish Cypriots, to dismantle fortifi-

¹⁶⁸ U.N. Doc. No. S/5950, paras. 41, 42 (1964).

¹⁶⁹ *Id.* para. 228.

¹⁷⁰ *Secretary-General's Report of April 29, 1964*, U.N. Doc. No. S/5671, Annex I, para. 1 (1964). In his Report of June 15, 1964, the Secretary-General mentioned that "proposals had been put forward both to the Government and to the Turkish Cypriot leaders, including different plans, especially for the removal of fortifications in the city of Nicosia, and in the Kyrenia range," but that no agreement had been reached and no progress had been made in those areas although some progress had been made in other areas. U.N. Doc. No. S/5764, para. 61 (1964).

¹⁷¹ U.N. Doc. No. S/6102, para. 161 (1964).

¹⁷² U.N. Doc. No. S/6228, para. 51 (1965).

cations by undertaking to "take steps to ensure, by demarcation of existing positions, by redeployment, and by the use of force in self-defense as a last resort, that none of the positions left unmanned as a result of the disengagement programme would be occupied by the opposing side, and that no infiltration would take place."¹⁷³ These proposals elicited some favorable response and even a measure of unilateral removal of armed posts and fortifications on the government's side, but very little from the Turkish Cypriots, except for a promise not to take any military advantage of the government's withdrawal.¹⁷⁴ Perhaps this was a situation where greater insistence by UNFICYP upon reciprocal withdrawal by both sides would have been a violation of realistic neutrality.

Even more subtle and difficult to assess is the relationship between UNFICYP's efforts "to contribute to a return to normal conditions," and its basic commitment to impartiality so far as the underlying dispute is concerned. The critical question has been whether a return to normality would consolidate control of the government in the hands of the Greek Cypriots. The general outlines of the problem are suggested in an exchange of memoranda, dated November 23, 1964, and December 6, 1964, respectively, between UNFICYP and Vice President Kuchuk, the leader of the Turkish Cypriot community.¹⁷⁵ The UNFICYP memoranda suggested among other things, further steps to ensure freedom of movement for all members of both communities throughout the island, and the return to duty of all Turkish Cypriot administrative and clerical staff of the courts. In response to these suggestions the Vice President said in part:

- (b) The suggestions made in the aide-mémoire envisage return to a normality which, far from being within the framework and spirit of the Constitution, of the laws of the country and of the United Nations Security Council resolution of 4 March, is in accord with the unlawful situation which the Greek Cypriot leadership has brought about by the use of force and violence and tend to consolidate such a situation; . . . (d) If the suggestions and the recommendations in the aide-mémoire are accepted, it will mean that the unlawful situation which the Greeks have been trying to perpetuate by the use of force and violence will be consolidated with the assistance and support of UNFICYP and thus a kind of politi-

¹⁷³ U.N. Doc. No. S/6426, para. 44 (1965).

¹⁷⁴ *Id.* paras. 45-46.

¹⁷⁵ U.N. Doc. No. S/6102, Annexes V, VI (1964).

cal solution which the Greeks want to impose on the Turks will gain ground.¹⁷⁶

The Secretary-General developed his own analysis of this problem in his report of March 11, 1965, in the following terms:

UNFICYP by its very nature cannot wholly satisfy the aspirations and aims of either community in Cyprus. On the one hand, it cannot act as the instrument of the Government in helping it to extend its authority by force over the Turkish Cypriot community in the areas now under its control. On the other hand, it cannot assume responsibility for restoring the constitutional position which existed prior to the outbreak of hostilities in 1963 and early 1964 nor to contribute to the consolidation of the present stalemate in the Island. Both of these courses would basically affect a final settlement of the country's problems, a matter which is in the province of the Mediator and not of UNFICYP. UNFICYP's action is limited to doing its best to halt violence, to promote a reduction in tension and to restore normal conditions of life, thus creating an atmosphere more favourable to the efforts to achieve a long-term settlement.¹⁷⁷

Despite the impeccable logic of this position it could hardly be gainsaid that the Secretary-General's program for a gradual return to normality through economic reintegration of the two communities and the return of the Turkish Cypriots to full administrative and judicial participation in the government would tend to put the stamp of *fait accompli* upon the Greek Cypriot resolution of the stalemate and to make less likely of fulfillment the Turkish Cypriot dream of a federalist state.¹⁷⁸

¹⁷⁶ *Id.* Annex VI, para. 1.

¹⁷⁷ U.N. Doc. No. S/6228, para. 274 (1965).

¹⁷⁸ This is partially recognized in the Secretary-General's comment on the same problem in the Report of June 10, 1965, U.N. Doc. No. S/6426, para. 106 (1965): "The Turkish Cypriot leaders have adhered to a rigid stand against any measures which might involve having members of the two communities live and work together, or which might place Turkish Cypriots in situations where they would have to acknowledge the authority of Government agents. Indeed, since the Turkish Cypriot leadership is committed to physical and geographical separation of the communities as a political goal, it is not likely to encourage activities by Turkish Cypriots which may be interpreted as demonstrating the merits of an alternative policy. The result has been a seemingly deliberate policy of self-segregation by the Turkish Cypriots. The Government contends that the hardships suffered by the Turkish Cypriot population are the direct result of the leadership's self-isolation policy, imposed by force on the rank and file. The Turkish Cypriots assert that these hardships are designed by the Government to pressure the Turkish community into submission and to destroy it politically and that Turkish Cypriots are at one in their determination to resist."

These balancing acts which the United Nations has had to perform in both the Congo and Cyprus might well be taken as demonstrations of the prescience of Hammarskjöld's admonition against "employment of United Nations' elements in situations of an essentially internal nature." Nevertheless, realism also requires us to acknowledge that in the modern world it is frequently impossible to separate internal conflicts from threats to world peace. If the United Nations were to be wholly faithful to Hammarskjöld's precept, it would be condemned to sitting on the sidelines, at least so far as peace-keeping operations are concerned, in a good many of the world's most dangerous trouble spots. As U Thant seems to have regretfully concluded in respect to Cyprus, the United Nations may have an inescapable role to play in keeping the peace in what is essentially a civil war situation, even though the peace-keeper's lot will not be a happy one.¹⁷⁹ Once catapulted into such a situation, of course, the guiding principle must be one of neutrality or impartiality with respect to the underlying dispute; the peace-keeping force must not "be used to enforce any specific political solution of pending problems or to influence the political balance decisive to such a solution." So stated, the principle is almost a truism. The difficulties arise when a choice must be made between what are on their face equally impartial courses of conduct—to close or not to close the airports or radio stations, to prevent or not to prevent smuggling, to remove or not to remove fortifications, to protect or not to protect contending politicians from political arrest, to provide or not to provide safe conduct on political or other missions. Obviously the list might be extended with many other examples. Being true to the principle of impartiality in such situations requires to some extent a weighing of the consequences. It may also require some consideration and interpretation of the mandate under which the Force operates. Did the authority to provide the government of the Republic of the Congo "with such military assistance as may be necessary" imply the authority, and even the obligation, to assist that government with military force in putting down secession of any one of the provinces, or was it limited in the context of the situation to assistance in the maintenance of law and order, that is, to the prevention of anarchy? Given the deliberate ambiguity of many resolutions the answer may have to be found, not in the intention of the sponsors nor in the principle of impartiality, but in the good sense of the administrator as to what course in the long run will best contribute to the accomplishment of the mission.

¹⁷⁹ See, for example, the concluding observations in both the *Report of June 10, 1965*, U.N. Doc. No. S/6426, paras. 182-89 (1965), and the *Report of Dec. 10, 1965*, U.N. Doc. No. S/7001, paras. 205-18 (1965).

V. CONCLUDING OBSERVATIONS

And now we must return to the question with which this long journey started—whether we can find in the experience of peace keeping the enunciation or development of a body of “principles and purposes,” “legal doctrine and precepts” which tend to make it “possible for the Secretary-General to carry out his tasks in controversial political situations with full regard to his exclusively international obligation under the Charter and without subservience to a particular national or ideological attitude.”¹⁸⁰ Obviously the great exponent and architect of such development has been Dag Hammarskjöld himself, not only in the Oxford Address, but in the day-to-day work of his office, including such notable examples as the Summary Study and the occasional reports to the General Assembly or Security Council. It is noteworthy that this attempt to develop a body of principles began before there was any intimation of a serious split between the Secretary-General and the Soviet Union with regard to the executive responsibilities of the Secretariat. The development of administrative standards did not begin as a kind of self-serving declaration to furnish support in the great debate; rather it grew naturally out of a conscientious discharge of the responsibilities devolved upon the Secretariat by the governing bodies of the United Nations. Finally, it should be noted that the reliance upon principles in the course of operations did not cease with the death of Hammarskjöld, and that the fundamental themes remained the same even if the emphasis and the manner of expression changed with the change of personalities and the broadening of the relevant experience.

Nevertheless, it would be idle to pretend that the experience thus far points clearly in one direction or another in answer to the ultimate question confronting us. The duration of a peace-keeping operation, for example, seems plainly a matter for resolution at the highest political level available, whether its termination involves the acquiescence, opposition, or insistence of the host state. The Secretary-General may indeed have an important and even decisive role to play in reaching the decision, but his role will be primarily that of adviser to the political organs rather than administrator of any general policy which can be meaningfully declared in advance. Quite the opposite would seem to be true of the composition of the Force. Here the interests of administration bulk large while the political interests should for the most part be secondary.¹⁸¹ This assumes, of course, that the

¹⁸⁰ HAMMARSKJÖLD, *THE INTERNATIONAL CIVIL SERVANT IN LAW AND IN FACT* 329, 346-47 (1962).

¹⁸¹ The delicate combination of administrative and political considerations involved

general prohibition against Great Power participation will be followed unless there is informal agreement in advance that the prohibition may be waived. Adjustment of any other political requirements regarding the composition of the Force, particularly sensitivities of the host state, may well be left to the judgment of the Secretary-General. Apart from such special considerations, a U.N. Force should be peculiarly designed as a nonpolitical instrument. As such, its composition is particularly appropriate for delegation to the Secretary-General with a large measure of uninhibited discretion.

As for the other major themes developed in the Summary Study—freedom of movement, use of force only in self-defense, and impartiality in political disputes—it must be conceded that they are frequently difficult of application and sometimes even point in opposite directions. Shall we conclude from this that the principles are not really helpful guides to decision making, but merely intellectual façades designed to give an appearance of rationality to a course of executive conduct based largely on intuition and the demands of expediency? Choosing the most difficult examples, the reliance upon principle as the basis for decision in some of the most trying moments of the Congo experience did not always carry a convincing ring of reality. This was particularly true of Hammarskjöld's reliance upon the obligations of neutrality and the precedent of Lebanon as the grounds for refusing to commit ONUC to the aid of the Central Government in the subjugation of Katanga. Nevertheless, the false ring of the argument may be due more to the unfortunate choice of analogies and method of expression than to the lack of applicable grounds of general principle. This was a situation where the U.N. commitment to give military assistance to the Central Government and to preserve the territorial integrity of the Congo pointed in one direction, while its commitment to restraint in the use of force and to impartiality in internal political disputes pointed in the other. But the choice involved did not necessarily imply a complete sacrifice of either set of commit-

in the composition of the U.N. Forces is well illustrated in the *Survey of the United Nations Emergency Force*, U.N. Doc. No. A/C.5/1049 (1965). The Survey Team concluded that efficiency would be increased and expenses reduced if fewer countries were represented in the Force, especially "if the Secretary-General were able to change the composition of the Force either by retaining only those contingents whose Governments' claims are relatively low, or by replacing expensive contingents by less costly ones." *Id.* para. 39, at 17. But the report also states: "Obviously there are overriding political considerations which rule out a number of simple solutions. For example, it is desirable and necessary to maintain a broad geographical basis for the Force, even though this undoubtedly complicates its structure and adds to its expense . . ." *Id.* para. 17, at 10. The solution suggested by the Survey Team was a system of rotation of contributions among several different countries. *Id.* paras. 25, 40, at 13, 17.

ments. Doubtless Hammarskjöld hoped in the long run to preserve the territorial integrity of the Congo without a premature exercise of force by the United Nations and without imposing on either side complete acceptance of the views of the other. To explain all this to the impetuous men in Leopoldville would not have been an easy task in any language; it was not made any easier by the legalistic language of the Hammarskjöld memorandum. But the rather obvious failure of communication does not establish either the irrelevancy of the general principles or their irreconcilability.

The apparent breakdown of communication or understanding between the top echelons of the Secretariat and Conor Cruise O'Brien, their man in Katanga, with respect to "Operation Morthor," the abortive attempt in September 1961 to end Katanga's secession by force, might also suggest some suspicious inquiries regarding the importance of the principles in guiding operations. If the operation had been successful, would it have been happily acknowledged as a reasonable application of the use of force in self-defense while carrying out ONUC's mandate to evacuate mercenaries and to assure ONUC's freedom of movement, just as the subsequent unauthorized but successful breakthrough into Jadotville was welcomed and justified? If not, why did the official description of the events emphasize "the menace to the security of the United Nations personnel and property" and explain that "the UN forces therefore took security precautions while the UN resumed carrying out its task of apprehending and evacuating foreign military and para-military personnel."¹⁸² Here again, as in the debate with Lumumba, the credibility of the principle may have suffered from overzealousness in the argumentation. Apparently Hammarskjöld concluded that he could neither ratify the operations as planned nor disavow the actions of his subordinates, no matter how misguided he may have regarded them; the course he chose was to reinterpret facts in the light of what he regarded as the controlling principles. In retrospect this seems to have been an unfortunate choice from the point of view of the overall credibility of the Secretariat's rationalization of peace-keeping operations. But it is certainly not an uncommon phenomenon in all types of government and may be especially excusable in the light of tremendous political pressures under which the United Nations was then operating in the Congo.

In contrast to these somewhat unfortunate examples, it is noteworthy that the Secretary-General's reports on the Cyprus operation, while following basically the same pattern as that established by Hammar-

¹⁸² U.N. SECURITY COUNCIL OFF. REC. 16th year, Supp. July-Sept. 1961, at 101, 103 (S/4940) (1961).

skjold in the case of UNEF and ONUC, have happily avoided excessive rationalization and justification of everything that UNFICYP has done. This may be partly a reflection of the facts that Cyprus, for the United Nations itself, has not been the pressure cooker the Congo turned out to be and that the Secretary-General has not been constantly required to justify every step to one set of critics or another. Perhaps, then, it is not surprising that the reports have made no attempt to hide the facts that freedom of movement even for the Force has not always been fully achieved, that the magic words "self-defense" do not answer every dilemma which the Force faces, and that even the commitment to impartiality has its pitfalls. Nevertheless, those same reports bear impressive witness to the vitality of the principles which Hammarskjold first adumbrated in the Summary Study and elaborated in the various reports on the Congo. As in many other affairs of life, the principles of peace keeping may be guides even when they are not guideposts. They have served to give a sense of direction to peace-keeping operations as a whole, to establish a sense of continuity between one operation and another, to provide an intellectual framework both for the transfer of knowledge from one experience to the next and for the testing of that knowledge against new experience. In short, they have been points of the compass in a continuing dialogue about the problems and the potentialities of U.N. forces.

Finally, in attempting to evaluate the significance of the principles themselves we must not forget one of the very practical objectives which Hammarskjold had in mind when he first undertook their systematic formulation. In introducing his statement of "Basic Principles" in the Summary Study, the Secretary-General suggested that they might be formally approved by the General Assembly as the basis for standby arrangements to be negotiated by the Secretariat with interested governments for the contribution of troops to future peace-keeping operations.¹⁸³ This proposal was never carried out exactly in the way suggested; the General Assembly did not formally express its approval of the basic principles. But the substance of the idea has been accomplished as the principles have been referred to again and again in reports both to the General Assembly and the Security Council and tacitly accepted as a basis for action by those organs. Thus they have become part of the common law of the United Nations upon which member nations may rely in earmarking, training, and contributing troops for peace-keeping operations¹⁸⁴ and which a host state must cer-

¹⁸³ Summary Study, para. 154.

¹⁸⁴ See FRYDENBERG, *PEACE-KEEPING EXPERIENCE AND EVALUATION—THE OSLO PAPERS* 203-09 (1964). Unpublished papers of the Meeting of Military Experts to Consider the Technical Aspects of U.N. Peace-Keeping Operations, Ottawa, Nov. 2, 1964 (U.N. Library).

tainly take into account when agreeing to accept such a Force. That these principles are vague and to some extent even contradictory does not exactly distinguish them from comparable principles of domestic administrative law.¹⁸⁵ Neither are they beyond legislative amendment, by resolution of the Security Council or the General Assembly as the case may be. In several instances they have been given a new context or direction in which to operate, either by explicit provision of a resolution or by tacit acceptance of a specific suggestion or interpretation of the Secretary-General, as was especially noticeable in the gradual liberalization of the concept of self-defense. Subject to all of these qualifications and limitations, they are an indispensable part of that body of "principles and purposes," "legal doctrine and precepts" which should make it possible for the Security Council or the General Assembly to delegate to the Secretary-General—if need be in the broadest terms—executive responsibility for the maintenance of the peace in any situation where the responsible parties to a dispute can be persuaded to accept U.N. peace-keeping forces.

¹⁸⁵ Compare FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962).