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The United Nations
at Age Fifty

A Legal Perspective

KLUWER LAW INTERNATIONAL

THE ROAD TO HELL IS PAVED WITH GOOD INTENTIONS

THE UNITED NATIONS AS GUARANTOR OF INTERNATIONAL PEACE AND SECURITY: - A FRENCH PERSPECTIVE -

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Karl Marx is to sociology what Sigmund Freud has been to psychology: since *Das Kapital*, we know that what states and governments publicly say and declare both hides and betrays what they really mean. And there is no need to adhere to the Marxist Vulgate in order to recognize that both law and institutions are superstructures reflecting the underlying balance of power. This is indeed commonplace and may easily be checked by taking a cursory look at the evolution of the UN system for the maintenance and strengthening of international peace and security.

While, at the end of the Second World War, the Allied Powers sought to perpetuate their unity against the common enemies, it soon appeared that they were behind the times and that the system of collective security they had imagined had become unrealistic. For this reason, there was no other option but to adapt to the situation of the 'Cold War' in which the UN, in spite of impressive

* The author is not an official of the French Government. The views expressed in this paper are strictly personal. The width of the topic compared with the limited number of pages allocated to each writer denied any possibility to offer but a very general and necessarily superficial overview. As a lawyer, I have put a stress on the role and limits of international law in the 'guarantee' (?) of international peace and security by the UN. As a French, I have not succeeded in concealing some irritation regarding the present arrogant behavior of the United States in the system. This does not imply that other states, including France, or groups of states have no responsibility for the somewhat disappointing results of recent UN efforts to maintain and strengthen international peace and security. Doctrinal references have been limited to a strict minimum.

efforts to invent new and suitable instruments for the fulfillment of its tasks, could play only a marginal role. With the end of the Cold War, a radical new shift became necessary. But, far from a return to the original system, the new system can largely be seen as a legitimizing mechanism for the now single and unrivalled superpower.

I. 'ONE FOR ALL AND ALL FOR ONE': THE IMPOSSIBLE DREAM
OF A COLLECTIVE SECURITY SYSTEM

When the dust of the war had settled and the UN Charter was drafted, its authors were, conspicuously and legitimately, obsessed by the fear of a new world conflict. Not only was their main objective to avoid the recurrence of a third world war, but they also tried to perpetuate the alliance against Germany, Japan and their supporters.

This was made obvious by the drafting process of the Charter. Only the Allies, the fifty states which had waged the war against the Axis Powers (including those who had done so fairly late), were invited to participate in the San Francisco Conference. And the Charter itself strongly evidences this obsession, particularly in Articles 53 and 107 which justify action against 'any State which during the Second World War has been an enemy of any signatory to the present Charter' if such action is 'taken or authorized . . . by the Governments having responsibility for such action' (Article 107).

This last sentence relates to the directorate of the 'Big Five'--the group of states consisting of the United Kingdom, the United States and the Soviet Union to which China and France were ultimately admitted. This means something important: to maintain international peace in general was entrusted to the UN, but the maintenance of the recently gained peace was bestowed on this small group of big powers. With the exception of particular cases in which responsibility was expressly conferred upon the organization (such as the postwar fate of the Italian colonies), the UN was not in charge of the post-World War II settlement of peace. It is, therefore, legally correct that the territorial arrangements in Europe or the question of Berlin have never been put on the agenda of UN organs.

As is well known, not only did the 'Five' play a predominant role during the elaboration of the Charter at Dumbarton Oaks and San Francisco, but they also double-locked the system: first, by granting themselves the privileges of permanent seats in the Security Council and of a right of veto in this organ entrusted with the 'primary responsibility for the maintenance of international

peace and security' (Article 24) and the exclusive right to *decide* in this area; and, second, by reserving for themselves another right of veto against any modification of the Charter against their will (Articles 108 and 109, paragraph 2).

Whether this is seen as proof of mutual confidence flowing from the solidarity that had emerged during the common fight, or of lack of mutual confidence, does not matter. The fact is that the Charter's drafters were mainly concerned with the past, and established what has aptly been described as a 'veterans' pacifism' (*pacifisme d'anciens combattants*)¹ aiming at maintaining the alliance against the Axis Powers and making impossible any enforcement measures against the Big Powers. This last point is made obvious by the fact that the right of veto has been excluded regarding decisions made under Chapter VI while it has been introduced for the much more far-reaching measures to be decided upon under Chapter VII (see Article 27, paragraph 3, of the Charter).

This mechanism is certainly open to criticism from a moral or ideological point of view since it appears as a cynical ratification of the inequality of power between states and as a means of perpetuating a *status quo* which may be seen as unjust and unfair. It is nevertheless realistic both politically and legally. Inequality between states is a fact of life which to ignore would have been imprudent and irresponsible; all the more so because the system of the League of Nations, which indeed provided for a higher degree of equality, had proved inefficient. Legal rules do not become any better by being totally disconnected from social reality.

Moreover, the list of the 'Big Five' was certainly much less arbitrary at the time than it appears to be now. France and the United Kingdom were still in possession of enormous colonial empires and had not yet realized their relative decline in power. Nor had world public opinion. What is more, the following years legitimated anew the initial list since the Five were the first to build nuclear weapons. Today, they are still the only ones capable of using these weapons on a global scale, and the only ones whose status as nuclear-weapon states has been recognized as legitimate.² It can also be maintained that, while it has probably become unavoidable to increase the number of the permanent members, the reasons for this likely step are not very good ones. Germany or Japan are indeed 'economic giants', but, it is suggested, permanent membership is not only a problem of 'paying tickets', and in spite of some steps in the right direction the two countries have not yet completely accepted full worldwide

¹ Michel Virally, *L'organisation mondiale* 257 (Paris, 1972).

² See the 1968 Treaty on the Non-Proliferation of Nuclear Weapons; 729 U.N.T.S. 161; 7 ILM 811 (1968).

responsibilities.³ Similarly, India, Brazil or Nigeria are certainly important regional powers. But the Security Council is in charge of *world* peace.

However that may be, both the conferral of the primary responsibility for the maintenance of international peace and security on the Security Council, and of the right of veto on a handful of big powers met the demands of realism. At the same time, however, this caution held the danger of a future paralysis of the system which then, indeed, occurred when the alliance degenerated into Cold War confrontation.

The system conceived of at Dumbarton Oaks, Yalta and San Francisco was more realistic than the one set up after World War I but it implied the unity of the Big Five. The idea of collective security underlies both systems although it was more clearly expressed in Articles 10 and 11 of the League of Nations Covenant than it is in the Charter, which simply states that the peoples of the United Nations are determined 'to ensure . . . that armed force shall not be used, save in the common interest' (Preamble, paragraph 7).

The very idea of 'all for one' clearly rules out a system of alliances between members or groups of members of the collective whole. Such a system was, however, exactly the result of the conclusion of various treaties of defence by Western states, culminating in the North Atlantic Treaty of April 1949, and the Warsaw Pact with which the East responded in May 1955. This system of rival military alliances is unquestionably incompatible with the collective security concept and is the most dazzling sign of the collapse of the Charter mechanism, a mechanism which, in fact, had been paralyzed from the outset as exemplified by the impotence of the UN during the Greek civil war or regarding Spain in 1946--50. It is interesting to note that in both cases the General Assembly, notwithstanding Article 12 of the Charter, made recommendations in order to mitigate the consequences of the inefficiency of the Council incapacitated by the Soviet vetoes.⁴

³ For Japan, see the Law Concerning Cooperation in United Nations Peacekeeping and Other Operations of June 19, 1992; 1011 *Jurisuto* 33 (1992), unofficial English translation in 32 *ILM* 215 (1993); see also Akiho Shibata, *Japanese Peacekeeping Legislation and Recent Developments in U.N. Operations*, 19 *Yale J.Int'l L.* 307 (1994). For Germany, see the decisions of the Federal Constitutional Court of Apr. 7, 1993, 88 *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 173; June 23, 1993, 89 *BVerfGE* 38; and July 12, 1994, 90 *BVerfGE* 286. Comments by W. Heintschel von Heinegg & U.R. Haltern, *The Decision of the German Federal Constitutional Court in Re Deployment of the German Armed Forces 'Out of Area'*, 41 *Neth.Int'l L.Rev.* 285 (1994), and C. Tomuschat, *Le juridique fait place à la politique: L'arrêt de la Cour constitutionnelle allemande du 12 juillet 1994 sur le mandat international des forces armées allemandes*, 40 *Ann.Franç.D.Int.* (1994).

⁴ See, e.g., GA Res. 39 (I) and 386 (V) (Spain) and 109 (II), 193 (III) and 288 (IV)

The General Assembly's 'Uniting for Peace' resolution of November 1950⁵ made the effort to codify this idea of substituting the Assembly for a defaulting Security Council. The resolution expanded and generalized the decisions made in Resolution 376 (V) concerning the Korean War, a resolution now completely forgotten.

This short presentation is not the place to discuss once more the legality of Resolution 377(V). But it must be made clear that the 'Uniting for Peace' approach is diametrically opposed to the system instituted by the Charter. By substituting the General Assembly for the Security Council, it neutralizes the right of veto, thus challenging the balances which the Charter has carefully and realistically established between, first, these two organs (that is, in fact, between the Five and the smaller member states), and, second, between the Big Five themselves. Moreover, the new system was undoubtedly directed against one, and only one, of the big powers; it therefore appeared to be an alliance of the majority against the minority rather than a collective security system. While the Charter aimed at avoiding a confrontation between the 'Big Five', 'Uniting for Peace' allowed of a war against one of them.

However, there is no doubt that the Korean War marked the extreme limit of tolerable tension in the international society. Significantly enough, it was the only opportunity for putting into operation the 'Uniting for Peace' model in its entirety. Later, it was either totally set aside (as was the case during the Hungarian crisis of 1956 or the missile crisis of 1962), or only elements of it were used. The resolution nevertheless remained a source of inspiration for those groping for a new system of international peace and security.

II. UN PEACEKEEPING: NECESSITY IS THE MOTHER OF INVENTION

It is hardly necessary to recall that peacekeeping forces, at least their first 'version',⁶ have little in common with the Korean operation. While the latter was a coercive operation entirely directed and controlled by the United States --with the blessing of the UN--in a conflict at the very heart of the Cold War, UN peacekeeping forces are interposed, on a consensual basis, between smaller states in what could be called 'peripheral conflicts'.

In addition, their main purpose is not to impose peace but to consolidate the

(Greece).

⁵ GA Res. 377 (V) of Nov. 3, 1950.

⁶ See *infra* text accompanying note 45 et seq.

end of armed conflict, thus often consolidating the differences themselves, as could be seen, for instance, in Cyprus or even in the Middle East.

The 'Uniting for Peace' approach has, nevertheless, certainly given a new impetus to the search, and realization, of alternatives to the Charter system which take into account the new conditions of postwar international relations. The main features of the new system may be briefly described as follows:

- The very notion of 'peace' has been globalized and expanded;
- the maintenance of peace *stricto sensu* on a global scale was, in fact, removed from the field of action of the UN;
- the Security Council progressively became again the center of the new partial UN system although the General Assembly retained some powers not contemplated by the drafters of the Charter;
- the roots of the residual competence of the UN in this respect were neither in Chapter VI nor in Chapter VII of the Charter but are to be found in the implied powers of the organization.

The Charter is certainly not just a 'peacekeeping treaty' in the strict sense of the expression. Instead, it embraces a wide range of subjects including human rights, social progress, and 'international problems of an economic, social, cultural, or humanitarian character', as Article 1, paragraph 3, puts it. The drafters were conscious of the fact that all these issues had been causes of the Second World War. But all these problems are not dealt with *per se*; they are strictly related to the maintenance of international peace and security. This is made clear by the wording of Article 55, probably one of the most important clauses of the Charter: 'With a view to the creation of conditions of stability and well-being *which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote*' international economic and social cooperation.⁷

In accordance with the demands of developing countries, concern for development, and now for 'sustainable development', may appear as an autonomous task of the organization besides its main purpose, that is the maintenance of international peace and security. And it is true that, in a way, peace is a precondition for development as much as development is a precondition for peace. Nevertheless, steps and actions for development are an integral part of the maintenance of peace as was admirably expressed by the British Prime Minister in his capacity as chairman of the Security Council:

⁷ Emphasis added.

The absence of war and military conflicts does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters.⁸

Similarly, the guarantee and promotion of human rights are inseparable from the quest for peace. Thus it becomes apparent that there cannot exist an absolute separation between internal and international problems. Here again, the evolution of minds during the Sixties and Seventies paved the way for the recent and more spectacular measures. Not only is it absolutely impossible to claim that human rights are 'matters which are essentially within the domestic jurisdiction' of states, but it is also undeniable that massive violations of human rights constitute a threat to peace.

However, during the Cold War period this idea was translated into action only partially or, to be more precise, very selectively. Leaving aside the question of decolonization which is not only a human rights problem, only two cases of UN practice illustrate that systematic contempt for human rights amounts to a threat to peace: the Rhodesian crisis⁹ and, more clearly, the question of apartheid in South Africa which was defined as seriously disturbing international peace and security,¹⁰ therefore justifying sanctions under Chapter VII.¹¹ It is nevertheless revealing that these are the only two cases in which sanctions were imposed.

This also shows how restricted the use of the Chapter VII peacekeeping system was during the Cold War. It could only play a role in solving Southern Africa's problems which obviously were of peripheral importance to global order. Besides that, Articles 39 and 40--but not Articles 41 and 42--were used in some rare cases.¹² But in the most critical instances, as in the events taking place in Central Europe in 1956 or 1968 or the missile crisis of 1962, the UN was completely left aside.

The UN had become nothing more than an element, and not the main one, of a much more complex general system of guarantees of international peace

⁸ Statement at the end of the session of the Council at the level of heads of state and government, Jan. 31, 1992; UN doc. S/PV.3046, p. 143.

⁹ See, e.g., GA Res. 1747 (XVI) of June 28, 1962; 1889 (XVIII) of Nov. 6, 1963; SC Res. 202 (1965) of May 6, 1965. But in this case decolonization problems interfered with 'pure' human rights concerns.

¹⁰ Cf. SC Res. 392 (1976) of June 19, 1976.

¹¹ Cf. SC Res. 418 (1977) of Nov. 4, 1977.

¹² See, e.g., the cases of Palestine, Indonesia, the Falkland Islands and the Iraq/Iran war.

and security the main purpose of which was to face the new real threat to world peace: the threat of a nuclear war. This threat was created by the nuclear powers--precisely the same five states which the Charter had entrusted with the primary responsibility for the maintenance of international peace and security. If one keeps in mind that the Charter does not provide for any mechanism which could impose a solution in case of a conflict between these states, it becomes obvious that the guarantee of international peace and security had to be found outside the UN framework. And this was indeed what happened.

However cynical it may seem, it is clear that world peace was, at the time, secured by the 'balance of terror', the non-use of nuclear force (or of any kind of armed force on a large scale) by one camp being guaranteed by the fear of nuclear reprisals by the other.

Although not a legal phenomenon as such, this system of international peace--which could probably be more accurately described as a system of non-recourse to armed force--had important legal consequences: First, each camp organized itself, by means of a network of treaties, in regional alliances. Second, both groups agreed to lock the system once more by consolidating the nuclear oligopoly. This was realized in 1968 through the conclusion of the Nuclear Non-Proliferation Treaty (NPT)¹³ the main purpose of which is to ban nuclear dissemination (Article II). At the same time, the treaty legitimizes the possession of nuclear weapons by the Five (Article I). While formally discussed within the UN, it is obvious that the NPT was in fact imposed by the two main superpowers (whose successive drafts constituted the basis for discussion) and established a system of maintenance and guarantee of international peace and security which has no real link with the United Nations.

That is not to say that the UN lost any role in the global system. Instead of centralizing and controlling it, the organization simply became part of it. Moreover, inside the UN the distribution of powers between the Security Council on the one hand and the General Assembly on the other hand has not evolved in a linear way, the trends depending on the evolution of the balance of power between the main groups of states and strongly being influenced by the will and the interests of the United States.

During a first phase, the United States, confident of the support of the Western-oriented majority, favored a strengthening of the powers of the General Assembly. Though being a striking manifestation of this first trend, the 'Uniting for Peace' resolution is by no means an isolated example. Not less illustrative is the creation, by General Assembly Resolution 998 (ES-1) of November 4,

¹³ See *supra* note 2.

1956, of the first United Nations Emergency Force (UNEF I) to be deployed between Egypt and Israel.

Although the creation of UN non-coercive peacekeeping forces by the General Assembly cannot be objected to from a legal point of view, UNEF I has remained an isolated precedent. It was made possible, and even necessary, by the very special circumstances of the case since, as is well known, using the Assembly was the only means of avoiding vetoes on the part of France and the United Kingdom and of saving the face of these two permanent members of the Security Council. Since then, all other peacekeeping operations have been launched by the Security Council, even though the Assembly, based on its budgetary powers, could have insisted on a right to initiate or, at least, control such operations.¹⁴

Besides these spectacular but exceptional decisions, the Cold War period saw a reconquest of important powers by the General Assembly to the detriment of the Council in the field of peacekeeping *lato sensu*:

- i) While the Security Council was paralyzed by the veto, or the fear of the veto, the Assembly could occupy the whole field of 'matters within the scope of the Charter' (Article 10), including 'questions relating to the maintenance of international peace and security' (Article 11, paragraph 2), and it used this power abundantly either in relation to particular cases or by adopting resolutions of a general nature. Some of them, although at times highly controversial, had a far-reaching influence.¹⁵
- ii) Even more comprehensively, the Assembly dealt with the root causes of international conflicts and disputes, giving strong impetus to international involvement in the fields of development, decolonization, human rights, environment and disarmament--the latter being closely related to the guarantee of international peace and security and allocated, though not exclusively, to the competence of the Assembly.¹⁶

¹⁴ Art. 12, para. 2, of the Charter grants the Assembly a right of information with regard to 'matters relative to the maintenance of international peace and security which are being dealt with by the Security Council'. Even this very limited right has been exercised only timidly and as a matter of routine.

¹⁵ See, e.g., GA Res. 2131 (XX) (Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States), 3314 (XXIX) (Definition of Aggression), 37/10 (Manila Declaration on the Peaceful Settlement of Disputes).

¹⁶ See arts. 11, para. 1, 26, and 47, para. 1, of the Charter.

- iii) The General Assembly also played a fundamental 'legitimizing' role¹⁷ by crystallizing moral or political principles into legal norms, thus ensuring the 'progressive development of international law'. A striking example of this can be found in the total inversion of the meaning of the Charter's regulations concerning (de)colonization. While the text is clearly 'colonialist' in the sense that it imposes guidelines for the behavior of colonial powers,¹⁸ it must now be read in the light of 'the subsequent development of law'¹⁹--that is, in an anticolonialist perspective. This might appear remote from the problem of peacekeeping *stricto sensu*. But it is not, and this for two reasons: first, decolonization is part of the general picture of the global conditions of peace, and, second, the General Assembly 'legitimized' (or 'de-legitimized') situations which are more closely linked with peacekeeping than decolonization generally speaking. It thus legitimized

the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers which suppress their aspiration for freedom and independence.²⁰

As 'all necessary means' include the use of force, the Assembly added one more form of legal use of armed force to those already provided for in the Charter.²¹ Conversely, the Assembly made clear that '[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal'.²²

- iv) This legitimizing power has been expanded by the Assembly appropriating the right to qualify situations with regard to their impact on international peace and security. The Assembly did so in spite of the silence of the Charter on this point and in spite of Article 39 which can be read as reserving for the Security Council the power of determining 'the

¹⁷ The idea is 'fashionable' today. It seems fair to recall that this power of collective legitimization was studied nearly thirty years ago by Inis L. Claude, Jr., in *The Changing United Nations* 73--103 (New York, 1967).

¹⁸ See ch. XI of the Charter, Declaration regarding Non-self-governing Territories.

¹⁹ Namibia Opinion, 1971 I.C.J. 16, 31 (June 21); see also the Western Sahara Opinion, 1975 I.C.J. 12, 32 (Oct. 16).

²⁰ GA Res. 2621 (XXV) of Oct. 12, 1970.

²¹ See, essentially, arts. 42 and 51.

²² Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, Annex to GA Res. 2625 (XXV) of Oct. 24, 1970.

existence of any threat to the peace, breach of the peace, or act of aggression'. However, this 'power of qualification' is the necessary prerequisite for the exercise of the Assembly's right of recommendation which is expressly recognized by Article 10 as a general power and by Article 11, paragraph 2, with regard to questions relating to the maintenance of international peace and security. In practice, the right to make recommendations has been widely used (and probably even been expanded by Resolution 377 (V)). Interestingly enough, the Assembly is unquestionably less reluctant to exercise its power of qualification than the Council which usually avoids determinations at all or, if it makes them, uses understatements. Thus, the General Assembly did not hesitate to designate as aggression the North Korean attack of 1950²³ or the situation in Bosnia and Herzegovina²⁴, while the Security Council determined that these actions constituted a 'breach of the peace'²⁵ and a 'threat to international peace and security',²⁶ respectively.

Therefore, it appears that the relative paralysis of the Security Council because of the veto has been a good bargain for the General Assembly--that is to say, for the smaller states--which could fully assume its 'secondary responsibility' for the maintenance and strengthening of international peace and security by partially filling in the gap created by the rivalry of the two superpowers.

It is certainly difficult to identify a single peacekeeping system in the time of the Cold War. During the whole period, the maintenance of international peace and security has rather been a continuous improvisation: states, groups of states and the organs of the UN have constantly adapted their conduct to conditions prevailing at the time when decisions had to be made.

It has sometimes been argued that a new system had emerged--a new 'Chapter VI *bis*' of the Charter. There is some merit in seeing things that way as the concept of UN peacekeeping borrowed from both Chapter VI and Chapter VII. Articles 39 and 40 were used in most cases in which a real threat to international peace and security existed and in which none of the two superpowers was involved.²⁷ In some cases (seven in the period between 1956 and 1988), mili-

²³ GA Res. 498 (V) of Feb. 1, 1951.

²⁴ GA Res. 43/88 of Dec. 20, 1993.

²⁵ SC Res. 82 (1950) of June 25, 1950.

²⁶ SC Res. 757 (1992) of May 30, 1992.

²⁷ It must be recalled that the Korean exception was a pure 'accident' resulting from the Soviet miscalculation of the effects of its empty-seat policy in the Security Council.

tary forces were created and, except for UNEF I, the respective decisions were made by the Council in accordance with the general spirit of the Charter and, in particular, with its Article 24. But, in contrast to the provisions of Article 42, these peacekeeping forces had no coercive power and, above all, their deployment depended on the consent of the conflicting parties. In this respect, the clear distinction made in the Charter between recommendations (Chapter VI) and decisions (Chapter VII and Article 25)²⁸ was erased.

But these features are not enough to make up a 'system', whatever its legal definition.²⁹ But, if it is a system, it is a 'pick-and-choose' system, something not remote from what has been called a *bric-à-brac* (odds and ends):³⁰ According to circumstances, to their interests, and to the balance of power, states chose to use the U.N. mechanisms or not; and if they did so they chose to stick to the Charter in a strict 'constructionist' perspective--the usual view of the Soviet Union and, more often than not, of France--or to interpret the Charter 'constructively'--a tactic used both by the United States (although not systematically) and the Third World majority in the General Assembly after 1960.

One of the most tangible proofs of the non-systematic approach to peacekeeping during the Cold War is given by the inability of the Special Committee on Peace-keeping Operations to come to an agreement on a systematization of the legal rules applying to these operations although the discussions have now lasted for thirty years.³¹

In any case, if one is to accept the image of a Chapter VI *bis*, it must be stressed that, first, it certainly does not cover the whole system of peacekeeping during the Cold War period and, second, it did not replace Chapters VI and VII which have not fallen into abeyance.

²⁸ 'Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter'; Namibia Opinion (supra note 19), 1971 I.C.J. 53.

²⁹ I take it in the very broad meaning of an 'ensemble organisé'; see Serge Sur, *Système juridique international et utopie*, 37 *Archives de philosophie du droit* 36 (1987).

³⁰ Jean Combacau, *Le droit international: bric-à-brac ou système?*, 36 *Archives de la philosophie du droit* 85 (1986).

³¹ The Commission was created by GA Res. 2006 (XIX) of Feb. 18, 1965. GA Res. 49/37 of Dec. 9, 1994 takes stock of various very general points on which a consensus could be reached.

III. MIGHT IS RIGHT?

This last assertion is evidenced by the 'revival' of Chapter VII during the first half of the 1990s, when, with the end of the Cold War, it became possible to use more frequently--if not more consistently--more of Chapter VII. More of it, but not the whole of it, since Articles 43 to 47 apparently still remain dry wood. This statement requires additional remarks and raises an interesting legal problem.

The problem is the following: Is it legally acceptable to use Article 42 while the agreements contemplated by Article 43--supposed to make available national military forces to the Security Council--have not been concluded, while the Article 46 plans for the application of armed force have not been prepared, and while the Military Staff Committee provided for in Article 47 is not ready to play its role?³² In other terms, is Article 42 autonomous with regard to the following Charter provisions? It has been the constant view of the Soviet Union and several scholars that the answer to this question is in the affirmative. This is not so: Article 42 is drafted in a very general way and Article 43 and subsequent provisions only specify one particular modality of military sanctions. As the International Court of Justice put it in its Advisory Opinion of July, 20 1962:

It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements of Article 43 have not been concluded.³³

The clear consequence of this is that the legality of peacekeeping operations is not questionable on the sole ground that they are based on Article 42 alone, in the absence of the agreements according to Article 43, that the forces are composed of 'air, sea, or land forces of Members of the United Nations'--which is precisely what is provided for in Article 42-- , or that they remain under national command, provided of course that they act in conformity with the political instructions and guidance by the Security Council.

In this respect, it is suggested that the Security Council acted in complete conformity with the Charter

³² It can, however, be noted that the Committee is mentioned in passing in SC Res. 665 (1990) in connection with the economic sanctions imposed on Iraq.

³³ Certain Expenses of the United Nations, 1962 I.C.J. 167. To an extent the relationship between art. 42 on the one hand and art. 43 *et seq.* on the other hand can be construed in the same way as the one between art. 25 and ch. VII; see *supra* note 28.

- when it authorized 'Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement Security Council resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area',³⁴
- when it authorized states 'to use all military means' (which implies a right to use force) 'to establish as soon as possible a secure environment for humanitarian relief operations in Somalia',³⁵
- when it required states and regional organizations (in fact NATO) to take, in cooperation with UNPROFOR, measures to monitor and enforce the maritime embargo against Yugoslavia (Serbia and Montenegro)³⁶ or to enforce no-fly zones over Bosnia and Herzegovina,³⁷ or
- when it welcomed 'the offer by Member States . . . to cooperate with the Secretary-General in order to achieve the objectives of the United Nations in Rwanda through the establishment of a temporary operation under national command and control' and authorized these member states 'to conduct [this] operation using all necessary means to achieve the humanitarian objectives' defined by the Council.³⁸

Another interesting feature of all the operations cited above is that the forces are 'authorized' or 'invited' to 'use all necessary means', including, if need be, armed force, a formula which amounts at best to a recommendation or an authorization, but certainly not to a decision binding on member states providing military contingents. Here again, the Security Council could demand more and *decide* that member states *must* contribute to military sanctions. It *could* do so in accordance with the wording of Article 42 and in light of Article 25, but it is not compelled to do so. He who can do more can do less, and there is certainly no legal objection to the adoption of mere recommendations where decisions could be made.³⁹

³⁴ SC Res. 678 (1990) of Nov. 28, 1990 (operation 'Desert Storm').

³⁵ SC Res. 794 (1992) of Dec. 3, 1992 (UNITAF -- operation 'Restore Hope').

³⁶ SC Res. 787 (1992) of Nov. 16, 1992; 820 (1993) of Apr. 17, 1993.

³⁷ SC Res. 816 (1993) of March 31, 1993; 836 (1993) of June 4, 1993.

³⁸ SC Res. 929 (1994) of June 22, 1994 (operation 'Turquoise'); see also SC Res. 940 (1994) of July 31, 1994 authorizing member states 'to form a multinational force under unified command and control and, in this framework, to use all necessary means' in order to restore democracy in Haiti.

³⁹ It is, however, suggested that the General Assembly itself could authorize or recommend the use of force in a similar way, at least when the Security Council is not exercising its respective functions (art. 12, para. 1 of the Charter). The Assembly did so at least on two

The conformity of the peacekeeping operations initiated in the 1990s with the Charter is also challenged on another ground: It has insistently been suggested in some academic and political circles that at least in some cases--mainly during the Gulf crisis--the Security Council went beyond its powers, mainly for two reasons which are linked to each other: It allegedly abused its authority in imposing sanctions while any breach of peace and immediate threat to peace was averted, and it allegedly behaved as a 'quasi-judicial' organ. With respect, both criticisms seem at least debatable.

Beginning with the second one, there is at least some paradox in reproaching the Council for taking care of legal requirements before taking the decisions it is entitled to make. If it has to determine that a given state is an aggressor, it is certainly advisable that it refers to some legal concept of aggression.⁴⁰ Similarly, in such a case, some implicit or express reference to the legal notion of responsibility is certainly better than a purely timeserving and arbitrary appreciation. As an institution created by law, the Security Council is bound by the law even though its mandate gives it a large power of appreciation with respect to the qualification of a given situation. '[D]iscretionary authority must not, however, be confused with arbitrary power.'⁴¹ A balance must therefore be found between this discretion and the respect which must be paid to legal principles. This, in turn, raises the very difficult problem of the judicial control which the Council is--or should be-- subject to.⁴² But controlling is one thing, deciding in accordance with law--or paying attention to law in the decision-making process--is something else. There is nothing wrong for the Council to behave as a 'quasi-judicial organ' even if, afterwards, its own decision can be reviewed, at certain conditions, by a real judicial organ.

This being said, the 'determinations' made by the Security Council are certainly limited in scope: they are relevant only in view of its primary responsi-

occasions: during the Korean War (see supra note 23) and in the case of decolonization (see supra text accompanying note 20).

⁴⁰ Even if it is suggested that the so-called Definition of Aggression (Annex to GA Res. 3314 (XXIX) of Dec. 14, 1974) is despicably badly drafted and of little help in that respect.

⁴¹ *Ballo v. UNESCO*, International Labour Organization Administrative Tribunal, Judgment No. 191 (1972). This sentence reflects concisely the notion of 'pouvoir discrétionnaire' which is very popular in French administrative law. For international law, see Stevan Jovanovic, *Restriction des compétences des Etats en droit international* (Paris, 1988).

⁴² See Mohammed Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité* (Bruxelles, 1994), and M. Bedjaoui & Alain Pellet in *Colloque des Rennes: Le chapitre VII de la Charte des Nations Unies et les nouveaux aspects de la sécurité collective* (Société française pour le droit international ed., Paris, 1995).

bility for the maintenance of international peace and security.⁴³ But it must also be accepted that, here again, the Council enjoys a large freedom of appreciation (or *pouvoir discrétionnaire* in the French legal terminology). It therefore seems, at least legally speaking, far from extravagant that, in Resolution 687 (1991) of April 3, 1991, the Security Council decided that Iraq had to accept a demarcation of its border with Kuwait and very constraining disarmament measures, or that Iraq had to pay full reparations if, in its view, these measures were necessary to restore and guarantee international peace and security. Similarly, there is no doubt that the Council was empowered to establish an International Criminal Tribunal for the Former Yugoslavia if it believed that the establishment of such a tribunal 'would contribute to the restoration and maintenance of peace'.⁴⁴

It therefore appears that the peacekeeping operations started in the 1990s, including those which have seemed most audacious, are fully consistent with the Charter. But, if they are soundly founded on its provisions, they are only a 'soft application' of what had been contemplated in San Francisco fifty years ago. We are not in 'Chapter VII *bis*', even less in 'Chapter VII and a half', but rather in 'half Chapter VII': peace may be enforced against troublemakers, but 'peace-loving States', which are supposed to constitute the membership of the UN (Article 4, paragraph 1, of the Charter), are still not forced to participate in peace-making as had been foreseen in San Francisco. In this respect the situation is half-way between the 'model' contemplated in Article 43 and subsequent provisions of the Charter, and the 'classical' peacekeeping operations devised from 1956 onwards.

One has, however, to differentiate even further. Thus, as is already well known, the peacekeeping, and maybe peace-making, operations⁴⁵ of the Nineties often rely on a very wide understanding of the notion of 'threat to the peace' which is interpreted to include essentially internal situations most unlikely to degenerate into an international conflict. As examples, one might

⁴³ Contrary to what has been written, art. 4 of the second part of the ILC Draft on State Responsibility is not open to criticism in this respect. The article states that legal consequences of an internationally wrongful act of a state 'are subject, *as appropriate*, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security' (emphasis added). The phrase 'as appropriate' must be interpreted as meaning, 'if this comes under the competence of the Council'.

⁴⁴ SC Res. 827 (1993) of May 25, 1993.

⁴⁵ On this distinction, see Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping. Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*; UN docs. A/47/277 and S/24111 of June 17, 1992.

recall the 'human tragedy caused by the conflict in Somalia',⁴⁶ the civil wars in Liberia⁴⁷ or Angola,⁴⁸ the 'humanitarian crisis' in Rwanda,⁴⁹ or the coup against the elected President of Haiti.⁵⁰ More generally speaking, humanitarian considerations have, no doubt, reached an extent previously unknown, since, in recent times, they justified not only economic sanctions as was previously true in the cases of Southern Rhodesia and South Africa, but also military sanctions (against Iraq) or what could be called 'judicial sanctions' (against 'persons responsible for serious violations of international humanitarian law' in the former Yugoslavia⁵¹ or in Rwanda⁵²). To this must be added the declaration that 'acts of international terrorism . . . constitute threats to international peace and security'.⁵³

These various factors allow us to speak of 'peacekeeping operations of the second generation'. But this assertion must at once be qualified in several regards:

- i) The former model has never been forsaken. Right to the contrary, several 'consensual' forces without coercive powers have been created since 1990 (UNTAG, UNIIMOG, MINURSO, ONUCA, etc.).
- ii) The operations of the 'second generation' can hardly be seen as a homogeneous category. The truth is that there now exists a wide range of operations, some of which being both coercive and consensual, as UNPROFOR (which is only partly vested with enforcement powers), others, being not coercive but non-consented to or neither coercive nor consensual, which apparently corresponds to the 'first generation', but the subcategory is widely diversified in terms of the aims of the operation, etc. According to different parameters a multitude of typologies can be established, the purpose of which is doubtful
- iii) Moreover, it must be recognized that even forces of the 'first generation' created during the Cold War period had characteristics which are more visible in the new type. Thus, for example, ONUC's mandate was

⁴⁶ SC Res. 751 (1992) of Apr. 24, 1992.

⁴⁷ SC Res. 788 (1992) of Nov. 19, 1992.

⁴⁸ SC Res. 864 (1993) of Sep. 15, 1993.

⁴⁹ SC Res. 929 (1994) of June 22, 1994.

⁵⁰ SC Res. 873 (1993) of Oct. 13, 1993; 940 (1994) of July 31, 1994.

⁵¹ SC Res. 808 (1993) of Feb. 22, 1993; 827 (1993) of May 25, 1993.

⁵² SC Res. 955 (1994) of Nov. 8, 1994.

⁵³ SC Res. 731 (1992) of Jan. 21, 1992.

progressively tainted with 'coercive elements';⁵⁴ at the same time, the creation of the force, although formally justified by the Belgian intervention, was in fact mainly called for to face an explosive internal situation.

Similarly, leaving the topic of peacekeeping or peacemaking forces, it cannot be denied that only very artificially *apartheid* in South Africa or even the situation in Southern Rhodesia were related to international peace strictly speaking. These cases can reasonably be seen as precedents for the numerous international actions launched by the United Nations--whether by the Security Council or the General Assembly--with a view to contributing to establish or restore democracy⁵⁵ or the respective state itself.⁵⁶

There is no doubt that the safer legal ground for all these peace-keeping operations is Chapter VII of the Charter. But, here again, it must be recognized that it must be read in a dynamic perspective and in the light of the development of law since 1945.⁵⁷ Nowadays, international peace and security is not seen anymore as it used to be seen in the 1950s. World order, although still fragile, has consolidated. 'Mankind' and 'international community' have acquired a hesitant legal status, and it can be assumed that all that interferes with the fundamental principles accepted as such by the community of states as a whole and all that is seen as contradicting the basic interests of that community, constitutes a threat to the peace calling for a decision of the Security Council and entitling the General Assembly to make recommendations within the limits drawn by Article 12 of the Charter.

This being said, it would probably be hazardous to sustain that we are attending a 'Copernican revolution'.

In the first place, the excitement among lawyers about the novelty of the recent peacekeeping operations must probably be moderated. Not only are *vetera et nova* inextricably intertwined, but it must also be kept in mind that the partial application of parts of Chapter VII is not that new. As recalled above,

⁵⁴ Cf. SC Res. 161 (1961) of Feb. 21, 1961; 169 (1961) of Nov. 24, 1961.

⁵⁵ Cf., e.g., the cases of Haiti (ONUVEH, GA Res. 45/2 of Oct. 10, 1990; UNMIH, SC Res. 867 (1993) of Sep. 23, 1993) or Mozambique (ONUMOZ, SC Res. 797 (1992) of Dec. 16, 1992).

⁵⁶ See, e.g., the cases of Namibia (UNTAG, SC Res. 435 (1978) of Sep. 29, 1978; 632 (1989) of Feb. 16, 1989), Western Sahara (MINURSO, SC Res. 690 (1990) of Apr. 29, 1990), and Cambodia (UNAMIC, SC Res. 717 (1991) of Oct. 16, 1991; UNTAC, SC Res. 745 (1992) of Feb. 28, 1992).

⁵⁷ See supra note 19.

Articles 39 and 40 of the Charter have constantly been resorted to during the Cold War; Article 41 was only used in two cases--Southern Rhodesia and South Africa--but it was used; and the same can even be said with regard to Article 42 because, even if we leave aside the Korean War, on at least one occasion the Security Council called upon the United Kingdom to use force if this were necessary to uphold the efficacy of economic sanctions imposed on the minority regime in Southern Rhodesia.⁵⁸ It must, however, also be recognized that recourse to Chapter VII has increased in such a proportion that the change is not purely quantitative but is also an indication of deep underlying evolutions.

However, the main trends which were briefly examined in the second section of this short paper have not all vanished. Far from this. Thus, it can now be taken for granted that the very concept of peace is 'polymorphous' and that in its 'structural dimension' its strengthening is dependent firstly on the General Assembly.⁵⁹ But, at the same time, responsibility for day-to-day maintenance of international peace and security has been refocused on the Security Council, even if large elements of the system remain outside the UN.⁶⁰ Moreover, it can by no means be ascertained at this stage that the partial 'refocusing' is definitive, nor even stabilized: at any moment the ongoing situation could degenerate into a 'Cold Peace', a softened version of the late Cold War. Significantly enough, NATO has not been dissolved and, in 1995, Russia is moving to promote a new system of alliances with the countries of her former empire.

However, at a deeper level of analysis, the international system for the maintenance of peace and security remains largely immutable: It is based on power, and power is not a problem of words but of realities.⁶¹ Words are part of reality but they do not, by themselves, shift or give power as if they were magic formulas.

The reality today is a formidable inequality of power between states and groups of states. Inequality between the North and the South has not been reduced while discrepancies among the Southern countries themselves become ever more severe. And, at the other end of the chain, international peace and

⁵⁸ SC Res. 221 (1966) of Apr. 8, 1966.

⁵⁹ See Pierre-Marie Dupuy, *Sécurité collective et organisation de la paix*, 97 *Rev.Gén.D.Int.Publ.* 622 (1993).

⁶⁰ See supra text accompanying note 12. The strengthening of the CSCE (now OSCE) is also an important element of the new general picture.

⁶¹ As Professor W. Michael Reisman has put it, 'Security, in the final analysis, is not a verbal exercise but the exercise of power in defense of public order. Without power, security is a word'. Reisman, *The Constitutional Crisis in the United Nations*, 87 *Am.J.Int'l L.* 83, at 97 (1993).

security is entirely in the hands of an 'unequal directorate' from which, at the end of the day, a single superpower has emerged. The traditional checks and balances have been significantly weakened with the disappearance of the second superpower. And the Third World as a whole has not even retained the illusion of its power.

This unfortunate situation⁶² has pernicious consequences in and for the United Nations. Some of them can be outlined as follows:

- There are clear signs of a large-scale return to secret diplomacy, a mode of governance clearly incompatible with the spirit of the Charter, but which permits the 'directorate' (P7, P5 or P3) to find compromises unimpeded by public curiosity and democratic control.
- Even more disturbing, the credibility of the UN is entirely dependent upon the financial and military support of the United States, which does not hesitate fully to play these trump cards.⁶³
- On the other hand, the same superpower uses the organization in its own interest whenever it finds it helpful. It mainly takes advantage of the UN for the purpose of legitimizing a certain action (as was clear in the case of the Gulf War)⁶⁴ or when pursuing an 'infiltration' policy (as has been the case with the massive placing of U.S. specialists 'at the disposal' of the International Criminal Tribunal for the Former Yugoslavia).
- This whole pattern creates, mainly among Third World countries, a feeling of discouragement and disillusion which could lead to a 'crisis of legitimacy' if it has not yet occurred.

The picture might be drawn in too dark colors, since there certainly exist ways out. The United States, with its lively domestic democratic interplay, is always good for a surprise. However, it would not be very sensible to expect that remedies will come exclusively from the very state which creates, though not exclusively, the main problems. In fact, for all the member states and

⁶² This qualification does not mean that, in my view, the situation during the previous decades was fortunate . . .

⁶³ As evidenced, e.g., in 1985 by the *Kassebaum amendment* (22 U.S.C. § 278e) and the *Gramm-Rudman Act* (2 U.S.C. § 901) which reduced unilaterally and unlawfully U.S. contributions to the UN budget, or, in 1995, by the program of the newly elected Republican congressional majority.

⁶⁴ Although I am not convinced by the 'double standard' argument: The UN might have been wrong in not intervening in nineteen cases. Then to take effective measures in the twentieth case is better than nothing . . .

groups of states⁶⁵ the only way to handle the problems certainly consists of confronting them together in order to find in-depth solutions--without being too much intimidated by the apparent imbalance of power. Unity is strength and common interest creates unity. Thus could be rediscovered, at the world level, the Allied unity of the Second World War, with a view to adapting the remarkably flexible instrument that the Charter has proved to be to the new conditions of contemporary international society, and, hence, to uniting again and more deeply 'our strength to maintain international peace and security' (Preamble of the Charter, paragraph 6).

Conversely, the worst solution would be to draw up a textbook reform not taking due account of the reality of the balance of power, that is without addressing preconditions for its success. The road to hell is paved with good intentions.

⁶⁵ The cohesion of the various groups has, however, certainly lost strength during the last few years.