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# The Limits of Omnipotence

Correspondence with the United Nations Charter in Four  
Cases of Coercive Action by the Security Council

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# Summary

The purpose of the thesis is to assess whether or not the Security Council in four cases in the beginning of the nineties violated the UN Charter in its Chapter VII resolutions. In the theoretical chapter preceding the case study, limits on the Council's Chapter VII competence are identified in Articles 24, 1, 2 and 39. Important terms and sentences, such as "threat to the peace" and "sovereign equality", are then analysed, since they are parts of the power-limiting Articles. It is shown that the latter term is very problematic, and that the rest of the Charter does not accord with it. Furthermore, an intimate link between the terms legality and legitimacy is assessed, the former being based on the latter. It is also concluded that Member States of the UN do not have to obey illegal Chapter VII resolutions.

Then, the case study begins with an examination of the Gulf Crisis in 1990-1991. This is followed by three more cases, namely the decision in the year 1992 on sanctions against Libya, the War-Crime Tribunal for the Former Yugoslavia in 1993, and, finally, the intervention on Haiti in 1993-1994. Violations of the UN Charter are assessed in the first two cases, but not in the other two. In the Gulf War, the complete delegation of competence to an unidentified coalition is considered as a breach against the Charter. In the Libyan case, the demand on extradition of two Libyan citizens combined with mandatory sanctions is found to be completely illegal. The tribunal for the former Yugoslavia and the Haiti intervention are unusual measures, but are still seen as lawful.

# Preface

In the first stages of my work on this thesis, the United Nations' system suddenly faced a severe challenge when a group of Member States ignored the established procedures required in order to make an armed attack lawful. In spite of the sudden "irrelevance" of the UN, I stuck to my main questions and completed the work as I had intended from the beginning. The later development in Iraq has proved that the UN continues to be relevant, but once again voices are raised in favour of organisational reforms. Perhaps my conclusions in this thesis could be useful in a debate about possible and necessary changes in the apparatus of the UN.

The work in general, and the reading of the large amount of material in particular, took longer time than expected in my early plans in January-February this year. Other engagements have also competed with the thesis, delaying the completion even more. Now, finally, I have achieved my aims.

I would like to thank my supervisor, Professor Göran Melander, for his patience and positive attitude towards my work. I would also like to express my gratitude to friends and beloved, who have endured my prolonged engagement in thesis writing. Thank you all!

Lund, 2003-11-10

Ilan Sadé

# Abbreviations

AJIL	American Journal of International Law
AYIL	Australian Year Book of International Law
CYIL	Canadian Yearbook of International Law
EILR	Emory International Law Review
EJIL	European Journal of International Law
GYIL	German Yearbook of International Law
HILJ	Harvard International Law Journal
ICJ	International Court of Justice
IJIL	Indian Journal of International Law
NYIL	Netherlands Yearbook of International Law
UN	United Nations

# 1 Introduction

## 1.1 Purpose and Main Questions

The purpose of this thesis is to examine whether the Security Council of the United Nations in four cases in the beginning of the nineties has violated provisions of the UN Charter when applying its Chapter VII authorities. Taking a stand in that issue is only possible after a thorough discussion about the meaning of a number of terms and provisions that appear in the Charter. Therefore, there is also a purpose to provide such a discussion in the first part of the thesis.

The cases that I have dealt with are (1) the Gulf Crisis 1990-1991; (2) the sanctions against Libya in 1992; (3) the establishment of the War-Crime Tribunal for the Former Yugoslavia in 1993; and (4) the intervention on Haiti, beginning in 1993.

I have formulated a couple of main questions, the answers to which are considered as helpful in the quest to fulfil the above-mentioned purposes.

- **Are concepts such as legality and legitimacy separable in an analysis of the Security Council's Chapter VII resolutions?**

Although this question is particularly vast – even to the extent that it is difficult to give it the space that it deserves – I find it necessary to touch upon it before addressing legality issues. Scholars have dealt with this field, and if I define these concepts before using them, this could only enhance the clarity of the reasoning.

- **Where do we find the legal power-limits of the UN Security Council?**

A determination whether or not the Security Council in four cases in the beginning of the nineties has trespassed into areas beyond its own is, of course, only possible to make after we know where those legal limits are drawn. Answering this question leads us straight to the Member State perspective:

- **Are UN Member States obliged to obey whatever decision the Security Council takes under Chapter VII?**

I will try to address this issue in my final discussion.

## 1.2 Delimitation

In the beginning, I had an ambition to scrutinise every Chapter VII resolution that has been adopted in the nineties, in order to look for a certain pattern. That quest turned out to be impossible – I simply underestimated the amount of resolutions that the Security Council produced during that period. Therefore, I reduced my objects of study to four cases that *prima facie* seemed to house controversies regarding the competence of the Council.

Furthermore, I have not been able to penetrate the issue of *jus cogens*, in spite of it representing an alleged limit for Council competence. However, the choice of legal norms that we may tag “peremptory norms of international law” is far from being self-evident, so it is doubtful whether an examination in depth of *jus cogens* would add anything to my conclusions. However, if I had enough time, I would have done such a research in order to improve the credibility of my conclusions even more.

## 1.3 Methodology

My method is confined to searching for and reading literature of different types. The subject is highly theoretical, and there is a large supply of books and articles that touch upon different fields of my study. The library of the Raoul Wallenberg Institute has been a real treasury – especially when it comes to journal articles.

The search for literature in my specific field revealed a huge amount of commentaries, dating from the birth of the UN until today. In order to answer the somewhat prejudicial question concerning the relationship between legality and legitimacy in international law, I have examined literature without any chronological limitations. The birth of modern, international law is dated by many to the 17<sup>th</sup> century.

Concerning my second main question, I have focused on finding more recent literature. Naturally, the historical limit is the years of 1944-1945, when the United Nations was constructed. Since UN law is developing over the years, I have especially tried to find literature that is written in recent times. In my case study, synchronic literature, commenting the actual case at hand, becomes indispensable.

I have mainly used two searching-methods. The first one is to simply examine the whole collection of literature by looking systematically in registries, sections in libraries and tables of contents. The “LOVISA” database of the University Library has helped me a lot. However, the most thorough and systematic search undertaken was an examination of all journals in international law in English and French from the year 1990 until



today that are available at the library of the Raoul Wallenberg Institute, by consulting their tables of contents. My attention was focused on article headlines, which are always instructive.

I would name my second searching-method “guidance by inter-textuality”. By paying attention to footnotes in books and articles, I got a picture of the debate and the most important writings in the different fields. When many commentators refer to a common source, it becomes important.

## 2 Theoretical Premises

### 2.1 The Legal Framework: Charter Provisions and International Law

The Charter of the United Nations and customary international law have more or less coalesced. Ideas such as “sovereign equality” and the prohibition of use of military force are deeply rooted in custom, as well as in the Charter. No wonder that this is the case – the world community and the Members of the UN are practically the same thing.<sup>1</sup> The Charter’s Purposes and provisions have affected custom, and custom has indeed influenced the interpretation of Charter provisions.

However, the “Founding Fathers” of the UN assured a close relationship between the Organisation and international law by explicitly mentioning the latter in the first Charter Article. Article 1 (1) reads as follows:

- (1) [The Purposes of the United Nations are] [t]o maintain international peace and security, and to that end: to take effective, collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and *in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;(emphasis added)

Thus, the adjustment or settlement of international disputes, or situations, which might lead to hostilities, has to be carried out both in conformity with “justice” and “international law”. A close look at the Paragraph reveals that it is separated into two different parts, and that the words justice and international law only refer to the second part, in which they are situated: “and bring about by peaceful means (...) adjustment or settlement of international disputes or situations which might lead to a breach of the peace”. This remark does not belong to the realm “picky academic comments with no practical bearing”, on the contrary. The wording of the Paragraph is a product of intense debates and has an extremely important significance. I will return to this in the next section.

The article continues with three more Paragraphs. In Paragraph 2 “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” is mentioned as another purpose of the organisation. Paragraph 3 provides for the achievement of international co-operation in order to solve a diversity of problems and the promotion of human rights as goals for the UN.

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<sup>1</sup> According to the UN Internet homepage, on the day this thesis is completed, the Organisation consists of 191 states.

Article 2, where the Principles of the UN are enumerated, establishes in its Paragraph 1 the following:

- (1) The Organization is based on the principle of the sovereign equality of all its Members.

The concept of “sovereign equality” will be discussed in subsequent sections, but it is note-worthy that it is mentioned as a basis for the UN, with no confinements to any particular UN activities that the Charter provides for.

Article 2 (7) refers to one of the consequences of “sovereign equality” when ascertaining the non-intervention rule, which is also well founded in international law.

- (7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Article 24 is where the actual delegation of power from the Member States to the Security Council in the field of “maintenance of international peace and security” is provided for. Paragraph 1:

- (1) In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

In Paragraph 2 we find a clear link between the above-mentioned purposes and principles and the action of the Security Council:

- (2) In discharging these duties [maintenance of international peace and security] the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.

Finally, it is appropriate to mention Article 103 in this section. Here, the link to international law is of another kind. The UN Charter announces itself to be superior to any other “international agreement” in the event of a conflict-of-laws.

I will now engage in a discussion about the different constraints on the powers of the Security Council that are found in the Charter.

## 2.2 Delimitation of Chapter VII Authority

### 2.2.1 Article 24

Article 24 is the right-establishing provision that all the other articles that are dealt with in this thesis encircle and constrain. What limitations will be found in the Article itself? Many scholars point at the expressions “Members confer on” and “Security Council acts on their behalf”, noting that this is a clear provision of delegation – a fact that would delimit the powers of the Council. “The Member States could not attribute to the Organization a power which they themselves did not and do not possess.”<sup>2</sup> This sentence needs an analysis, see section 2.3.

The definition of the subject matter that the Security Council is supposed to deal with is, of course, also a delimitation of its powers. The subject matter is provided for in Article 24 (1), namely “the maintenance of international peace and security”. This is, according to the Charter, the *raison-d’être* of the Council, and nothing else.

Paragraph 2 of the Article in question is the location in the Charter where the limits of the Council’s powers are enumerated. The Purposes and Principles of the Organisation, *i. e.* Articles 1 and 2, always have to be respected. The general mission of the Council – the maintenance of international peace and security – is further specified in Chapters VI, VII, VIII and XII, where more specific power-limits are established. The concern of this thesis is Chapter VII, so the other Chapters will only be touched upon if boarder-lines with Chapter VII will be found.

Sometimes, the concept of *implied powers* is said to widen the competence of the Security Council. T. D. Gill offers a good summary of the concept.<sup>3</sup> As mentioned, Article 24 (2) refers to other chapters of the Charter when defining the *specific* powers that the Council possesses. Does this imply the existence of a *general* power to deal with maintenance of international peace and security, which does not have to be based on any specific chapter? Gill answers positively, referring to the *Namibia* Opinion of ICJ from 1971. He further establishes a number of alleged limitations on these implied powers. Firstly, the Council always has to act in conformity with the Purposes and Principles of the Charter. Secondly, it must not contravene the specific provisions of the Charter (like Chapter VII) in cases when one of those is applicable. Thirdly, it does not give the Council any right to breach against “fundamental principles and rules of international law”.<sup>4</sup> To summarise, the existence of implied, general powers – which enlarge the

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<sup>2</sup> T. D. Gill, “Legal and some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter”, *NYIL*, Vol. XXVI, 1995, p. 82

<sup>3</sup> *Ibid.*, pp. 68-72

<sup>4</sup> *Ibid.*, p. 71

competence of the Council – is affirmed by Gill, but the limits of those powers are fixed with the help of other vague concepts.

The purpose of this thesis is to examine Chapter VII resolutions, which per definition are based on *specific* powers (following the terminology of Article 24(2)). Therefore, a further examination of the general, implied powers of the Security Council only becomes necessary if a resolution with a Chapter VII etiquette is considered as falling outside that Chapter in reality.

### 2.2.2 Article 25

Article 25 is the general obedience-clause. Can it establish any limitation? It is important to note its exact wording:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council *in accordance with the present Charter*. (emphasis added)

How should one interpret the last words? There are two options: we could limit the significance only to be a self-evident reminder that Member States must follow the Charter, or we could see these words as an assessment that the obligation to carry out Council decisions only applies when they conform with the Charter. Different Charter commentaries reach different conclusions. Erik Suy, writing in *La Charte des Nations Unies*, leans towards the first interpretation, in spite of his remark that the International Court of Justice has, allegedly, supported the second possible option.<sup>5</sup> In another commentary, it is stated that the text was formulated “to make it clear that members were obligated to carry out only those decisions of the Council that were legally mandatory”.<sup>6</sup> In other words: when looking at Article 25 isolated from the rest of the Charter, both interpretations are possible. I will return to this in my analysis, but already here I would like to mention that the Vienna Convention on the Law of Treaties makes clear in its Article 31 that the context, object and purpose shall guide the interpretation. Even though the Vienna Convention is a later treaty than the UN Charter, its provisions are relevant in this case, since they are seen as a codification of pre-existent customary law. A glance in the Charter reveals that there exist no specific rules of interpretation that would replace custom and the Vienna Convention.

### 2.2.3 Chapter VII

Chapter VII grants the Security Council options how to act when the peace that it has been created to maintain in Article 24 is threatened or breached.

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<sup>5</sup> J-P. Cot et Alain Pellet, *La Charte des Nations Unies*, Paris 1985, p. 481

<sup>6</sup> L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations, Commentary and Documents*, New York & London 1969, p. 208

First, the Council has to “determine the existence of any threat to the peace, breach of the peace, or act of aggression”.<sup>7</sup> When that has been made, the Council may either refrain from action, only pronouncing recommendations to the actors involved, or decide upon measures from a vast spectrum of opportunities. Those opportunities are set forth in Articles 40-42. Articles 43-45, concerning special agreements between Member States and the Council in order to make forces available, and Articles 46 and 47, providing for a Military Staff Committee, have remained paper-products. Such agreements have never been concluded between the Council and Member States.

What then makes the Security Council powerful, in spite of the fact that the ultimate measure – military enforcement – never can be taken for granted, due to the lack of special agreements? The answer will be found both in the Charter and in real politics. To begin with the former, Article 25 establishes a general obligation on Member States to obey the Security Council. This obligation is reiterated in Chapter VII, Articles 48 and 49, in the context of enforcement measures. Article 103 strengthens the Council even more, by providing for the superiority of the Charter in relation to other international agreements. Add to this the facts of real politics, and the picture is more or less complete.

Article 39 contains limitations of its own. The Security Council has to interpret a situation as being a threat to the peace, breach of the peace or act of aggression in order to make Chapter VII applicable. Situations that may fall into one or more of these three categories have shown to be extremely diverging. It is almost futile to assess in abstract what may constitute peace-threats, breaches and acts of aggression. We will have to study the existing cases and try to identify standards. As scholars have noted, the matter also depends on the opinion, the *opinio juris*, of the world community of states.<sup>8</sup>

A specified obligation on Member States to carry out Chapter VII resolutions and to co-operate with the Security Council is set forth in Articles 48 and 49. Those Articles may be described as a clarification of the consequences of Article 25 – the general rule of obedience. Naturally, these provisions raise a lot of questions concerning the extent of Member States’ obligation to act in accordance with Chapter VII resolutions if the Council would manifestly violate the Charter, as touched upon in previous section (2.2.2).

There is one legal power-limit presented in literature that is appropriate to mention in this section, namely the alleged freedom of Members to decide

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<sup>7</sup> Article 39, UN Charter

<sup>8</sup> B. Conforti, “Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d’une menace contre la paix, d’une rupture de la paix ou d’un acte d’agression”, in *Le développement du rôle du Conseil de sécurité*, Colloque La Haye 21-23 Juillet 1992, ed. René-Jean Dupuy, pp. 56-57. See also M. Bothe, “Les limites des pouvoirs du Conseil de sécurité”, *ibid.*, p. 70 and T. M. Franck, “The Security Council and ‘Threats to the Peace’: Some Remarks on Remarkable Recent Developments”, *ibid.*, p. 85

whether or not they will contribute with forces in a military enforcement operation under Article 42.<sup>9</sup> If the Council had been given the power to compel Members to contribute with troops, then Articles 43-45 concerning the envisaged special agreements, the argument goes, would be completely superfluous. Practice also shows that all military operations following Chapter VII resolutions have been voluntary, in the sense that the resolutions have *authorised*, not *compelled*, Member States to act. Article 48 would refer to measures under Article 41 (and 40) exclusively.

The last provision to be found in Chapter VII is the famous Article 51, not only confirming that the legal right to self-defence is not compromised by the Charter, but also obliging the attacked Member State to report immediately to the Security Council what counter-measures it has taken. When the Council “has taken measures necessary to maintain international peace and security”, further military actions by the attacked State cannot by definition be considered as self-defence any more, and thus the general non-violence obligation in the Charter (Article 2 (4)) applies again. Article 51 is considered as constituting a limitation on the powers of the Council, since it has no right to prevent a Member State to defend itself, if the criteria that according to international law legalise self-defence are fulfilled and the Council does not offer effective protection.<sup>10</sup> The decisive issue is the actual situation on the ground – as long as the armed attack continues and the Council fails to effectuate counter-attacks that repel the perpetrator, the victim-state is entitled to strike back within the framework of international law. Hence, a Chapter VII resolution that prohibits or effectively prevents the exercise of self-defence, without stopping the armed attacks in one way or another, violates the Charter.

## 2.2.4 Purposes and Principles of the UN

### 2.2.4.1 Article 1

As I mentioned above, Article 1 (1) is divided into two sections, in accordance with the two different means to achieve the purpose of maintaining international peace and security that are set forth in this paragraph.

The first section clearly refers to enforcement measures under Chapter VII.<sup>11</sup> Actually, all the three troubling situations enumerated in Article 39 – threat to the peace, breach of the peace and act of aggression – are explicitly mentioned as phenomena that have to be fought against in order to maintain international peace and security. The following section begins with the phrase “and to bring about by peaceful means”, which indicates that

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<sup>9</sup> Gill, *supra* note 2, p. 59

<sup>10</sup> Goodrich etc., *supra* note 6, pp. 55-56, but also Gill, *supra* note 2, pp. 90-106, where a more comprehensive account is offered.

<sup>11</sup> For support of this interpretation: Goodrich etc., *supra* note 6, pp. 23-27, Conforti, *supra* note 8, p. 55, Gill, *supra* note 2, pp. 64-68

Chapter VII resolutions of the Security Council fall *outside* the field of application. The requirements of justice and conformity with international law do not apply to action under Chapter VII! Chapter VI seems to be the relevant part of the Charter in this case.

The drafting history of the Charter only confirms this conclusion, since it reveals that suggestions on further delimitation of the Security Council's decision-making was a highly debated issue. Small states pronounced their concern regarding the omnipotence of the Council at the San Francisco Conference, and wanted to restrain the competence of that forum in different ways.<sup>12</sup> The great powers accepted the demand to subject the "peaceful means"-section of the Paragraph to international law and justice, but refuted suggestions on adding that requirement to the first part. Efficiency and possibility to adjust action to political reality served as official motives to their resistance.<sup>13</sup> Still, other quite similar proposals were advanced – and rejected. Norway, for instance, suggested that a demand be inscribed in Article 24 (2) that action by the Security Council not only must accord with the Purposes and Principles of the Organisation, but also with Charter provisions in general. This seemingly harmless and self-evident proposal faced the same destiny as the thoughts about subjecting Chapter VII to legality and justice did.<sup>14</sup> The representatives of the great powers anticipated situations when the Council, on an interim basis, will have to violate certain provisions of the Charter in order to restore and maintain peace and security – the purpose of the Organisation. Another small state, Equator, expressed the following opinion:

Dans l'accomplissement des tâches résultant du fait qu'il est responsable du maintien de la paix et de la sécurité internationales, le Conseil de sécurité ne créera pas de nouveaux principes ou règles de droit, ni ne modifiera ceux qui existent mais observera et appliquera les principes et les règles du droit existant.<sup>15</sup>

Neither these thoughts were ever transformed into Charter provisions. The will of the great powers to create a competent body with ability to act in times of crisis, resulting in Articles 24 and 1 in their present form, stood firm. Mohammed Bedjaoui is apparently not satisfied with this state of affairs.

Il paraît d'ailleurs moins acceptable que jamais que des Etats souverains créent une Organisation internationale dotée de larges

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<sup>12</sup> See G. Simpson's article "The Great Powers, Sovereign Equality and the Making of the UN Charter", *AYIL*, vol. 21 (2001). See also M. Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité*, 1994

<sup>13</sup> Goodrich etc., *supra* note 6, p. 24

<sup>14</sup> M. Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité*, Bruxelles 1994, pp. 24-25

<sup>15</sup> *Ibid.*, p. 41. My translation: "In the accomplishment of tasks that result from the fact that it is responsible for maintenance of international peace and security, the Security Council shall not invent any new principles or rules of law, neither modify those that exist, but observe and apply existing principles and rules of law."



pouvoirs de contrôle et de sanction à leur rencontre, mais qui serait elle-même affranchie du devoir de respecter la Charte qui l'a enfantée et le droit international.<sup>16</sup>

The second section of Article 1 (1) refers to action under Chapter VI – pacific settlement of disputes. Justice and international law then, as noted above, become imperatives. What this means remains to be interpreted in each and every situation, and the matter will not be addressed any further here, since this thesis deals with Chapter VII.

Paragraphs 2 and 3 of Article 1 have one specifically important purpose each. The former mentions “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” as an object for the Organisation, and the latter enumerates, among other things, “promoting and encouraging respect for human rights and for fundamental freedoms for all”. As a consequence of the respect for self-determination of peoples, T. D. Gill argues that the Security Council is prohibited to impose any form of government on the population of a state.<sup>17</sup> When it comes to human rights, he stresses the obligation that rests upon the Council to ensure that human rights and humanitarian values are respected when carrying out sanctions or military enforcement measures against a state.<sup>18</sup>

In addition, some of the rules governing human rights and humanitarian law are considered as “peremptory norms of international law” (*jus cogens*), thus constituting a set of rules that the Council in any case, allegedly, is obliged to respect.

I specifically mention these two sections of Paragraphs 2 and 3 since they, due to the development of the UN-practice and international law, are considered as being of a more “legal” nature than the other ones enumerated in those Paragraphs. In this case, “legal” signifies that clear common standards have emerged and been adopted by the body of international law. This does not mean that the other objects enumerated are inferior in importance, *but in practice it is much more difficult to assess a breach against those other purposes, since no clear legal and moral standards have emerged*. Suffice it here to note that the Security Council is not allowed to contravene any of those purposes, not even when Chapter VII is invoked.

#### **2.2.4.2 Article 2(1) – sovereign equality**

What is the meaning of “sovereignty”? An historical survey shows us that the notion of state sovereignty had its theoretical breakthrough in 16<sup>th</sup> and

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<sup>16</sup> Ibid., pp. 17-18. My translation: “So it seems less acceptable than ever that sovereign states create an international organisation empowered with large powers of control and sanction on their behalf, but which would be detached from the obligation of respecting international law and the Charter that has given birth to it.

<sup>17</sup> Gill, *supra* note 2, p. 75

<sup>18</sup> Ibid., pp. 77-79

17<sup>th</sup> century Europe, affected by the political-religious developments at the time. *Rex imperator est in territoria sua* was the essence of the Machiavellian maxims. Princes should not anymore consider the Pope as being a superior ruler. Later on, the classical international lawyers and the first liberal philosophers made the famous analogy between states and human beings. The liberal self-determination of man was transposed on states – state sovereignty was born.

That this term, in addition of being a keyword in international law, also is a very problematic concept, is clearly shown by Martti Koskenniemi in his comprehensible dissertation *From Apology to Utopia: The Structure of International Legal Argument*.<sup>19</sup>

Koskenniemi contends that international legal argument always lacks consistency, due to the prevailing idea about state sovereignty. Modern international law is based on the liberal notion that moral is subjective, from which follows that no supreme authority should tell individuals how to live their lives. Individual consent is crucial. However, one confinement of the personal freedom has to be settled: no individual may infringe the right of other individuals to exert *their* freedom of choice.<sup>20</sup> Who may determine the prevalence of an infringement? Here we find, according to Koskenniemi, and many others by the way, the paradox of liberalism: someone has to set limits since man has always lived in societies, but the notion about subjective moral makes conflict-solving by third-party authorities impossible. If my neighbour decides to paint his house in a shock-pink nuance, he may argue that he exerts his inherent freedom/sovereignty to live his life, meanwhile I may answer him that he spoils my aesthetic experience during my evenings on the porch – that is, the freedom not to be disturbed. How could the conflict be settled? Liberalism remains silent. Since modern international law has adopted the liberal system, only transforming individuals into states, the same problem appears in conflicts between states, Koskenniemi concludes.<sup>21</sup>

The incoherence in modern international law leads to a legal reasoning that tries to hide the conceptual flaws with vagueness and an ever-ongoing switch between two mutually exclusive groups of arguments, which Koskenniemi chooses to name “ascending” and “descending”.<sup>22</sup> For example, State A and State B are involved in a conflict, which is referred to a third party for arbitration. State A argues that State B has to fulfil a certain commitment which, arguably, the two states have agreed upon. This is a purely ascending argument, referring to state *consent*, which according to the principle of sovereignty is a precondition for rules to be binding.

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<sup>19</sup> M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Helsinki 1989

<sup>20</sup> See for example J. S. Mill, *Om friheten* (a Swedish version), Lund 1998 (originally from 1859)

<sup>21</sup> See for example Koskenniemi, *supra* note 19, Chapter 2: “Doctrinal History: The Liberal Doctrine of Politics and its Effect on International Law”, pp. 52-130

<sup>22</sup> *Ibid.*, pp. 131-143

Without state consent, no binding law exists. Suppose that State B denies prior consent from its side – also an ascending argument. Now State A has to prove that State B actually has agreed to be bound by the relevant rule, *independently* of what State B thinks about the matter. The perspective suddenly becomes descending – State B's prior actions will be interpreted *by State A* and by a third party (the arbiter). But how can they know what State B *really*, subjectively, has consented to? The argument will inevitably become descending, referring to objective standards of interpretation. If State B replies that it has never accepted those standards, state A will, in order to justify its position, probably try to show the prevalence of tacit consent, which throws us back to an ascending perspective. And so on, either *ad infinitum*, or, more likely, until the arbiter has had enough and tries to compose a fair judgement.

Koskenniemi argues that a complete adoption of the liberal notion of sovereignty leads to the conclusion that everything that states do will be regarded as law, which deprives law its normative function. If law is what I do, how then can I know what to do? On the other hand, attempts to settle normative rules regardless of state consent will deprive them their precision and legitimacy. His compromising suggestion is, in brief, that states have to acknowledge certain common values as legally binding, being respected both in theory and in practice, without any pretensions concerning objectivity and natural law, nor any subjective consent in each matter. Thus, *legality is founded on legitimacy*.<sup>23</sup> No state can be completely sovereign.

The term “equality” is easier to grasp. Robert A. Klein provides us with a good explanation:

[A]ll states are corporate persons with a single will, and the same qualities or attributes philosophically applicable to human personality apply to them. In arriving at decisions affecting world order, therefore, inequality of power is irrelevant: all states have an equal voice, none entitled to a greater weight than another, which strongly implies that the will of the majority must prevail.<sup>24</sup>

The thought that states should be equated with human beings dates back to the classical 17<sup>th</sup> century philosophers Thomas Hobbes and Samuel Pufendorf. Hobbes drew an analogy between the states of the world and the struggling men in the Hobbsean state of nature.<sup>25</sup> Edwin Dewitt Dickinson writes:

Thus Hobbes prepared the way for the reception into the law of nations of the theory of natural equality. With him the premises were

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<sup>23</sup> Ibid., pp. 490-501

<sup>24</sup> R. A. Klein, *Sovereign Equality among States: The History of an Idea*, Toronto 1974, p. 9

<sup>25</sup> E. D. Dickinson, *The Equality of States in International Law*, Cambridge 1920, p. 75

complete. It remained for another to formulate the obvious conclusion that states are equal by the law and right of nature.<sup>26</sup>

The man that developed Hobbes' thoughts was Pufendorf. His naturalistic theories included the idea that men are equal by nature.<sup>27</sup> The previous equation between states and men, fully accepted by Pufendorf, then leads to the inevitable conclusion that all states are equal.

More interesting than dating theories in time is to find the moment in history when ideas about state equality first influenced real politics. The Congress of Vienna in the year 1815 was, according to Robert. A. Klein, the first occasion when the old notion about great power primacy in international relations faced questioning.<sup>28</sup> However, the rule that certain countries also formally should have larger influence over the future of Europe than others, especially due to their military power and, consequently, "paternalistic" responsibility, stood firm during the 19<sup>th</sup> century. The real breakthrough in terms of equality, or sovereign equality, was the second Hague Peace Conference in 1907.<sup>29</sup> The constitution of an arbitral tribunal was subject for discussion. Heads of Latin American states, like Ruy Barbosa (Brazil) and José Tible Machado (Guatemala), strongly advocated that each state should have one judge in the tribunal, and that all judges should have votes of equal weight.<sup>30</sup> These political leaders set forth the old analogy between states and human beings, which suddenly proved to be an effective weapon.<sup>31</sup> In 1907 the maxim that all men are equal, regardless of nationality or race, had probably gained more support than in the past century. So, the same equality should apply to states – the corporate entities that consist of men. State discrimination becomes racial discrimination. The arbitral tribunal never came into being, because of these conflicts.

Edwin Dewitt Dickinson argues in a publication dating 1920 that one may be a protagonist of equality among states, without pushing the application as far as the Latin American delegates did in 1907. Dickinson separates between "equality before the law" and "capacity for rights".<sup>32</sup> He only supports the former. Every state should be protected by some hard-core rules, but military and economic strength affects the capacity of incurring obligations and enjoying the corresponding rights. Dickinson concludes that it is *not* inconsistent with equality before the law if certain states have, for instance, stronger representation and voting rights in international organisations than others.<sup>33</sup> That status would follow from their large involvement, and real power, in international affairs. However, the question

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<sup>26</sup> Ibid., p. 75

<sup>27</sup> Ibid., p. 78

<sup>28</sup> Klein, *supra* note 24, p. 17 *et seq.*

<sup>29</sup> Ibid., p. 54

<sup>30</sup> Ibid., p. 54 *et seq.*

<sup>31</sup> Ibid., p. 61

<sup>32</sup> Dickinson, *supra* note 25, pp. 334-335

<sup>33</sup> Ibid., p. 335

that should be asked in this connection reads: could not every inequality be explained with reference to different capacities for rights? What is the essence of equality before the law? I will discuss this issue further in the analysis that ends this chapter.

Gerry Simpson tells the history of sovereign equality in the context of the UN Charter in his article “The Great Powers, Sovereign Equality and the Making of the UN Charter”.<sup>34</sup> Simpson shows how the clash of the differing interests of great powers and small states lead to the current, often bewildering and self-contradicting provisions of the UN Charter. In general, the five permanent members of the Security Council succeeded to enact their opinions to the extent that Simpson is ready to use the slightly mocking term “sovereign inequality”.

The effect of the collective security provisions is to entrench a form of sovereign *inequality*. It is not just that the great powers enjoy special powers in the realm of enforcement and institutional management but that their position in relation to the former has an effect on their sovereign power *vis à vis* other states. Chapter VII of the Charter, in effect, grades sovereignty on the basis of degrees of immunity of territorial integrity.<sup>35</sup>

Here Simpson refers to the fact that no state among the “P5” ever risks to be subjected enforcement measures, due to the right to veto. The Organisation contains two groups of member states, and in each one of them the states are equal in relation to each other, but the smaller group of P5-states is superior in relation to the other in terms of influence and the integrity of each state in that group. In the end, Simpson contends that “sovereign equality needs to be understood as a raft of principles, some of which survive the creation of semi-centralised constitutional orders, others of which are severely compromised as a consequence”.<sup>36</sup>

Is this an accurate mode to describe the position of sovereign equality in the Charter? The matter will be scrutinised.

#### **2.2.4.3 Article 2 (7) – domestic jurisdiction**

As a means of defence against accusations from other States in, for example, the field of human rights, Article 2 (7) has often been invoked by the accused. However, when it comes to Chapter VII resolutions, there is an *explicit provision* in the Paragraph that it “shall not prejudice the application of enforcement measures” under the mentioned Chapter. Once the Security Council has determined that Chapter VII is applicable in accordance with the criteria in Article 39, the “domestic jurisdiction”-rule is suspended. What issues, then, are entitled to the headline “essentially domestic

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<sup>34</sup> Simpson, *supra* note 12

<sup>35</sup> *Ibid.*, p. 153

<sup>36</sup> *Ibid.*, p. 158

jurisdiction”? The answer is clear, but its implications are not: international custom determines the limits from time to time.

#### **2.2.4.4 Expansion of authority: Article 2 (6)**

Article 2 (6) states:

- (6) The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

This provision is a result of bad experiences from the League of Nations, which had severe difficulties to handle aggressions committed by non-member states.<sup>37</sup> The problem that rises is legal: could the Charter legally bind non-members? In the international law of treaties, it is a well-established principle that third parties cannot be bound by a treaty, something that is expressed in the Vienna Convention on the Law of Treaties, Article 34. Article 103 of the Charter is irrelevant, since it, like the rest of the Charter, only applies to Member States. Thus, we cannot assess a formal obligation on all states of the globe to follow the Charter.

Ahmed Mahiou, writing in *La Charte des Nations Unies*, discerns two different interpretations of the Article.<sup>38</sup> The far-reaching version reads that the Principles of the Charter bind all states (legally?), since disrespect of those Principles automatically threatens the peace, which makes Article 2 (6) applicable. This equation of a breach against the Principles and a threat to the peace is not approved by the stricter version.

In practice, the Security Council has made use of Article 2 (6) in at least two important cases, namely the treatment of the racist regimes in Southern Rhodesia and South Africa. Paragraph 7 of Resolution 232 (1966) concerning the situation in Southern Rhodesia reads:

7. [The Security Council] *[u]rges*, having regard to the principles stated in Article 2 of the United Nations Charter, States not Members of the United Nations to act in accordance with the provisions of paragraph 2 of the present resolution<sup>39</sup>

Paragraph 2 establishes a comprehensive trade-embargo on Southern Rhodesia. This measure was followed by a number of Rhodesia-resolutions up until 1979, reiterating the same urge of compliance by all states of the world. In addition, in 1977 the Council laid South Africa under an obligatory arms-embargo that was claimed to apply also to non-member states (Resolution 418).<sup>40</sup>

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<sup>37</sup> Cot/Pellet, *supra* note 5, p. 137, and Goodrich etc., *supra* note 6, p. 59

<sup>38</sup> Cot/Pellet, *supra* note 5, p. 134

<sup>39</sup> Security Council Official Records, Twenty-first Year, S/INF/21/Rev. 1

<sup>40</sup> Security Council Official Records, Thirty-second Year, S/INF/33

At the time when the measures against these two racist regimes were taken, there were many more states than today that were outside the UN. Today, the world community and the UN are almost identical.

## 2.3 Analysis and Conclusions

### 2.3.1 The meaning of delegation

The statement that no state can confer power on an organisation that it itself never possessed has to be further clarified. That the Security Council is entitled to do things that states in general are not allowed to do under international law is obvious. What the States have delegated is not an anterior state competence to interfere in the matters and developments of fellow states, but it is their power, following from the principle of sovereignty, to decide to what regimes they want to subject themselves. If two states decide to completely merge into one single entity, they are free to do so. The delegation of powers to the UN and the Security Council is a delegation of jurisdiction over *the own territory* of each Member State. The UN Charter establishes new international law, which could be called *particular* – that is, it applies to the relations between the involved States. *Lex specialis derogat legi generali, lex posterior derogat priori.*

According to international law theorists there is, however, one thing that states are never entitled to violate, regardless of treaty-provisions, namely *jus cogens*-rules. Then, in accordance with the principle of non-delegation of powers that the state does not possess, the Security Council may never violate peremptory norms of international law. What the *jus cogens*-box contains is another matter, which, as already stated, cannot be closely examined here.

### 2.3.2 The spirit of the Charter

Articles 1 and 2 enjoy an explicit protection in the Charter against violations (Art 24). The avoidance to expressly mention justice and international law as binding guidelines when the Council professes its duties under Chapter VII is partly neutralised by Paragraphs 2 and 3 of Article 1, but also by Articles 2 (1) and (4) and the Charter Preamble. These provisions put together express the *spirit* of the Charter, which cannot be ignored when interpreting it. I would summarise the spirit in these three words: *maintenance of peace, respect of human beings, collective action.* Especially the last principle is important to have in mind, as it possesses a quite clear meaning: the Organisation has to keep all action that is carried out in its name under its direct control and responsibility.

Since the concept of implied powers seems to have gained support both in literature and in the ICJ, the spirit of the Charter has become even more important as a counterweight to the extremely vast competence of the Council.

### **2.3.3 Some are more equal than others**

The Charter's reference to "sovereign equality" pushes us into a theoretical minefield. Indeed, these two words constitute somewhat the hard-core of international law, but this matter of fact also means that the vagueness and highly debated inconsistencies inherent in the referred "core" will not stop troubling us.

Member States are supposed to be both sovereign and equal. My brief analysis of these two terms shows that the former theoretically is more problematic than the latter. In practice, both are difficult to apply. Actually the UN Charter itself is a magnificent evidence of this difficulty. Is it correct to say that the UN-system is "based on the principle of the sovereign equality of all its Members", as Article 2 (1) states? Already on a formal level, the authorities of the Security Council certainly put this maxim to the test. No doubt, the Chapter VII authorities express the notion that great powers, thanks to their strength and possibility to act, also formally should have more power and more responsibility than other states. Could you still contend that both state sovereignty and equality are reconcilable with the rest of the UN Charter? The main issue is how to interpret "based on". If this means that the constitution and operation of the organisation have to be in accordance with the principle of sovereign equality, which is the only way that I can interpret it, there are conflicts with other clauses in the Charter.

The term "sovereignty", though, does not cause any mayor problems when standing alone. I have failed to find any contradictions with other parts of the Charter, and I would even say that such a finding is impossible in the case of treaties of this kind. Member States have freely subordinated themselves to the Charter – how then can their sovereignty become infringed in the Charter text? Only when UN organs go further than Charter rules concede, can we talk about violations of sovereignty. Thus, a case study is necessary in order to assess such violations. Important to note already in this theoretical chapter is that the authoritative interpretation of the Charter changes along with time and politics – something that has to be taken in mind in each and every case.

As stated above, sovereignty in itself is a notion followed by contradictions, but there is no room for any further investigations in that matter.

When it comes to "equality", the coherence of the Charter starts to dissolve. Is it possible to reconcile the principle of equality among nations with the articles concerning permanent membership in the Security Council for five



UN Members and their right to veto resolutions? Of course, you can try to justify it on the grounds of the difference between “equality before the law” and “capacity for rights”. But then, could you sincerely hold that France and Senegal are equal before the law? The reason that I answer no to this question is not, primarily, the permanent seat of the French delegation, and the fact that it takes part in the resolution-making process. The reason is that France may always block a Chapter VII resolution that would strike against her. She is immune against the only coercive, potentially military, sanction-system for the preservation of peace and security in which the whole world is involved. Thus, France and Senegal are not equal before the law, and Article 2 (1) is violated already in the Charter itself, and cannot be taken seriously.

However, for the sake of credibility in analysis by trying as many paths as possible, I will also examine the less likely, but perhaps not excluded, interpretation of the words “based on”. Suppose that “sovereign equality” refers to some original position of the Member States *before they ratified the Charter*. Could we then reconcile “equality” with the Charter? Well, then we can always try to justify obvious inequalities with the same argument that was used to justify the loss of sovereignty for Members. The Charter in itself expresses lack of equality, but it is nevertheless a treaty that Member States have voluntarily ratified on an equal footing, the argument goes. It follows from state sovereignty that every state is entitled to confer that sovereignty to someone else, also if inequality is the result. The important matter is under which conditions agreement was made. This type of reasoning has much in common with the liberal view on society as being a contract between individuals – also some of the flaws of that theory. Have the Members really agreed to be unequal? What can they do if they suddenly do not? Leave the UN? Today the UN system and international law are practically the same thing, as the list of UN Members in comparison with a world map only lacks a handful of very small island-states. As stated in Article 2 (6) (see section 2.2.4.4) of the Charter, the UN shall also insure that *non-member states* comply with all the Principles laid down in Article 2. Suppose that the Security Council interprets situation X as a threat to the peace, and that state Y (*a non-member state*) that is involved in the situation claims to be unfettered by any Council decisions. Theoretically, the Council has no legal right to bind state Y. In practice, the dispute will be settled in accordance with the will of the strong side. To leave the United Nations in all senses of the word is not an option today – the Rhodesian case shows us that it was hard enough already in the sixties for non-members that did not want to enforce the embargo. Article 2 (6) in combination with Article 39 and the great number of powerful Member States produces an obvious imbalance between the UN and a non-member state. If one or a couple of average sized nations would leave the Organisation today<sup>41</sup>, this would certainly not imply a protection against measures taken by the Security Council. As citizen of a state, you cannot do anything but emigrating if you wish to denounce the presupposed societal contract. States, however, cannot

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<sup>41</sup> It is noteworthy that there is no denunciation/withdrawal-clause in the Charter.

move, and will still have to face the current world order, including the UN system. This system contains the great powers of the world, which makes it legitimate. *The legality of UN decisions is founded on its legitimacy.* We can hereby conclude that the inequalities would persist from the state point-of-view after it leaving the UN. Not even an unusual interpretation of the words “based on”, leading to contract theory, can save the Charter from its manifest incoherence when it comes to equality of states.

### **2.3.4 Do Member States have to obey?**

The question how to interpret the last words of Article 25 is not very difficult to answer. Charter-based limits on the powers of the Council would in effect become null and void if Member States were obliged to carry out whatever a Chapter VII resolution could come up with. Of course, one may argue that the obligation to obey in the specific case is absolute, but that repeated breaches of the Charter in the long run would deprive the UN system its legitimacy – a circumstance that would induce the Council to respect the power-limitations. I am not prepared to support this view. What if the Council decided to oblige one state to commit horrible crimes against humanitarian law? Should that state carry out the decision, and hope that it would bring the Organisation into a mayor crisis?

Who may decide that a violation of the Charter is at hand? That is a later issue, which will be dealt with in my final conclusions.

# 3 Case Studies

## 3.1 The Gulf War and Its Aftermath

### 3.1.1 Summary of events

On 2 August 1990 the Iraqi army began the invasion of the small neighbour-state Kuwait. This clear act of aggression and violation of Article 2 (4) of the UN Charter immediately alerted the Security Council, which adopted Resolution 660 on the same date.<sup>42</sup> The resolution condemned the Iraqi invasion and demanded an immediate withdrawal of forces, explicitly referring to Articles 39 and 40 of the Charter. Notwithstanding this, the Iraqi invasion was completed. The subsequent events mark a new chapter in the history of the United Nations. Resolution 661 of 6 August<sup>43</sup> imposed comprehensive trade-sanctions upon Iraq and established a Sanctions Committee with the power to implement those sanctions. In the resolution text the Council specifies that it acts “under Chapter VII of the Charter” – an expression that from that moment became the standard reference to the legal basis of the decisions. A whole group of resolutions followed the important 661, many of which contained provisions concerning the protection of Kuwaiti and third-state nationals, diplomatic missions (Iraq violated international law by intrusions in foreign missions and by taking hostages) and specifications of the already imposed sanctions.<sup>44</sup> Resolution 665 of 25 August is historic, enforcing Resolution 661 in a way that was to become the standard method of the Council when forcible action was deemed necessary. Paragraph 1 reads:

1. Calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)<sup>45</sup>

The Council thus, in a quite general manner, invested Member States with the right to forcible action in the name of the UN. This was repeated in even more general terms in the famous Resolution 678 of 29 November, which is a consequence of Iraqi non-compliance with the often reiterated demands on

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<sup>42</sup> Security Council Official Records: Forty-fifth Year, S/INF/46

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., Resolutions 664, 666, 667, 669, 670, 674, 677.

<sup>45</sup> Ibid.

withdrawal.<sup>46</sup> A coalition of states, with the US as a leading actor, had already deployed sea- and land forces in the region, preparing for a war. In Resolution 678, “[a]cting under Chapter VII”, the Council, provided that Iraq still had not withdrawn its forces from Kuwait, *authorised* Member States to attack Iraq after 15 January 1991 in order to restore peace and security in the region.

As well known, the war began immediately after the time had run out due to Iraqi refusal to comply, and Iraq was heavily attacked and defeated by the “Coalition of Willing”, that is, the US and its allies. The cease-fire and the following peace were dictated by Council Resolutions 686 and 687.<sup>47</sup> The latter is a very comprehensive peace of legal act, imposing a complicated, controlling peace-regime upon Iraq, which includes boarder demarcation, liability issues, trade sanctions, weaponry prohibitions and inspections.

### 3.1.2 The legality of the attack

#### 3.1.2.1 Collective self-defence?

There is a very rich flora of articles that comment the legal aspects of the Gulf War and the preceding events leading to it. No wonder – for the first time since the Korean War in 1950 a full-scale war was carried out in the name of the UN. Furthermore, Chapter VII was put to the test and interpreted in a way that provoked many international lawyers.

Firstly: could the military operations against Iraq be classified as collective self-defence? In fact, one commentator, Eugene V. Rostow, takes that very position in an article in the *AJIL*. According to him, Resolution 678 is *only* an encouragement of collective self-defence of Kuwait. The word “authorizes” would not be but an affirmation of that inherent right.<sup>48</sup> Rostow, though, takes an extreme standpoint that does not find much support among other scholars. In an often-cited article in the same volume of *AJIL* Oscar Schachter contends that self-defence is a *possible* legal basis for the Gulf War, which, however, would not exclude other concurring legal grounds.<sup>49</sup> But other international lawyers attack the view that the Gulf War is a case of collective self-defence – exclusively or in company with others. Yves le Bouthillier and Michel Morin write in the *CYIL* that sanctions in accordance with Article 41 put an end to the right to “*légitime défense*”.<sup>50</sup> In any case, le Bouthillier and Morin contend, Resolution 678, adopted on 29 November 1990, expresses an ultimatum that does not run out until 15

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<sup>46</sup> Ibid.

<sup>47</sup> Security Council Official Records: Forty-sixth Year, S/INF/47

<sup>48</sup> E. V. Rostow, “Until What? Enforcement Action or Collective Self-Defence?”, *AJIL*, Vol. 85 (1991), pp. 508-509

<sup>49</sup> O. Schachter, “United Nations Law in the Gulf Conflict”, *AJIL*, Vol. 85 (1991), pp. 457-460

<sup>50</sup> Y. le Bouthillier et Michel Morin, “Réflexions sur la validité des opérations entreprises contre l’Iraq en regard de la Charte des Nations Unies et du droit canadien”, *CYIL*, Vol. 29 (1991), p. 167

January 1991. This would imply that no state was allowed to attack Iraq between those two dates.<sup>51</sup> How, then, is it possible to argue that the right to self-defence subsists? Christian Dominicé produces a fruitful contribution to the debate in the *EJIL*. He discerns between *individual* and *collective* self-defence, and he argues that the former remains unaffected by the measures taken by the Security Council. “Le Conseil de sécurité n’a pas le pouvoir d’interdire à un Etat de combattre sur son propre territoire contre un agresseur”.<sup>52</sup> Consequently, the Council would not have had the legal competence to prohibit attacks launched by an official Kuwaiti resistance-movement on the Iraqi military, as long as those attacks would have occurred within the boundaries of Kuwait. Even the collective self-defence remains legally valid, according to Dominicé, unless the Council *explicitly* puts an end to it – which, he argues, is exactly what happened on 29 November 1990. Dominicé interprets the Resolution as a suspension of certain prerogatives (the inherent right of collective self-defence), in force until 15 January.<sup>53</sup>

Another way to put the proposition of collective self-defence to the test is to scrutinise the development *after* the big clash. Only the protagonist of the idea that collective self-defence continued to apply, that is Eugene V. Rostow, addresses that issue when suggesting that the right to self-defence not only allowed the coalition forces to repel the Iraqi military from Kuwait, but also to disarm Iraq and even occupy her completely.<sup>54</sup> In order to base this extremely far-reaching self-defence legally, Rostow invokes the Cuban missile crisis in 1962, when US naval forces carried out offensive military action to stop Cuba from enlarging her arsenal of arms, which, unless a treaty stipulates otherwise, is within the sovereign realm of every state. From that case would follow that forceful disarmament of other states, as a means of self-defence, is legal. As I mentioned above, Rostow is alone among the scholars that I have read in assessing whether or not the Gulf War itself could fall within the legal requirements of self-defence. Do the others find the answer to that question self-evident? Probably, I would say.

To summarise the debate: the position taken by the majority of the international legalists, explicitly or implicitly, is that collective self-defence is excluded as a legal basis for each and every military action against Iraq.

### **3.1.2.2 Lawful action by the Security Council?**

Resolutions 665 and 678 invented a method that from then on became applied in all military interventions sanctioned by the UN. When the Security Council was faced with the Iraqi invasion of Kuwait, Article 43 of the Charter – that is, the military muscles of the Organisation – was still

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<sup>51</sup> Ibid., p. 168

<sup>52</sup> C. Dominicé, “La sécurité collective et la crise du Golfe”, *EJIL*, Vol. 2 (1991), p. 102. My translation: The Security Council does not possess the power to forbid a State to fight against an aggressor on its own territory.

<sup>53</sup> Ibid., pp. 103-104

<sup>54</sup> Rostow, *supra* note 48, p. 514

(and still is) a dead-letter provision. The anticipated special agreements between the Council and Member States, which would oblige the latter to hand over military forces to the Organisation upon the call of the Council, never came into being. What, then, about the applicability of Article 42? Does the lack of special agreements mean that the Security Council lacks “teeth”? Some scholars, like Burns H. Weston, argue that that is the exact case.<sup>55</sup> Article 42 is considered to be dependent upon 43, meaning that the Council cannot take any military action at all under Chapter VII. This interpretation of Chapter VII is well in line with Article 106, in which some kind of a subsidiary basis for military action, pending the coming into force of special agreements, is established. The Article is ambiguously worded, referring to a previous declaration/treaty between the four main Allied States in 1943. It speaks about “joint action” of the Permanent Five that “may be necessary for the purpose of maintaining international peace and security”. Since Article 43 has become what it is, there is no doubt, in my opinion, that Article 106 is still in force. However, the Council has never referred to it in its resolutions, and two writers have also excluded it as a legal basis for the actions against Iraq.<sup>56</sup>

A vast majority of scholars, though, has adopted a less categorical view than Weston, or, with the words of Helmut Freudenschu , a “common law approach”.<sup>57</sup> Thomas M. Franck and Faiza Patel belong to this group, concluding that Article 42 applies, since lack of agreement under Article 43 has “led to organic growth and the alternative creation of police action through invocation of Article 42, which does not require special agreements”.<sup>58</sup> Dominicé holds that one cannot use Article 42 as legal ground, but that Chapter VII *in general* would be a firm basis. As long as the authorisation of the use of force is in conformity with the spirit of the Charter, the action would be a part of the *implied powers* of the Council.<sup>59</sup>

As specified in the summary of events above, the Council, lacking military forces under its direct control, delegated the implementation of the sanctions and the military attacks to individual states in the form of a general authorisation. So, what the majority of legal writers has accepted is the competence, in principle, of the Council to delegate such tasks. However, most doctrinal writers also emphasise that such a delegation must be subjected certain conditions. It is the non-existence of such terms that has provoked the heaviest criticism against the Gulf War.

The Canadian scholars le Bouthillier and Morin, cited above, speak about a “complete abdication” (“abdication totale”) of the Council, when deciding

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<sup>55</sup> B. H. Weston, “Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy”, *AJIL*, Vol. 85 (1991), p. 519

<sup>56</sup> Bouthillier/Morin, *supra* note 50, p. 155

<sup>57</sup> H. Freudenschu , “Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council”, *EJIL*, Vol. 5 (1994), No. 4, p. 526

<sup>58</sup> T. M. Franck and Faiza Patel, “UN Police Action in Lieu of War: ‘The Old Order Changeth’”, *AJIL*, Vol. 85 (1991), p. 66

<sup>59</sup> Dominicé, *supra* note 52, pp. 100 and 105

upon a general concession for any state in the world that wishes to attack Iraq to do so.<sup>60</sup> They ask themselves about the boundaries of the mandate. Which objectives were to be achieved? What kind of operations was intended? The writers strongly contend that the Council should have stipulated a number of conditions in order to remain in control over the operations. Anything else would be a clear violation of the Purposes and Principles of the UN. They do not specify exactly what conditions that should have been set, but the implications of their arguments *against* the conducted operations are nevertheless clear. Primarily, if an attack was necessary, the Security Council should have activated the Military Staff Committee (Charter Articles 46-47), which then would have given the orders. If this would have turned out to be impossible, perhaps due to US refusal, at least a clear delegation of powers to a designated group of states should have been made. Delegate states should then have been instructed with unequivocal orders concerning the limits of the task: the purpose of the war, acceptable means of warfare, etc. According to le Bouthillier and Morin, the “authorising but not controlling”-system opens up for any attacking state to put its own narrow interests prior to the common, which would be exactly what the Charter based, collective security-mechanism is designed to suppress. Furthermore, they argue that the decision-making rules of the Council makes it possible for one single permanent member to block a termination of an open, unlimited war-mandate. If, instead, joint action by the P5 in the Military Staff Committee would be the customary procedure, such a risk of putting the sanctioned state in a continuous outlaw status because of one veto in the Council would practically disappear. The Committee, which is the Charter based executive organ that was supposed to deal with the resolutions providing for forcible sanctions, could not act unless at least a majority – and maybe all – of the P5 states co-operated, the argument goes. Then, the vetoing of a termination of a war-resolution would not have any practical effect, since the actual waging of the war would be an exclusive competence of the P5 *together in close co-operation*.

Since the Preamble and Chapter I of the Charter have such a focus on peaceful development and collective action and responsibility, le Bouthillier and Morin conclude that the Gulf War was *ultra vires* – a violation of the UN Charter. They gain support from other commentators, like M. S. Rajan, whose article in *IJIL* is loaded with indignation against the policy of the Western great powers in the war. He uses the term “blank cheque” to describe Resolutions 665 and 678, and compares the committed acts of the years 1990-1991 with the omitted ones during the previous 40 years. Likes should be treated likely in the name of justice, he reiterates continuously.<sup>61</sup> Also Jules Lobel and Michael Ratner share the le Bouthillier/Morin-opinion. They stipulate three requirements on violence-authorisations: (1)

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<sup>60</sup> Bouthillier/Morin, *supra* note 50, p. 158. *In order to reduce the number of footnotes, I direct the reader to the referred article as a whole, instead of providing one note for each specific piece of information.*

<sup>61</sup> M. S. Rajan, “The UN Security Council and the Iraq-Kuwait Conflict (1990): An Exercise in Hypocrisy by Member Nations”, *IJIL*, Vol. 31 (1991), pp. 39-73

non-acceptance of any implicit – and thereby vague – authorisations; (2) a narrow interpretation of the explicit authorisations; and (3) termination of the mandate when the goals of the operations are met and cease-fire established.<sup>62</sup>

### 3.1.3 The sanctions regime

The comprehensive Resolution 687 of 3 April 1991 should indeed be examined from a Charter perspective. It settled how the boarder-demarcation between Iraq and Kuwait were to be handled; fixed a demilitarisation zone; provided for weapon-destruction and inspections; pointed out Iraq as liable under international law for the damages on foreign property, and thus provided for a compensation-fund financed by Iraqi petroleum export incomes; and, finally, established a sanction regime with the Resolution 661-committee in charge. I find that the conformity with the Charter of the two last-mentioned impositions is more doubtful than is the case with the others, hence I will deal only with them. A glance at the literature confirms that it is the sanctions in particular that have awakened the commentators.

Paul Conlon provides us with an article in *GYIL* full of criticism against the sanction system.<sup>63</sup> According to Resolution 687, restrictions on Iraqi import do not apply to food, medicines and “material and supplies for essential civilian needs”.<sup>64</sup> These exempted goods are in turn classified into three categories, namely (1) goods that the export-state does not have to declare; (2) goods that must be notified; and (3) so called “No-Objection Items”, that is, goods that may not enter Iraqi territory unless a specific authorisation has been obtained by the exporting state from the Sanctions Committee. That Committee is composed by Security Council Member States. One single Member of the Committee can veto a concession. When it comes to scrutiny, it is virtually non-existent. Conlon explains this by stating that Security Council Committees in general avoid asking states to provide information about what is happening in the field, as such a request would be interpreted as lack of confidence. He continues his critique by giving a quite horrid picture of a corrupt system of concessions that are traded between states and companies. The lack of transparency is the main factor to blame, according to Conlon.<sup>65</sup>

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<sup>62</sup> J. Lobel and M. Ratner, “Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime”, *AJIL*, Vol. 93 (1999), pp. 124-154

<sup>63</sup> P. Conlon, “The Humanitarian Mitigation of UN Sanctions”, *GYIL*, Vol. 39 (1996), pp. 249-284. *In order to reduce the number of footnotes, I direct the reader to the referred article as a whole, instead of providing one note for each specific piece of information.*

<sup>64</sup> Resolution 687, *supra* note 47

<sup>65</sup> For yet another critical view, see M. Koskenniemi, “The Police in the Temple. Order, Justice and the UN: A Dialectical View”, *EJIL*, Vol. 6 (1995), No. 3, p. 345



All Iraqi export is, unless the Committee gives exceptions, completely forbidden in Resolution 687. A certain volume of petroleum constitutes an exception – the incomes from which the damage-fund is supposed to be built.

### 3.1.4 Commentaries

It is my firm position that we must examine the legal right of the UN to use offensive violence when evaluating the legality of the forcible repulsion of Iraqi forces from Kuwait. This statement may seem like a tautology, but arguments have been made that the attack in fact was a case of self-defence. However, to base the operations on the inherent right to collective self-defence, and thus make the delimitation of the powers of the Security Council irrelevant, has proven to be futile. The Security Council spelled out in Resolution 678 that it *acted* under Chapter VII. Furthermore, the ultimatum which stretched between 29 November 1990 and 15 January 1991 implied that the Council did not allow any attack during that period. An otherwise legal right to strike-back against Iraqi forces was thus suspended during that period, meaning that the Council was in charge.

In addition, the comprehensive military campaign conducted by the “Coalition of Willing” went way beyond the legal limits of self-defence, at least at the time (more doubtful today). Three prerequisites have to be fulfilled in order to classify a counter-attack as lawful: necessity, imminence and proportion. The interpretation of those standards in the year 1991 was too narrow to allow the kind of massive attacks and far-reaching, military intrusions that were committed by the allied forces.

When it comes to the lawfulness of Resolutions 665 and 678, I have to admit that le Bouthillier and Morin make a strong case against it. For sure, UN Charter law has to develop and adapt itself to prevailing circumstances, and in 1990, as well as today, that means *inter alia* that Article 43 is a dead-letter provision. But why did the Security Council simply ignore to designate the states that would have had the right to carry out the attacks, or at least establish the procedure of designation? Why were no precise goals set up, the fulfilment of which would put an end to the war mandate? The answer is spelled convenience, and maybe also trust in the main actor, its powers and assumed good will. However, I cannot but consider the blank-cheque given, especially in Resolution 678, as a breach of the UN Charter – at least the *spirit* of the provisions. War is regarded as a negative, prohibited phenomenon, with only two *exceptions*. It is a well-established principal within the art of law-interpretation that exceptions are to be interpreted narrowly. In the case of the UN Charter I also find strong normative reasons for such an interpretation.

Concerning Resolution 687 I find that the contents sometimes overlap the field of Chapter VI. Is that to say that we are facing yet another violation of the Charter? I have difficulties to adopt a firm standpoint in that matter. The

provision of Iraqi liability and payment of damages seems doubtful from a Charter point of view. One can argue that Chapter VI establishes some kind of “elastic” limit, since the Council ought not to use its power of imposition too often in matters that were reserved for voluntary negotiation and agreements. Furthermore, one can continue by noting that boarder-demarcation, and not to mention assessment of liability under international law for damages, are not meant to be imposed by Chapter VII resolutions which must pass through the door of Article 39. Hence, ones again we may be faced with a violation of the Charter-spirit, but also a much too wide interpretation of Article 39. However, it could be argued that the liability-issues could be based on the *implied, general powers* of the Council, thus not being based on Chapter VII at all. I see that as a possibility. The inspection regime, in any case, seems to have a stronger basis in the Charter (threat to the peace).

In sum, it is hypocritical not to admit that the normative view of the commentators of the Gulf War, as well as international law in general, effects the interpretation of treaties and custom. I have already presented my view that international law and politics (legitimacy) are strongly interrelated. Reading the texts of highly distinguished scholars only confirms my position: aversion against war as a means, criticism against US policy, but also the opposite views in those fields – all those normative standpoints load the texts. The matter is really transparent, even if the writers clay their hopes and indignation in the clothes of legal argument.

## **3.2 Sanctions against Libya**

### **3.2.1 Summary of events**

In December 1988 a large US aircraft exploded in the skies over the Scottish village Lockerbie, causing the death of about 270 persons. It was concluded that the plane had carried a bomb, and a search for the assassins began. After a while, the Governments of the US and the UK claimed that two suspects were residing in Libya, being Libyan citizens, and urged the Libyan Government to extradite them immediately. Libyan refusal lead to Resolution 731 in the Security Council on 21 January 1992<sup>66</sup>, which reiterated the demand on extradition. The resolution does not refer to any Charter provisions, and the language indicates that it is a non-binding resolution under Chapter VI.

After the adoption of Resolution 731, the case developed in an unexpected direction. On 3 March 1992 the Libyan Government filed an application to the International Court of Justice,<sup>67</sup> claiming that the US and the UK were

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<sup>66</sup> Security Council Official Records, Forty-seventh Year, S/INF/48

<sup>67</sup> *ICJ Reports*, 1992, p. 3

taking illegal action against Libya in the Lockerbie affair, with reference to the “Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation” done at Montreal on 23 September 1971 (the Montreal Convention) and to general, international law. This initiated Court proceedings, meaning that the Security Council and the ICJ had been seized with cases that overlapped.

On 31 March 1992 the Council adopted Resolution 748 (by the way, three days after the closure of oral proceedings in the ICJ regarding provisional measures against the US and the UK, but before the deliberations of the judges). Now, the Council explicitly invoked Chapter VII and decided on an embargo against Libya, which *inter alia* consisted in an aircraft blockade, prohibition of selling arms and reduction of diplomatic missions.

The later developments are not within the scope of this investigation. Neither is the delicate relationship between the Council and the ICJ, which drew lots of attention at the time and was the focal issue of many articles. My question is on the correspondence of the two mentioned Resolutions with the UN Charter, and if parts of the ICJ-judgement are referred to (or dissenting opinions), the purpose is to shed light on that issue.

### **3.2.2 Lawful action by the Security Council?**

To start with Resolution 731, there is no doubt that it is solely based on Chapter VI.<sup>68</sup> However, already here Bernhard Graefrath contends that at a very clear and formal rule was violated.<sup>69</sup> Article 27 (3) of the Charter states that a Council Member that is a party to a dispute addressed in a resolution proposal under Chapter VI “shall abstain from voting”. Thus, the US and the UK violated that provision, being parties to the relevant dispute, Graefrath concludes. He also points at Article 2 (7) – the rule of non-involvement in domestic affairs (which may only be set aside by a Chapter VII resolution).<sup>70</sup> The rule of abstention from voting in disputes where the state in question is directly involved is not brought up by the Swedish scholar Inger Österdahl. She states that “members of the Council may very well decide cases in which they are themselves parties both under Chapters VI and VII”.<sup>71</sup> Should we interpret the word “may” as a summary of the factual development, or as a reference to written provisions in the Charter? This remains unclear. The keyword in the interpretation of Article 27 (3) discussion is “dispute” – see further in my commentaries.

Of course, Resolution 748 is more debated. The step to Chapter VII was taken without the appearance of any new circumstances in the case, except

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<sup>68</sup> See for example B. Graefrath, “Leave to the Court What Belongs to the Court – The Libyan Case”, *EJIL*, Vol. 4 (1993), No. 2, pp. 187-188

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, p. 193

<sup>71</sup> I. Österdahl, *Threat to the Peace. The interpretation by the Security Council of Article 39 of the UN Charter*, Uppsala 1998

for the fact that an oral procedure in the ICJ had been held and a scrutiny of the case from an international law perspective was to begin. In what sense were the requirements of Article 39 met? Graefrath holds that it is the failure of Libya to comply with Resolution 731 that is turned into a “threat to the peace”.<sup>72</sup> He is very critical to this extremely free interpretation of that notion. So is Bernd Martenczuk, another participator in the debate. He argues that “any situation within the meaning of Article 39 must have a demonstrable link to the use of armed force in international relations”.<sup>73</sup> He also contends that any distinction between Chapters VI and VII becomes obsolete if there were no limits on the scope of the latter.<sup>74</sup> Why dividing the rules concerning possible Council resolutions into two different Chapters, if it turns out that everything could be covered by one?

In the Libyan case, legal doctrine seems to be united around a critical point of view. Even four judges in the ICJ expressed openly that the action taken by the Council was unsatisfactory.<sup>75</sup> Österdahl’s writings about the case are more of a “on one hand – on the other hand”-style, thus lacking any clear position in the matter.

### 3.2.3 Commentaries

I do not find any reasons to hesitate: both Resolutions 731 and 748 violated the Charter.

The participation of the US and the UK in the voting on adoption of 731 means that those states were judges in a case in which they were parties. But was the case a “dispute” in the meaning of Article 27 (3)? Well, the P5-states may have classified the case as a “situation”, which is a vague UN-term that could mean almost anything which is less grave than a full-fledged war. One cannot find any guidance in Resolution 731, where classifications are avoided. Neither Bernhard Graefrath nor Ingrid Österdahl pronounce themselves in this matter. However, as I see it, if Article 27 (3) is to have any real meaning, this presupposes that at least some cases cannot be considered as anything else but disputes, and if the Council calls a cat a dog, it should not be able to do that in peace. Is the Libyan case a dispute? The attributes are there: opposing sides with a limited number of states and the applicability of international law.

It seems to be easier to assess a breach of Article 2 (7) (domestic jurisdiction), but also against the whole spirit of Chapter VI, where concepts such as justice and international law (see Article 1 (1)!) are embedded. To try to settle a quarrel between two opponents peacefully, with one of them taking part in the voting for solutions, is both unwise and unjust. The fact

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<sup>72</sup> Graefrath, *supra* note 68, p. 196

<sup>73</sup> B. Martenczuk, “The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?”, *EJIL*, Vol. 10 (1999), No. 3, p. 544

<sup>74</sup> *Ibid.*, p. 542

<sup>75</sup> *ICJ Reports*, *supra* note 67, Judges Evensen, Trassov, Guillaume and Aguilar Mawdsley

that both the US and the UK are veto-states does not make the situation any better, to say the least.

I consider Resolution 748 a Charter-breach due to the erasure of all limits of the term “threat to the peace” that that Resolution implies, alternatively because of the excessive use of implied powers. To address the first basis: exactly how did they determine the existence of a threat? Could it be that two suspected murderers with assumed ties to the Libyan State were residing in Libya, with a good chance of escaping severe and just punishment? If that standard were applied consistently, I guess that a fairly large amount of states immediately would be subjected Chapter VII embargoes. Furthermore, since the Council may act without any requirements on public evidence and a fair court-procedure, suspected states may become convicted without a single chance of defending themselves.

If the threat consisted in a possible aggravation of the conflict between the parties, it is appropriate to speak about a complete eradication of justice. So, if one state strongly urges another to commit an act that it has no legal obligation to do, could this be a sufficient base for a Chapter VII resolution against the refusing state, in order to avoid an escalation? Of course, such a resolution should be directed against the *demanding* state, if the situation risks ending up in military action from that party for the sake of enforcing its demands. Otherwise, the Security Council would in fact instigate aggressive and threatening behaviour among states, since a reward in the shape of a favourable Council resolution then would be expected. This is as far from the UN Charter as one can get.

Now, to the second alternative: could both Resolutions be justified as based on the implied powers of the Council? I do not see that as an option. They clearly violate the principles of the Charter and fundamental principles and rules of international law, which is not permitted when using those powers. Thus, even that door is closed.

The dispute (I have difficulties to call it anything else) between the US/UK and Libya was a typical case for Chapter VI. The Council should have intervened in accordance with the rules thereunder, and – in case of dangerous aggravation – decided upon recommendations in a correct manner. That is, if breaching the Charter and violating its spirit is seen as a bad thing to do.

## 3.3 The War-Crime Tribunal for the Former Yugoslavia

### 3.3.1 Summary of events

As well known, the war between states and ethnic groups in former Yugoslavia was full of cruelty and the sides engaged in incredible violations of humanitarian law. The Council was seized by the matter, which *inter alia* came into expression in Resolution 764, which stated that persons violating international humanitarian law were *individually* responsible.<sup>76</sup> On 22 February 1993 the Security Council adopted Resolution 808 with reference to Chapter VII, ordering the establishment of an international war-crime tribunal and demanding the Secretary General of the UN to present a report on the implementation of the resolution.<sup>77</sup> On 25 May 1993 the Council had received such a report, and adopted Resolution 827 under Chapter VII as well, converting the report into a legally binding document.<sup>78</sup> The Council expressed its conviction that the Tribunal, which was to be situated in The Hague, would contribute to restoration and maintenance of peace. The mandate of the Tribunal, that is the period of jurisdiction, was settled to begin on 1 January 1991 and continue to a date to be determined later on by the Council. Thus, retroactive jurisdiction was accepted.

Two Trial Chambers and one Appellate Chamber composed the Tribunal. It was going to judge with reference to crimes ordered in two groups: war crimes and crimes against humanity. These crimes are formulated in the 1907 Hague Conventions, the Nuremberg judgements, the 1949 Geneva Conventions (including common Article 3) and the Genocide Convention, so reference was made to those legal documents that bind all nations on the globe.

### 3.3.2 Lawful action by the Security Council?

May the Security Council establish international tribunals with compulsory jurisdiction? The issue was actually addressed by the Tribunal itself in its first case, namely *Prosecutor v. Tadic*<sup>79</sup>, which is referred in detail by Faiza Patel King in *Emory International Law Review*.<sup>80</sup> Since the judgements of

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<sup>76</sup> For a good summary, see J. C. O'Brien, "The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia", *AJIL*, Vol. 87 (1993), pp. 639-659

<sup>77</sup> Security Council Official Records, Forty-eighth Year, S/INF/49

<sup>78</sup> *Ibid.*

<sup>79</sup> Cases No. IT-94-I-T and IT-94-1-AR72, in A. Klip/G. Sluiter (eds.), *The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Vol. 1, 1999, pp. 13-30 and 33-84

<sup>80</sup> F. P. King, "Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers Under Chapter VII of the Charter", *EILR*, Vol. 10, No. 2 (1996), pp. 509-591. *In order to reduce the number of footnotes, I direct the reader to the*

the Tribunal are highly authoritative, and since the legal literature addressing the competence of the Council in relation to this matter has proven to be very rare, I have used the judgement and the commenting article of King as main source. The Tadic-case went both to the Trial Chamber and the Appeal Chamber.

In the Trial Chamber, the defence argued that the Tribunal had not been established properly, which implied lack of jurisdiction. The prosecutor held that the Tribunal had no authority to review the powers of the Security Council, meanwhile the defence opposed jurisdiction, referring to Article 14 of the ICCPR and Article 6 Paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which *inter alia* provide for the right to be tried in an “independent and impartial tribunal established by law”. The Trial Chamber ruled in favour of the prosecutor. It stated, *in dicta*, that the Council has a discretionary right to determination under Chapter VII, and that the Tribunal was hindered to examine the legality of its establishment. Notwithstanding this point-of-view, the Trial Chamber expressed itself regarding the competence of the Council, when stating that the Council may not act *arbitrarily or under ulterior purposes*. King concludes:

The Trial Chamber therefore indicated that “arbitrariness” and “ulterior purpose” were the appropriate standards for reviewing the Council’s discretionary determination under Chapter VII.

It also states (still *in dicta*) that there are two ways in which the Tribunal could help restoring and maintaining peace, namely by deterring further violations of humanitarian law and convicting criminals the freedom of whom would constitute an obstacle to the peace. What would happen if the Tribunal had regarded a Council resolution as arbitrary, or motivated by an ulterior purpose? Would it immediately have abdicated, or would it have remained loyal, abstaining from mentioning its views in the judgement? The Trial Chamber does not give any clear answer.

The defence brought the case to the Appeal Chamber, which found the appeal admissible. The Appeal Chamber opposed the view of the Trial Chamber that reviewing Council resolutions is prohibited. Although it rejected all thoughts of being a constitutional court, it held that it incidentally could have jurisdiction to pronounce itself upon the legality of Council resolutions. The *compétence de la compétence* of international tribunals, *i. e.* the right to draw the lines of ones own jurisdiction, is a well-established principle, it argued. Addressing the subject matter, the Appeal Chamber stated that the Council is bound by the Charter and its Purposes and Principles, when determining a threat to the peace in accordance with Article 39. After that, it dealt precisely with that determination, concluding that the armed conflict in former Yugoslavia was more than sufficient to

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*referred article as a whole, instead of providing one note for each specific piece of information.*

legally found a Chapter VII resolution. However, the Appeal Chamber did *not* entitle itself to evaluate the legality of the *means* chosen by the Security Council to tackle the situation. Hence, the limit between jurisdiction for the Tribunal and complete discretion for the Council was drawn between judging the character of a specific situation and the choice of means to deal with it. Or to present it differently: the Security Council's perception of reality and the choice of corresponding tag in Article 39 is subjected judgements in court, meanwhile Articles 41 and 42 still remain outside that jurisdiction. The defence after all lost their case.

Whereas the Trial Chamber introduces the terms "arbitrariness" and "ulterior purpose" as invalidating Council resolutions, but still regards the Council's power of determination as discretionary, the Appeal Chamber openly intrudes on the field of Article 39 and establishes jurisdiction, with a clear delimitation towards Articles 41 and 42. I have lingered on this issue in order to show that the Tribunal in fact has *not* judged the Council's choice of means, which is the most spectacular part of Resolutions 808 and 827. That specific action remains to be evaluated.

### 3.3.3 Commentaries

Although the case *Prosecutor v. Tadic* is an example of judiciary on the move towards previously "sacred" ground, the measure to establish a tribunal remains, as mentioned above, unsettled by the Tribunal. Regarding the legality of that measure, I will have to reason basically without any clear guidelines from the judiciary.

Firstly, it is worth recalling the absence of preconditions such as correspondence with justice and international law, when a Chapter VII resolution is adopted (Charter Article 1 Paragraph 1). In addition, the already softened Article 2 Paragraph 7 concerning domestic affairs as a protected zone also comes out of force. The competence of the Council, in case the reader has not noticed it at this stage, is really vast.

Secondly, we have to take into account the development of practice regarding UN law. For sure, the founders of the Organisation had in mind a Council dealing with inter-state peacekeeping on a macro level, not expecting a Spanish inquisition (I just had to make that travesty from a famous Monty Python act). Even more in the Libyan case, the Council acts like a coercive World Court. But on the other hand, consent among states – both explicit and implicit – is an extremely important factor within international law. One could argue that the approved collection of tools accessible for the Council has grown, just as other provisions of the Charter have undergone re-interpretations. If the action of the Security Council gains an overwhelming support, it becomes *legitimate*, which in turn makes it *legal*.



The commentator James C. O'Brien contends that the Council clearly acted within legal boundaries. Prior to its mandatory resolutions, it exhausted all possible alternative remedies. He also argues that the establishment of a Tribunal is a "lesser, surgical step" than others contemplated in Articles 41 and 42.<sup>81</sup> Finally, he produces a sentence that seems completely self-evident, stating that the legitimacy of the Tribunal is dependent upon its success.<sup>82</sup> Does he really mean *legitimacy*, or is it rather *legality* that he has in mind (so that the sentence will have a real meaning)? Or is not this yet another example that there exists a blur in international law between these two terms, and that they are strongly interconnected?

However, international support is not the only standard of evaluation, although significant. As in the previous case, I would also like to deal with morals – the permanent subject that one cannot escape from in international law. The exertion of retroactive jurisdiction has a famous precedent: the Nuremberg trials. Those trials convicted some of the worst moral and legal criminals history has ever witnessed, even though those individuals strictly legally were not subjected the jurisdiction of any international court when they committed the acts. Should one have opposed the Nuremberg (and Tokyo) trials? My answer is no. In the case of former Yugoslavia, we can in addition lean on the Genocide Convention, notions about *jus cogens*, the trial *Israel v. Eichmann*, etc. These new facts do not abolish the, from a rule of law perspective, dubious retroactive jurisdiction, but they speak in favour of the Council's competence to make an exception in order to restore the peace, provided that it is legitimate.

## 3.4 Intervention on Haiti

### 3.4.1 Summary of events

The democratically elected leader of Haiti, President Aristide, had been displaced by a military junta who oppressed the people severely, when the Security Council adopted Resolution 841 on 16 June 1993.<sup>83</sup> The Council decided on a comprehensive embargo against Haiti, the abolishment of which was conditioned on an abdication by the junta and a return of Mr Aristide into office.

A whole row of resolutions followed, as the junta leaders exerted manoeuvres and sent differing messages over time. The violent oppression only escalated. On 31 July 1994, over a year after the adoption of Resolution 841, the Council had had enough and thus adopted Resolution 940, authorising a "multinational force" to intervene on Haiti and to use "all necessary means" in order to obtain the settled goal: replacement of the

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<sup>81</sup> O'Brien, *supra* note 76, pp. 642-643

<sup>82</sup> *Ibid.*, pp. 643-644

<sup>83</sup> Security Council Official Records: Forty-eighth Year, S/INF/49

junta with the elected leader.<sup>84</sup> In September US forces were assembled and approached the island, which in itself induced the military junta to capitulate. Haiti was subsequently invaded without the firing of one single bullet. President Aristide could return into office.

### 3.4.2 Lawful action by the Security Council?

Once again, the term “legitimacy” in its different conjugations appears in the texts. The US named the military junta “illegitimate”.<sup>85</sup> At the time, Michael J. Glennon notes, at least 50 dictatorships existed around the world.<sup>86</sup> He continues with the following critical judgement:

In Haiti, however, sovereignty lost. But sovereignty’s loss was not an arguable gain for the community of nations, because that community has not adequately considered either the rationale for continued ad hoc opportunism or the impact of its improvised precedents on future attempts to avoid the piecemeal and move toward principle. Absent safeguards that do not yet exist, that principle should be noninterference in the internal affairs of sovereign states as embodied in the United Nations Charter.<sup>87</sup>

Glennon argues in favour of establishing some kind of “safeguards” before acting under Chapter VII. The Haiti resolutions are deemed as yet another expression of “ad hoc opportunism” in the decisions of the Council. But Glennon is contradicted by W Michael Reisman, who asserts that violations of human rights have been considered as threats to the peace ever since the blockade against Southern Rhodesia in the sixties.<sup>88</sup> He further emphasises that it is the sovereignty of *peoples*, not of *regimes*, that is to be protected.

Another article writer, Richard Falk, is critical against the total delegation of responsibility to the US, which is an argument based on the same ground as much of the criticism against the handling of the Gulf War: the alleged abdication of the Council as a directing and controlling organ.<sup>89</sup> He also argues that the only official motive of the Council to authorise the intervention was the refugee problem caused by oppression and insecurity on the island. However, he admits that the brutality of the military regime is a well-founded counter-argument.

To summarise, I could not find any clear tendency among writers in the legal journals.

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<sup>84</sup> Security Council Official Records: Forty-ninth Year, S/INF/50

<sup>85</sup> M. J. Glennon, “Sovereignty and Community after Haiti: Rethinking the Collective Use of Force”, *AJIL*, Vol. 89 (1995), p. 71

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, p. 74

<sup>88</sup> W. M. Reisman, “Haiti and the Validity of International Action”, *AJIL*, Vol. 89 (1995), p. 83

<sup>89</sup> R. Falk, “The Haiti Intervention: A Dangerous World Order Precedent for the United Nations”, *HILJ*, Vol. 36, No. 2 (1995), p. 356

### 3.4.3 Commentaries

Is a *coup d'état* against a democratically elected regime enough to establish a threat to the peace? I consider it very difficult to argue that a forcible coup *per se* fulfils the criteria of Article 39. A democratically elected leadership is, under certain circumstances, not immune from carrying the country into violence, extreme poverty, or other conditions that we find repugnant. What if human rights as a whole ultimately were to become more respected after an undemocratic replacement of the regime (at least for the moment)? Such situations cannot be excluded.

Massive and cruel violations of human rights, which may or may not be a consequence of a violent overthrow of a state regime, seem to fit more easily under the headline “threat to the peace”, or even “breach of the peace”. We could also invoke the vague notion of implied powers. There are, as mentioned, precedents from the sixties and seventies, when racist regimes in southern Africa were struck by sanctions. The attempt to give Kurds and Shiites within the boundaries of Iraq a sufficient protection after the Gulf War is another example. In general, the connection between large-scaled human rights violations and international insecurity is not only a far-fetched idea that is invented to make the case fit into the realm of Article 39. Oppression of certain cultural groups can easily lead to hostilities with neighbouring states (the Balkan wars, India-Pakistan, Israel-Arab countries, just to mention a few). Refugee flows are perhaps not primarily a threat to the peace, but they could be a heavy burden on host countries, which ultimately may instigate conflicts.

However, even if a threat to the peace may be identified, I am not certain that it is the real reason for action in all cases. Let us address the moral aspect. Suppose that an isolated island-state would engage in horrible atrocities against its own population. Furthermore, suppose that this state was situated far away from any other state, hardly had any cultural links with other areas of the globe and did not cause any refugees at all (no-one succeeded to leave its territory). Could, and/or should, the described situation still be considered as sufficient to base a Chapter VII resolution? My answer is affirmative in both cases. Before Haiti, the Council had already adopted resolutions regarding the situation for minorities in Iraq and the chaos, with ensuing violations of human rights, in Somalia. And as mentioned, Southern Rhodesia and South Africa had been subjected sanctions decades before the end of the Cold War. To try to prove links between domestic violations of human rights and threats to the international peace is always feasible, but does it always give a fair picture of the real motives for intervention? In my invented case with the isolated island, the Security Council would probably adopt a Chapter VII resolution with the protection of human rights in mind, but I assume that it would found the resolution on some more or less constructed, far-fetched threat to the peace. Then, the link to Article 39 lacks credibility.

Perhaps we should simply acknowledge that a new custom has developed, which is perfectly in line with other Charter provisions and its general spirit. Massive violations of human rights consist a sufficient base for Chapter VII resolutions. I estimate that this is the current state of affairs in the UN. Oddly enough, the Council still has not classified any coercive resolution dealing with the protection of human rights or humanitarian law as a part of its implied powers. At least not expressly.

### **3.5 Final Conclusions**

I have now examined four cases from the beginning of the nineties, when the Security Council suddenly became very active and added a lot to the very thin, almost non-existent, catalogue of case law. I have added my own commentaries to each case. Now, it is time to make some final remarks and conclusions.

In the Gulf War-case I have considered the determination of a breach of the peace completely justified. It is a classic case of international aggression, which means that the Article 39-determination of the Council could hardly rest on a more solid ground. What I have criticised as a possible illegal act – at least at the time – is the extreme delegation of powers to an unidentified coalition. I dare call this a violation of the UN Charter. In a way, the Council abdicated totally and breached against the principle of collective security, which is an important part of the spirit of the Charter, as I have stressed in the theoretical chapter above. The ensuing sanctions regime and the Iraqi liability issues are situated in a twilight zone.

Regarding the sanctions against Libya, the violation of the Charter is more obvious than in the Iraqi case. I have already presented my reasons for that conclusion. If Libya was to become a legally important precedent, virtually everything could be considered as a threat to the peace.

Furthermore, I considered the war-crimes tribunal for the former Yugoslavia as being legally established. The atrocities were so many and so grave, that morality in combination with a massive support among states rendered the Resolutions at hand legal. In addition, we could not defend the Nuremberg trials and the conviction of Eichmann legally if we considered the ex-Yugoslav tribunal illegal.

Finally, I have concluded that the measures against the regime on Haiti are within the boundaries of legality. Violations of human rights had been a reason for action by the Council in many previous cases. Both the opinions of states and morality speak in favour of actions of the Haitian type.

If UN Member States should not follow an illegal resolution, how can they know when it is perfectly legal to refuse? Well, the only reliable standard that I can come up with is the accumulated opinions of states and other

commentators around the world. Legality is based on legitimacy, which *inter alia* consists of the opinion of world community. From a world peace perspective, it is less risky to refuse implementation of a Chapter VII resolution when there is a large number of states that have the same point of view. So, the only advice to give a refusing state is to try to build an opinion alliance. Failure in this respect would render the Council resolution lawful.

How can we prevent the Security Council from adopting unlawful resolutions in the future? This question may seem quite uninteresting in a period like the current, when a super-power has undertaken offensive military action without any previous authorisation by the Council, thereby challenging the whole world security order. Everything that stays within the boundaries of a Chapter VII resolution could be seen as an achievement, regardless of the actual contents of the resolutions. I think that this view is a slippery slope that leads us directly to Iraq in springtime 2003. When the Council stops to respect the Charter, it spreads the signal that all types of military action on whatever grounds could become legal after a quick decision in New York. When suddenly the majority in the Council, or a P5-State, opposes a suggested action-plan, the freedom-of-action-attitude may have grown so strong in the minds of government leaders who lost the vote, that the formal rules of decision-making in the UN become refuted as being “irrelevant”.

An organ that could oversee Council resolutions and pass mandatory judgements, that were respected by all Member States, is one solution for the future that I find desirable. But this is, of course, another subject for examination.

# Supplement: The UN Charter

*From the UNHCR's official homepage*

## PREAMBLE

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

## CHAPTER I PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human

rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

## CHAPTER II MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in

the judgment of the Organization, are able and willing to carry out these obligations.  
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

#### Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

#### Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

## CHAPTER III ORGANS

#### Article 7

1. There are established as the principal organs of the United Nations:  
a General Assembly  
a Security Council  
an Economic and Social Council  
a Trusteeship Council  
an International Court of Justice  
and a Secretariat.  
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

#### Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

## CHAPTER IV THE GENERAL ASSEMBLY

### COMPOSITION

#### Article 9

1. The General Assembly shall consist of all the Members of the United Nations.  
2. Each Member shall have not more than five representatives in the General Assembly.

### FUNCTIONS AND POWERS

#### Article 10

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

#### Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.  
2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.  
3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.  
4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

#### Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.  
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

#### Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:  
a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;  
b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.  
2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

#### Article 14

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

#### Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.
2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

#### Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

#### Article 17

1. The General Assembly shall consider and approve the budget of the Organization.
2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.
3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

### VOTING

#### Article 18

1. Each member of the General Assembly shall have one vote.
2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.
3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

#### Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

### PROCEDURE

#### Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

#### Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

#### Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

## CHAPTER V THE SECURITY COUNCIL

### COMPOSITION

#### Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.
2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.
3. Each member of the Security Council shall have one representative.

### FUNCTIONS AND POWERS

#### Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

#### Article 25



The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

#### Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

#### VOTING

##### Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

#### PROCEDURE

##### Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.
2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.
3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

##### Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

##### Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

##### Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

##### Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate,

without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

## CHAPTER VI PACIFIC SETTLEMENT OF DISPUTES

##### Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

##### Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

##### Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.
3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

##### Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

##### Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.
2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action

under Article 36 or to recommend such terms of settlement as it may consider appropriate.

#### Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

## CHAPTER VII ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

#### Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

#### Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

#### Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

#### Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

#### Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

#### Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

#### Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

#### Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

#### Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

#### Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of

international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.  
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they remembers.

#### Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

#### Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

#### Article 51

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

## CHAPTER VIII REGIONAL ARRANGEMENTS

#### Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.
4. This Article in no way impairs the application of Articles 34 and 35.

#### Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the

authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

#### Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

## CHAPTER IX INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

#### Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

#### Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

#### Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.
2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

#### Article 58

The Organization shall make recommendations for the co-ordination of the policies and activities of the specialized agencies.

#### Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required

for the accomplishment of the purposes set forth in Article 55.

#### Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

## CHAPTER X THE ECONOMIC AND SOCIAL COUNCIL

### COMPOSITION

#### Article 61

1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.
2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.
3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty-four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.
4. Each member of the Economic and Social Council shall have one representative.

### FUNCTIONS and POWERS

#### Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned.
2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.
3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.
4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

#### Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may co-ordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

#### Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.
2. It may communicate its observations on these reports to the General Assembly.

#### Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

#### Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connexion with the carrying out of the recommendations of the General Assembly.
2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.
3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

### VOTING

#### Article 67

1. Each member of the Economic and Social Council shall have one vote.
2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

### PROCEDURE

#### Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

#### Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

#### Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

#### Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

#### Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

## CHAPTER XI DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

#### Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

#### Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the

rest of the world, in social, economic, and commercial matters.

## CHAPTER XII INTERNATIONAL TRUSTEESHIP SYSTEM

#### Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed there under by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

#### Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- a. to further international peace and security;
- b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

#### Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed there under by means of trusteeship agreements:
  - a. territories now held under mandate;
  - b. territories which may be detached from enemy states as a result of the Second World War; and
  - c. territories voluntarily placed under the system by states responsible for their administration.
2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

#### Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

#### Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held

under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

#### Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

#### Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

#### Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

#### Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

#### Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

#### Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of

the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly shall assist the General Assembly in carrying out these functions.

## CHAPTER XIII THE TRUSTEESHIP COUNCIL

### COMPOSITION

#### Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:

a. those Members administering trust territories;  
b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and

c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

### FUNCTIONS AND POWERS

#### Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

a. consider reports submitted by the administering authority;  
b. accept petitions and examine them in consultation with the administering authority;  
c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and  
d. take these and other actions in conformity with the terms of the trusteeship agreements.

#### Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

### VOTING

#### Article 89

1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

### PROCEDURE

#### Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

#### Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

## CHAPTER XIV THE INTERNATIONAL COURT OF JUSTICE

#### Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

#### Article 93

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

#### Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

#### Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

#### Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

## CHAPTER XV THE SECRETARIAT

#### Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

#### Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

#### Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

#### Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.
2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

#### Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.
2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.
3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

## CHAPTER XVI MISCELLANEOUS PROVISIONS

#### Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

#### Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

#### Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

#### Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.  
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.  
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

### CHAPTER XVII TRANSITIONAL SECURITY ARRANGEMENTS

#### Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

#### Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

### CHAPTER XVIII AMENDMENTS

#### Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

#### Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference.  
2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.  
3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

### CHAPTER XIX RATIFICATION AND SIGNATURE

#### Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.  
2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.  
3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.  
4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

#### Article 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.  
IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.



DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

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