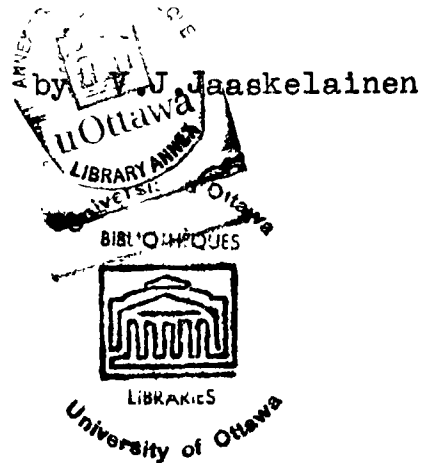


NATIONAL SOVEREIGNTY AND THE UNITED NATIONS



Dissertation presented to the
Faculty of Social, Economic
and Political Sciences of the
University of Ottawa as partial
fulfilment of the requirements
for the degree of Master of
Arts

*Not well organized - Easier
Chronological description of U.N. discussions
given instead of thorough analysis of
concept of sovereignty and situations
Needlessly repetitions - but sufficient
for a "pass" - J. M. B. and.*

Ottawa, Ontario, 1959

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INTRODUCTION

National Sovereignty connotes the freedom of action of the State in pursuit of national self-interest. It claims an independence of action for the State in its relations with other States and absolute independence from other States on its own territory. At the very core of this concept of National Sovereignty has been the right of war.

Amidst the holocaust and terror of the Second World War, men became convinced that the common good was universal peace; that the continuance of the absolute sovereignty of States made permanent world order impossible; and that an international organization to keep world order and to preserve peace was absolutely essential of mankind was to survive. Consequently, a permanent international organization with authority and power to prevent or stop aggression was established in 1945 and ^{NAMED} the the United Nations.

Since the concept of National Sovereignty as an absolute power above which there is not and cannot be any superior power is incompatible with the authority and power of the United Nations to prevent or stop aggression, it will be interesting to find out to what extent National Sovereignty has been diminished by the Charter

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of the United Nations. As the United Nations has also been entrusted with the safeguarding of National Sovereignty, there is an obvious clash ^{IN} ~~of~~ the ideals of the organization. From this contradiction of the functions of the United Nations, the question arises as to what has been the impact of the concept of National Sovereignty on the framing of the Charter and the operation of the United Nations, and whether the United Nations has been able to fulfil its obligations under the Charter provisions. The ultimate purpose of this dissertation is to study the present stage of evolution from the system of national, sovereign States towards a new type of system, from which a world government might result, in order to indicate the direction in which the United Nations should develop.

There are three distinct points of research. First, the development of the concept of National Sovereignty and the criticism of the concept. Second, the Charter of the United Nations with relation to the concept of National Sovereignty. Third, the operation of the United Nations with regard to National Sovereignty.

The dissertation contains five chapters and it is divided into two parts. Part I is divided into two chapters, so that Chapter I contains the historic development and the criticism of the concept of National Sovereignty and Chapter two contains both a short history and an

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analysis of those provisions of the Charter of the United Nations which relate to National Sovereignty. In order to draw conclusions from the aforementioned clash between the two incompatible ideals of the United Nations, one need not engage in theoretical considerations alone but should also study the actual operation of the United Nations. Part II, therefore, contains a study of the impact of National Sovereignty (as recognized by the Charter and adhered to by the Member States) on the operation of the United Nations. It is divided into three chapters dealing with: (1) the problem of general disarmament, (2) disputes over a territory, and (3) disputes over an internal policy of a State.

PART I

THE CLASH OF THE IDEALS OF THE UNITED NATIONS
AND THE CONCEPT OF NATIONAL SOVEREIGNTY

CHAPTER I

THE PRE-TWENTIETH CENTURY DEVELOPMENT
OF THE
CONCEPT OF NATIONAL SOVEREIGNTY

(a) Development of the Concept

The idea of sovereignty is very old. "Quod principi Placuit, legis habet vigorem" was the old Roman principle followed by the interpretative statement "Cum lege regia quae de ejus imperio lata est, populus ei, et in eum, omne imperium suum et potestatem concedat"¹. Although this dictum had its origin in a law enacted by the legislature of Rome and in spite of the words which immediately follow and which are interpretative of the statement preceding, it soon developed into an absolute personal power, the majestas of the Emperor, to make laws without limitation. In the Western World this principle was lost in the Teutonic Invasions with the constitutionalism of the tribes, while it survived in Byzantium until the fall of Constantinople in 1453.

¹ The ordinance of the prince has the force of a law, for the people by the lex regia have made a concession to him of their whole power.

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Charles the Great who restored the Western Empire - called the Holy Roman Empire - built it upon the foundation of the De Civitate Dei of St. Augustine². Consequently, the majestas of the Emperor was limited not only by the Teutonic constitutionalism but also by the Christian faith according to the commands of God, by the christianized stoic philosophy and by the Church itself, namely during the Investiture controversy.

Moreover, medieval man did not possess that abstract conception of sovereignty which is so fundamental to all modern political thought. The structure of his society differentiated its members according to a number of social strata determined by property in land rather than by total wealth and linked together in contractual exchange of services. At the bottom of this hierarchical order were the serfs, the villeins or the tenants (according to the locality and the time) with the lord of the manor as his immediate superior. He, in turn, was bound by service to a baron or a lord, until this chain of mutual services culminated in the Emperor and, gradually towards the end of the Middle Ages, in the Kings who thus acquired the title of sovereign - a title which connoted a position of prestige rather than one of power.

² Robert H. Murray, The History of Political Science from Plato to the present, p. 43

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During the Middle Ages, the Emperors were not able to consolidate power in their hands and poor communications made it very difficult to check the growing power of the ambitious Kings. By the 13th century, the Kings had acquired such an independence from the Emperor that the latter was not much more than a figurehead of Christendom. This usurpation by the Kings was aided by the growing awakening of national consciousness which soon led to regard the imperial power as a foreign power in those territories in which the Emperor had ruled merely de jure but not de facto. Next, the Kings eliminated that great obstacle which the feudal organization constituted to the development of a modern state by reducing by degrees the rights and prerogatives of the various classes in respect to the governing of the dominion.

In feudal times a litigating party could appeal from a decision of his immediate sovereign to a higher sovereign. The King, at the top of the feudal organization, was the last court of appeal. As such his jurisdiction was limited to the interpretation of law. He had no authority to legislate. Towards the end of medieval times, the Kings sought to secure for themselves the power to enact laws. They achieved this power in so similar a way that in all the Western European countries the pattern was

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the same. Whenever a King desired to pass a law he summoned the most influential members of his dominion and then persuaded them to accept the law. This was necessary because these were the men who would have to enforce the law. The development of law and legislation was an inevitable consequence of the growth and development of the society. Therefore an organ had to be created to take care of new legislation which the evolution of society called for. The King at the top of the feudal organization was in a good position to acquire that function. In the course of time the feudal lords lost their juridical power which was transferred to the King, through the joint effort of the Sovereign himself and the bourgeoisie, now growing in influence and seeking freedom from the feudal lords.

Another tendency of the time which came to strengthen the authority of the King was the development of military organization. It also called for a more and more centralized authority to enable the creation of an effective military force for defence, or, for that matter, for aggression. Since the traditional function of a King had always been to lead the armed forces, the growth of armies and the development of military organization thus placed the Sovereign far above his feudal vassals in respect to military strength.

Once the Sovereign had eliminated his vassals from the government of the dominion, the duty of obedience and loyalty of vassal to lord was transmuted into the duty of allegiance of subject to the Sovereign. In the feudal society political rights were based, broadly speaking, on property. Consequently, the identification of rights of property with political rights led to regard the realm as as the dominion or property of the Sovereign.

Since the Kings had become free from their former allegiance to the Emperor, they found it expedient to encourage further study of the Roman law, which declared that the will of the prince is law. However, the Roman jurists had dealt only with the legal sovereign. They had approached the concept of sovereign as lawyers, and not as political philosophers. The Roman law, nevertheless, strengthened the power of a Sovereign until men started to ask why should right be determined by the will of a single man.

The reformation which began in Germany brought disastrous consequences to the position and powers of the Emperor for it came to be accepted as the result of innumerable conflicts that each of the German princes had the right to choose what religion he pleased, and the further right to impose this religion upon his own subjects. Thus the Reformation freed to a great extent the German

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princes from the control of the Emperor. It also destroyed the concept that the Church was the ultimate master of human affairs. "Before the Reformation the state had been the handmaiden of the Church; after the Reformation most Churches became the handmaidens of the state."³ The Reformation removed Church as a limitation of the temporal power in the protestant states, and, consequently, the power problem became secularized there.

Before the Reformation the States were never absolute, neither in theory nor in fact. From the Reformation there developed a new kind of a state, a state which claimed to be the supreme authority on its own territory. To support this claim a new theory of the state was evolved, a theory of sovereignty.

The concept of sovereignty was first explicitly formulated by Jean Bodin (1530-1596) in his De Republica published in 1576. Bodin defined a state thus :

"A Republic is the justly ordered government of a number of families and of that which is common to them, with sovereign power."⁴

³ William Montgomery McGovern, "From Luther to Hitler", p.27.

⁴ De Republica, Lib.I, cap.1.

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This definition of a state implies that a supreme power is essential to the idea of the state; that the state is the government itself; and that the basis of the state is a family. With regard to the nature of the "supreme power" he stated that

"Sovereignty is supreme power over citizens and subjects, unrestrained by the laws"⁵.

Bodin made his sovereign a legislator and recognized the power to make laws as the most characteristic function of the sovereignty. As a legislator, the sovereign cannot be restrained by laws which he makes. Nevertheless, Bodin's sovereign is bound by the Divine Law and Natural Law and also by the law that is common to all nations. Moreover, he is bound by certain laws which Bodin calls leges imperii. These leges imperii, the fundamental laws of the state, cannot be abrogated nor modified by the sovereign "since they are connected with sovereignty itself". Bodin observes that "if we should define sovereignty as a power legibus omnibus soluta, no prince could be found to have sovereign rights". Thus the supreme power is neither arbitrary nor irresponsible. It is defined by law and subject to law. For Bodin it is still the law that makes the sovereign.

⁵ Underlining ours.

A new and potentially revolutionary theory of social contract was expounded by Johannes Althusius (1557-1638) in his *Systematic Politics, confirmed by Examples from Sacred and Profane History*, which was published in 1610.

Althusius based the government of a state on a contract between the people and the sovereign. To him a state is

"a general public association in which a number of cities and provinces, combining their possessions and their activities, contract to establish, maintain and defend a sovereign power"⁶.

Thus the members of the state are cities and provinces, and not individuals. Althusius defined sovereignty as the supreme and supereminent power of doing what pertains to the welfare of those members of the state. Furthermore, he ascribed sovereignty to the corporation of members of the state, not to the members of the state.

"What is owed to a corporation is not owed to its individual members", declared Althusius.

Hugo Grotius (1583-1645) adopted into his political philosophy the notions of social contract and sovereignty expounded by Bodin and Althusius. In his famous work, The Law of War and Peace, he stated that

⁶ Dunning, p. 63.

"Originally men, not by the command of God, but of their own accord, after learning by experience that isolated families could not secure themselves against violence, united in civil society, out of which act sprang governmental power" 7.

Thus Grotius denounced all notion of Divine Law and attributed the existence of a state to a government, established by contract and enjoying supreme political power. "That power", he asserted, "is called Sovereign, whose acts are not subject to the control of another, so that they can be rendered void by the act of any human will."⁸ Although the sovereignty is absolutely independent of the interest and judgement of the subjects, the end of all government is, nevertheless, the good of the governed.

Grotius declared that states are members of a society for which the universal supremacy of law is indispensable. Furthermore, he proclaimed that states are equal. The concept of equality of states was introduced into the political philosophy by drawing an analogy between natural persons and separate states.

The concepts of sovereignty and equality of states became universally accepted doctrines through the Peace of Westphalia of 1648, the peace treaties of which recognized

7 *Infra*, I, IV, 7,3.

8 *Ibid*, I, 3, 7.

the new states as the component units of international society. Ever since the concept of sovereignty - territorial sovereignty - has been the basis of international intercourse.

In 1651, three years after the Peace of Westphalia, Thomas Hobbes (1588-1679) published his Leviathan which has influenced all political thought to this day. Hobbes adopted the concepts of state of nature and contract. In Hobbes' state of nature natural rights were equivalent to natural might. This state of nature was, in fact, a perpetual state of war. He conceived of government originating in two main ways - either, on the one hand, by "natural force" or "warre", or, on the other hand, by original contract.

"The attaining to this Sovereign Power, is by two ways. One by natural force; as when a man maketh his children, to submit themselves, and their children to his government, as being able to destroy them if they refuse; or by Warre subdueth his enemies to his will, giving them their lives on that condition. The other is when men agree among themselves, to submit to some man, or assembly of men, voluntarily, on confidence to be protected by him against all others. This latter, may be called a Political Commonwealth, or Common-wealth by Institution; and the former a Common-wealth by Acquisition." ⁹

9 Leviathan, ch.17

Hobbes described this original contract in the following terms :

"A Common-wealth is said to be instituted, when a Multitude of men do Agree, and Covenant, every one, with everyone, that to whatsoever Man, or Assembly of Men shall be given by the major part, the Right to present the Person of them all, (that is to say to be their Representative) every one, as well he that voted for it, as he that voted against it, shall Authorize all the Actions and Judgement, of that Man, or Assembly of Men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men." ¹⁰

Hobbes published the Leviathan shortly after the death of Charles I and the proclamation of the Commonwealth. Its aim was determined by the political crisis. Keenly alive to the mischief brought upon the country by civil war, and firmly convinced that this war sprang from perverted ideas of morality and religion, Hobbes sought to convince mankind that all resistance to government must be wicked and absurd. To justify sovereignty and explain its scope are thus the principal objects of the Leviathan. Sovereignty is justified by an audacious tissue of legal fictions combined to show that total subjection is perfect freedom, since the subject never suffers any evil from the sovereign but with his own full and free consent. Sovereignty is shown to be unlimited either by

10 Ibid, ch. 18.

law or by morality, since the interpretation of law or of morality, if left to the subjects, will virtually make his likings or his aversions the measure of his obedience, so as to make the very existence of society a mere matter of taste. According to Hobbes the contract of men

"is by covenant only, which is artificial: and therefore it is no wonder if there be somewhat else required, besides covenant, to make their agreement constant and lasting; which is common power, to keep them in awe, and to direct their actions to the common benefit."

Hobbes described the unlimited authority of sovereign power or government thus:

"The Rights and Consequences of Sovereignty are the same in both. His power cannot, without his consent, be tranfered to another; he cannot forfeit it; he cannot be accused by any of his subjects of injury; he cannot be punished by them; he is judge of what is necessary for peace; and judge of doctrines; he is the sole legislator and supreme jedge of controversies; and of times, and occasions of warre, and peace; to him it belongeth to choose magistrates, cousellers, commanders, and all other officers, and ministers; and to determine of rewards, and punishments, honour and order. The reasonswhereof, are the same which are alleged in the precedent chapter, for the same rights, and consequences of sovereignty by institution."¹¹

Hobbes' concept of sovereignty as supreme and unlimited power was more extreme than anything which had

¹¹ Ibid, ch. 17.

been expounded previously. For Hobbes, law is not above the sovereign; it does not make the sovereign or limit his authority. Sovereignty is absolute, unlimitable and indivisible. It is the sole source and criterion of right. To what degree Hobbes attained absolutism in his political philosophy appears clearly from the following quotation:

"So that it appeareth plainly to my understanding, both from reason and Scripture, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular and aristocratic commonwealths, is as great as possibly men can be imagined to make it. And though of so unlimited power, men may fancy many evil consequences, yet the consequences of the want of it, which is perpetual war of every man against his neighbour, are much worse." 12

This is pure totalitarianism. Hobbes attained the theoretical perfection of absolutism. His political philosophy became a centre of animated controversy.

It is characteristic of the times that Samuel von Pufendorf (1632-1694) while imprisoned in Denmark for eight months in 1658 passed his time meditating on the theories of Hobbes and Grotius. This meditation gave him the incentive to write a large work entitled De Jure Naturae et Gentium. In this book, which was published in 1672, von Pufendorf defined a state thus:

12 Ibid., ch. 20.

"It is a compound moral person, whose will, united and tied together by those covenants which before passed among the multitude, is deemed the will of all; to the end, that it may use and apply the strength and riches of private persons towards maintaining the common peace and security." 13

Von Pufendorf adopted the concept of sovereignty from Grotius who had maintained that external sovereignty could be diminished by compact or by conquest and still exist. Sovereignty to von Pufendorf was supreme but not absolute. By defining the state "as a compound moral person" he treated the state as an artificial person. Through this anthropomorphy he came to define the extent of sovereign power in the following terms:

"Thus of old, when mankind was divided into distinct families, and now since they are fallen into separate communities those might have been then and may now be said to live mutually in a state of nature, neither of whom obey the others, and who do not acknowledge any common master among men.....So that commonwealths, and the governors thereof may fairly declare themselves to be in a state of natural liberty, while they are furnished with sufficient strength to secure the exercise of that grand privilege." 14

In England such political questions as the rights of kings and subjects, the point at which rebellion is justifiable, the origin of government, agitated the minds

13 Kenneth's translation, VII, 2, 13.

14 Ibid, II, 2 4.

between the outbreak of the Civil War and the Revolution of 1688. Consequently, a large amount of controversial literature was produced. In 1690, John Locke published his Treatise of Civil Government in which he accepted without question the doctrine of an original state of nature and the doctrine of an original contract as the charter of political society. Locke admitted that governments may have originated without consent of the people through conquest, usurpation or tyranny, but claimed that "all peaceful beginnings of government have been laid in the consent of the people". He described the original contract of government by consent in the following terms:

"than being, as has been said, by Nature all free, equal and independant, no one can be put out of his Estate, and subjected to the political Power of another without his consent. The only way whereby any one divests himself of his Natural Liberty and puts on the Bonds of Civil Society, is by agreeing with other men to join and unite into a Community, for their comfortable, safe and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. When any number of men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politic, wherein the majority have a right to act and conclude for the rest." 15

15 Locke, Treatise of Civil Government, VIII, pp. 95-99

This consent which is necessary to establish a government by peaceful means may be given either expressly or tacitly and the tacit consent "reaches as far as the very being of any one within the territories of that government". While Locke placed the right of decision on the form of government upon the majority, he, on the other hand, denied its competence to establish an absolute monarchy on the ground that absolute monarchy is "inconsistent with civil society, and so being, no form of government at all." Locke maintained that by the law of nature everybody seeks his own preservation or welfare and enters into political society for the better assurance which it affords; that sovereigns are established only in order to promote the good of the subject, and that when they repudiate their duty, they may lawfully be resisted or even deposed. Locke does not assert that sovereignty is limited by positive or human law, but he does assert that it is limited by natural or divine law. He described the natural or divine limitation on sovereignty thus:

"And thus the Community perpetually retains a supreme power of saving themselves from the attempts and designs of any Body, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the Liberties and properties of the subject.... Whenever any one shall go about to bring them to.....a slavish condition, they will always have a right...to rid themselves of those who invade this fundamental,

sacred and unalterable law of self-preservation, for which they entered into society." 16

The theory that the people as a whole were the sovereign was further propounded by Jean Jacques Rousseau (1712-1778). In the American and French Revolutions, this theory was upheld to justify the rebellions. The slogan of popular sovereignty was a protest against arbitrary government. However, the people as a whole cannot be the sovereign because they do not rule being incapable of acting as a body. Thus Jeremy Bentham was called forth to furnish a political theory to bridge that gap.

Bentham (1748-1832) dismissed Hobbes' and Locke's concept of government originating from an original contract as a natural law fiction which Hume had effectively destroyed. In its stead, Bentham asserted that government originated when natural society became political. Bentham described this political society thus:

"When a number of persons (whom we may style subjects) are supposed to be in the habit of paying obedience to a person, or an assemblage of persons, of a known and certain description (whom we may call governor or governors), such persons altogether (subjects and governors) are said to be in a state of political society." 17

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16 Ibid, XII, p. 149 and XIX pp. 212-217 and 219-222.

17 Bentham, Fragment on Government, p. 137.

Though accepting Hobbes' and Locke's state of nature, Bentham rejected their idea that political society immediately succeeded natural society. For Bentham, there is no clear dividing line between natural society, where persons "are not in the habit of paying obedience to a governor or governors", and political society, where they are in the habit of paying such obedience.

Bentham rejected the natural law limitation on sovereignty and the natural political rights of man. He asserted that the sovereignty of government was unlimited except by express convention with another sovereign government.

"Let us avow, then, in short,... that the authority of the supreme body cannot, unless where limited by express convention, be said to have any assignable, any certain bounds." 18

Bentham explained the limitation on sovereignty by express convention thus:

"where one state has upon terms submitted itself to the government of another; or where the governing bodies of a number of states agree to take directions in certain specified cases from some body or other that is distinct from them all; consisting of members for instance appointed out of each other...to say that not even by convention can any limitation be made to the power of that body in a state which in other respects is supreme...would be saying that there is no such thing as government in the German Empire, nor in the Dutch provinces, nor in the

18 Ibid, p. 218.

Swiss cantons, nor was of old in the Achaen league."¹⁹

Bentham further asserted that resistance to sovereignty was morally justified if such resistance accorded, not with natural or divine law, but with the principle of utility.

"It is then, we may say, and not till then, allowable to, if not incumbent on, every man, as well on the score of duty as of interest, to enter into measures of resistance; when, according to the best calculation he is able to make, the probable mischiefs of resistance (speaking with reference to the community in general) appear less to him than the probable mischiefs of submission. This then is to him, that is to each man in particular, the juncture for resistance." ²⁰

Although Bentham agreed with Hobbes that sovereignty was not normally limited by law, he did not agree with him that sovereignty was unlimited morally. While Bentham agreed with Locke that sovereignty was limited morally, he differed from him in that he considered it was morally limited by Utility and not by natural or divine law.

Bentham considered that law existed solely to make men do what they would not do without it, and that, in contrast to economic harmony which was to be created without legislative coercion, social harmony was to be created with legislative coercion.

19 Ibid, pp. 222-223

20 Ibid, p. 215

Bentham attacked any form of government which had

"for its actual end or object, the greatest happiness of a certain one (e.g. the King), with or without the addition of some comparatively small number of others, whom it is a matter of pleasure or accommodation to him to admit, each of them, to a share in the concern, on the footing of so many junior partners." 21

Consistent with his Principle of Utility, Bentham conceived "the only right and justifiable end of government to be the greatest happiness of the greatest number." 22 He believed that the utilitarian object of government could best be achieved through a representative democratic republic; and that sovereign power should reside in a single legislative assembly elected annually by all male adults able to read.

"He held that the ruling power should be in the hands of the people, because the happiness of the people being the object of government, the means of obtaining that object would thus be in the power of those who have the chief interest in realizing it." 23

Thus Bentham conceived the people as the ultimate sovereign and placed them in a position to use their sovereign power once a year by electing those who would govern on behalf of the people between the elections.

21 Bentham, Morals and Legislation, p. 5

22 Ibid, p. 5 - note

23 J.H. Burton, Benthamiana, p. 395

The theoretical perfection of the sovereignty of the people was attained and since the European society had developed into a nation-state system, this sovereignty of the people became "national sovereignty" with respect to external relations with other sovereign states.

A curious development of the concept of sovereignty took place in Germany. There the idealists presented quite elusive and unsubstantial metaphysical concepts which paved the road to extreme and destructive nationalism. For example, G.W.F. Hegel (1770-1831) defined a state as "embodied Morality". He continued his subscription in the following terms:

"It (the State) is the ethical spirit which has clarified itself and has taken substantial shape as Will, a Will which is manifest before the world, which is self-conscious and knows its purpose and carries through that which it knows to the extent of its knowledge. Custom and Morality are the outward and visible form of the inner essence of the State, the self-consciousness of the individual citizen, his knowledge and activity, are the outward and visible form of the indirect existence of the State. The self-consciousness of the individual finds the substance of its freedom in the attitude (Gesinning) of the citizen, which is the essence, purpose and achievement of its self-consciousness."

Furthermore, the state for Hegel is not only an "embodied Morality". It is Vernunft-Mind.

"The State is Mind (Vernunft) per se. This is due to the fact that it is the embodiment of the substantial Will, which is nothing else than the

individual self-consciousness conceived in its abstract form and raised to the universal plane. This substantial and massive unity is an absolute and fixed end in itself. In it, freedom attains to the maximum of its rights: but at the same time the State, being an end in itself, is provided with the maximum of rights over against the individual citizens, whose highest duty it is to be members of the State."

The kind of a definition of sovereignty clouded political ideas with deep mystery and was apt to stay beyond the reach of comprehension of the average man. Hegel's definition of sovereignty contains the culmination of the development of the concept. It declares that the state is an end in itself. A brief analysis of the concept of sovereignty, keeping in mind this Hegelian contention, is therefore in order.

(b) Analysis of the Concept

To analyse the concept of sovereignty, it is necessary to establish what the State is.

Would there be a State without a society? No, there would not. Since a society is composed of men, the question arises as to why men get together to form a society.

A community is formed by men instinctively. In other words, man is a social animal. Necessity of forming a society is another factor: an isolated family has less

capacity than a group of families to subdue the surrounding nature that makes even its very existence precarious. The uniting for an effort is power and surely men have that reasonable instinct to unite their potentials for a common effort since ants with their simple physical construction do possess it. Patterns of behaviour in a community are thus molded by circumstances and inherited as generations go by.

A society is that form of association of men in which men are applying intelligence to achieve an aim requiring an effort of the community and based on an idea that thrives for common good. Now, intelligence instead of the surrounding nature is enforcing patterns of behaviour on men regulating their behaviour amongst themselves for the good of each individual and thereby for the good of the whole society.

Whenever men start to apply reason to achieve a common good, they become a Body Politic living in a Political Society.

Professor Maritain defines the Political Society in the following terms:

"Political Society, required by nature and achieved by reason, is the most perfect of temporal societies. It is concretely and wholly human reality, tending to a concretely and wholly human good - the common good (...) Justice is a primary

condition for the existence of the body politic, but friendship is its very life-giving form." ²⁴

Furthermore, Professor Maritain distinguishes between the State and the Political Society. To illustrate the difference between them he defines the Political Society as the whole and the State as the topmost part of this whole entrusted with the maintenance of law and order and the promotion of common good through the administration of public affairs, accomplished by experts. He concludes the expounding of this instrumentalist theory thus:

"When we say that the State is the superior part in the body politic, this means that it is superior to the other organs or collective parts of this body, but it does not mean that it is superior to the body politic itself. The part as such is inferior to the whole. The State is inferior to the body politic as a whole, and is at the service of the body politic as a whole."²⁵

Surely the State is for man, not man for the State. The most essential function of the State is the maintenance of justice, because a society without the rule of law is inevitably in chaos. In fact, it is no more a society. Consequently, the chief function of the State is to render justice to every individual. An injury to any individual

²⁴ Jacques Maritain, "Man and the State", p. 10.

²⁵ Ibid. p. 13.

is an injury to the whole society. This is obvious, although it might be overlooked when one man or a small number of men are concerned. However, if one imagines a situation where a state is injuring the lives of, say, half of the population of the society, that is a half of the number of individuals composing the society, it certainly becomes obvious that an injury to an individual is an injury to the whole society. The end of the State is consequently the common good of all the individuals who constitute the Political Society. It is utter nonsense to say that the State is an end in itself. What is the State? Is it something concrete without men? Surely not. The State is but a human institution established for the temporal and common good. Consequently, the concept of sovereignty as the supreme power above and separate from the body politic is but an erroneous abstract idea. According to Dr. Rommen,

"the concept of sovereignty is wrong when it is an empty formal concept open, according to the arbitrary will of the sovereign power, to any and all contents. The concept of sovereignty is right and not dangerous either internally or externally if it is put into its interdependence with the principle of subsidiarity and the hierarchical order of ends, and subject to the natural and divine law".²⁶

26 Heinrich A. Rommen, "The State in Catholic Thought", p. 409.

The concept of sovereignty at first developed from the prestige of the sovereign to the personal, absolute power of the sovereign under the impact of modern nationalism. It freed the sovereign from all restrictive theories and practices of feudalism. Then the social contract theory transferred the absolute sovereignty of the monarch to the people. However, the sovereignty of the people came to mean the sovereignty of the majority through the influence of the Utilitarian political theory.

The voluntarist theory of law and political society also made the State into a person - the State Person - and subject to right. This theory was developed from the concept of sovereignty. It is just as ridiculous an idea as the concept of sovereignty is erroneous. The supreme power is entrusted in every modern political society either to one man or a group of men or several groups of men, but these men certainly do not turn miraculously into a State Person. They stay as men holding offices established for the common good. Although the abstract idea of the State as a person has served well in the sphere of legal matters, in the sphere of political science it has contributed well to the confusion of ideas and concepts of the State.

The idea of the independence of the State is also derived from the concept of sovereignty. It maintains

that a State is absolutely independent from other States on its own territory. It also claims for an independence of action of the State in its relations with other States. Thus National Sovereignty connotes the freedom of action of the State in pursuit of national self-interest. However, no State is able to wage successfully a defensive or aggressive war against the rest of the States of the World. All States are therefore interdependent on one or more States for their peace and security. Since the States are not entirely independent, they cannot be absolutely sovereign either.

While the development of civilization brought more and more unity in the world, the development of the concept of sovereignty tended to bring, in theory at least, more and more disunity among the States, that is to say among those men who were entrusted with the public administration in the political societies. The emphasis on nationalism both in political philosophy and the arts led the governments indoctrinated with the doctrine of national sovereignty to regard themselves as State Persons embodying the nationality of their political society and to view each other as men did in the Hobbesian state of nature.

Notwithstanding the fact that the concept of sovereignty is intrinsically wrong, the governments have adhered to it as if it were an infallible dogma. In the

sphere of international relations this concept has been a road block on the way to a genuine international cooperation. Governments, like Hobbesian men, have nevertheless made attempts to "live peaceably amongst themselves and be protected against other" States. Since the concept of National sovereignty as an absolute power above which there is not and cannot be any superior power is incompatible with the development which has taken place towards the establishment of a "supreme power" over and above the States, i.e. a world government, an attempt will be made in the following chapter to find out to what extent the fallacy of the doctrine of national sovereignty has influenced the framing of the Charter of the United Nations.

CHAPTER II

THE CHARTER OF THE UNITED NATIONS AND NATIONAL SOVEREIGNTY

(a) The Establishment of the United Nations

October 30, 1943. The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics (the USSR) and China issued from Moscow a "Declaration of Four Nations on General Security". In Article 4 of this Declaration they stated:

"That they recognize the necessity of establishing at the earliest practicable date a general international organisation based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of International peace and security."

Thus, the four powers, by deciding to establish a new organization of States, discarded the League of Nations although it was still in existence - at least in some of its subsidiary organs. Since the new organization was to be established on "the principle of the sovereign equality" of Members, the Declaration failed the hopes, widely maintained during the war, for the establishment of an organic association of States on a federal basis.

The four powers assumed responsibility for the elaboration of a constitutional plan for the new

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organization. From August to October 1944, they held exploratory conversations at Dumbarton Oaks, Washington, D.C. The agreed plans were embodied in a document entitled "Proposals for the Establishment of a General International Organization". These Proposals defined the organizational framework of the proposed organization, and the basic obligations and responsibilities of Members. They provided, inter alia, for a General Assembly in which all members would be represented equally, and for a Security Council of eleven members, on which five of the great powers would have permanent representation and the other powers only occasional representation. The Proposals left the voting procedure of the Security Council unresolved. This question was taken up at the Yalta Conference of February 3 - 11, 1945, where an agreement was reached on the formula. According to this agreement, all decisions on procedural questions should be taken by a majority of seven votes, and on other questions by a like majority but including all the permanent members. Were not the authors of these proposals aware that they were introducing in the important Security Council a principle quite alien to that of the "sovereign equality of States" which is quite indifferent to the concept of power? It was also agreed that a party to a dispute should abstain from voting.

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In conformity with the agreement reached at Yalta, the so-called United Nations Conference on International Organization was called at San Francisco from April 25 to June 26 1945. This Conference had the task of implementing the principles announced at Dumbarton Oaks by drafting a charter for the permanent international organization with authority and power to prevent or stop aggression. The representatives of fifty States, consequently, drew up and, on the 26th of June, 1945, signed the Charter of the United Nations. It came into force on the 24th October, 1945, and the first session of the General Assembly convened on January 10, 1946, in London. The authority and power of the United Nations to prevent or stop aggression is in contradiction with the national sovereignty of the Members which, according to the Moscow Declaration, was to be safeguarded under the Charter.

What are, then, the organs of the Organization which have been entrusted with the authority and power to stop aggression and how are they supposed to function?

The Charter of the United Nations provides for the following principal organs of the Organization: a General Assembly, a Security Council, an Economic and Social Council, an International Court of Justice and a Secretariate. Of these organs, the General Assembly and the Security Council are the most influential bodies.

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The General Assembly consists of all the Members of the United Nations each of whom may have as many as, but "no more than five representatives" although it may only cast a single vote.

"The Assembly is the most representative organ of the United Nations, and the one from which the authority of certain of the other organs is largely derived. It is also the organ which is chiefly responsible for the performance of the functions of discussion, recommendation, review, election, financial control and initiation of Charter amendments which are so important to the successful functioning of the United Nations. If the Organization of the United Nations were to be compared with that of a state, the General Assembly might be called the Parliament or Congress. This analogy should not be pressed too far, however, because, since the United Nations is not a world state having independent powers of its own, the General Assembly is not a legislative body in the sense in which that term is commonly used. It can initiate studies, discuss and recommend, but it cannot adopt legislation binding upon Members or their citizens."¹

The decisions of the General Assembly are framed as "recommendations" which have no binding force and may be ignored by the parties concerned². However, the General Assembly's recommendations have great moral force as recommendations of the majority of the world's Governments.

¹ Goodrich and Hambro, "Charter of the United Nations", p. 25.

² See "The Kashmir Dispute", Chapter 4(a) and "Racial Segregation in the Union of South Africa", chapter 5(b).

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The General Assembly may "consider" the general principles of cooperation in the maintenance of international peace and security, including those concerning disarmament and the regulation of armaments; and it may make recommendations in respect to such principles to the Members or to the Security Council, or to both. It may discuss and make recommendations on any question relating to the maintenance of international peace and security which any Member, the Security Council or a non-Member State brings before it. However, a non-Member State must accept the obligations of pacific settlement provided in the Charter prior to any discussion of such question. The General Assembly may also call the attention of the Security Council to situations which in its view are likely to endanger international peace and security. It may recommend measures for the peaceful settlement of any situation which in its view is likely to impair the general welfare or friendly relations among the States, including such situations which result from a violation of the Purposes and Principles of the Organization, provided that the Security Council is not exercising its functions on the question.

The Security Council consists of five permanent members (France, the United Kingdom, the United States, the USSR

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and China) and six non-permanent members elected for a term of two years by the General Assembly. Under Article 24 of the Charter, the Members of the United Nations have conferred the "primary responsibility for the maintenance of international peace and security" upon the Security Council. For this purpose, under Articles 24 and 25, they have agreed that in carrying out its duties the Security Council acts on their behalf and that they will accept and carry out its decisions. In case of a threat to, or a breach of, the peace, the Security Council is empowered to call upon the military and economic resources of any Member of the United Nations; and to determine economic, diplomatic and military sanctions which the Members are then obliged to carry out. It even has a right to use both the manpower and, within certain limits, the territories of the Member States. To bring about an amicable settlement, the Security Council may intervene in any situation and dispute, the continuance of which is likely to endanger the maintenance of international peace and security. This is a drastic limitation of national sovereignty.

With regard to the duty of the Members of the United Nations to give effect to the decisions of the Security Council, Messrs. Bentwick and Martin have made the following observations:

"Nominally, Members were to retain their full sovereignty. Constitutionally, the Security Council was not a supra-national authority, only an agent acting for and on behalf of Sovereign States. But the incidents of this particular relationship between principals and agent were so formulated as to amount to a delegation of authority, irrevocable for the duration of the Organization, and involving a duty for the principals to give effect to the decisions of the agent in all matters relating to sanctions.

"This new conception of the relationship between sovereign States and the executive organ of a public international organization went to the root of the legal character of the Organization itself.... The United Nations is more 'organic' than an association of States, but less organic than a composite State. The absence of legislative powers in the General Assembly and the tacit admission of the right of withdrawal suggest an analogy with confederations. But the analogy is far from complete. The Security Council has compulsory powers which are not unlike the powers of a federal government in the field of defence; and in the matter of the protection of human rights, the right of petition by individuals and groups, which is inherent in the Charter, establishes a close parallel to that direct relationship between federal organs and the national component States which is an essential characteristic of a federal constitution."³

Thus the Security Council wields powers previously unknown in the history of international organizations, unless it be that of certain popes in the Middle Ages. The authority of the Security Council and the General Assembly is of such a magnitude that it necessarily constitutes a limitation of the national sovereignty of a

³ Bentwick and Martin, "A Commentary on the Charter of the United Nations," pp.XVI - XVII.

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Member State, despite the preliminary declarations of principles in Article 4. This, of course, was inevitable if the purposes of the United Nations were to be realized. But national sovereignty would not be forgotten altogether. How it was to be safeguarded is now studied in the following paragraphs.

(b) Purposes of the United Nations

The United Nations Organization was established for functions which are set forth as Purposes in Article 1 of the Charter.

The maintenance of international peace and security is placed at the head of the list of the Purposes since peace is a fundamental prerequisite for the fulfilment of the other objectives. Although universal peace is the ultimate objective of the United Nations, as announced in the Preamble of the Charter, the primary objective is international peace. The words "international peace" refer to peace among States. Consequently "international peace" is to be distinguished from peace within a State. Thus the phrase excludes any responsibility of the United Nations with regard to peace within one and the same State and by so doing it upholds the doctrine of National Sovereignty.

The second function of the United Nations is "to take effective collective measures" for the maintenance of

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international peace and security. It is significant that they are mentioned in the first place among the means through which the first objective - the international peace and security - is to be achieved. There is an obvious emphasis on taking effective collective measures. In fact, the whole Charter system is based on the assumption that the United Nations will be able to sanction its decision for the maintenance of international peace and security by taking effective collective measures. Therefore, it is of great importance to determine how the United Nations Organization is to make decisions on taking effective collective measures. This matter will be discussed later on in the dissertation under the heading "the Right of Veto".

Since threats to the peace are usually caused by disputes between States, the third Purpose of the United Nations is to bring about an amicable settlement of such international disputes which "might lead to a breach of the peace". Accordingly, the United Nations Organization is not authorized to intervene in such minor disputes the continuance of which is not likely to endanger the maintenance of international peace and security. This limitation of the authority of the United Nations is a further concession to the doctrine of National Sovereignty. It actually leaves to the parties concerned to determine

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whether the continuance of an international dispute constitutes a threat to the peace or not. Furthermore, any party to an international dispute may refuse to utilize the United Nations' methods and means of pacific settlement of disputes on the ground that the dispute does not constitute any threat to the peace⁴. Without the co-operation of the disputing States, the United Nations Organization cannot "bring about by peaceful means.....adjustment or settlement of international disputes or situations which might lead to a breach of the peace" before the very breach of the peace has taken place.

In paragraph 2 of Article 1, the Charter adopts the development of "friendly relations among nations based on the principle of equal rights and self-determination of peoples"⁵ as its fourth Purpose. However, it does not indicate what action the United Nations should take to that end. The meaning of the phrase "based on respect for the principle of equal rights and self-determination of peoples" was defined by Committee I/1 at the San Francisco Conference as follows:

⁴ See "The Anglo-Iranian Oil Co. Case", Chapter 4(a).

⁵ Underlining ours.

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"the principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct; the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace; an essential element of the principle in question is a free and genuine expression of the will of the people."⁶

While this definition of the principle of equal rights of peoples and that of self-determination tend to promote democracy, it also adheres to the doctrine of National Sovereignty since "the respect of that principle is a basis for the development of friendly relations"⁷ which relations must refer to relations between nations.

The fifth function of the United Nations is "to take other appropriate measures to strengthen universal peace". However, these "appropriate measures" have to be consistent with the Principles of the United Nations. Although "universal peace" is a wider concept than "international peace" and refers to peace within a State, the Principles of the United Nations exclude definitely the power of the Organization to intervene in an armed conflict that is strictly within the State.

The sixth function is "to achieve international cooperation in solving international problems of an

⁶ The United Nations Conference on International Organization (UNCIO), Report of Rapporteur of Committee I to Commission I, Doc. 944, I/1/34(1), (Document VI, p. 455).

⁷ Underlining ours.

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economic, social, cultural or humanitarian character". It recognizes the fact that the threat of coercion alone does not suffice for the maintenance of international peace and security, and that the causes of conflicts are reduced by the settlement of minor international disputes thereby creating conditions favourable to peace. It also adheres to the doctrine of National Sovereignty, for the words "international cooperation" and "international problems" refer in this connection to co-operation and problems between sovereign states.

The seventh function of the United Nations is to promote and encourage "respect for human rights and for fundamental freedoms for all, without distinction as to race, sex, language or religion". Although human rights and fundamental freedoms are mentioned several times in the Charter, the terms are not defined. At the San Francisco Conference a suggestion was made that a declaration of human rights should be included in the Charter. At Committee I/1 it was, however, decided that for lack of time the Committee could not proceed to realize such a draft and that the Organization, once formed, could consider the suggestions and deal effectively with it.⁸ While the United Nations Organization and its

⁸ Ibid, p. 456

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Members are obliged to promote and respect human rights and fundamental freedoms, the lack of definition of those terms deprives the obligation of much of its force.⁹

The last of the functions of the United Nations is "to be a center for harmonizing the actions of nations in the attainment" of its objectives. This phrase suggests that the Charter does not envisage action in the political, economic, social and cultural fields to be taken by the United Nations, but that the United Nations should be only a center where the States reach agreement for the common ends. It is an unintelligible suggestion that the Charter does not always want action by the United Nations itself, but only intends the United Nations Organization to be a center for agreement. Furthermore, this function, as stated in the Charter, definitely emphasizes national sovereignty of the Member States.

(c) Domestic Jurisdiction

In pursuit of the purposes of the United Nations, Article 2 of the Charter sets forth seven fundamental principles which the United Nations Organization and its

⁹ See Racial Segregation in the Union of South Africa, Chapter 5 (b).

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Members must respect. The preamble and paragraphs 1 and 7 of this article relate to the doctrine of national sovereignty.

The preamble of this article contains a definite obligation both to the Organization and to its Members to conduct their policies according to the principles of the United Nations. The binding character of these principles is evident, and especially so under Article 6 of the Charter which lays down the rule that the persistent violation of principles of the United Nations may lead to expulsion of the offending Member. Thus the principles of the United Nations constitute a limitation of national sovereignty of a Member State. Under paragraph 3 of Article 2, all Members are obliged to settle their international disputes in such a manner "that international peace and security, and justice", are not endangered. Under paragraph 4, the Members are obliged to refrain "from the threat or use of force against the territorial integrity or political independence of any state". Under paragraph 5, the Members are obliged "to give the United Nations every assistance in any action it takes in accordance with the present Charter" and to refrain from giving assistance to any state against which the United Nations is taking "preventive or enforcement action". Naturally, these

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limitations of national sovereignty of Member States are valid only in case the United Nations is able to sanction them by force.

Under paragraph 1 of Article 2, the United Nations Organization is based "on the principle of the sovereign equality of all its Members". The term "sovereign equality" combines the two distinct concepts of sovereignty and equality. At the San Francisco Conference, Committee I/1 defined the meaning of the term in the following manner :

- *(1) that states are juridically equal;
- (2) that each state enjoys the right inherent in full sovereignty;
- (3) that the personality of the state is respected, as well as its territorial integrity and political independence;
- (4) that the state should, under international order, comply faithfully with its international duties and obligations." ¹⁰

When the Charter founds the Organization on the principle of sovereign equality of all its Members, it adheres to the doctrine of National Sovereignty. Under

¹⁰ UNCIO, Report of Rapporteur of Committee 1 to Commission I, Doc. 944, I/1/34 (1) (Documents VI, p.457)

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the Charter, the principle of sovereignty is compatible with responsible participation in carrying out the functions of the Organization as defined in the Purposes of the United Nations and elsewhere in the Charter. The framers of the Charter were clearly of the opinion that a State exercises its sovereignty by assuming international obligations under the Charter and that by so doing it does not violate its sovereignty. On the other hand, the Members of the United Nations are by no means expected, under the Charter, to assume international responsibilities to the extent that it would amount to giving up the substance of their sovereignty to the Organization. Thus the Charter declares allegiance to the principle of national sovereignty, which principle, if rigidly adhered to, means a denial of the only evolutionary goal that might eventually give mankind a rule of law based on justice in place of the capricious and ruthless rule of force. The most serious consequence of the first principle of the United Nations Organization is the probability that it will fortify and revitalize the extreme nationalism which is quite inconsistent with the establishment of the United Nations Organization itself.

The concept of State equality as a juridical term is the necessary consequence of the concepts of State sovereignty and State independence. By the equality of

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States it is to be understood that the rights of each State ought to be respected the same as those of every other, without distinction between great powers and those which are smaller; that all States enjoy an independent personality; and that each State may assert all rights which are derived from that personality. In other words, the rights of States are equal. This juridical equality of States is recognized by the Charter which provides, for example, that new obligations for Members must be based on voluntary acceptance and that the organs of the United Nations may only make recommendations, and not decisions, with respect to matters of substance. However, the Security Council is empowered to make substantive decisions under Chapter VII of the Charter which decisions create obligations for Members who have not concurred in the decisions, but not for the permanent members of the Security Council because each of them has the right to prevent a decision from being taken. This contradiction in the Charter provisions is obviously due to a compromise made between two conflicting ideals:

- (1) the ideal of achieving collective security through an international authority over and above all the States, and
- (2) the ideal of independent national States, based on the concept of national sovereignty and upheld by virtue of the political influence of the great powers. This contradiction

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in the Charter provisions will be further dealt with under the heading "The Right of Veto".

Under paragraph 7 of Article 2, the United Nations is denied the authority to intervene "in matters which are essentially within the domestic jurisdiction of any State", and the Members are specifically excluded from any obligation to submit such matters to settlement under the Charter. The setting of this paragraph makes it applicable to the entire Charter, with the exception of "the application of enforcement measures under Chapter VII". The important words in this article are "essentially within the domestic jurisdiction of any State". What is the meaning of the words "domestic jurisdiction"? Definitely the word "domestic" restricts the idea of wider jurisdiction, i.e. authority in a wider sense. It also draws a distinction a matter's being within the jurisdiction of a State and its being within the domestic jurisdiction of that State. Thus, a matter to be within the domestic jurisdiction of a State, must be one that pertains to the affairs of the subjects and the territories of that State as well as one over which that State has powers of direct legislation. Article 2 (7) is very important in the Charter system because it recognizes that the greatest part of international relations still remains within the domestic

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jurisdiction of States.

History of Article 2 (7). The origin of Article 2(7) is found in Chapter VIII, Section A, paragraph 7, of the Dumbarton Oaks Proposals. It reads as follows:

"The provisions of paragraphs 1 to 6 of Section A (dealing with the 'Pacific Settlement of Disputes') should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the State concerned."

At the San Francisco Conference, the four sponsoring governments¹¹ submitted an amendment which greatly extended the scope of the reservation by proposing that the principle of non-intervention by the United Nations in matters within the domestic jurisdiction of Members should be transferred from Chapter VIII, Section A, to Chapter II (Principles) where it would apply to all the provisions of the Charter¹². In the view of the sponsoring governments this change in the Dumbarton Oaks Proposals was a necessary corollary to the change in the character of the United Nations Organization as planned in the discussions at San Francisco and

¹¹ i.e. the United Kingdom, the United States, the USSR and China. France subscribed to the Dumbarton Oaks proposals but did not want to sponsor the Conference.

¹² UNCIO, Amendments Proposed by the Governments of the United States, the United Kingdom, the Soviet Union and China, 5 May 1945, Doc.2, G/29 (Documents, VI,p.622)

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which plans broadened the scope of the Organization's functions, particularly in respect to economic, social and cultural matters. Although this broadening of the scope of the Organization constituted a great advance, it also created special problems with respect to which the four power amendment stated as follows:

"The question has been raised as to what would be the basic relation of the Organization to member states: Would the Organization deal with the Governments of member states, or would the Organization penetrate directly into the domestic life and social economy of the member states? As provided in the amendment of the sponsoring governments, (....) this principle (Article 2(7)) would require the Organization to deal with the governments (....). The amendment recognized the distinct value of the individual social life of each state".¹³

Under this four power amendment, the principle of non-intervention in matters within the domestic jurisdiction was to be subject to one qualification; namely, it was not to prejudice the application of Chapter VIII, Section B, of the Dumbarton Oaks Proposals, dealing with the determination of threats to the peace and acts of aggression and action with respect thereto.

This four power amendment was vigorously criticized at the San Francisco Conference. On the one hand, some delegations opposed it on the grounds that it weakened the

¹³ UNCIO, Summary Report of the Seventeenth Meeting of Committee I/1, Doc. 1019, 1/1/42 (Documents, VI, pp. 507-508).

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authority of the United Nations; that it diminished the role of law in the proposed Organization; and that it enabled the United Nations to make arbitrary acts based on considerations of national interests, of expedience and not of justice. On the other hand, other delegations were not prepared to accept the amendment on the ground that it might imply the possibility of serious impingement upon the internal jurisdiction of members. They pointed out that the powers of the Security Council under Chapter VIII of the Proposals (Chapter VII of the Charter) included not only the power to take enforcement action once it had determined the existence of a threat to the peace, or act of aggression, but also the power to make recommendations of terms of settlement under Section B of Chapter VIII. Therefore, they feared that this might empower the Security Council to interfere in the domestic affairs of States, and dictate terms to a State over a dispute arising out of a matter of internal jurisdiction. Moreover, they argued that such a provision would constitute an invitation to use or threaten force in any dispute arising out of a matter of domestic jurisdiction, in the hope of inducing the Security Council to extort concessions from the state that is threatened¹⁴. Thus the exception would cancel out the rule

¹⁴ See Anglo-Iranian Oil Co. Case, Chapter 4 (a).

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of non-intervention in matters within the domestic jurisdiction of States, whenever an aggressor would threaten to use force. It was to remove these causes of uneasiness that the Australian Delegation proposed an amendment¹⁵, which was eventually adopted by a large majority, and the effect of which is to confine the exception to the principle of non-intervention to the taking of enforcement measures by the Security Council. With regard to the four power amendment, the Australian delegation asserted that

"the sponsoring governments would not themselves have included in the Charter this principle of general intervention, had it not been for one significant fact. The Charter reserves to each of them an individual veto on action by the Council (under Article 27 of the Charter). They can therefore assure their legislatures that these drastic powers of intervention in domestic matters can never be put into operation against themselves."¹⁶

Before the vote on the Australian amendment to the four power amendment was taken, Dr. Arnold Raestad, delegate of Norway, opposed both of these proposals, concluding his statement as follows:

"The Norwegian Delegation sincerely hopes that it will be realized that the cause of peace by conciliation cannot be realized without a certain willingness on the part of member states to recede from rigid concepts of national sovereignty.

¹⁵ UNCIO, Amendment by the Australian Delegation to Proposed Paragraph 8 of Chapter II (Principles), Doc. 969, I/1/39 (Documents, VI, p.p. 436-440)

¹⁶ Ibid, p.p. 438-439

"Insisting upon what may be called the domestic jurisdiction veto against the Security Council's exercising its good offices under Chapter VIII A (Chapter VII of the Charter), states represented at this Conference would hardly give the UN system of conciliation, from which so much is expected, a fair chance." 17

Nevertheless, the majority of States were not willing "to recede from rigid concepts of national sovereignty". Instead, the four power proposal with the Australian amendment was adopted and it forms paragraph 7 of Article 2 of the Charter.

Analysis of paragraph 7. Paragraph 7 of Article 2 establishes a limitation on the authority of the United Nations by denying its right to intervene in matters which are essentially within the domestic jurisdiction of any State and by declaring that Members are not required to submit such matters to settlement under the Charter. It must be concluded from the wording of this paragraph that the United Nations's intervention even in such a dispute which refers to the obligation assumed by an international treaty is definitely excluded if the international obligation refers to a subject matter which is "essentially" within the domestic jurisdiction. Obviously, this can be said of almost every subject matter. Consequently,

17 UNCIO, Doc. 929, I/1/37 (Documents, VI, p.432).

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Article 2 (7) may be used as an instrument to paralyze an important part of the activity of the United Nations as the greatest part of international relations still remains within the domestic jurisdiction of States.

The only exception to this principle is the application of enforcement measures under Chapter VII. This exception is not great for a situation cannot be imagined which could be determined to constitute a threat to the peace, a breach of the peace or an act of aggression, and at the same time be essentially within the domestic jurisdiction of a State. However, the United Nations Organization is authorized, but not obliged, to intervene with enforcement measures in matters of domestic jurisdiction.

The four power amendment dealt with domestic jurisdiction as a basic principle, and not as a technical and legalistic formula designed to deal with the settlement of disputes by the Security Council. However, if the question of domestic jurisdiction is a political one which an interested State may claim to be entitled to decide for itself, it necessarily limits the influence of the United Nations. At the San Francisco Conference decisions were taken according to which paragraph 7 of Article 2

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is interpreted by the organ concerned and by Members themselves.¹⁸ Thus those decisions distinguish between the Organization and its Members. As Article 2 (7) now stands, disputes which arise out of a matter of domestic jurisdiction may remain in legal stalemate unless the disputants resort to arms.

The text of paragraph 7 of Article 2 and the documents of the United Nations Conference on International Organization do not give any clear indication of the exact meaning of the paragraph. Its interpretation, therefore, will determine the role of the United Nations Organization in the fulfilment of those duties and responsibilities which the Member States have subscribed to under Article 1 of the Charter.

Article 2 (7) is the embodiment of the present day concept of national sovereignty. The principle of non-intervention in matters within the domestic jurisdiction of any State is, however, weakened by the exception in connection with the application of enforcement measures for the maintenance of international peace and security. Thus the Charter places peace and security above national

18 UNCIO, Doc.1019, I/1/42, (Documents, VI, p. 509) and Doc.933, IV/2/42(2) (Documents, XIII, pp.703-712).

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sovereignty. The doctrine of national sovereignty is, therefore, losing ground in international relations. On the other hand, there is a very important exception to this Charter provision with regard to the permanent members of the Security Council. This exception is embodied in Article 27 of the Charter.

(d) The Right of Veto

Under the Charter, the Security Council of the United Nations has been entrusted the maintenance of international peace and security which is the main function of the Organization.

Article 27 of the Charter determines the voting procedure of the Council. According to paragraph 1 of Article 27, each member of the Council has one vote. This provision conforms with the principle of sovereign equality. However, the equality is limited to members of the Security Council. Out of eleven members of the Security Council, five members are permanent while other members of the United Nations are only occasionally members of the Council. The first paragraph also gives the impression that the votes of all Members are always equal. However, there is equality of votes only in respect to procedural matters. According to paragraph 3

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of Article 27, in all other matters, the negative vote of a permanent Member nullifies the effect of all affirmative votes, regardless of their number, while the negative votes of five non-permanent Members is required to prevent a decision from being taken. The inequality of votes of the Council Members under paragraph 3 is, in fact, a gross violation of the very fundamental principle of "sovereign equality" announced in Article 2, paragraph 1, of the Charter. This inequality of the Members of the Security Council is entirely due to the demands made to this effect by the five great powers and embodied in the so-called Yalta Formula.

History of Article 27. The Dumbarton Oaks conferees were unable to reach agreement on the voting procedure of the Security Council. According to the working paper submitted by the USSR, "decisions of the Council on questions pertaining to the prevention or suppression of aggression shall be taken by a majority of votes, including those of all permanent representatives on the Council".¹⁹ The United Kingdom proposal while admitting that unanimity of the permanent members should normally be required added

19 U.N. Security Council, Official Records, 2nd Session, 125th Meeting, p. 683.

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that "in any event the votes of parties to a dispute should not be taken into account".²⁰ The delegation of the USSR insisted throughout the discussion at Dumbarton Oaks that the principle of unanimity should be applied even when a permanent member of the Security Council was party to a dispute, and should be enforced to the extent of barring even the very discussion of such a dispute by the Security Council. At the Yalta Conference President Roosevelt proposed the rule that a permanent member of the Security Council, party to a dispute, should abstain from voting on decisions for the peaceful settlement of that dispute. That formula was acceptable to the USSR and it was incorporated in the Dumbarton Oaks proposals, after having been subscribed to by France and China.

At the San Francisco Conference, various delegations of governments participating in the Conference criticized vigorously paragraphs 2 and 3 of Article 27 and submitted numerous proposals for their amendment to remove the right of veto of a permanent member of the Security Council²¹. In Committee III/1, delegations of the Five Great Powers were requested to indicate how paragraphs 2 and 3 would be

20 Ibid.

21 UNCIO, Doc. 360, III/1/16, pp. 8-12 (Documents, XI, pp. 774-778).

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applied in specific situations. The Governments of the Five Great Powers were, however, unable to give an interpretation of the meaning of the paragraphs. Subsequently, delegations of smaller Powers prepared a list of twenty-three questions which were submitted on 22 May 1945 to the Delegations of the Five Great Powers²². On June 7, the Five Great Powers announced a joint statement on voting procedure in the Security Council²³. From 9 to 13 June, the appropriate technical committee of the Conference (Committee III/1) discussed the so-called Yalta formula and the joint statement of interpretation. In the view of the smaller Powers, both the Yalta formula and the joint statement were too restrictive in the scope allowed for the use of the procedural vote; they also left many important questions unanswered; they violated the principle of "sovereign equality"; and they weakened the Security Council to such an extent that it might not be able to take decisions in the discharge of its responsibilities

22 UNCIO, Questionnaire on Exercise of Veto in Security Council, Doc. 855, III/1/B/2(a) (Documents, XI, p.p. 699-709).

23 UNCIO, Doc. 852, III/1/37 (1), June 8, 1945 (Documents, XI, pp. 710-714).

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for the maintenance of international peace and security²⁴. To remedy the last mentioned weakness of the Great Power Proposals, the delegate of El Salvador suggested that when a deadlock occurred in the Security Council, the matter should be referred to the General Assembly, as representative of all the United Nations, to take action in the interests of peace²⁵. However, the delegates of the Five Great Powers maintained that the unanimity of the permanent members was necessary for the discharge of the Security Council's duties. The joint statement frankly admitted that the reason for the right of veto of a permanent member was purely political:

"In view of the primary responsibility of the permanent members, they could not be expected in the present condition of the world to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they have not concurred."

The delegates of the Five Great Powers informed the other delegates that the text proposed by the Yalta formula and the joint statement of interpretation were as far as their Governments were prepared to go. The

²⁴ UNCIO, Doc. 897, III/1/42 (Documents, XI, pp. 430-440); Doc. 922, III/1/44 (Documents, XI, pp. 454-460); Doc. 936, III/1/45 (Documents, XI, pp. 471-476); Doc. 956, III/1/47 (Documents, XI, pp. 486-495); Doc. 967, III/1/48 (Documents, XI, pp. 520-527).

²⁵ UNCIO, Doc. 897, III/1/42 (Documents, XI, p. 436).

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Governments of the smaller Powers, realizing that no veto meant no United Nations Organization then accepted the proposal.

Assessment of the Article. While Article 27 makes a distinction as to voting procedure between procedural and substantive questions, it does not define those terms. The joint statement of the Five Great Powers declares that the question whether a dispute or situation is to be discussed and the question whether parties to a dispute are to be heard by the Security Council must not be treated as substantive questions. In controversial cases not expressly covered by the joint statement the preliminary question as to whether a matter is procedural or substantive, should be decided by the Security Council as a substantive question. According to the joint statement, the scope of the procedural voting was thus limited because beyond this scope

"decisions and actions by the Security Council may well have major political consequences and may even initiate a chain of events which might, in the end, require the Council under its responsibilities to invoke measures of enforcement (...) (under Chapter VIII of the Charter). This chain of events begins when the Council decides to make an investigation, or determines that the time has come to call upon States to settle their differences, or makes recommendations to the parties. It is to such decisions and actions that unanimity of the permanent members applies.. "

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The proviso in paragraph 3 of Article 27 for abstention from voting by parties to a dispute seems to be an important proviso, for it appears to diminish the privileged voting power of the permanent members in a sphere of matters which might well be crucial for the maintenance of international peace and security. However, the value of this proviso is questionable because a permanent member, alleged to be a party to a dispute, may deny the very existence of the dispute and then the question, whether there is a dispute, must be decided by the Security Council as a substantive question which in turn is subject to the veto of the permanent members, including the member who is alleged to be a party to the dispute²⁶. On the other hand, the rule of abstention applies merely to decisions concerning the amicable settlement of the dispute but not to the enforcement measures under Chapter VII of the Charter. Consequently, a permanent member may use his right of veto to prevent any collective measures from being taken against himself, because all substantive decisions under Chapter VII of the Charter are subject to the veto of every permanent member. Thus, a permanent member, even when he is a party to a dispute, is in a position to deny the existence of a

²⁶ Bentwick and Martin, "A Commentary on the Charter of the United Nations", pp. 69-70.

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dispute and to frustrate any action deemed necessary by the other members of the Security Council to prevent or stop his aggression.

Under paragraphs 2 and 3 of Article 27, the permanent members are actually independent from the United Nations Organization. They are above the United Nations Organization. This privileged status of the five permanent members is a definite concession to the concept of national sovereignty.

(e) Withdrawal from Membership

The Dumbarton Oaks Proposals did not suggest any method of withdrawal from membership. This question was taken up at the San Francisco Conference. In the discussions at Committee I of Commission 2²⁷, it soon became evident that the right of withdrawal must be recognized in one form or another. Some of those delegates who argued for the right of withdrawal maintained that the Charter should not preclude the right of a member to withdraw from the United Nations Organization if the rights and obligations of a State as such were changed by Charter amendment in which it

²⁷ UNCIO, Doc.1086, I/2/77, (Documents, VI, pp. 262-267).

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has not concurred and which it finds itself unable to accept. The delegate of Belgium opposed this contention on the grounds that it would be especially unfortunate to associate withdrawal with amendments. He also held that withdrawal was a faculty, not a right, which opinion was supported by the delegation of the United Kingdom and Egypt.

The delegate of the U.S.S.R. maintained that the right of withdrawal, like the right of admission, should be voluntary. In his view any attempt to retain a State within the Organization by force would be contrary to the voluntary principle upon which the Organization was based. The delegate of the Ukrainian S.S.R. held that the right of withdrawal was necessary to protect the sovereignty of the States and the delegate of the Byelorussian S.S.R. informed the other delegates that his Government desired that the right of withdrawal be specifically mentioned in the Charter. A motion to this effect had already been initiated by the delegate of Canada, who moved that "There should be mention of the right of withdrawal in the Charter".

Although the delegate of the United States held that "in an organization of sovereign states" all members must possess the faculty of withdrawal, he maintained that

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if it is necessary to make a statement on the subject of withdrawal, this statement should be only in the Committee's report, and not in the Charter. The delegate of China being of the opinion that the faculty of withdrawal was 'inherent' likewise opposed the inclusion of the right of withdrawal in the Charter, maintaining that 'there was no need to build an impressive portal' for the withdrawal. While the delegate of France subscribed to the statement of the delegate of the United States, the delegate of the United Kingdom held a different opinion, contending that "the inclusion of a specific reference in the Charter to withdrawal would not affect the rights which already belonged to a state".

Thus all the future permanent members of the Security Council agreed that the faculty of withdrawal from membership must be recognized in one form or another. The opposite opinion had no chance of winning as it was confronted by the unanimity of the delegates of the five great powers which were supported by the majority of other delegates. Nevertheless, the delegate of Denmark faced with courage the old 'school' of national sovereignty contending that "the nations must yield certain aspects of sovereignty".

However, that opinion which held for universality gained a small victory when the Commission rejected, by a vote of 19 to 24, the motion of Canada that provision for

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withdrawal from the Organization should be included in the Charter. Instead the Committee adopted the following commentary on withdrawal which was subsequently accepted by Commission I and the Conference in plenary session :

"The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their co-operation with the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its co-operation in the Organization.

"It is obvious, however, that withdrawals or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice.

"Nor would it be the purpose of the Organization to compel a Member to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.

"It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal." 28

28 Ibid. p.267.

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Although the commentary recognized that "the highest duty" of the Members is to continue their co-operation for the fulfilment of the Purposes of the United Nations, this duty is by no means a legally binding one because a Member may withdraw for reasons of "exceptional circumstances". With regard to the significance of this commentary, Messrs. Goodrich and Hambro observed that :

"while it is doubtful whether declarations adopted by the San Francisco Conference but not forming part of the Charter are binding on Members to the same extent as the Charter itself, the manner in which this declaration was adopted would seem to justify its being considered as generally accepted reservation with the same binding force as the Charter itself," 29

If that is so, then the right of withdrawal from the Membership of the United Nations under the commentary of Committee I/2 of the UNCIO constitutes a significant admission to national sovereignty.

29 Leeland M. Goodrich and Edward Hambro, "Charter of the United Nations", p.144

CONCLUSION

While the Principles of the United Nations constitute a limitation of national sovereignty of a Member State, the Charter on the other hand adheres to the doctrine of national sovereignty. Thus, according to paragraph 7 of Article 2 a matter is solely within the domestic jurisdiction of a State if it pertains to the affairs of the subjects and the territories of that State and is also a matter over which that State has powers of direct legislation. Consequently, the greatest part of international relations still remain within the sphere of domestic jurisdiction of States. This paragraph also lays down the rules that the United Nations Organization must deal with the Governments and that it has no authority to penetrate directly into the domestic life and social economy of a Member State. Definitely this paragraph constitutes a very drastic limitation of the authority of the United Nations. Since there is no clear indication of the meaning of the paragraph, its interpretation will consequently determine the extent to which the United Nations Organization will be able to carry out its duties and responsibilities. Paragraph 7 of Article 2 constitutes the embodiment of the present day concept of national sovereignty. It reserves the greatest part of

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international relations to the domestic jurisdiction of States. However, it places international peace and security above all considerations of national sovereignty. Thus a significant advancement towards world government in the political and legal theories affecting the life and welfare of every individual in the world has taken place. There is but one defect in this Charter provision and that is the special powers granted to five of the great powers.

A State being only a highest form of all institutions of people and lacking completely any supernatural State personality, entirely separate, over and above people, it follows that 'sovereign equality' of States must mean also sovereign equality of peoples. Some writers claim that the term 'sovereign equality' as expressed in Article 2(1) is solely a legalistic term which means merely equality of rights of States. This conception of the term is in contradiction with the term "principle of equal rights and self-determination of peoples" of Article 1(2) which implies more than merely legal rights. It necessarily implies real equality of peoples in every respect, in legal as well as in political rights, as Member Peoples represented by their Governments. Consequently, Article 27 is a flagrant violation of both the Purposes and the Principles of the United Nations. It gives the permanent members of the

Security Council a real independence from the United Nations Organization. While they are thus placed above the Organization, they also are entrusted with exceptional powers under Articles 23 and 24 with regard to the decisions of the Security Council which decisions, under Articles 24 and 25, all other Members are bound to obey. Since all other Members of the United Nations have surrendered a significant part of their national sovereignty to the United Nations in matters concerning the maintenance of international peace and security, it follows that the right of veto ought to be removed and the permanent members of the Security Council brought by that means within the United Nations Organization. Only then the obligation of the principle of equality of States will be fulfilled.

The weakness of the United Nations Organization becomes especially evident if the commentary of Committee I/2 on the withdrawal from membership is considered to constitute the right of withdrawal.

The clash of the Purposes of the United Nations and the concept of national sovereignty which is so evident in the Charter, invokes the question what is the impact of national sovereignty on the operation of the United Nations. Indeed, what is the realm of national sovereignty to-day? In Part II of this dissertation it

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is sought to find the answers to these questions by studying the operation of the United Nations in three especially important categories of matters dealt with by the United Nations : (1) the problem of general disarmament, (2) disputes over the internal policy of a state and (3) disputes over a territory. Through the study of the case histories of these matters, answers to the questions might emerge.

PART II

THE IMPACT OF NATIONAL SOVEREIGNTY

ON THE OPERATION OF THE

UNITED NATIONS

PREFACE

In the previous chapter it was established that the United Nations is to safeguard both international peace and the National Sovereignty of the States. As the concept of National Sovereignty implies the right of the State to pursue its self-interest, the role of the United Nations is to reconcile the self-interests of the nations. However, with regard to the maintenance of international peace and security, the United Nations is also empowered under the Charter to take enforcement measures to impose its will. Thus the United Nations is to preserve National Sovereignty and at the same time to restrict it. From this contradiction of the functions of the United Nations, the question arises as to what has been the impact of the concept of National Sovereignty on the operation of the United Nations and whether the United Nations has been able to fulfil its obligations under the Charter provisions. In Part II, three categories of matters dealt with by the United Nations have been chosen for research in order to find answers to these questions:

i) the problem of general disarmament which concerns the whole world;

ii) disputes over a territory such as have so often led States to resort to arms; and

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iii) disputes over the internal policy of a state, the handling of which will further illustrate the competence of the United Nations.

The historical method is used in the study of the above-mentioned case histories. Each case history contains a description of the proposals and counter-proposals presented before the United Nations. This method was deemed necessary to illustrate in the proper perspective the role of National Sovereignty in the operation of the United Nations.

CHAPTER III

THE PROBLEM OF GENERAL DISARMAMENT

(a) International Control of Atomic Energy

On the 6th of June, 1945, the first atomic bomb exploded over Hiroshima. It appeared at the very end of hostilities, when men's thoughts were naturally turning to devising methods for the prevention of war. The atomic bomb made it clear that the plans which had been laid at San Francisco for the United Nations Organization would have to be supplemented by a specific control of an instrument of war so terrible that its uncontrolled development would not only intensify the ferocity of warfare, but might directly contribute to the outbreak of war.

The United States, at first, assumed the role of a trustee, according to which they were to hold their exclusive knowledge of atomic energy as a "sacred trust". "We must constitute ourselves trustees of this new force", President Harry S. Truman told Congress¹. It was obvious, however, that the security provisions of the Charter would

¹ The International Control of Atomic Energy: Growth of a Policy, Department of State Publications 2702, Washington, 1946, p. 11.

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be meaningless unless an organ of international control of atomic energy was set up. It was also clear that within a few years other powers would have the bomb. Consequently, President Truman met with Mr. C.R. Attlee, Prime Minister of the United Kingdom, and Mr. W.L. Mackenzie-King, Prime Minister of Canada, to consider the possibility of international action in preventing the use of atomic energy for destructive purposes, while utilizing it for peaceful and humanitarian ends. On November 15, they issued a joint declaration in which the three governments proposed the establishment under the United Nations of a commission to study the problem of control². On December 27, the Foreign Ministers of the USSR, the United Kingdom and the United States issued a joint communique which recommended, for the consideration of the General Assembly, the establishment by the United Nations of a commission to consider the problems arising from the discovery of atomic energy³. On January 24, 1946, the General Assembly unanimously decided to establish a United Nations Atomic

² Department of State Bulletin (United States), Vol. XIII, No. 334, November 18, 1945, p. 782.

³ Ibid., Vol XIII, No. 340, December 30, 1945, p. 1032.

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Energy Commission.⁴ According to the resolution, the Commission was to consist of one representative from each of the States permanently represented on the Security Council, and Canada, whether a Security Council Member or not. The Commission was to submit its reports and recommendations to the Security Council. Its terms of reference required it to make specific proposals:

i) for extending between all nations the exchange of basic scientific information for peaceful ends;

ii) for control of atomic energy to the extent necessary to ensure its use only for peaceful purposes;

iii) for the elimination from national armaments of atomic weapons and of all major weapons adaptable to mass destruction;

iv) for effective safeguards by way of inspection and other means to protect complying States against the hazards of violations and evasions.

At the first meeting of the Atomic Energy Commission⁵, the representative of the United States presented a plan for the establishment of an international atomic development authority entrusted with all phases of the development and use of atomic energy. Under this plan the authority

⁴ U.N., General Assembly, 1st Session, Official Records, Plenary Meetings, 1946, 17th Meeting.

⁵ U.N., Atomic Energy Commission, Official Records, 1st Meeting (June 14, 1946).

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would conduct continuous surveys of world supplies of uranium and thorium and would control all atomic raw materials. It would control and operate all the plants producing fissionable products from uranium and thorium and all plants working with these materials in any significant quantity. It would possess the exclusive right to conduct research in the field of atomic explosives. Atomic research for peaceful purposes would be open only to nations under licence of the Authority which would provide them with denatured materials not suitable for weapons. Dangerous activities of the Authority and its stockpiles would be decentralized and strategically distributed so that no one area could have at its disposal overwhelming sources of power. All nations would grant the freedom of inspection on a continuing basis, including surveys by airplane, without notice to the area inspected, to the extent deemed necessary by the Authority. The representative of the United States urged that "there must be no veto to protect those who violate their solemn agreements not to develop or use atomic energy for destructive purposes". On the other hand, the Authority must have all the power necessary to take prompt and effective action to insure that there will be a swift punishment of violation of the atomic agreement.

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During the following discussions on the American plan, the representative of the U.S.S.R. found it difficult to reconcile the proposed powers of the Authority with the principles of sovereignty of States, provided in the Charter. He surmised that the representatives of the United States were aware of the difficulty, since they recommended that, by agreement, all matters of control should be considered of international, not national, importance and subject to international, not national, jurisdiction. Such an agreement, in his view, would render inapplicable paragraph 7 of Article 2 of the Charter, through no actual amendment of the Charter was proposed. He stressed the importance attached to safeguarding the sovereignty of States at the San Francisco Conference and maintained that such sovereignty was basic to the United Nations. Any violation of this principle would have far-reaching, negative consequences on the United Nations' activities, and perhaps even for its very existence. Furthermore, he made clear that the Government of the U.S.S.R. took the definite position that it was wrong to attempt to undermine the functions, powers and authority of the Security Council in connection with the control of atomic energy. He stressed that the Security Council was the appropriate body to carry out all decisions relating to the control of atomic energy, because it was

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charged under the Charter with the main responsibility for the maintenance of international peace and security. Thus, the Charter conferred upon the Security Council full power to control atomic energy, as it was a problem relating to peace and security. The establishment of any kind of authority exercising the same functions as those assigned to the Security Council would result in a dualism harmful to the whole system of the United Nations. With regard to the importance of inspection as a means of control of atomic energy, stressed in the American plan, he said that it had been exaggerated, that inspection could not guarantee peace and security between the nations, and that inspection would violate the principle of State sovereignty.

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On June 19, 1946, the representative of the U.S.S.R. presented a plan according to which the first measure to be adopted should be the conclusion of an international agreement to prohibit the production and use of weapons based on the use of atomic energy. Within three months from the day of the entry into force of the agreement all stocks of atomic weapons should be destroyed. Violation of the agreement should be severely punished under the

U.N. Atomic Energy Commission, Official Records
No.2, 2nd Meeting.

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domestic legislation of the contracting parties. The agreement should be of indefinite duration, coming in force after approval by the Security Council and ratification by one half of the signatory States, including the Council's permanent members. All States, whether Members of the United Nations or not, should be obliged to fulfil all provisions of the agreement.

Thus, the U.S.S.R. suggested the immediate outlawing and destruction of atomic weapons whether the control system were established or not. In comparison with the United States plan, the U.S.S.R. plan placed far more stress on national control over the production of atomic energy and national enforcement of the outlaw agreement.

These two sets of proposals reflect fundamental points of disagreement which have deadlocked all the negotiations in or outside the United Nations. The majority of States represented on the Commission insisted that a foolproof control system be established before the United States should give up its advantage in the field of nuclear weapons. The U.S.S.R. proposed the establishment of an International Control Commission with only prescribed supervisory powers instead of complete control and management of the production of atomic energy. In the view of the majority this commission would never provide

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the requisite security. On the other hand, the U.S.S.R. regarded the American plan, supported by the majority, as a capitalist plot seeking to dominate the U.S.S.R. by means of an international monopoly which would be in fact controlled by the United States. In the view of the U.S.S.R., the seizure of atomic production facilities, the investigations of industrial installations and the unrestricted surveillance from the air would be violation of the rights of sovereign States. The U.S.S.R. proposed only "periodic" and "limited" inspection while the United States called for unlimited authority and right of access for inspection purposes.

The United States plan, in fact, sought to entrust the Atomic Development Authority with such power and authority that it would have been a kind of world government of the whole field of nuclear development. In the view of the United States the abolition of the right to veto was essential to security. Except for the communist States, all other States were prepared to yield their sovereignty to the extent implied in the United States plan.

After various delegations had expressed their views on the two proposals, it was decided to establish various working committees to consider political, scientific and technical aspects of the two proposals.

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On November 13, 1946, the Atomic Energy Commission decided by a vote of 10 to 0, the U.S.S.R. and Poland abstaining, to submit to the Security Council before December 31 a report on its work, its findings and recommendations.⁷ While this report was being prepared, the General Assembly on December 14⁸ approved unanimously a resolution on the principles governing the general regulation and reduction of armaments, and among other things, urged the expeditious fulfilment by the Atomic Energy Commission of its terms of reference. It also recommended that the Security Council expedite consideration of the reports which the Atomic Energy Commission would make to the Security Council; that it facilitate the work of the Commission; and also that the Security Council expedite consideration of a draft convention or conventions for the creation of an international system of control and inspection, these conventions to include the prohibition of atomic and all other major weapons adaptable to mass destruction and the control of atomic energy to the extent necessary to ensure its use only for peaceful purposes.

⁷ U.N. Atomic Energy Commission, Official Records, No. 6 Sixth Meeting.

⁸ U.N. Resolutions Adopted by the General Assembly from 23 October to 15 December 1946, pp. 65-67.

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At the Atomic Energy Commission's seventh meeting on December 5, 1946, the representative of the United States offered a resolution on the principles to be included in the findings and recommendations of the report of Commission to the Security Council. These proposals were based on the prospective establishment of an International Atomic Development Authority as suggested in the first United States proposals. On December 20 the Commission resolved that the principles on which the United States resolution was based should be incorporated in the report and should not necessarily follow the exact text of the United States resolution, in order to conform to the wording of the relevant parts of the text of the General Assembly resolution of December 14. The United States resolution, in an amended form, was adopted by the Commission by a vote of 10 to 0. Poland abstained from voting and the representative of the U.S.S.R. did not participate because he was not "in a position to participate in the taking of any decisions relating to the substance of the United States proposals".

On December 31 the Commission submitted to the Security Council its first report. ⁹ On the scientific and

⁹ U.N. Atomic Energy Commission First Year's Official Records, Special Supplement, Report to the Security Council (1946).

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technical aspects of the problem, the Commission reported that it was feasible to extend among all nations the exchange of basic scientific information on atomic energy for peaceful ends; to control atomic energy to the extent necessary to ensure its use only for peaceful purposes; to accomplish the elimination from national armaments of atomic weapons; and to provide effective safeguards by way of inspection to protect complying States against the hazards of violations and evasions. The Commission recommended the creation of a strong and comprehensive international system of control and inspection by a treaty or convention in which all Members of the United Nations would participate. This convention should establish an international authority possessing power and authority necessary for the prompt and effective discharge of its duties under the convention. It was also stated that the convention should provide that the rule of unanimity of the permanent members which governed all substantive decisions of the Security Council should have no relation to the work of the authority.

The Security Council considered the Commission's report during February and March, 1947. On March 10 the Security Council adopted unanimously a resolution¹⁰ which,

¹⁰ U.N., Security Council, Official Records, 2nd Year, No.24, 117th Meeting, p.512.

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among other things, urged the Commission to continue its enquiry into all phases of the problem of the international control of atomic energy and to prepare and submit to the Security Council a draft treaty or treaties or convention or conventions incorporating its ultimate proposals.

The veto question in relation to the operation of an international control agency for atomic energy was discussed at the Commission on June 19, 1947. Then the representative of the USSR stated that the so-called veto should not apply to the day-to-day operations of a control commission. But punishments for serious violations should, however, always be subject to decisions of the Security Council. He stressed that the rule of unanimity was a basic principle of the United Nations Charter and that the USSR could never agree to the violation of such a principle. The representative of Australia maintained that any control agency should not be in any way subject to the veto and argued that the Charter of the United Nations provided for the sovereign equality of all nations, while the rule of unanimity was not a principle of the United Nations but applied only to one organ, the Security Council.

During 1947 and 1948, several delegations made efforts to secure clarification of the USSR proposals in regard to such matters as inspection and management. The

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replies of the USSR were considered unsatisfactory by the majority of the States. Consequently, the United Kingdom, Canada, China and France prepared a joint report analyzing the USSR proposals¹¹. The report concluded that:

"The Soviet Union proposals are not an acceptable basis for the international control of atomic energy. The United Nations Atomic Energy Commission cannot endorse any scheme which would not prevent the diversion of atomic material, which provides no effective means for the detection of clandestine activities and which has no provision for prompt and effective enforcement action. The Soviet Union Government has not only proposed a scheme that is fundamentally inadequate for the control of atomic energy, but at the same time has made the overriding stipulation that they will not agree to establish even such a feeble scheme of control until all atomic weapons have been prohibited and destroyed. It is completely unrealistic to expect any nation to renounce atomic weapons without any assurance that all nations will be prevented from producing them."

In the third report of the Atomic Energy Commission¹² to the Security Council, the Commission reported that it had reached an impasse and could not prepare a draft treaty incorporating its ultimate proposals as urged by the Security Council resolution of March 10, 1947. The Commission explained the reasons for its failure thus:

"The difficulties which confront the Commission were first evidenced when the plan under consideration by most of the Governments, members of the Commission, was rejected by the Soviet Union "either

11 AEC/C.1/76 (29 March, 1948)

12 AEC/31/Rev.1.

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as a whole or in its separate parts' on the ground that such a plan constituted an unwarranted infringement of national sovereignty. For its part, the Soviet Union insisted that a convention outlawing atomic weapons and providing for the destruction of existing weapons must precede any control agreement. The majority of the Commission considered that such a convention, without safeguards, would offer no protection against non-compliance."

The Commission reported that it had been unable to secure the agreement of the USSR to even those elements of effective control which are considered essential from a technical point of view. The Commission concluded that no useful purpose could be served by continuing negotiations at the Commission and recommended that negotiations in the Atomic Energy Commission be suspended until such time that there existed a basis for agreement on the international control of atomic energy.

The General Assembly, however, rejected the proposal to suspend the work of the Commission. On November 4, 1948,¹³ the General Assembly resolution requested the Atomic Energy Commission to continue the search for agreements, approved the majority plan as constituting the necessary basis for establishing an effective system of international control of atomic energy and expressed deep concern at the impasse which

13 General Assembly Resolution A/690.

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had been reached in the work of the Commission.

In 1949, the USSR exploded its first atomic device. The development of hydrogen or fusion bombs was imminent and an atomic arms race was under way in spite of the General Assembly resolutions and the forced resumption of the Atomic Energy Commission's work which was quite frustrating and fruitless. In 1950, the USSR refused to participate in any United Nations meetings with the Nationalist Delegation of China. Consequently, negotiations were suspended at the Atomic Energy Commission.

A summary of the role which National Sovereignty played in the discussions on the international control of atomic energy will be given in the conclusion of this chapter.

(b) Regulation of Conventional Armaments

The provisions of the Charter of the United Nations with respect to disarmament are considerably weaker than the provisions of the Covenant of the League of Nations. It is quite clear that the framers of the Charter did not intend that disarmament should take as important a place in the system of the United Nations as it did in the League system. The Charter, however, recognizes the importance of the international regulation of armaments as an element in an effective international system for the maintenance

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of peace and security. Thus the Charter expressly grants to the General Assembly under Article 11 the power to consider "the principles governing disarmament and the regulation of armaments" and to make recommendations with respect to such principles, while the Security Council alone is responsible under Article 26 "for formulating.... plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments". The competence of the General Assembly is confined to the formulation of general principles, while that of the Security Council is directed towards the formulation of specific plans. It also should be noted that the General Assembly may under Article 11 make recommendations whether or not the Security Council is dealing with the same subject matter.

In October 1946, the representative of the USSR introduced a resolution in the General Assembly which favored a general reduction of armaments. As a result of the initiative on the part of the USSR, the whole question of the international regulation of armaments, including atomic and other weapons of mass destruction, was considered in the General Assembly from October to December 1946. The USSR apparently hoped to shift the focus of discussion from the United States proposals on

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atomic energy to the general reduction of armaments, in a discussion in which she would find better opportunity for propaganda. In the view of the United States, the United States plan for international control of atomic energy might be weakened if all armaments were considered together. Therefore, the United States advance a counterproposal which was accepted by the USSR. On the initiative of the USSR, the General Assembly on December 14, 1946, adopted unanimously a resolution on the principles governing the general regulation and reduction of armaments. This resolution recommended that the Security Council formulate the practical measures which are essential to provide for the general regulation and reduction of armaments and armed forces and to assure that such regulation and reduction of armaments and armed forces will be generally observed by all participants.

On February 13, 1947¹⁴, the Security Council resolved to establish a Commission for Conventional Armaments to prepare a plan of work for the Council's approval and to formulate proposals for carrying out the General Assembly's resolution of December 14, 1946. The Commission, consisting of representatives of the members

¹⁴ U.N., Security Council, Official Records, 2nd. Year, No. 13, 1947.

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of the Security Council, held its first meeting on March 24, 1947 and adopted a plan of work on the 18th of June.

This plan of work¹⁵, approved by the Security Council on July 8, 1947, provided, among other things, that the Commission should "consider and make recommendations to the Security Council concerning armaments and armed forces which fall within the jurisdiction of the Commission for Conventional Armaments". On August 20, 1947, the representative of the United States opened the substantive discussion of the plan of work by proposing a resolution¹⁶ which defined weapons of mass destruction, in order to determine the jurisdiction of the Commission. In the course of the Committee's discussion the United States' resolution was slightly revised. In the final form it read as follows:

"The Working Committee (of the Commission for Conventional Armaments) resolves to advise the Security Council

"(1) that it considers that all armaments and armed forces, except atomic weapons and weapons of mass destruction, fall within its jurisdiction and that weapons of mass destruction should be defined to include atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable

15 U.N. Doc. S/387

16 S/C.3/SC.3/8.

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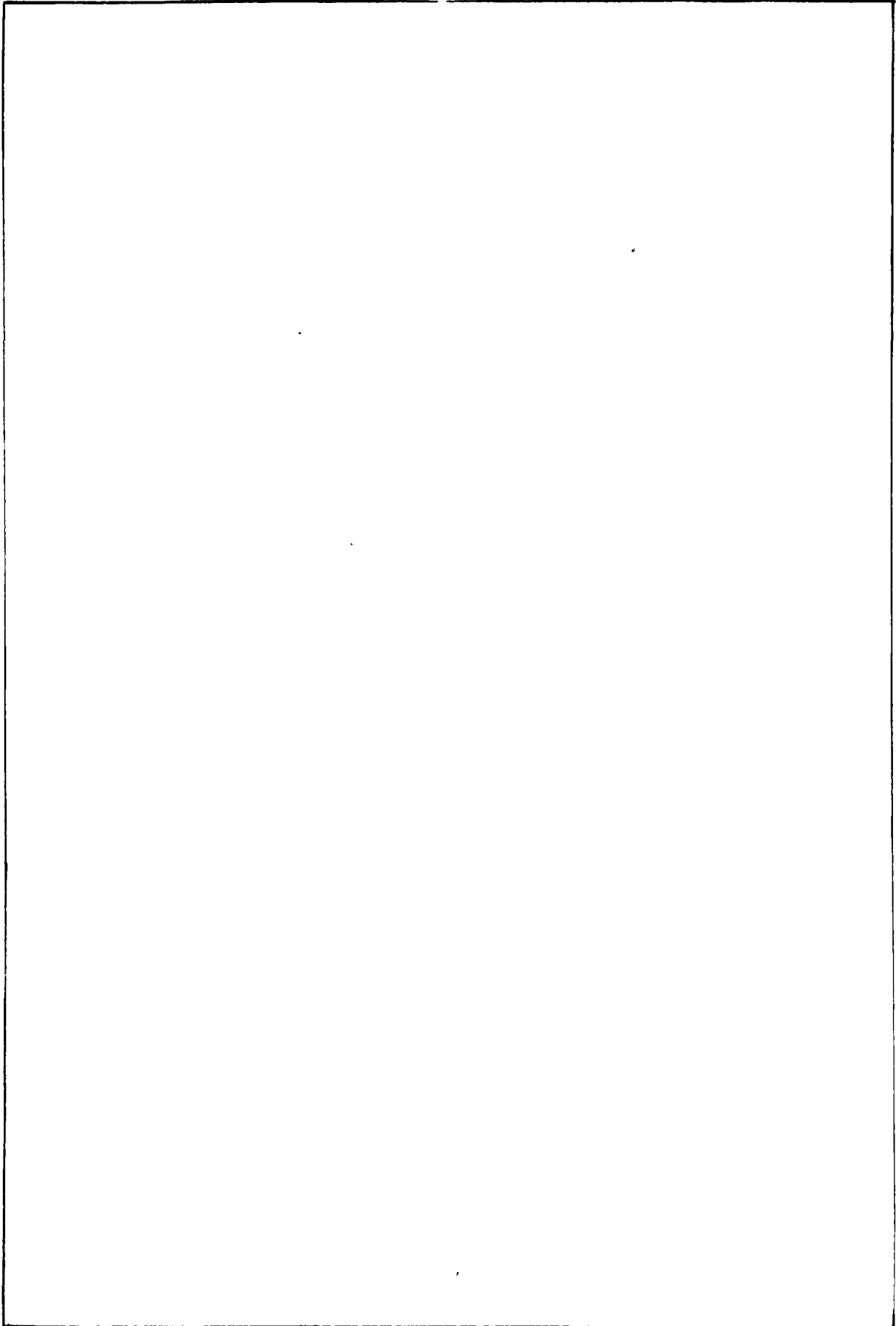
"in destructive effect to those of the atomic bomb or other weapons mentioned above;

"(2) that it proposes to proceed with its work on the basis of the above definition¹⁷."

The representative of the USSR opposed this proposal on the ground that it involved a separation of the general problem of the regulation and reduction of armaments into a problem concerning atomic weapons and other weapons of mass destruction and a problem concerning so-called conventional armaments. He held that this separation was artificial and would divert the Commission from the preparation of proposals for practical measures for the general regulation and reduction of armaments and armed forces. Furthermore, he held that measures for the regulation and reduction of armaments and armed forces required not only the reduction of conventional armaments, but also the prohibition of the use of atomic weapons and the destruction of existing stocks of atomic weapons.

On August 17, 1947, the Commission agreed on the following principles for regulating arms, by vote of 9 to 2, the USSR and the Ukrainian SSR opposed: (1) A system to regulate and reduce armaments can only be put into effect in an atmosphere of international confidence and security

17 S/C.3/SC.3/7/Rev.1.



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(2) Such confidence and security required the establishment of armed forces under Article 43 of the Charter and the establishment of international control of atomic energy.

(3) The conclusion of peace treaties with Germany and Japan as conditions of international peace and security will not be fully established until measures have been agreed upon which will prevent these States from undertaking aggressive action in the future. (4) Reduction of armaments and armed forces to the levels required by articles 43 and 51 (self-defence) of the Charter. (5) A system for the regulation and reduction of armaments and armed forces must include an adequate system of safeguards, which by including an agreed system of international supervision will ensure the observance of the provisions of the treaty by all parties thereto.

The USSR opposed these principles on the ground that they amount to a refusal to implement the General Assembly's resolution of December 14, 1946. In the view of the representative of the USSR, that resolution required the Commission to formulate promptly practical measures for the regulation and reduction of armaments and armed forces. Furthermore, it contained no conditions or prerequisites, such as the conclusion of agreements under Article 43 of the Charter, for the formulation or imple-

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mentation of such practical measures. The representative of the USSR argued that the establishment of international confidence and security was dependant on the speedy formulation and implementation of practical measures for the regulation and reduction of armaments and armed forces, including the prohibition of the manufacture of atomic weapons and other weapons of mass destruction.

Negotiations carried on during 1947 and 1948 in the Commission for Conventional Armaments did not bring any results. The next significant move was made in the General Assembly by the USSR in September 1948. The representative of the USSR introduced a draft resolution¹⁸ which recommended, among other things, that, as a first step in the reduction of armaments and armed forces, the permanent members of the Security Council should reduce by one-third during one year all existing land, naval and air forces, that atomic weapons should be prohibited and that an international control body should be established within the framework of the Security Council for the supervision of and control over the implementation of the measures for the reduction of armaments and armed forces, and for the prohibition of atomic weapons. This means that the

18 A/658.

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USSR was willing to establish an international control body within the framework of the Security Council because she then could, as a permanent member of the Security Council, block any action of the control body through the Council itself¹⁹. This constitutes an adherence to the doctrine of National Sovereignty. The General Assembly referred this draft resolution to the First Committee (the Assembly's First Committee for political and security questions including regulation of armaments) for consideration. When the draft resolution was under consideration in the Committee, the representative of the USSR submitted an amendment which provided that full official data on the state of the armaments and armed forces of the permanent members of the Security Council must be submitted to the international control body proposed in the draft resolution.

During lengthy discussion, representatives of the West pointed out that the USSR draft resolution did not take into account the inherent technical difficulties of the problem of disarmament and completely disregarded both the political aspects of the problem and the necessity for effective control, that the atmosphere of international confidence, a prerequisite of armaments reduction, would

19 See Chapter 2 (d) The Right of Veto.

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not be established until the USSR ceased to threaten the world with Communist aggression, and that the USSR proposals, because of their misleading nature, could only facilitate a war of aggression. The USSR draft resolution was rejected by a vote of 6 in favour, 35 against, with 7 abstentions.

On November 18 and 19, 1948, the General Assembly considered the report of the First Committee²⁰ and a USSR draft resolution²¹ similar to the one rejected by the First Committee. The representative of the Philippines observed at the 161st plenary meeting on November 18 that the USSR draft resolution did not take into account the absolute necessity of honest and genuine disarmament. He also pointed out that the inequality between the armed forces of the permanent members of the Security Council was so great that while the USSR could reduce its forces by one-third and still maintain its aggressive capacity, if the other powers made a similar reduction their defence forces would be brought well below the level needed for security. In his view, the character of the USSR and its policy made an effective system of control and verification necessary before any effective reduction of armaments could begin.

20 U.N. Doc. A722.

21 U.N. Doc. A/723

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The representative of Yugoslavia stated that the implementation of the USSR draft resolution would be "tantamount" to the creation of a solid basis for international collaboration and confidence.

A different view of the USSR draft resolution was taken by the representative of the United States who contended as follows²²:

"There were some nations which, in the name of sovereignty, refused to accept international controls. They contended that national promises and national reports ought to be an acceptable substitute for international control and international verification. The fact was that such promises and unverified reports would not serve to allay suspicion. History has too often proved their unreliability. Perhaps governments would no longer be deceitful or unreliable, but the lessons of history were too recent and too bitter to be disregarded at the present time. Rightly or wrongly, suspicion and fear would persist unless there were effective international controls and any nation that refused to do what was necessary to allay fear and suspicion, was itself a contributor to the conditions that led to war."

The USSR draft resolution was rejected by a vote of 6 in favor, 39 against, with 6 abstentions.

Instead the General Assembly adopted on November 19, 1948, the draft resolution recommended by the First Committee²³, by a vote of 43 to 6 with one abstention. The

22 162nd plenary meeting, p. 524

23 A/722

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General Assembly considered, inter alia, that no agreement is attainable on any proposal for the reduction of conventional armaments and armed forces so long as each State lacks exact and authentic information concerning the conventional armaments and armed forces of other States and so long as no organ of control has been established. It recommended the Security Council to pursue the study of the regulation and reduction of conventional armaments and armed forces through the agency of the Commission for Conventional Armaments.

Before this resolution was put to the vote, the representative of the USSR attacked its phraseology and insisted again that the problem of prohibition of atomic weapons and the reduction of conventional armaments and armed forces should be considered and solved simultaneously as an organic entity. Throughout the negotiations carried on in the Commission for Conventional Armaments in 1948 and 1949, the USSR kept insisting on this point.

On December 5, 1949, the General Assembly approved²⁴ the proposals²⁵ formulated by the Commission for Conventional Armaments for the submission by the member States of full information on their conventional armaments and armed

24 G.A. Resolution 300 (IV).

25 S/1372

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forces, and considered that the early submission of this information would constitute an essential step towards a substantial reduction of conventional armaments and armed forces. During the Assembly's discussion the representative of the USSR recalled²⁶ that the resolution 41 (1) of December 14, 1946, had been adopted by the United Nations at the initiative of the USSR, "despite the active opposition of the aggressive elements of the Anglo-American block". He held that the reduction of armaments could not be effective unless it was accompanied by the prohibition of atomic weapons and charged that the United States and the United Kingdom had refused to reduce armaments and were extending a system of strategic bases and military alliances which, according to him, had been created solely in order to further the aggressive plans of the United States and the United Kingdom for world domination, "to transform the other countries into colonies of the United States and to deprive States of their sovereignty and make them slaves of American monopoly capital". The United Kingdom and several other Western powers replied that armaments could not be reduced until an international control of armaments was achieved.

26 268th Meeting, pp. 511-522.

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In April 1950, the USSR withdrew its representative from the Commission for Conventional Armaments on the grounds that it refused to recognize the right of the National Government to represent China on the Commission, i.e. on the ground that the National Government did not possess sovereign power over China. The work of the Commission was for all practical purposes at an end. Moreover, a complete deadlock between the Western powers and the USSR had developed during the discussions in various Organs of the United Nations. It was obvious that efforts to reach an agreement on the regulation and reduction of national armaments and armed forces within the framework of the General Assembly's resolution of December 14, 1946, had completely failed. The effect of National Sovereignty upon the negotiations on the regulation of conventional armaments will be discussed in the conclusion of this chapter.

(c) The United Nations' Armed Force under Article 43 of the Charter.

Under Article 39 of the Charter, the Security Council is entrusted with the duty to "determine the existence of any threat to the peace, breach of the peace, or act of aggression", and in such a case to take action

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to "maintain or restore international peace and security". To this end, the Security Council may take "provisional measures" of an unspecified character (Article 40), order economic and political sanctions (Article 41) and, if it deems it necessary, "take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security" (Article 42). In order to provide the Security Council with armed forces for carrying out the military sanctions, the member States were required under Article 43 to earmark elements of their armed forces and other "assistance and facilities" for use upon the call of the Security Council. Article 43 reads as follows:

"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."

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The armed forces under Article 43 were not intended to be international forces or the United Nations' forces. The framers of the Charter had three broad alternatives in making available armed forces for the Security Council: (1) to establish a permanent armed force of an international character, over national armed forces or even replacing them; (2) to establish a system of national contingents placed under international direction for specific purposes; or (3) to provide for co-operative action by national forces under overall international direction, but with national strategic and tactical command left intact. At the time of the drafting of the Charter, the first alternative was found unacceptable because it was considered to involve too great an infringement upon national sovereignty. The system under Article 43 is substantially that of the second alternative. Thus, under the Charter, the members of the United Nations are to make available to the Security Council specific national contingents of armed forces by special agreements between the members or groups of members and the Security Council. It was intended that the number, types, degree of readiness and general location of these armed forces as well as the nature of facilities and assistance to be provided to the Security Council would be specified by the agreement or

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agreements. The stipulation that each agreement must be ratified "by the signatory states in accordance with their constitutional processes" illustrates a case in which national sovereignty is respected, safeguarded and even nurtured under the Charter.

Article 47 of the Charter provides for the establishment of a Military Staff Committee to advise and assist the Security Council on all matters relating to the Council's requirements for the maintenance of international peace and security. The Military Staff Committee consists of the Chiefs of Staff or their representatives of China, France, the United Kingdom, the United States and the USSR - the five permanent members of the Security Council. Here again it appears how well the national sovereignty of the permanent members of the Security Council is protected by the Charter provisions.

On January 25, 1946, the Security Council requested the permanent members to initiate Military Staff Committee negotiations²⁷. On February 3, 1946, the Committee was established and on February 16 the Security Council directed it to examine from the military point of view the provisions of Article 43 of the Charter. The Committee

27 U.N., Security Council, 1st Year, 1st Series, Supplement No. 1; Annex 1,a, section 3.

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decided that it should first formulate recommendations to the Security Council on the basic principles that should govern the organization of the armed forces which would be made available to the Council under Article 43. The General Assembly, realizing that the ground principles governing the regulation and reduction of armaments and armed forces was closely related to the organization of collective security, recommended in its resolution of December 14, 1946²⁸ that the Security Council accelerate the placing at its disposal the armed forces under Article 43 of the Charter.

On April 30, 1947, after more than a year of study, the Military Staff Committee submitted to the Security Council its report²⁹ on the general principles governing the organization of the armed forces to be made available to the Security Council by member States of the United Nations. This report took the form of a series of 41 articles governing the principles for arming the United Nations. Out of these 41 articles, unanimous agreement had been reached on only twenty-five and these were propositions explicitly stated in the Charter. The

28 U.N. Doc., Resolution 41 (1)

29 U.N., Doc. S/336

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disagreements were on matters of vital importance that had to be solved before any agreements could be concluded under the Charter.

The Military Staff Committee agreed that armed forces should be composed of units of national armed forces and that the national character of the forces was to be retained in such matters as regulations and discipline. It was also agreed that the armed forces should be limited to a strength sufficient to enable the Security Council "to take prompt action in any part of the world for the maintenance or restoration of international peace and security"³⁰, that all members of the United Nations should have the opportunity to place armed forces at the disposal of the Security Council, that the permanent members should contribute "initially" the major portion of the forces "in order to facilitate the early establishment of the armed forces"³¹ and that as contributions of other Member States become available they would be added to the force already contributed.

With respect to the specific forces which the permanent members themselves were to provide there was a basic disagreement between the USSR and the other permanent members. The USSR insisted that the permanent

³⁰ Article 6

³¹ Article 10

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members should make available their armed forces on "the principle of equality" regarding both the overall strength and the composition of these forces. Here the USSR adhered to the principle of "sovereign equality" of States³². Was this adherence to the principle adverse to the self-interest of the USSR, or did it serve her needs? The delegations of China, France, the United Kingdom and the United States maintained that the contributions of permanent members should be "comparable", and that "in view of the difference in size and composition of national forces of each permanent Member and in order to further the ability of the Security Council to constitute balanced and effective combat forces for operation, these contributions may differ widely as to the strength of the separate components, land, sea and air".³³

Nor was the Committee able to agree on the general location of armed forces made available to the Security Council. The United Kingdom, the United States and China held that these forces should be garrisoned at the discretion of Member Nations in any territories or waters to which they have "legal right of access". France

32 See Chapter 2, (b) Purposes of the United Nations.

33 Article 11.

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wanted the Committee to make even more specific recommendations which would explicitly permit garrisoning of these forces within national territory and territorial waters. The USSR held that the proposals of the other permanent members to permit the stationing of these armed forces in any territories or waters to which they have the legal right of access could not be justified by the interests of maintenance of peace and development of friendly relations among nations. The presence of foreign troops on the territories of other member States would only give rise to a feeling of anxiety among member states "for their national independence". Therefore, the USSR held that these forces should be garrisoned in their own territories or territorial waters.

The report of the Military Staff Committee was considered by the Security Council between June 4 and July 15, 1947. The different viewpoints expressed in the report were maintained during the discussions in the Security Council. The opinions of France, the United Kingdom and China on the strength and nature of armed forces to be made available to the Security Council were closer to those of the USSR than to those of the United States. The United States held that the United Nations needs in order to enforce peace in all parts of the world a "mobile force

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able to strike quickly at long range and to bring to bear, upon any given point in the world where trouble may occur, the maximum armed force in the minimum time".³⁴ The quantitative estimates of the United States were far in excess of those made by the other permanent members. For example, the United States recommended air force contingents three times the size of those recommended by other permanent members³⁵. The representative of the USSR maintained that since Germany and Japan had been defeated and placed under the control of the Allies there was no necessity in general for the United Nations to maintain excessively numerous armed forces. He pointed out the General Assembly's resolution on the general reduction of armaments and armed forces and argued that it would be impossible to justify a situation whereby simultaneously with the consideration of measures for the implementation of this resolution, members of the United Nations would maintain "inflated armed forces" and would "moreover legalize the maintenance of such forces by concluding agreements with the Security Council."³⁶

³⁴ U.N., Security Council, Official Records, 2nd Year, 138th Meeting (June 4, 1947), p. 956

³⁵ U.N., Doc. S/394 (June 30, 1947).

³⁶ U.N., Security Council, Official Records, 139th Meeting (June 6, 1947) p. 968.

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The composition of the armed forces to be made available to the Security Council was another basic issue on which the permanent members could not reach an agreement. The United States insisted that the contributions of permanent members should be "comparable" in order to have a force of the mobility and striking power which was required in the view of the United States for the maintenance of peace and security in any part of the world. Therefore it was necessary that each member should contribute such elements as it was best able to contribute. This general principle was accepted by other members of the Security Council, except the U.S.S.R. and Poland. The representative of the U.S.S.R. maintained that the principle of equality proposed by the U.S.S.R. was based on the provisions of the Charter under which the five permanent members have been placed in an equal position in the Security Council. Thus, the principle of equality does not permit any preferential position for any one of the permanent members in the contribution of armed forces by them. On the other hand, the principle of comparable contributions, permitting some of the permanent members to furnish the major portion armed forces chiefly in the form of air forces; others in the form of naval forces, etc., would lead to a situation in which some members would

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enjoy "a predominant position as compared to others".³⁷ Thus the U.S.S.R. was using the Charter provisions to safeguard her position as an equal to the other permanent members of the Council.

With regard to the provision of Article 43 that members should make available to the Security Council "assistance and facilities, including rights of passage", the U.S.S.R. insisted on an interpretation that would exclude the provision of bases. The representative of the U.S.S.R. contended³⁸ that the posing of the question of bases was irrelevant since this question was not mentioned in the Charter, and argued that the demand for bases was inconsistent with the principles of the United Nations. According to him, the acceptance of the proposal on bases would be utilized by some states as a means of exerting political pressure on other states which provided such bases and that it would affect "the sovereignty of nations".

With regard to the principle governing withdrawal of the forces, once their mission had been completed, France,

³⁷ U.N. Security Council, Official Records, 2nd Year, 139th Meeting, p.968.

³⁸ Ibid, p.970

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the United Kingdom, the United States and China were of the opinion that, after the armed forces made available to the Security Council had completed their mission, they should be withdrawn "as soon as possible" in accordance with the provisions of the agreements governing the location of the forces.³⁹ The USSR objected, demanding that armed forces should be withdrawn within a time limit of thirty to ninety days. The representative of the USSR stated the position of his Government thus :

"The general formula providing for the withdrawal of armed forces 'as soon as possible' is absolutely insufficient. It does not oblige the armed forces to leave the territories of other States when their presence is no longer necessary and when it is not called for in the interest of the maintenance of peace. This formula, if accepted, would be used as a pretext for the continuous presence of foreign troops in territories of other States, which is inadmissible from the point of view of the basic purposes of our Organization."

"The adoption of this proposal would affect the sovereignty of some States Members of the United Nations as well. This would be beneficial, not to the Organization as a whole, but only to certain great Powers contributing armed forces. It is clear that, under such conditions, the interests of small nations especially may be affected."

There the USSR is championing the cause of National Sovereignty.

Discussion in the Security Council did not lead to general agreements on the principles governing the con-

39 Ibid, p.970

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clusion of agreements on the armed forces under Article 43. As a result it was impossible for the Military Staff Committee to establish the levels of strength of the national contingents to be made available to the Security Council. Although the Committee has continued the formality of periodic meetings, it has had no progress to report. This failure to reach decisions necessary to the implementation of Article 43 was primarily due to a political impasse which terminated serious negotiations in the Military Staff Committee and the Security Council by 1948. Already on June 6, 1947, the representative of USSR pointed this out in the course of his defence of the principle of equal contributions, thus :

"I should like to draw the Security Council's attention to the fact that the whole question of armed forces being made available to the Security Council by the United Nations under special agreements is not only, and not so much, a technical question as a political one. It is a political problem and should be decided as such.... If we bear this in mind, we cannot take such a light view of the Soviet proposal of equal contributions as certain representatives on the Council do." ⁴⁰

The framers of the Charter realized that a considerable period of time was bound to elapse before the special agreement or agreements would be concluded under

40 Ibid., p.975

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Article 43. In order to provide the Security Council, primarily responsible for the maintenance of peace and security, with adequate means for the taking of action under Article 42, transitional security arrangements were provided for in Article 106. As a result of the failure to conclude the agreement or agreements on the armed forces to be made available to the Security Council, the transitional security arrangements are still operative under Article 106 "pending the coming into force of such special agreements referred to in Article 43". However, the political impasse which made it impossible for the permanent members to provide the Security Council with armed forces, is very likely to make impossible any joint action under Article 106 as well. Moreover, failure to provide the Security Council with armed forces under Article 43 will in all likelihood prevent the conclusion of any agreements for the reduction and limitation of national armaments and armed forces.

All attempts made to create the armed force of the United Nations under Article 43 of the Charter were frustrated by the USSR on the ground that they constituted a violation or threat to the National Sovereignty of States and, as such, were contrary to those Charter provisions which safeguard the National Sovereignty of

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States. Here it appears plainly how contradictory to each other the UN function to safeguard national sovereignty and the other function to maintain or restore international peace are and to what sort of results this incompatibility of the Charter provisions may lead.

(d) "Uniting for Peace" Resolution

On June 25, 1950, the United Nations Commission informed the Secretary General that North Korean forces had invaded the territory of the Republic of Korea all along the 38th parallel⁴¹. The Security Council⁴² called for immediate cessation of hostilities, withdrawal of the North Korean armed forces to the 38th parallel and, furthermore, it called upon all Members of the United Nations to render every assistance to the United Nations in the execution of this decision. The North Korean authorities, however, flouted the decision of the Security Council.

The weakness of the United Nations' enforcement action was quite obvious now. There were no armed forces

41 U.N.Doc. S/1496

42 U.N., Security Council, Official Records, 5th Year, 473rd Meeting, (25 June 1950), pp. 13-18.

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provided to the Security Council. However, the Security Council at this time did not suffer from its crippling handicap - disunity - because the USSR was boycotting the Security Council. On January 13, 1950, the USSR had withdrawn from the Security Council on the ground that the presence of the representative of the National Government of China was illegal, declaring that the USSR would not recognize as legal any decision of the Security Council adopted with the participation of the representative of the "Kuomintang group". Thus, it was possible for the Security Council to call for a cease-fire, a retreat to the 38th parallel and recommend that all members render every assistance to the United Nations in the execution of its decision. In these circumstances, President Truman ordered the United States air and sea forces to give the Korean government troops cover and support⁴³. On June 27, 1950, the Security Council recommended⁴⁴ that the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack. It was necessary to "recommend" because there were no armed forces available to the Security Council under Article 43 to order into action.

⁴³ "United States Policy in the Korean Crisis".
Department of State Pub. 3922, Far Eastern Series 34, 1950
Doc. 9. ⁴⁴ U.N. Documents S/1517 and S/1579.

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The USSR⁴⁵ objected to the Security Council Resolution of June 27, stating that it had no legal force since it had been adopted by only six votes, the seventh being that of the representative of the National Government of China, who had no legal right to represent China. Moreover, although the United Nations Charter required the concurring votes of all five permanent members of the Security Council for any decision on an important matter, the above resolution had been passed in the absence of two permanent members of the Security Council, the USSR and China. The USSR⁴⁶ maintained that the United States' support to the Government of South Korea constituted an armed intervention in Korea's domestic affairs and that the Koreans had the same right to arrange their internal national affairs in the matter of the unification of South and North Korea into a single State as the North Americans had held and exercised in the 1860's. Here the USSR attempted to utilize the doctrine of National Sovereignty in the spreading of communism.

Under Article 28, however, the Security Council is "so organized as to be able to function continuously.

45 U.N. Documents S/1517 and S/1579.

46 U.N. Doc. S/1603

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"Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization". These Charter provisions were drafted on the assumption that the ability of the Security Council to act promptly in any emergency would greatly increase its effectiveness. The above-mentioned objections of the USSR were rejected by some other members on the ground that under Article 28 the representative of the USSR was obliged to remain at the Council table. This contention was very clearly stated by the representative of France, thus:

"The Delegation of the Soviet Union, by abandoning the Council, has abandoned the Charter. When it returns to the one and to the other, it will find again its right of speech, of criticism, of vote and veto. So long as it has not done so, the USSR Government has no legal or moral basis for contesting the action of the United Nations." ⁴⁷

The United Nations action in Korea, however, fell short of a model international police action. An insufficient number of members of the United Nations participated and the United States contributed too large a share of the armed forces. Also the United Nations' "Unified Command" was not really "unified" for it consisted solely of Americans, with liaison officers from other countries. Efforts were made to persuade the United States

⁴⁷ U.N., Security Council, Official Records, 5th Year, 475th Meeting, p. 8.

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to accept a joint command, including officers from some of the sixteen contributing members other than the United States. These proposals were rejected by the Government of the United States. This instance shows clearly how free the permanent member of the Security Council is, in fact, from the United Nations Organization. Nevertheless, the moral support of the majority of member States for the United Nations' action in Korea was evident. Seventeen Members contributed armed forces and twenty-one additional Members gave non-military contributions.

On August 1, 1950, the representative of the USSR returned to the Security Council and took his turn as President. He then challenged the United Nations' sanctions which had already been taken against the North Koreans. According to him, the war between the North and South Koreans was a civil war and therefore did not come under the definition of aggression, since it was a war, not between two States, but "between two parts of the Korean people temporarily split into two camps under two separate authorities!"⁴⁸ Furthermore, he held that the United States armed intervention in Korea constituted "an armed aggression" against the Korean people, since the

⁴⁸ U.N., Security Council, Official Records, 5th Year, 482nd Meeting, p. 7.

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Charter of the United Nations directly prohibited intervention by the United Nations in the domestic affairs of any State when the conflict is an internal one between two groups within a single State.

The representative of France⁴⁹ replied to the charges of the USSR, stating that it was not the United States Government but the Security Council which decided that an act of aggression had taken place. He pointed out that it was also the Security Council which called upon all the members of the United Nations to implement its resolution. Therefore, the responsibility in the matter was not solely that of the United States, but it was a joint responsibility of the Security Council as a whole.

In August, the Security Council, under the direction of its President (USSR) became completely entangled in procedural wrangles and, consequently, was not able to accomplish anything.

The United States, therefore, came before the Fifth Assembly in September 1950 with a plan "designed to increase the effectiveness of the United Nations". It was considered by the Assembly's First Committee from October 9 to 21, and by the General Assembly from

⁴⁹ Ibid. p. 16.

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November 1 - 3, 1950. After modifications, the United States plan was sponsored by Canada, France, the Philippines, Turkey, the United Kingdom, the United States and Uruguay, and introduced as a Uniting for Peace Resolution.

On November 3, 1950, the General Assembly ⁵⁰ adopted it by 52 votes to 5 (the USSR, the Ukrainian SSR, the Byelorussian SSR, Czechoslovakia and Poland), with 2 abstentions (Argentina and India). This "Uniting for Peace" resolution⁵¹ introduced four specific innovations to the Charter's enforcement machinery.

First, the General Assembly was to recommend collective measures including the use of armed forces in any case when there appears to be a threat to the peace, breach of the peace, or act of aggression if the Security Council, because of lack of unanimity of the permanent members, failed to exercise its primary responsibility for the maintenance of international peace and security. If not in session at the time, the General Assembly was

50 U.N., General Assembly, Official Records, 5th Session, 302nd Meeting, p.347

51 U.N., General Assembly, Official Records, 5th Session, Supplement No. 20, pp. 10-12, Uniting for Peace Resolution (377(V)).

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to be summoned in emergency special session on twenty-four hour notice at the request of either the Security Council on the vote of any seven members, or a majority of the members of the United Nations.

Second, a Peace Observation Commission of fourteen members was established to observe and report situations in any area where there exists international tension likely to endanger the maintenance of international peace and security. The Commission was to have the consent or invitation of the State into whose territory it was to go.

This provision indicates again the respect paid by the United Nations to the doctrine of national sovereignty. The Commission might be utilized by the General Assembly "if the Security Council is not exercising the function assigned to it by the Charter with respect to the matter in question"

Third, each member was recommended to maintain "within its national armed forces" elements so formed and organized that they could promptly be made available, "in accordance with its constitutional processes" for service as a United Nations unit on the recommendation of the Security Council or the General Assembly. The similarity between this provision and Article 43 is obvious. There are, however, important differences. Instead of nego-

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tiating with the Security Council treaties which would pledge elements of their armed forces to the Security Council for use at the Council's discretion, members should hold elements within their national armed forces at their own discretion when the Security Council or the General Assembly ask for assistance. Thus, cooperation is voluntary.

Fourth, a Collective Measures Committee of fourteen members was established to study and make a report to the Security Council and the General Assembly on methods which might be used to maintain and strengthen international peace and security "in accordance with the Purposes and Principles of the Charter".

This resolution also recommended that the Security Council should devise measures for the "earliest" application of Article 43 of the Charter to provide the Security Council with armed forces.

One of the purposes of the Uniting for Peace resolution was to provide the United Nations with adequate armed forces made available by the members of the United Nations. In this respect the resolution brought no results. Only Denmark, Norway, Greece and Thailand responded to the General Assembly's appeal, while the United States who originally introduced this plan did

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nothing to implement this provision of the resolution. Obviously, the United States lost faith in a real collective action of the United Nations and decided to rely solely on regional alliances. As a result, the other States which had voted for the Uniting for Peace resolution followed this lead.

However, the importance of the Uniting for Peace resolution can hardly be overestimated. It transferred from the Security Council to the General Assembly the ultimate responsibility for the maintenance of international peace and security by creating a new system based on the power of the General Assembly to discuss and make recommendations with respect to any questions and matters within the scope of the Charter.

During the Korean war an interesting development took place again in regard to the problem of general regulation of armaments. Was it possible to reach an agreement on this acute problem of all mankind in spite of the diverse national self-interests so well safeguarded by the doctrine of National Sovereignty?

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(e) General Regulation of Armaments (1950-1954)

The next effort for disarmament was taken at a time when the majority of States were in a feverish armament race. On October 24, 1950, Mr. Truman, President of the United States, addressed the General Assembly and, *inter alia*, suggested that a proper plan for disarmament must include all kinds of weapons; that it must be based on unanimous agreement and that it must apply equally to all nations possessing substantive armaments. He also suggested, yielding a point to the USSR, that it would be useful to explore ways in which the work of the Atomic Energy Commission and the Commission for Conventional Armaments could be more closely brought together. Furthermore, he suggested that the work of the two disarmament commissions could be carried forward in the future "through a new and consolidated disarmament commission".⁵²

A draft resolution⁵³ was developed on the lines suggested by President Truman, and introduced to the General Assembly on December 12, 1950, by Australia, Canada, Ecuador, France, the Netherlands, Turkey, the

⁵² U.N. General Assembly, Official Records, 5th Session, 295th Meeting, p. 247.

⁵³ U.N. Doc. A/1688

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United Kingdom and the United States. This draft resolution proposed the establishment of a Committee of Twelve, consisting of the Security Council members, together with Canada, to consider ways of co-ordinating the work of the two disarmament commissions and it was passed by a vote of 47 to 5, with 3 abstentions, on December 3, 1950⁵⁴.

The USSR had introduced a draft resolution⁵⁵ which proposed that the Atomic Energy Commission be instructed to resume its work and to prepare draft conventions for the unconditional prohibition of atomic weapons and for the control of atomic energy. It was rejected by the majority of members on the ground that it only repeated proposals that the General Assembly had previously rejected.

On January 11, 1952,⁵⁶ the General Assembly, following a recommendation of the Committee of Twelve, established a Disarmament Commission composed of the members of the Security Council plus Canada. This Commission replaced both the Atomic Energy Commission and Commission for Conventional Armaments. It was directed to prepare a draft treaty or treaties for the regulation

54 U.N.Doc. 496 (V)

55 U.N.Doc. A/1676

56 U.N.Doc. 502 (VI)

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limitation and balanced reduction of all armaments and all armed forces, for the elimination of all major weapons adaptable to mass destruction and for effective international control of atomic energy to ensure the prohibition of atomic weapons and the use of atomic energy for peaceful purposes only. The Commission was also directed to consider plans for progressive and continuing disclosure and verification, "the implementation of which is recognized as a first and indispensable step in carrying out the disarmament program." Furthermore, it was directed to determine how over-all limits and restrictions on all armed forces and all armaments could be calculated and fixed.

The Disarmament Commission held its first meeting on February 4, 1952. At the second meeting of the Commission⁵⁷, the representative of Canada said that, with the best will in the world, it would be misleading to pretend that the Commission had any reasonable right to expect rapid or spectacular results. Indeed the change of scene did not bring about any change of the character of negotiations. Both the USSR and the United States kept on introducing proposals which were basically similar to those they had suggested in the two previous disarmament

⁵⁷ U.N., Disarmament Commission, O.R., 2nd Meeting, p. 2.

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commissions. Each of them also continuously rejected the proposals of the other⁵⁸. However, a further study of the nature of disagreement, in the light of the proposals made by these two permanent members and by other States, is necessary to find out what role the concept of National Sovereignty has played in these negotiations.

On April 24, 1952, the United States submitted a working paper⁵⁹ on "Essential principles for a disarmament program". According to these principles, the goal of disarmament was to prevent war by relaxing the tensions and fears created by armaments and by making war inherently, as it is in fact under the Charter, impossible as a means of settling disputes between nations. To this end, all States should co-operate to establish an open and substantially disarmed world, in which armed forces and armaments would be reduced to such a point and in such a thorough fashion that no State would be able to start a war, and in which no State could undertake preparations for war without other States having knowledge of such preparations. International conventions should provide effective safeguards to ensure that all phases of the

58 U.N., Disarmament Commission, Official Records, 1952

59 U.N.Doc.DC/C.1/1.

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of the disarmament program will be carried out. In particular, the elimination of atomic weapons should be accomplished by an effective system of international control of atomic energy to ensure the use of atomic energy for peaceful purposes only. This working paper also developed the concept of stages and the concept of inspection. It suggested five stages of disclosure and verification to be carried out step by step, proceeding from the less secret to the most secret information, since no State would unveil its security secrets without being certain that all States were proceeding with the same good faith and at the same time. The fifth stage should provide the disclosure of "location, numbers and types of atomic and radioactive weapons".

The representative of the USSR regarded the verification proposal as an intelligence operation "serving the purpose of the United States intelligence service", and bearing no relation to the Commission's task of prohibiting the atomic weapon and reducing armaments. According to him, the United States working paper led only to aggravation of international tension.

In general, there was a radical difference in principle and procedure between the United States proposals and the USSR proposals on disclosure and verification. The

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USSR proposals called for a one-time disclosure of complete official data with verification of such data only. The method of verification should include inspection on a continuing basis but without interference in domestic affairs. This was practically the same as the USSR plan for atomic control, which was by no means effective. The USSR would not permit general inspection for secret atomic activities, except for inspection in case of suspicion, the establishment of which required freedom of information and movement, which the USSR denied. Nor would the USSR admit international inspection of other atomic mines and plants than those which it had declared.

On May 28, 1952, France, the United Kingdom and the United States submitted to the disarmament Commission a working paper⁶⁰ setting forth proposals for fixing numerical limitations of all armed forces. It suggested that the maximum ceilings for the USSR, the United States and China should be the same and fixed at between 1,000,000 and 1,500,000, and the maximum ceilings for the United Kingdom and France should be the same and fixed at between 700,000 and 800,000. Ceilings for the other powers would be agreed upon later. The three powers contended that this substantial reduction of armed forces in itself would tend to reduce the likelihood of armed conflict.

⁶⁰ U.N.Doc. DC/10

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The USSR rejected these proposals on the ground that they were limited to armed forces while ignoring the prohibition of atomic weapons, and that the reduction would apply exclusively to that arm which was least effective for purposes of aggression since the proposals did not make it clear that the ceilings covered land, naval and air forces. The USSR also maintained that the armed forces of France, the United Kingdom and the United States should be considered as a single military force to which should be added the armed forces of the remaining eleven members of the NATO countries. On this point the USSR departed from its usual argument of the equality of the permanent members of the Security Council.

On August 12, 1952, the representative of the United States, on behalf of his own Government and the Governments of France and the United Kingdom, submitted to the Disarmament Commission a supplement⁶¹ to the original tripartite working paper. It suggested that the permitted armed forces be distributed by agreement among the principal categories of armed forces, that the type and quantities of armaments be defined, that all other armed forces and armaments be eliminated and that an international control organ be established to ensure the

⁶¹ U.N.Doc. DC/12.

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carrying out of the limitations, reductions and prohibitions.

In introducing the supplementary working paper the representative of the United States⁶² recalled the unwillingness of the USSR representative to discuss the first tripartite proposal on the ground that it did not deal with the distribution of armed forces nor with the limitation of armaments.

The representative of the USSR⁶³ rejected these tripartite proposals on the ground that they did not call for the immediate and unconditional prohibition of the atomic weapon. Moreover, he charged that they were based on the United States plan, (now called the United Nations' plan) of atomic energy control which aimed at "an international atomic hegemony of American monopolists" instead of the prohibition of atomic weapons.

On January 11, 1951, the General Assembly had directed the Disarmament Commission to consider the United Nations plan on the control of atomic energy as the basis for its deliberations. The USSR, however, continued to object to the international ownership and effective control system proposed by the United Nations' plan. In the view of the USSR, control should involve merely continuous

62 U.N., Disarmament Commission, 18th Meeting, p.3.

63 Ibid., 25th Meeting, p. 8.

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inspection which must not interfere in the domestic affairs of States.

On July 20, 1954, the representative of the United States summed up the approach of the USSR in the following words⁶⁴:

"Make a pledge without safeguards. Make promises without providing for policing these promises. Say that you want safeguards, that you want international control, but evade any discussion of the practical methods of securing those controls. Prepare plans that will disarm the West without disarming the Soviet block. Shout for peace and at the same time arm to the teeth."

The USSR⁶⁵, on the other hand, maintained that the establishment of military, air and naval bases on territory of other States increases the threat of a new world war and undermines the national sovereignty and independence of States. Therefore the USSR recommended that the Security Council take measures for the abolition of military bases on foreign territories.

Conclusion

Before any agreement on the methods of reduction and prohibition of armaments could be reached, it is obviously necessary to reach first an agreement on the controls or safeguards required to guarantee security in

⁶⁴ U.N., Disarmament Commission, Official Records, 36th Meeting

⁶⁵ Rep. of the Sub.-Com. of the Disarmament Comm. Dec. DC/53.

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return for reductions, prohibitions and limitations of the different kinds of armaments. Thus, the problem was to find safeguards which all permanent members of the Security Council could accept. Without some kind of agreement on that point, all discussion of quantity and methods of reduction and prohibition must be largely theoretical.

The USSR proposals and those made by the French, United Kingdom and United States representatives have points of resemblance with regard to the question to be settled, and they diverge only with regard to methods which the several parties propose for the implementation of the measures in question.

The permanent members of the Security Council agreed in acknowledging the need to adopt a strict policy in order to put an end to the armaments race. The East and the West, however, disagreed on the question of establishing international control to ensure compliance with the rules of prohibition. The West wanted such an international control of armaments that it would not be possible for any State to avoid disclosing all its arms and means of waging war. The USSR proposals described how an international control organ, provided it did not interfere in the domestic affairs of States - which is an almost impossible condition - would be empowered to

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remain permanently at certain key points, which it would specify, in order to verify the observance by governments of their obligations under the disarmament convention. But how would an international control organ know that everything has been disclosed; how would it keep itself up to date and discover violations of the agreement in parts of the country to which it has not been given access? Therefore, the West held that the officials of the international control organ should be empowered to pursue their investigations anywhere at any time within the boundaries of every State covered by the convention, and with complete freedom of movement, including freedom of movement by air. Moreover, the USSR desired the immediate and unconditional prohibition of nuclear weapons, while the other permanent members of the Security Council wanted the proposed control machinery to be in existence and in operation from the moment at which the prohibition enters into force and the reductions start taking effect, but not until the reductions as well as the prohibitions have been embodied in a general disarmament convention. Throughout the negotiations the USSR, however, held that there must be agreement on the "main issue" of the prohibition of the atomic weapon immediately, before there could be discussion and agreement on details and subsidiary questions, such

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as that of the problem of collecting information. That such a proposal was pressed by the USSR as a precondition to serious negotiation on disarmament is clearly evidence that the USSR did not really desire to reach a disarmament agreement. The USSR was unwilling to resign that necessary amount of her sovereignty which is necessary to establish an effective international control organ to ensure compliance with the rules of prohibition and disarmament. While the United States was willing to give up part of her national sovereignty to create an international atomic energy authority, the USSR adhered stubbornly to the doctrine of National Sovereignty. That fundamental difference is illustrated clearly by the differences between the plans of the United States and the USSR on the following points:

The United States proposed international ownership of fissionable material while the USSR insisted on national ownership. The United States proposed also international ownership, operation and management of facilities producing dangerous quantities of fissionable material. The USSR was opposed to the establishment of an international "supermonopoly". In the view of the USSR, the United Nations plan was wholesale interference in the domestic affairs of States, in their economic life and in all parts of their internal organization. The USSR, thus, rejected

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the plan on the ground of Article 2, paragraph 7, of the Charter.

The control of armaments is clearly more a political than a technical problem because the reduction and regulation of armaments involves manipulation of the relative power of sovereign States.

The framers of the Charter could not provide the United Nations with a permanent armed force of international character because it was considered to involve too great an infringement upon National Sovereignty. Instead the Members of the United Nations are to make available to the Security Council specific national contingents of armed forces by special agreements between the members and the Security Council. The provision of Article 43 that those agreements must be ratified "by the signatory States in accordance with their constitutional processes" is a further concession to the principle of National Sovereignty. Thus the contribution of armed forces was left to the sovereign discretion of member States. Twelve years have passed and the United Nations is still without its own "earmarked" national contingents. The failure to provide the United Nations with sufficient armed forces is likely to obstruct general disarmament, for unless there is an international armed force to police the world, Governments

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would hardly be willing to scrap their national defences.

With regard to the garrisoning of the armed forces to be made available to the Security Council, the USSR held that those forces would be garrisoned in their own territories or territorial waters, since the presence of foreign troops on the territories of other member States would give rise to a feeling of anxiety among member States for their national independence. Thus the USSR was opposed to the establishment of even a nucleus of international armed force. Throughout the discussion on the question of providing the Security Council with armed forces, the USSR defeated all plans on the ground that they would have amounted to an infringement of National Sovereignty.

"The Uniting for Peace" Resolution transferred from the Security Council to the General Assembly the ultimate responsibility for the maintenance of international peace and security by creating a new system which is based on the power of the General Assembly to discuss and make recommendations with respect to any question or matters within the scope of the Charter. Since the General Assembly has now the ultimate responsibility for the maintenance of international peace and security, one single permanent member of the Security Council is no more able to stop the United Nations from taking collective measures. This innovation diminishes that sphere of national sovereignty

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granted to the permanent members of the Security Council by the framers of the Charter.

From the foregoing one may conclude that the USSR was unwilling to give up any amount of her national sovereignty and her special powers and rights as a permanent member of the Security Council in favour of any system which, in fact, could provide for general disarmament and international control of armaments.

The doctrine of National Sovereignty as adhered to by the Charter of the United Nations and the special position of the permanent members of the Security Council in the Charter system obviously provide the permanent member of the Council with great freedom of the United Nations Organization and other nations. The necessity of the unanimity of the permanent members, in other words the right of veto, has only emphasized the national sovereignty of the permanent members of the Security Council while the Charter provisions have subdued to a considerable extent other member States of the United Nations under the united will of the permanent members⁶⁶.

In view of the realities in power politics, the value of the "Uniting for Peace" resolution is questionable

⁶⁶ See Chapter 2, (a) and (d).

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as any permanent member of the Security Council may ignore it and, due to her military strength, could be brought to submit to the will of the United Nations only through war (resulting in her defeat) - and war is contrary to the principles of the United Nations.

Nevertheless, the "Uniting for Peace" resolution opens up new vistas for the possible course of development of the United Nations Organization, towards democracy. The resolution itself might also serve its purpose in some future emergency if the development of power politics is favourable to its spirit. In any event, the "Uniting for Peace" resolution must be reckoned by any State planning to act against the Purposes and Principles of the United Nations.

CHAPTER IV

DISPUTES OVER A TERRITORY

Preface

In the history of mankind, disputes over a territory, i.e. contests about Sovereignty over a territory, have been a traditional cause of wars. Since the main function of the United Nations is to maintain or restore international peace and security, it is especially revealing for the purpose of this dissertation to examine such disputes in order to find out whether the United Nations has been able to carry out its obligations in case of disputes over a territory and to what extent, if any, the concept of National Sovereignty has influenced the operation of the United Nations in this particular category of matters.

The United Nations has been confronted with several disputes over a territory. For the purpose of this dissertation only two cases have been chosen, namely the Kashmir dispute and the Palestine question, because due to their nature, they represent two different types of disputes over a territory that frequently arise.

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(a) The Kashmir Dispute (1948-1952)

The State of Jammu and Kashmir is bounded on the southwest by Pakistan, on the west by Afghanistan, on the north by the Sinkiang Province of China, on the east by Tibet, and on the south by India. The strategic importance of this area is obvious. The upper Indus, with the Gilgit tributary, forms a valley stretching from the southeast to the northwest of the State. Northeast of this valley lie the Karakorum Mountains. The Himalayas lie along the southeast of the State, bordering on India. The valleys of the Jhelum and Chenab are southwest of the Himalayas. The Jhelum Valley is the famous "Vale of Kashmir", 80 miles long by 20 miles wide. Three Kashmir rivers,-the Indus, the Jhelum and the Chenab,-flow into Pakistan and also control to a very large extent the agricultural economy of Pakistan for 19 million acres of land is irrigated in West Pakistan by the waters of these rivers. For many years the waters of these rivers have been the especially bitter source of disagreement and hostility between India and Pakistan. The State of Jammu and Kashmir has a population of about 4,000,000 (in 1941). According to the census of 1941, in Kashmir proper, apart from Jammu, 93.5 per cent and in Jammu 62 per cent of the population were

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Muslims. In 1950, Sir Owen Dixon reported¹ to the Security Council as follows:

"The State of Jammu and Kashmir is not really a unit geographically, demographically or economically. It is an agglomeration of territories brought under the political power of one Maharajah."

The great grandfather of the present Maharajah purchased the territory of the State from the East India Company in 1846.

The withdrawal of British authority from India on August 15, 1947, created a tense situation in Kashmir, where a Hindu Maharajah ruled a predominantly Muslim population. Both successor governments - India and Pakistan - sought the accession of Kashmir. The basis of partition of India was that Pakistan would comprise contiguous Muslim-majority areas in the northwest and the northeast of the sub-continent, and India would comprise contiguous non-Muslim majority areas. In August 1947, the State of Jammu and Kashmir entered into a standstill agreement with Pakistan. Into this already unstable situation came the aftermath of the widespread communal rioting in the Punjab all along the southern boundary of the State. In East-Punjab, 235,000 Muslims were massacred by Sikhs and Hindus

1 U.N.Doc. S/1791, p.28.

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during the "communal rioting". In the latter half of September armed bands of Sikhs, Hindus, and even the armed forces of the Maharajah committed massacres of the Muslim population of the State. These massacres provoked risings of the Muslim population in different parts of the State. On October 20, the tribesmen, bent on avenging their co-religionists, swarmed from the mountains into the State of Jammu and Kashmir, entering the State in its southwestern areas from the adjacent territory of Pakistan, and penetrated as far as the southern borders of the State and outskirts of Srinagar, the capital.

Unable to cope with a Muslim revolt strengthened by the Muslim tribesmen from the North-West Frontier Province in Pakistan, the Maharajah of Kashmir signed an act of accession to India on October 26, 1947. The following day the Government of India accepted the accession on the condition that as soon as law and order had been restored in the State, the question of the accession of Kashmir would be decided by reference to the people, and thereupon sent its air-borne troops into the State. The Indian forces, combined with the non-Muslim forces of the Maharajah of the State of Jammu and Kashmir were, however, unable to capture all of that territory of the State which was under the revolutionary "Azad (liberation) Kashmir

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Government".

On January 1, 1948, the representative of India to the United Nations, in a letter² addressed to the President of the Security Council, lodged a complaint against the Government of Pakistan, under Article 35 of the Charter, alleging that a situation existed between India and Pakistan which was likely to endanger peace and security. According to the Government of India, this situation was a result of the aid that invaders were receiving from Pakistan for operations against the State of Jammu and Kashmir, which State, India maintained, had acceded to India and was part of the Dominion of India. The specific charges which the India Government brought against Pakistan alleged that these invaders were allowed transit across Pakistan territory; that they were allowed to use Pakistan territory as a base of operations; that they included Pakistan nationals; that they drew much of their military equipment, transport and supplies from Pakistan; and that Pakistan officers were training, guiding and otherwise helping them. On the basis of these allegations, the Government of India requested the Security Council to call on Pakistan immediately to stop giving such assistance.

2 U.N.Doc. S/628.

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The Pakistan Government, by letter dated January 15, 1948, emphatically denied that it had given aid or assistance to the invaders of the State of Jammu and Kashmir, conceding that a member of independent tribesmen and persons from Pakistan were fighting as volunteers but that it was wrong to state that Pakistan territory had been used as a base for military operations, and that it was also incorrect that the Pakistan Government was supplying military equipment to the invaders or that Pakistan officers were guiding, training and otherwise helping them. In the same communication, the Government of Pakistan lodged a series of counter-charges against the Government of India, under Article 35 of the Charter, and requested the Security Council to take appropriate measures for the settlement of these disputes. The Government³ of Pakistan charged, inter alia, that India obtained the accession of the State of Jammu and Kashmir "by fraud and violence"; that large-scale massacre and atrocities on the Muslims of Jammu and Kashmir State had been perpetrated by the armed forces of the Maharajah of Jammu and Kashmir and the Indian Union; that India had made persistent attempts to undo the scheme of partition; that a pre-planned and extensive campaign of

3 U.S. Doc. S/646 and Corr.1.

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"genocide" had been carried out and was still in progress in the Union of India; that Junagadh and some neighbouring States which had lawfully acceded to Pakistan had been "forcibly and unlawfully" occupied by the armed forces of the Indian Union, which had caused extensive damage to the life and property of the Muslim inhabitants of those States; and that the object of the various acts of aggression by India against Pakistan was "the destruction of the State of Pakistan".

With regard to the question of Kashmir,⁴ the letter made the following important statement:

"India has chosen to confine the reference to the Security Council to one single aspect of the Kashmir question which ignores the basic and fundamental issues affecting the State of Jammu and Kashmir. But even the Kashmir episode in all its aspects is but one link in the chain of events which has been unfolding ever since it became obvious that there was no solution of the Hindu-Muslim problem except the partition of India. A reference to the Security Council must therefore cover much larger ground and embrace all the fundamental differences between the two dominions."

Thus, the Government of Pakistan attempted to widen the scope of the issue under the Security Council consideration.

On January 6, 1948, the President of the Security Council had sent an "urgent appeal" to India and Pakistan to maintain the status quo. This action of the President

⁴ Kashmir is the commonly accepted abbreviation of the State of Jammu and Kashmir.

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was sustained by the Security Council resolution of January 17⁵ which called upon the parties to take all measures within their power to improve the situation and to keep the Security Council informed.

On January 20, 1948, the Security Council resolution⁶ established a United Nations Commission for India and Pakistan (U.N.C.I.P.) consisting of three members, one selected by India, one by Pakistan, and a third by the two members so selected. This Commission was invested with a dual function of investigating the facts under Article 34 and of mediating between the parties. It was to perform these functions in regard both to the situation in the Jammu and Kashmir State and to "other situations" set out in the letter from the Government of Pakistan, dated January 15, 1948. Thus, the Government of Pakistan succeeded in enlarging the scope of the United Nations' intervention to include all disputes between India and Pakistan, such as genocide and Jumagadh.

On January 27, 1948, India and Pakistan introduced to the Security Council their draft resolutions,⁷ both of

5 U.N. Security Council, Official Records, 3rd Year, 229th Meeting, pp.121-125 U.N.Doc.S/651

6 Ibid, 230th Meeting, pp.129-143. U.N.Doc. S/654

7 U.N. Security Council, Official Records, 3rd Year, 236th Meeting, pp.265-268.

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which recognized that the future of the State of Jammu and Kashmir must be decided through "the democratic method of plebiscite" held and supervised under the authority of the Security Council. However, the Indian draft resolution suggested the cessation of hostilities as the first objective to be achieved while the Pakistan draft resolution stressed the plebiscite and the establishment of certain conditions, such as the establishment of an impartial interim administration in Kashmir, for the holding of a plebiscite.

The representative of the United Kingdom supported the Pakistan view, thus :

"In my conception, infinitely the best way to stop the fighting is to assure those who are engaged in it that a fair settlement will be arrived at under which their rights will be assured (...) Only when the combatants know what the future holds for them, will they agree to stop."⁸

The representative of Belgium argued that the plebiscite and the cessation of hostilities were really two aspects of one question and that to try to separate them would be a mistake. He tried to reconcile the diametrically opposed views of India and Pakistan by submitting two draft resolutions.⁹ The first called for a plebiscite to be organized, held and supervised under the Security Council's

8 Ibid, p.283

9 Ibid, 237th Meeting, pp.285-6

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authority and the second instructed the United Nations Commission for India and Pakistan to consider "that, among the duties incumbent upon it, are included those which would tend towards promoting the cessation of acts of hostility and violence."

The representative of Pakistan was prepared to accept these two draft resolutions¹⁰ as marking a definite and salutary step forward in the settlement of the dispute relating to Kashmir". The representative of India rejected them as "innocuous in the extreme"¹¹ He declared that the two draft resolutions did not meet with the "assent" of the Government of India.

The parties, however, agreed that the question of the accession of Kashmir to India or Pakistan must be determined by means of a free and impartial plebiscite. The problem with which the members of the Security Council were struggling in March and April was to determine and propound the essential conditions for such a plebiscite.

On April 21, 1948, the Security Council adopted¹² the first significant resolution on the Kashmir dispute.

10 Ibid, 240th Meeting, p.365

11 Ibid, 237th Meeting, p.295.

12 U.N.Security Council, Official Records, 3rd Year, 286th Meeting and U.N.Doc. S/726.

This resolution increased the membership of the United Nations' Commission for India and Pakistan to five by permitting the Security Council itself to appoint two members. It instructed the Commission to proceed immediately to the Indian sub-continent and there place its good offices and mediation at the disposal of the Governments of India and Pakistan with respect both "to the restoration of peace and order and to the holding of a plebiscite by the two Governments". It called on Pakistan to use "its best endeavours" to secure the withdrawal from Kashmir of tribesmen and Pakistani nationals who had entered the State for the purpose of fighting, and to prevent any further "intrusion" into the State and any furnishing of "material aid to those fighting in the State". On the other hand, the resolution permitted India to retain a minimum force to support the Government of Kashmir in the maintenance of law and order while the bulk of India's forces was to be withdrawn in consultation with the Commission and only after the Commission was satisfied that the tribesmen were withdrawing.

With regard to the plebiscite, the resolution decided that a nominee of the Secretary-General of the United Nations would be appointed to be the Plebiscite Administrator, with almost unlimited authority in carrying

out his functions. It also stipulated various measures to safeguard the freedom and impartiality of the plebiscite.

The UNSC abstained in all these decisions of the Security Council on the ground that the membership of the UNCIP was unsatisfactory and its relation to the Security Council not sufficiently close.

The UNCIP held preliminary meetings in Geneva starting on June 21, 1948. In the beginning of July the Commission proceeded to the Indian sub-continent where it stopped in Karachi from 7th to 9th of July before proceeding to New-Delhi. In Karachi the Commission was received informally by the Minister for Foreign Affairs and Commonwealth Relations, Sir Mohammad Fufullah Khan, who informed the members of the Commission that the Pakistan Army had at the time regular troops in Kashmir. These troops had been sent to Kashmir in the first half of May because the Indian army, notwithstanding the Security Council's resolutions calling for status quo and withdrawal of forces, had started an offensive against the Azad Kashmir forces.

The Commission immediately initiated inquiries with the Governments of India and Pakistan concerning the question of cease-fire.

In the view of the Pakistan Government,¹³ there were three minimum considerations to be taken into account if cessation of hostilities was to be brought about. First, the Indian troops should be withdrawn from the Jammu and Kashmir State. Second, provisions should be made for the protection of Muslim population and the maintenance of law and order following the withdrawal of Indian troops. For this purpose the Government of Pakistan suggested the use of international forces. Finally the views of the Azad Kashmir Government should be taken into due consideration. With regard to the entry of Pakistan troops into Kashmir, the Commission was informed that Pakistan sent troops in order to protect her own territory from possible aggression by Indian forces, to prevent a fait accompli in Kashmir by the Government of India, and to prevent the influx of some 2,750,000 refugees into Pakistan which would have resulted from the Indian offensive if it were not met with force and stopped.

The Indian Government regarded the entry of Pakistan troops into Kashmir as an act of aggression against the Union of India. India maintained that it was legally in Kashmir, and though this might be contested by Pakistan,

¹³ U.N. Doc. S/1100, paragraphs 50-51.

It was, however certain that Kashmir did not belong to Pakistan, and therefore its troops were illegally in that State. The Government of India was willing to accept a cease-fire on the condition that the sovereignty of the Jammu and Kashmir Government over the portion of their territory evacuated by Pakistani troops will be recognized; that the Azad Kashmir Government will not be recognized by the Commission; that Pakistan should have no part in the organization and conduct of the plebiscite or in any matter of internal administration of Kashmir; and that the strength of Indian forces maintained in Kashmir should be sufficient to ensure security against any form of external aggression as well as internal disorder.¹⁴

On August 13, 1948, the Commission adopted a resolution¹⁵ calling for a cease-fire order to apply to all forces under the control of India and Pakistan. This resolution called upon both Governments to accept certain principles as a basis for the formulation of a truce agreement. These principles were clearly to the advantage of India for all Pakistani troops, tribesmen and Pakistani nationals were to be withdrawn while only the bulk of Indian forces were to leave Kashmir but only after the

¹⁴ U.N. Doc. S/1100, paragraph 78

¹⁵ U.N. Doc. S/995

withdrawal of tribesmen and Pakistan nationals and while the Pakistan forces were being withdrawn India was permitted to maintain forces which in agreement with the Commission (but not with Pakistan) were considered necessary to assist local authorities in the maintenance of law and order. The resolution finally called upon India and Pakistan to reaffirm their wish that the future status of Kashmir should be determined through the democratic method of plebiscite, and to agree to enter into consultation with the Commission to determine conditions for such a plebiscite.

On December 11, 1948, a cease-fire agreement was signed by India and Pakistan to take effect from January 1st, 1949.¹⁶ The Commission then submitted to both parties proposals to serve as the basis for a plebiscite, and expressed the hope that they might be found "acceptable in their entirety"¹⁷ by both Governments. The Governments of India and Pakistan through letters dated on 23rd and 25th of December, respectively, and accepted the proposals of the Commission.¹⁸ Consequently the Commission adopted on January 5, 1949, a resolution incorporating the agreement already reached. The first two paragraphs of the resolution

16 U.N.Doc. 8/1196

17 U.N.Doc. 8/1196, annex 3.

18 U.N.Doc. 8/1196, Annexes 4 and 5.

read as follows:

"1. The question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite.

"2. A plebiscite will be held when it shall be found by the Commission that the cease-fire and truce agreements set forth in Part I and Part II of the Commission's resolution of 13 August 1948 have been carried out and arrangements for the plebiscite have been completed."

Thus, the agreement to decide the fate of Kashmir through an impartial plebiscite was finally concluded between the disputing parties and the United Nations Commission. This agreement is in conformity with the Purposes of the United Nations.

The next step was the execution of a truce agreement for the withdrawal of Pakistan forces and the bulk of Indian forces which was to be preparatory to the free and impartial plebiscite to be held under the United Nations auspices. Following the principles embodied in the resolution of August 13, 1948, the Commission established the schedules of withdrawal of the Pakistan troops and the bulk of the Indian forces. On April 28, 1949, the Commission submitted a plan¹⁹ to the Indian Government for the withdrawal of the bulk of the Indian forces from

19 U.N.Doc. S/1430, annex 22.

Kashmir. The Government of India rejected²⁰ the plan on the ground that it did not provide for the disbanding and disarming of the Azad Government forces, which had by now grown from a small, poorly equipped force to an army of thirty-two well equipped battalions. The Government of Pakistan²¹, on the other hand, was not able to accept the plan of the Commission on the ground that it did not provide for a simultaneous and synchronized withdrawal of the Pakistan forces and the bulk of the Indian forces. The Commission came to the conclusion that mediation by it, under the limitations within which it was obliged to perform its task, was exhausted. As a final effort to find a solution to the truce the Commission proposed to the parties that differences arising from interpretation of the Commission's resolutions should be referred to arbitration by Admiral Nimitz, who had been designated as Plebiscite Administrator in March 1949. The Government of India rejected the Commission's suggested course of action²² while the Government of Pakistan agreed²³ to the proposal of the Commission.

20 U.N.Doc. S/1430, annex 50.

21 U.N.Doc. S/1430, annex 49.

22 U.N.Doc. S/1430, annex 36.

23 U.N.Doc. S/1430, annex 37.

In December 1949, the Commission referred the entire question back to the Security Council, acknowledging its failure to secure the fulfilment of conditions necessary to the holding of a plebiscite, and recommended that the five-member Commission should be replaced by a single mediator with broad authority and undivided responsibility²⁴.

On December 17, 1949, the Security Council instructed its President, General McNaughton, to mediate between the parties. The two Governments had clearly and unequivocally agreed that the future of the State of Jammu and Kashmir shall be determined by the democratic method of a free and impartial plebiscite. In other words they had acknowledged the people of that State as the ultimate source of Sovereign Power. They disagreed, however, on the crucial question of the methods through which the necessary conditions for such a plebiscite could best be assured. General McNaughton attempted to strike a just and equitable balance between the conflicting interests in his proposals for the demilitarization of the State. These proposals provided, inter alia, that all the regular forces of Pakistan and the regular forces of India that are not required for the purposes of security or for the maintenance of law and order on the Indian

²⁴ U.N.Doc. S/1430, paras. 285-6.

side of the cease-fire line should be withdrawn; that all local forces, including on the one side the armed forces and militia of the State of Jammu and Kashmir and on the other the Azad forces, should be disbanded. McNaughton suggested the appointment of a United Nations representative to implement these principles of demilitarization.

On March 14, 1950, the Security Council²⁵, considering that steps should be taken forthwith for the demilitarization of the State and for the expeditious determination of its future through a free plebiscite, called upon the disputing Governments to prepare and execute within a period of five months from March 14, 1950, a program of demilitarization, and decided to appoint a United Nations Representative to supervise the implementation of the program of demilitarization contained in the report of General McNaughton. On April 12, Sir Owen Dixon, an Australian jurist and diplomat, was appointed the United Nations Representative.

Pakistan accepted this resolution²⁶. Though India accepted the replacement of the Commission by a single United Nations Representative, she rejected the

²⁵ Resolution 5/1469

²⁶ U.N. Security Council, Official Records, 5th Year, 470th Meeting, p.3.

McNaughton proposals and therefore, by inference, came to reject the resolution itself²⁷.

Sir Owen Dixon arrived in the Indian sub-continent on May 27, 1950, made an extensive tour of Kashmir during the next eight weeks and from the 20th to the 25th July held a conference with the Prime Ministers of India and Pakistan. Having been unsuccessful in obtaining the agreement of India to his demilitarization proposals and his suggestions for conditions which, in his opinion, would assure a fair and impartial statewide plebiscite, Sir Owen then ascertained the reactions of the two Prime Ministers to various plans alternative to that of an over-all plebiscite. While the Government of India appeared interested in certain of these suggestions, the Government of Pakistan, however, contended that the contravened India's commitment to determine the future of the State as a whole by a plebiscite. Despite this apparent impasse, Sir Owen continued in August his mediation and negotiations, and persuaded the Government of Pakistan to agree to discuss possible alternative settlements without abandoning their adherence to the principle of a statewide plebiscite, provided that the Government of India would agree to accept a plan to be drafted by Sir Owen containing conditions for a fair and impartial plebiscite in the general

²⁷ Ibid.

area of the Kashmir valley. Such a plan was, however, rejected by the Government of India. After both Prime Ministers had agreed that there was nothing further Sir Owen could do under his terms of reference, he left the sub-continent on August 23. In his report to the Security Council he contended as follows:

"In the end, I became convinced that India's agreement would never be obtained to demilitarization in any such form, or to provisions governing the period of the plebiscite of any such character, as would in my opinion permit the plebiscite being conducted in conditions sufficiently guarding against intimidation and other forms of influence and abuse by which the freedom and fairness of the plebiscite might be imperilled."²⁸

On April 30, 1951, the Security Council, following its decision of the 30th of March for demilitarization and arbitration, appointed Dr. Frank P. Graham, a distinguished American mediator, to succeed Sir Owen Dixon as the representative of the United Nations. Dr. Graham negotiated with the Governments of India and Pakistan continuously through 1951 and 1952. His mediation efforts, however, concentrated on the technical aspect of the problem of demilitarization, namely the size and character of the armed forces which should remain on each side of the cease-fire line during the demilitarization period²⁹.

²⁸ U.N.Doc. S/1791, p. 16.

²⁹ U.N.Documents S/2375, S/2448, S/2611, S/2783 and S/2967.

In this respect, his efforts brought about the narrowing of issues which in its turn revealed that the main differences rather than the technical problems were, in fact, blocking the way to an agreement. According to Dr. Graham³⁰, these main issues between the parties related to the status of the State of Jammu and Kashmir, the nature of the responsibilities of the appropriate authorities on each side of the cease-fire line during the demilitarization period, and the obligations of the two Governments under the agreed resolutions of August 13, 1948 and January 5, 1949. Indeed, India and Pakistan stated the fundamental postulates of their case on Kashmir at every stage of the United Nations intervention. These fundamental postulates could be summarized in the following way.

India considers itself to be in legal possession of the State of Jammu and Kashmir by virtue of the instrument of accession of October 26, 1947 signed by the Maharajah of the state and accepted by the Governor-General of India.

The fundamental postulate of Pakistan is that the accession of the State of Jammu and Kashmir to India is illegal. This stand was first stated in the Pakistan

³⁰ U.N., Security Council, Official Records, 7th Year, 605th Meeting, p.22.

complaint before the Security Council in January 1948 and has been repeated throughout the United Nations intervention. Pakistan's main arguments to support this contention may be summed up thus:

(a) The standstill agreement of August 15, 1947, between Pakistan and the State of Jammu and Kashmir debarred Kashmir from entering into any kind of agreement with any other State.

(b) On October 26, 1947, the Maharajah of Kashmir had no authority left to execute an instrument of accession because the revolt of his people had overthrown his Government and compelled the Maharajah himself to flee from the capital.

(c) The act of accession was brought about by conspiracy, violence and fraud and therefore it was invalid ab initio.³¹

(d) When the Government of India accepted the accession of the State of Jammu and Kashmir to India and rushed its troops to the State, the act of the Government of India implied recognition of the constitutional right of an autocratic ruler "to regard the State as his personal property, and its people as his chattels".³² This was

³¹ See U.N.Doc. S/1430, p.71 for details on this contention.

³² U.N. Security Council, Official Records, 5th Year, 464th Meeting, pp.14-15.

contrary to the principle of partition, acknowledged by India, according to which the decision of accession must be left to the people if it so happened that a ruler desired to accede to the Dominion whose predominant religion was different from the religion of the majority of his people. The Deputy Prime Minister of India, Sir Sardar Vallabhai Patel had specifically declared that on the lapse of British suzerainty, sovereignty in the States lapsed to the people, and that the decision of accession was the decision of the people.³³ Furthermore, when the Government of India came to know that the ruler of Junagadh, the majority of whose people were Hindus had signed an instrument of accession to Pakistan, it sent a telegram to the Government of Pakistan, which stated:

"Pakistan Government have unilaterally proceeded to action which, it was made plain, the Government of India could never and do not acquiesce in. Acceptance of accession to Pakistan cannot be but regarded by the Government of India as an encroachment on Indian sovereignty and inconsistent with friendly relations that should exist between the two Dominions. This action of Pakistan is considered by the Government of India to be a clear attempt to cause disruption in the integrity of India by extending the influence and boundaries of the Dominion of Pakistan in utter violation of the principles which partition was agreed upon and effected." ³⁴

³³ Ibid. p. 2

³⁴ Underlining ours.

Thus, India's acceptance of accession signed by the Maharajah of the State of Jammu and Kashmir is "an encroachment on the sovereignty and territory of Pakistan.

(e) The Gov. or-General of India accepted the Maharajah's offer of accession on the condition that as soon as law and order had been restored, the question of the accession of Kashmir would be decided by reference to the people. Thus, the action of the Maharajah and of the Government of India has no validity in law because the Indian Constitution Act does not recognize a conditional accession.

India argues that the instrument of accession is not conditional for it does not state that the accession is conditional.

(f) According to the United Nations Commission for India and Pakistan resolution of January 5, 1949, the purpose of the plebiscite was to determine whether Kashmir should accede to India or to Pakistan. Therefore, the Indian view that the State of Jammu and Kashmir is a part of India "begs the very question which is in dispute".

From India's basic premise - the legality of the presence of its troops in Kashmir - there follow certain

corollary attitudes. Thus, India maintains that the assistance which Pakistan rendered to tribesmen who made incursions into the State constituted a hostile act; and that the entry of regular Pakistan troops on 8th of May, 1948, into the State was an invasion of Indian territory. While India has its armies in the State as a matter of right, Pakistan has no locus standi in the State. On the one hand, India demands that during the period of preparation for and taking of the plebiscite the territory to the west of the cease-fire line should not be under the immediate government authority and direction of Pakistan or be administered by the Azad Kashmir Government. On the other hand, India maintains that the holding of the plebiscite for the entire State and the unquestioned sovereignty of the State over its entire territory are inseparably connected. The McNaughton proposals, in the view of India, eliminated the sovereignty of the Jammu and Kashmir State from the areas on the other side of the cease-fire line. Therefore, the McNaughton proposals were not acceptable to India.

The crux of the problem lies in the question of sovereignty. To solve the Kashmir dispute the United Nations must first of all determine the following questions:

Did the Maharajah of Kashmir hold the sovereign power of the State in spite of the revolt of his people at the moment when he signed the instrument of accession to India?

If he did hold the sovereign power of the State, was the act of accession by the Maharajah and the Government of India binding and legal under the India Independence Act as well as those principles of partition which the Government of India and Pakistan had concurrently acknowledged?

Both India and Pakistan have pledged themselves to solve this dispute over Kashmir through "the democratic method of a free and impartial plebiscite". Once the above mentioned questions are answered, it will be relatively simple to solve the technical problems of the plebiscite. Referring to the act of accession India has maintained that she holds the sovereign power of the State of Jammu and Kashmir in all matters relating to external affairs and defence of that State. On this ground India has been able to block every attempt of the United Nations to solve the dispute.

Over eleven years have passed since the Kashmir dispute was brought before the United Nations and still to-day it remains unsolved. This fact reflects the weakness of the United Nations. As the United Nations has no force

of its own to compel obedience to its orders, India has been able to evade by diplomatic manoeuvres her duty to take the plebiscite in Kashmir.

(b) The Palestine Question

In November, 1917, the Lloyd George Cabinet of the United Kingdom issued a so-called Balfour Declaration which promised the establishment of a National Home for Jews in Palestine after the successful termination of the war. This declaration was aimed to gain the support of world Jewry and quite particularly of American Jewry. In the autumn of 1917 the Allied and Associated Powers were in a serious position: The bolchevik revolution had demoralized the Russian Army; the Rumanians had been defeated; the French Army was not able to take the offensive; and the American troops had not yet arrived. In the view of the United Kingdom Government the Balfour Declaration was likely to serve the purpose.³⁵

In 1922 the League of Nations endorsed the Balfour Declaration and charged the United Kingdom to carry out her promise by acting as a Mandatory Power.³⁶ Thus, the League

³⁵ Arthur Koestler, "Promise and Fulfilment", p.6
John MacLaurin, "The United Nations and Power Politics"
p.128.

³⁶ See U.N.Doc.A/292 for text of the mandate for Palestine.

of Nations requisitioned Palestine from its owners to provide the Jews with their long-dreamed of home. Consequently, the vast distances of a Jewish unity in Palestine became a recognized international responsibility.

The United Kingdom Mandate over Palestine was to terminate on the 1st of August, 1948. On April 2, 1947, the United Kingdom Government submitted the question of the future government of Palestine to the General Assembly as all its efforts at reconciliation between the Arabs and the Jews had ended in failure.³⁷ The United Kingdom Government further suggested calling a Special Session of the General Assembly to constitute and instruct a special committee to prepare for the consideration, at the regular session of the Assembly, of the question.

The Special Session convened on April 28,³⁸ and on May 15 appointed the United Nations Special Committee on Palestine (UNSCOP) to study the question and report its findings to the Second Session of the General Assembly in the autumn.³⁹

The Committee made a careful and profound study of the question, sojourning in Palestine from the middle of

37 U.N. Doc. A/295

38 U.N. General Assembly, 1st Special Session Official Records, 68th Meeting.

39 Ibid, 79th Meeting, pp. 157-177

June to the end of July. The interests of the Arabs were represented by the Arab Higher Committee and the interests of the Zionists by the Jewish Agency. Each party was confident that it would win a case either in the General Assembly or in the Committee. The Arabs were not willing to permit large-scale immigration of Jews nor to grant independence to a Jewish State in Palestine. The Jews, on the other hand, were not willing to accept anything less than free immigration and the prospect of independence. All attempts to bring about conciliation between these definite contentions failed. The majority of the members of the Committee recommended to the General Assembly that Palestine be divided into two sovereign, independent, democratic States - an Arab State and a Jewish State - joined in a customs-union; and that an international regime be set up for Jerusalem.⁴⁰

The General Assembly, on September 23, 1947, established an ad hoc Committee on the Palestinian question, composed of all Members of the United Nations. This Committee was instructed to consider the Report of the United Nations Special Committee on Palestine and two other items, one proposed by the United Kingdom⁴¹ and the other by Saudi

⁴⁰ U.N. Special Committee on Palestine - Report to the General Assembly; U.N. Doc. A/364
⁴¹ U.N. Doc. A/365

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Arabia and Iraq.

The Committee made a profound study of the question between September 25 and November 25. The Arabs based their claim to Palestine upon their centuries' old possession of the country; their natural right to determine their own future and the pledges given to the Arabs by the United Kingdom Government during the First World War.⁴³ The Jews, on the other hand, based their claim to Palestine on the Balfour Declaration, which was also embodied in the Mandate for Palestine.⁴⁴ The Arabs rejected this contention on several grounds, inter alia, that it was inconsistent with the pledges given to the Arabs before and after the date it was made; that it was made without their consent and knowledge; and that it was contrary to the principles of national self-determination. On November 25 the Committee recommended to the General Assembly a plan of partition with economic union.⁴⁵

The recommendations of the Committee were considered by the General Assembly from the 26th to 29th of November, 1947. The plan of partition with economic union was opposed

⁴² U.N. Documents A/517 and A/508

⁴³ U.N. General Assembly, Ad Hoc Committee on the Palestinian Question, Records of Meetings, 1947, 3rd Meeting, pp. 5-11

⁴⁴ Ibid, 4th Meeting, pp. 12-19

⁴⁵ U.N. Doc. A/516

by the representatives of Cuba, Egypt, Greece, Haiti, Iraq, Lebanon, Pakistan, the Philippines, Saudi Arabia and Yemen. On November 23, the representative of Lebanon submitted the following proposal for the solution of the question:

1. An independent federal State of Palestine shall be set up not later than August 1, 1948.
2. The Government of the independent federal State of Palestine shall be constituted on a federal basis and shall consist of a federal government and the government of Arab and Jewish cantons.
3. The delimitation of the cantonal boundaries shall be carried out in such a way as to have the smallest possible Arab or Jewish minorities in each canton.
4. The population of Palestine shall elect by direct universal suffrage a constituent assembly which shall draw up the future constitution of the federal State of Palestine. The constituent assembly shall comprise all population groups, proportionate to their number.
5. In defining the powers of the federal Government of Palestine, its legislative and judiciary organs as well as the powers of the cantonal governments, and in determining the relationships between the cantonal governments and the federal Government, the constituent assembly will be guided principally by the basic pattern of the Constitution of the United States of America and by the organic laws of the States of the Union.
6. Among other imperative provisions, the Constitution shall provide for the protection of the Holy Places, freedom of access, visit and worship, in accordance with the status quo, as well as the safeguarding of the rights of religious establishments of all nationalities in Palestine."

46 U.N. General Assembly, Official Records, 2nd Session, 120th Meeting, p.1412.

In spite of this flattering appeal for the support of the United States, the representative of the United States urged that the report of the Ad Hoc Committee on the Palestinian Question should be put to the vote "immediately"⁴⁷. The General Assembly adopted the report of the Ad Hoc Committee⁴⁸ by 33 votes to 13, with 10 abstentions. This resolution⁴⁹ on the future Government of Palestine adopted the plan of partition with economic union; appointed a United Nations Palestine Commission to carry out the partition; and requested the Security Council to take the necessary measures to implement the plan, to empower the United Nations Commission if necessary to restore peace under Article 39 of the Charter and to regard as a breach of the peace or threat to it or act of aggression any attempt to alter the settlement by force.

The following quotations of the speeches made by representatives of Arab States after the resolution of partition was adopted, illustrate how the United Nations decision was regarded by the Arab States.

47 Ibid, p.1417

48 Ibid, pp.1424-5

49 U.N. Doc. 181 (II) A.

H.R.H. Amir Faisal Al Saud (Saudi Arabia):

"... today's resolution has destroyed the Charter and all the covenants preceding it."

"We have felt, like many others, the pressure exerted on various representatives of this Organization by some of the big powers in order that the vote should be in favour of partition. For these reasons, the Government of Saudi Arabia registers, on this historic occasion, the fact that it does not consider itself bound by the results achieved today by the General Assembly. Furthermore, it reserves to itself the full right to act freely in whatever way it deems fit, in accordance with the principles of right and justice."⁵⁰

Mr. Jamali (Iraq):

"We believe that the decision which we have now taken is a very serious one. It is one that undermines peace, justice and democracy. In the name of my Government, I wish to state that it feels that this decision is anti-democratic, illegal, impartial and contrary to the Charter. It contradicts the spirit and letter of the Charter (...). I wish to put on record that Iraq does not recognize the validity of this decision, will reserve freedom of action towards its implementation..."

Amir Arslan (Syria):

"Gentlemen, the Charter is dead. But it did not die a natural death; it was murdered, and you all know who is guilty."

"My country will never recognize such a decision".

The resolution of November 29 provided not for simple partition of Palestine, but for partition with economic union. It envisaged the creation of an Arab State, a Jewish State, and the City of Jerusalem under a special international regime administered by the United Nations. /

⁵⁰ Underlining ours.

These three entities, because of justifiable doubts concerning the economic viability of the proposed Arab State and the City of Jerusalem, were to be linked in an economic union of Palestine. Thus, the economic union was to correct to some extent the obvious disadvantage of territorial partition. However, it was possible to execute the plan of partition with economic union only if there existed a willingness on the part of both Arabs and Jews in Palestine to cooperate. The Jewish Agency accepted the partition plan, although with reluctance since it gave the Jews one-eighth of the territory envisaged in the Balfour Declaration. The Arab Higher Committee refused to recognize the resolution of November 29, 1947. In fact, the Arabs started a war against the Jews. Battles were fought all over the Jewish part of Palestine. The Mandatory Power was unable to keep order.

Under the partition resolution, a United Nations Palestine Commission, composed of the representatives of five member States, was established. This Commission was to implement the plan of partition with economic union. In this task it was to avail itself of the guidance and assistance of the Security Council. In January 1948, the Commission invited the Arab Higher Committee, the Jewish Agency and the United Kingdom as the Mandatory Power to designate representatives who might furnish the Commission such information and other assistance as it might require

in the discharge of its duties. The United Kingdom and the Jewish Agency complied with this request, while the Arab Higher Committee refused the invitation, stating that it was "determined to persist in rejection partition and in refusal recognize UNO resolution this respect or anything deriving therefrom"⁵¹.

The Commission submitted to the Security Council two monthly reports, dated respectively January 29 and March 12, 1948⁵². On February 16, 1948, the Commission presented to the Security Council a special report⁵³ on the problem of security in Palestine, with particular reference to the maintenance of law and order and to the implementation of the resolution of November 29, 1947, on the future government of Palestine. In this report the Commission called upon the Security Council for assistance in the discharge of its duties, having stated that "the Commission now finds itself confronted with an attempt to defy its purposes, and to nullify the resolution of the General Assembly". It referred to the Security Council the "problem of" providing that armed assistance which

51 U.N.Doc. A/532, p.6. Underlining ours.

52 U.N.Documents S/663 and S/695

53 U.N.Doc. S/676.

alone would enable the Commission to discharge its responsibilities on the termination of the Mandate", and emphasized the need for prompt action in order to avert bloodshed and to assist in the implementation of the resolution. Recognizing that it would be unable to establish security and maintain law and order unless military forces in adequate strength were made available to it, the Commission stated that "powerful Arab interests, both inside and outside Palestine, are defying the resolution of the General Assembly and are engaged in a deliberate effort to alter by force the settlement envisaged therein".

The partition resolution had asked the United Kingdom as the Mandatory Power to cooperate in carrying out the partition plan and had specifically requested the Mandatory Power to turn the administration progressively over to the Commission, coordinating its plans of withdrawal with the Commission's plans for taking over. The Government of the United Kingdom, however, had made it clear long before the General Assembly's decision was taken that it was not prepared to accept any responsibility under the General Assembly's recommendation which would involve the use of United Kingdom troops as the means of enforcing a decision likely to be resisted by Jews or by Arabs. /
Thus, the representative of the United Kingdom on November

20, 1947, urged that the General Assembly, in drawing up its recommendations, should "take full account of the risk of strife in Palestine and the need to provide a means of filling the gap in the process of enforcement left by the decision of the present Mandatory Power that its troops could not be used as the instrument of the United Nations for this purpose"⁵⁴.

The Mandatory Power never allowed the Palestine Commission to enter Palestine, but agreed that the Commission could send a few members of its staff for the purpose of finding accommodation and making arrangements for necessary facilities with the Palestine Government. The Commission accordingly sent an advance party to Palestine on March 3, 1948. It held meetings with the Government of Palestine relating to matters which would arise on the assumption by the Palestine Commission of the responsibilities assigned to it by the partition resolution. The group also kept the Palestine Commission informed of the general situation in Palestine, particularly with regard to matters of order and security.

On April 1, 1948, the Security Council, noting the increasing violence and disorder in Palestine, called

⁵⁴ U.N., Security Council, Official Records, 3rd. Year, 253rd Meeting, p. 271.

upon the Jewish Agency and the Arab Higher Committee "to make representatives available to the Security Council for the purpose of arranging a truce between the Arab and Jewish Communities of Palestine"⁵⁵. The representative of the Jewish Agency informed that the Jews of Palestine were ready to obey the call to cease fighting as soon as the Arabs did so, while the representative of the Arab Higher Committee declared that the Arabs would only do so if "they were assured that the truce and the ensuing discussions were not a preliminary to the partition scheme".

On April 2, 1948, the Palestine Commission presented a report⁵⁶ to the Security Council, explaining that it had not been able to implement the partition resolution because of "the armed hostility of both Palestinian and non-Palestinian Arab elements, the lack of co-operation from the Mandatory Power, the disintegrating security situation in Palestine, and the fact that the Security Council did not furnish the Commission with the necessary armed assistance".

On April 16, 1948, the Security Council passed another toothless resolution⁵⁷ calling on both parties

⁵⁶ U.N.Doc. S/532. Underlining ours.

⁵⁷ U.N. Doc S/723

to cease fighting "without prejudice to their rights, claims or possessions". On April 23, the Security Council established a truce commission for Palestine, composed of representatives of those members of the Security Council which had career consular officers in Jerusalem. Thus the USSR which had no career consular officers in Jerusalem was debarred from the Commission. The duty of the Commission was to assist the Security Council in supervising the implementation by the parties of the above resolution.

On March 19, 1948⁵⁸, the representative of the United States proposed that the Security Council should call another special session of the General Assembly in order to consider establishing a temporary Trusteeship over Palestine since the partition plan had "proved unworkable". The representative of the USSR thereupon stated that "full responsibility for wrecking the decision on the partition of Palestine" now lay with the United States. On April 1, 1948, the Security Council decided to summon the second special session of the General Assembly to "consider further the question of the future government of Palestine"⁵⁹.

⁵⁸ U.N. Security Council, Official Records, 3rd Year, 271st Meeting.

⁵⁹ U.N. Doc. 8/705.

The General Assembly convened on April 16, and four weeks of heated debate followed⁶⁰. The representative of the United States declared that it was plain that partition could not be enforced by peaceful means and suggested trusteeship as an emergency measure⁶¹. He, however, did not submit a formal draft resolution to this end. Instead, he presented a working paper⁶² which proposed a Temporary Trusteeship for Palestine. On May 14, 1948, the General Assembly finally adopted a resolution⁶³ which relieved the Palestine Commission from the further exercise of duties under the resolution of November 29, 1947, and empowered a United Nations Mediator in Palestine, to be chosen by a special committee of the General Assembly, to "promote a peaceful adjustment of the future situation of Palestine".

The situation of Palestine was at that moment getting out of the General Assembly's control. The Mandate of Palestine was to terminate on the 15th of May. Shortly before the General Assembly met for the final plenary

60 U.N., Official Records of the Second Special Session of the General Assembly, Vol. I, Plenary Meetings of the General Assembly.

61 U.N., Official Records of the Second Special Session of the General Assembly, Volume II, 1st Committee 117th Meeting, pp. 4-10

62 U.N. Doc A/C.1/277.

63 U.N. Doc. 186 (S-2).

debate on May 14, a Jewish Provisional Government proclaimed the Independent State of Israel and the Government of the United States gave Israel de facto recognition.

Under the General Assembly resolution of May 14, a committee of the Assembly composed of representatives of the permanent members of the Security Council met on May 20, 1948, and appointed Count Folke Bernadotte, President of the Swedish Red Cross, as United Nations Mediator on Palestine.⁶⁴

On May 15, 1948, the Security Council received a cablegram from the Jewish Agency for Palestine charging acts of aggression on the part of Transjordan⁶⁵ and a telegram from the Minister of Foreign Affairs of Egypt⁶⁶ stating that Egyptian armed forces had started to enter Palestine, after the British Mandate had ended, for the purpose of establishing security and order. In the course of the discussion, the representative of the Jewish Agency stated that the very idea that the armed intervention of Egyptian forces in Palestine would lead to restoration of order was grotesque. He furthermore urged that the

⁶⁴ U.N. Security Council, Official Records, 3rd Year, 229th Meeting, p.4.

⁶⁵ U.N. Doc. S/744

⁶⁶ U.N. Doc. S/743

Security Council determine the situation in Palestine to be a threat to international peace and an act of aggression and call upon the Arab States to refrain from aggression on penalty of action under Chapter VII of the Charter⁶⁷.

On May 17, the Security Council had before it three further communications regarding the situation in Palestine. A cablegram from the provisional Government of Israel informed the Security Council of the proclamation of an independent State of Israel in Palestine⁶⁸. A message from King Abdullah of Transjordan stated that his armed forces were compelled to enter Palestine to protect the Arabs there⁶⁹. And a cablegram from the League of Arab States⁷⁰ declared that "in order to fill the vacuum created by the termination of the Mandate and the failure to replace it by any legally constituted authority" the Arab States were compelled to intervene in Palestine for the sole purpose of restoring peace and security and establishing law and order. Then the cablegram continued as follows:

"The Arab States recognize that the independence and sovereignty of Palestine which was so far subject to the British Mandate has now, with the termination of Mandate, become established in fact, and maintain

67 U.N. Security Council, Official Records, 3rd Year, 292nd Meeting.

68 U.N. Doc. E/747

69 U.N. Doc. E/748

70 U.N. Doc. S/745

"that the lawful inhabitants of Palestine are alone competent and entitled to set up an administration in Palestine for the discharge of all governmental functions without any external interference. As soon as that stage is reached the intervention of the Arab States, which is confined to the restoring of peace and establishment of law and order, shall be put to an end, and the sovereign State of Palestine will be competent in co-operation with the other States members of the Arab League, to take every step for the promotion of the welfare and security of its peoples and territory."⁷¹

This cablegram was a flagrant defiance of the United Nations. The Mandatory Power had turned over the responsibility of the future government of Palestine to the United Nations which had accepted it as a successor to the League of Nations. The Arab States denied this transfer of authority over Palestine and maintained that the territory had no "legally constituted" government after the termination of the British Mandate. Furthermore, they held that "the lawful inhabitants of Palestine "were alone" competent and entitled to set up administration in Palestine for the discharge of governmental functions without any external interference". Thus, the Arab States denied both the competence and the legal right of the United Nations with respect to the establishment of the future government of Palestine and, consequently, rejected

⁷¹ Underlining ours.

the partition plan adopted by the United Nations.

The armed invasion of Palestine by the Arab states also constituted a flagrant violation of the Charter of the United Nations. Paradoxically, the Arab States denied any right of "external interference" in Palestine while they themselves launched an armed intervention. The unlawfulness of this armed aggression, according to Mr. Trygve Lie⁷², was compounded by "its design to upset the specific will of the United Nations". "The United Nations", in his view, "could not permit that aggression to succeed and at the same time survive as an influential force for peaceful settlement, collective security, and meaningful international law"⁷³.

Under Article 2⁴ of the Charter, the Members of the United Nations had conferred on the Security Council primary responsibilities for the maintenance of international peace and security "in order to ensure prompt and effective action by the United Nations".

On May 17, 1948, the representative of the United States submitted to the Security Council a draft resolution⁷⁴ which determined that the situation in Palestine constituted

72 Trygve Lie, In the Cause of Peace, p. 166

73 Ibid. p. 174

74 U.N. Doc. S/749.

a threat to the peace and a breach of the peace within the meaning of Article 39 of the Charter and ordered all Governments and authorities to cease any hostile military action and to issue a cease-fire order, to become effective within thirty-six hours after the adoption of the resolution. The representative of the United Kingdom submitted a series of amendments to the draft resolution. The main points of these amendments were the omission of any determination by the Security Council that the situation in Palestine constituted a threat to the peace or breach of the peace and the substitution for the cease-fire order of a call upon the parties to the same effect. Subsequently, the representative of the United States submitted to the Security Council a questionnaire⁷⁵ to be addressed by the Council to the parties concerned for the purpose of ascertaining the facts of the situation in Palestine. Among the questions to be put to the Governments of Egypt, Iraq, Lebanon, Saudi Arabia, Syria, the Hashemite Kingdom of Jordan, and Yemen, two questions read as follows:

"(1) Have the Arab Governments entered into any agreement among themselves with respect to Palestine.

"(2) If so, what are the terms of the agreement".

75 U.N.Doc. B/753.

The representative of Lebanon objected to the inclusion of the above questions at the meeting of the Security Council on the following day⁷⁶. The President (representative of France) held, however, that the two questions related to the maintenance of peace, which was "precisely within the province of the Security Council". Then the representative of Argentine cited Article 2 (7) and suggested that inclusion of the two questions in the questionnaire should be decided by vote. As a result of the vote these questions were omitted from the questionnaire⁷⁷.

The representative of Syria proposed at the same meeting that the following additional question should be addressed to the Jewish authorities in Palestine:

"Do you have among your armed forces foreigners who are not Palestinian citizens?" If so, how many or in what percentage?"⁷⁸

Whereupon, the representative of the Jewish Agency suggested that, since the immigration policy of Israel is a matter of domestic jurisdiction under Article 2(7), it should also be excluded from the questionnaire. Consequently, the Syrian proposal was rejected by a vote.⁷⁹

77 Ibid. p. 36

78 Ibid. p. 27

The representative of the USSR, however, expressed regret that a great deal of time had been wasted in discussing the questionnaire when it was clear that the Security Council had sufficient information to determine the existence of a breach of the peace.

On May 22, 1948, the Security Council adopted another toothless resolution⁸⁰ which gave a cease-fire order to all parties concerned in Palestine, effective in thirty-six hours after midnight New York standard time, May 22, 1948. When this resolution was passed the representatives of the USSR and Ukrainian SSR abstained. On May 20, the representative of the USSR had appealed to "the wisdom and sense of justice" of the members of the Security Council, and implored them not to aggravate the situation by adopting resolutions "which cannot be implemented".⁸¹

The Provisional Government of Israel accepted the resolution of May 22, and issued a cease-fire order to its troops. The Governments of Iraq, Lebanon and Syria informed the Security Council of a delay in the receipt of the resolution and requested an extension of the

⁸⁰ U.N.Doc. S/773

⁸¹ U.N., Security Council, Official Records, 3rd year, 299th Meeting, p. 18.

time-limit to enable the Arab Governments to consult. Thereupon the Security Council extended the time-limit of the cease-fire order by 48 hours. On May 26, the representative of Egypt informed the Security Council that his Government was unable to accept the resolution of May 22, 1948⁸², and the representative of Iraq read a communication⁸³ from the League of Arab States to the same effect⁸⁴.

On May 27, Sir Alexander Cadogan, representative of the United Kingdom, at last received instructions to agree to a truce order which threatened to bring the United Nations sanctions against the party refusing to comply. Consequently, he submitted to the Security Council a draft resolution⁸⁵ which provided, inter alia, for the cessation of hostilities in Palestine for a period of four weeks, and instructed the United Nations Mediator for Palestine to make contact with both parties, as soon as the cease-fire was in force, with a view to making recommendations to the Security Council about an eventual settlement for Palestine. The draft resolution at last provided that, should the resolution be rejected, repudiated or violated by either

82 Ibid. 305th Meeting, pp. 44-46

83 U.N.Doc. S/732

84 U.N. Security Council, Official Records, 3rd Year, 305th Meeting, pp. 47-49

85 U.N.Doc S/735

party or both, the situation in Palestine would be reconsidered by the Security Council with a view to action under Chapter VII of the Charter. This resolution, as amended by the United States of America, Canada and France, was adopted on May 29, 1948⁸⁶. The Arab States⁸⁷ and Israel⁸⁸ communicated their acceptance of this resolution to the Security Council on June 1, 1948. The cease-fire went into effect on June 11, 1948⁸⁹.

When the period of truce began to run out the United Nations Mediator on the 3rd and 5th of July, and the Security Council of the 7th of July, addressed urgent appeals to both Jews and Arabs for the prolongation of the truce. These appeals, accepted by the Provisional Government of Israel, were rejected by the Arab States, and hostilities resumed.

On July 15, 1948, the Security Council passed a resolution ⁹⁰ which determined the situation in Palestine a threat to the peace within the meaning of Article 39

⁸⁶ U.N. Security Council, Official Records, 3rd Year, 310th Meeting, pp. 37-64

⁸⁷ U.N. Doc. S/810

⁸⁸ U.N. Doc. S/804

⁸⁹ U.N. Progress Report of the United Nations Mediator on Palestine, General Assembly, Official Records, 3rd Session, Supp. No. 11 (A/648), Part II, p. 31

and ordered, in pursuance to Article 20, the cessation of military action. A threat of the United Nations sanctions under Chapter VII of the Charter was explicitly added in the resolution. Thus the Security Council's resolution having been adopted under Chapter VII of the Charter, constituted an order and not an appeal to the parties. The Arab States, therefore, yielded and the second truce came into effect on July 18, 1948. This new truce was of indefinite duration and was to remain in force, subject to further decision by the Security Council or the General Assembly, until a peaceful adjustment of the future situation of Palestine was reached.

Count Bernadotte, who had framed new peace proposals, was assassinated on September 17, 1948, by Jewish terrorists. Dr. Ralph J. Bunche was then appointed by the Secretary-General of the United Nations as an acting Mediator and he worked successfully to secure separate armistice agreements between the Arab States and Israel. The Israeli-Egyptian Armistice Agreement was concluded on February 24, 1949, the Lebanon-Israeli Agreement on March 23, the Jordan-Israeli Agreement on April 3, and the Syrian-Israeli Agreement on July 20⁹¹. The territory of Israel was

⁹¹ Walter Eytan, The First Ten Years, pp.27-46.

defined by the armistice agreements to include all mandated Palestine west of Jordan except the plateaus of Judea and Samaria, all Galilee, the Sharon Coastal plain, the valley of Esdraelon and Negev, with a narrow strip at its southeastern corner on the Gulf of Aqaba. The Arab territory was defined to include the plateaus, the lower part of Jordan valley and the Gaza strip. In his report of July 21, 1949⁹², the acting Mediator observed that the practical application of the Security Council's truce in Palestine has been substituted by effective armistice agreements voluntarily negotiated by the parties.

Although the State of Israel was admitted to the United Nations on May 11, 1949, the Arab States have refused to recognize Israel as a sovereign, independent State. The Arabs, including not only Palestinian Arabs, but those of the Arab States, find it extremely difficult to accept even the fact of a Jewish State in Palestine. They look upon the nationalistic Jews of Palestine as interlopers and aggressors. They point to the fact that the Arab population was the preponderant population of the country and that Palestine has been an Arab country for thirteen centuries. They reject not only the historical claims of the Jews, but even the legal basis for their

92 U.N.Doc. S/1357, pp.1-7.

presence in Palestine which the terms of the Mandate provided. The State of Israel, established under the cloak of the United Nations authority, can be eliminated only by force, the use of which is, however, forbidden by the United Nations. That is the Arab dilemma.

For the legalist, the State of Israel is founded on the Balfour Declaration endorsed by the League of Nations, and hence on international law. But in fact, the State of Israel is an historic injustice from the point of view of the concepts of National Sovereignty and self-determination of nations. Only one-third of the population of Palestine were Jews who pushed Arabs out of a part of the territory by violence. This fait accompli was then recognized by the United Nations. Then the Jews established a State which was subsequently recognized de facto and then de jure. Thus the State of Israel was established by the military strength of the Jews and the United Nations intervention. However, if the USSR had been backing one side and the United States the other, the machinery of the United Nations would have been unable to force a peaceful settlement in Palestine. All permanent members of the Security Council were, however, at that time concerned to see the fighting brought to an end. Speaking of the agreement on the Palestine question between the USSR and the United States, the representative

of the USSR stated as follows:

"We would have been very glad and delighted to see the delegation of the USSR and the delegation of the United States agree on some just matter. It is deplorable to see them agree only in one case, the only case brought before the Security Council and the United Nations which is unjust and immoral. (....) The United States and the USSR agree only in this one case, the only unjust case which the Security Council has ever handled." 93

Conclusion. What right had the United Nations to decide the partition of Palestine? An answer to this question is found in the concept of Sovereignty. The United Kingdom assumed Sovereign Power over Palestine during the First World War and through the United Kingdom Mandate over Palestine the League of Nations confirmed this Sovereign Power over Palestine to the United Kingdom who then transferred it to the United Nations, the successor of the League, upon her withdrawal from Palestine. Thus the United Nations became theoretically to possess Sovereign Power over Palestine.

When the Arab States launched an armed attack on the State of Israel, the United Nations determined the situation a threat to the peace within the meaning of Article 39 of the Charter and ordered the cessation of

93 U.N., Security Council, Official Records, 3rd Year, 229th Meeting, May 21, 1948. pp. 17-18. Underlining ours.

of hostilities in pursuance to Article 40, with a threat of the United Nations sanctions under Chapter VII of the Charter. The Arab States complied under the pressure of this ultimatum. Thus the United Nations was able to fulfil its responsibilities in the maintenance of international peace and security. This example shows clearly that the United Nations is capable of maintaining international peace. As the right of veto of the permanent members of the Security Council could prevent at any time such a United Nations decision for the maintenance of international peace and security from being taken, it is absolutely necessary to abolish the right of veto so that no single country would be in a position to further her national interests through war by use of veto in the Security Council.

CHAPTER V

DISPUTES OVER A POLICY OF A STATE

Often disputes between States arise from an internal policy of a State which another State or group of States consider to injure their interests and, consequently, attempt to change it by the use of diplomatic pressure. An internal policy of a State has frequently led to war. For example, the United States of America declared war on Mexico to prevent the nationalization of the Mexican oil industry in 1917. As the responsibility of the United Nations is, on the one hand, to maintain or restore international peace and, on the other hand, to safeguard National Sovereignty, it will be of great interest for the purpose of this dissertation to find out how the United Nations has been able to operate in connection with disputes arising from an internal policy of a State. Two typical examples - (1) Anglo-Iranian Oil Co. Case and (2) the question of racial segregation in the Union of South Africa - have been chosen for this purpose.

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(a) Anglo-Iranian Oil Co. Case

In 1901, the Government of Persia granted a concession to William Knox D'Arcy, a British subject, giving him the sole right to extract and exploit oil in all of Iran, except the five northern provinces, for sixty years. At the expiration of the concession in 1961, all the buildings and installations owned by the concessionaire were to revert to the Persian Government. The Anglo-Persian Oil Company later replaced D'Arcy as the concessionaire and the Government of the United Kingdom brought the matter before the League of Nations in 1933. Through the mediation of the League of Nations, a new agreement was made to replace the d'Arcy concession. The Concession Convention of 1933¹ concluded between the Government of Persia and the Anglo-Persian Oil Company extended the concession by thirty-two years, to 1993. Article 21 of the Convention provided that the Concession should not be annulled by the Government nor the terms altered either by general or special legislation. Article 22 provided that any disputes between the parties of any nature whatever should be referred to a tribunal presided over by an umpire appointed by the

1 I.C.J.Pleadings, Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), pp. 258-270.

President of the Permanent Court of International Justice.

In March, April and May 1951, the Iranian legislature - the Majlis and the Senate - enacted laws, enunciating the principle of the nationalization of the oil industry in Iran and establishing procedure for the enforcement of this principle². In May 1951, the Anglo-Iranian Oil Company asked for arbitration in accordance with the 1933 concession agreement. The Government of Iran, however, rejected the request and demanded that the Company's representatives should attend meetings for the liquidation of the Company. The Company, thereupon, applied to the President of the International Court of Justice to appoint a sole arbitrator³. At the same time, the Government of the United Kingdom submitted the matter to the Court as a dispute between itself and the Government of Iran.

In the application⁴ instituting proceedings, the United Kingdom Government asked the Court to declare that the Iranian Government was bound to submit the dispute to arbitration under the terms of the 1933 Concession Convention, and to accept and carry out the arbitral award.

2 Ibid. pp.279-280

3 Ibid. pp.387-389

4 Ibid. pp.8-19; Application dated 26 May 1951.

Alternatively, the United Kingdom Government asked the Court to declare that implementing the Oil Nationalization Act would be contrary to international law, insofar as it unilaterally annuls or alters the terms of the Convention. Moreover, the application requested the Court to declare that (a) the Convention continues to be legally binding on Iran and that, by denying to the Anglo-Iranian Oil Company the exclusive legal remedy provided in the Convention, Iran has committed a denial of justice contrary to international law; (b) that the Convention cannot be lawfully annulled, or its terms altered by Iran, except by agreement with the Oil Company or under the conditions of the Convention; (c) and to adjudge that the Government of Iran should give full satisfaction and indemnity for all acts committed in relation to the Anglo-Iranian Oil Company which are contrary to the Convention, and to determine the manner of such satisfaction and indemnity.

This application was immediately communicated to the Iranian Government which raised a Preliminary Objection on the ground that the International Court of Justice lacked jurisdiction ex officio in application of Article 2, paragraph 7, of the Charter of the United Nations⁵.

5 I.C.J. Yearbook 1951-1952, p. 93.

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On July 5, 1951, the Court, however, called on the Iranian Government and the Anglo-Iranian Oil Company to do nothing which would aggravate the dispute, the Company in the meantime to be permitted to carry on its industrial and commercial operations as it had been prior to May 1, 1951, the date of the Iranian Oil Nationalization Act, under the supervision of an Anglo-Iranian Board with one neutral member. This order was in no way to prejudge the jurisdiction of the Court to consider the "merits of the case"⁶. The United Kingdom Government accepted the Court's order but, on July 9, the Government of Iran informed the United Nations that it rejected the Court's order⁷.

On September 28, 1951, the United Kingdom Government requested the inclusion of the following item on the provisional agenda of the Security Council:

"Complaint of failure by the Iranian Government to comply with provisional measures indicated by the International Court of Justice in the Anglo-Iranian Oil Company Case."⁸

In this complaint, the United Kingdom Government recalled that the International Court of Justice had notified the Council of the provisional measures indicated

⁶ Anglo-Iranian Oil Co. Case, Order of July 5th, 1951 I.C.J. Reports 1951, p. 100

⁷ U.N.Doc. 46/04 (8)

⁸ U.N.Doc.S/2357; Security Council Official Records 6th year, Supp. for October-December 1951, pp. 1-2.

by the Court on July 5, 1951, under Article 41 (2) of its Statute⁹. The United Kingdom Government had accepted the findings of the Court, while the Government of Iran had rejected them and had ordered the expulsion from Iran of all the remaining staff of the Company, in violation of the provisional measures ordered by the Court. The complaint contained the following statement:

"His Majesty's Government in the United Kingdom are gravely concerned at the dangers inherent in this situation and at the threat to peace and security that may thereby be involved."

In the letter of complaint, the United Kingdom Government proposed a draft resolution which called upon the Government of Iran to act in all respects in conformity with the provisional measures indicated by the Court and to permit the staff affected by the recent expulsion orders to continue to reside at Abadan.

At the outset, there was some discussion as to whether the Security Council should include the complaint in its agenda. The representative of the USSR took the position that the actions taken or contemplated by the Iranian Government were essentially within its domestic jurisdiction and that the Security Council consideration of such matters as the nationalization of the oil industry, the activities of foreign industrial concerns there, or

the presence of foreign citizens would constitute interference and a gross violation of the sovereignty of the Iranian people. "Such interference", he stated, "is utterly inconsistent with one of the most important principles of the United Nations Charter as set forth in Article 2, paragraph 7".¹⁰

The representative of Yugoslavia thought likewise, making the point that one organ of the United Nations could not be bound by the decision of another and stating that the fact that the Court itself had made it clear that its interim order did not prejudge the question of jurisdiction indicated that it had grave doubts on this point¹¹.

The eight other representatives who spoke approved inclusion of the item, most of them specifically stating that they reserved their position on the Security Council competence in the matter or on the substance of the complaint. Thus the representatives of Ecuador and Turkey considered that the Security Council should hardly refuse to consider any matter which a Member State felt contained a danger or a threat to international peace and security, especially a situation such as this which it was generally known might increase the danger to peace.

¹⁰ U.N. Security Council, Official Records, 6th Year, 559th Meeting, 1 October 1951, pp. 1-2

¹¹ Ibid., pp. 2-3

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In the view of the United States representative, the question whether the matter was within the domestic jurisdiction of Iran depended on a consideration of the very substance of the question. When international peace is threatened by a dispute such as this, it was important that the Security Council should place the dispute in lis pendens "in order to bring to bear upon the parties concerned those restraints and self-disciplines which have always been regarded as appropriate and necessary to the carrying out of justice while a dispute is in lis pendens"¹².

The representative of China felt that, even for deciding its competence, the Security Council should have all the facts before it. He wanted it clearly understood, however, that at any stage in the discussion any member or any state invited to participate could take the position that the matter was one of domestic jurisdiction. In his view the question was not one of peace and security, but one of property, which might be a very important piece of property. Neither party, he believed, would resort to the use of armed force in seeking a satisfactory solution. "Personally", he concluded, "I feel that this matter is very, very remote, to say the least, from questions of

¹² Ibid., pp. 5-7

peace and security".¹³

After the debate, the Security Council adopted the agenda by nine votes in favour, with the USSR and Yugoslavia voting against.¹⁴

After the representatives of Iran had taken a seat at the Council table, the representative of the United Kingdom made an opening statement of Britain's case. He pointed out, *inter alia*, that, under Article 93 of the Charter, all members of the United Nations are ipso facto parties to the Statute of the International Court of Justice; and that by Article 93 each member of the United Nations undertake to comply with the decision of the Court. The interim measures which the Court gave on July 5, 1951, created international obligations which it is the right and the duty of the Security Council to uphold and which cannot be regarded as being solely within the domestic jurisdiction of Iran. In addition to this, the Security Council has special functions with regard to the decisions of the Court, both under Article 94 (2) of the Charter and under Article 41 (2) of the Statute of the Court. The fact that the Court notified the Security Council¹⁵ of the

13 Ibid. pp. 8-9

14 Ibid. p. 10

15 U.N.Doc. S/2239

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interim measures, implied that the Security Council had the power to deal with matters arising out of such interim measures.

Thereupon the representative of Iran expressed surprise that the United Kingdom should have brought a complaint to the Security Council based on the provisional measures indicated by the Court. "The Iranian Government", he stated, "has contested the Court's competence in the matter and has consequently withdrawn its declaration accepting the Court's compulsory jurisdiction, and has communicated its decision to all Members of the United Nations through the Secretary General". He continued:

"I am all the more surprised because the United Kingdom Government has recognized the principle of nationalization of the oil industry in Iran according to a formula accepted by both parties, and in fact did so after the Court had indicated the provisional measures on which this complaint is based."¹⁶

The Iranian Government therefore believed that there was no ground for discussion of the question in the Security Council, but if the Security Council decided to examine the question, the Iranian Government was determined to appear before the Council to show cause

¹⁶ U.N. Security Council, Official Records, 6th Year, 559th Meeting, 1 October 1951, p. 26.

why the complaint should be rejected. Since at least ten days would be required to enable the representative of Iran to reach New York, he asked the members of the Security Council to adjourn discussion for that length of time. Consequently, the Security Council decided to adjourn discussion until October 11, 1951.

Dr. Mossadegh, Prime Minister of Iran, arrived in New York on October 8, and a meeting of the Security Council was later called for the 15th of October. At this meeting, the representative of the United Kingdom, in view of the changed situation, including the expulsion of the remaining Anglo-Iranian Oil Company staff, submitted to the Security Council a revised draft resolution¹⁷ which called for a resumption of negotiations at the earliest practicable moment and suggested that the differences between the Governments of Iran and the United Kingdom should be solved in accordance with the principles of the provisional measures indicated by the International Court of Justice.

Explaining the new draft resolution, the representative of the United Kingdom told the Security

¹⁷ U.N.Doc. S/2258/Rev 1; Security Council, Official Records, 6th Year, Supplement for October-December 1951, pp. 3-4.

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Council that the situation had changed since the original draft resolution was submitted on September 29. The technicians of the Anglo-Iranian Oil Company had been expelled. The provisional measures, to some extent, had now been overtaken by events. The United Kingdom Government was not insisting on return to the status quo of before May 1, but was seeking agreement between the parties, at least on a provisional scheme, enabling the flow of oil to be resumed without prejudice to the ultimate agreed solution of the dispute. He continued:

"In other words, without abandoning our struggle for the acceptance of the rule of law as opposed to the rule of force, we are trying to suggest a way by which reasonable people can, with good will, find an approach to a settlement which will enable a great industry to resume operations. It is of course also with the object of upholding the rule of law that we have retained some reference to the International Court in the preamble¹⁸. The United Kingdom Government was anxious that negotiations be resumed, but it felt that, if they were resumed, it should be in the light of some pronouncement by the Security Council indicating, broadly, that this matter was not the exclusive concern of the Iranian Government, and that it must be solved, not by means of ultimata, but through free negotiations and in accordance with the accepted principles of international law!"

The discussion that followed Prime Minister Mossadegh's statement of October 15 occupied four meetings

18 U.N. Security Council, Official Records, 6th Year, 560th Meeting, p. 2.

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of the Security Council on 16th, 17th and 19th of October.

At the first of these, ¹⁹ he observed that the Security Council had no competence to deal with the question because the exercise of Iran's sovereign rights in such matters of domestic jurisdiction could neither be abridged nor interfered with by any "foreign sovereign" or international body. ²⁰ That principle of international law was also the law of the United Nations by virtue of Article 2, paragraph 2 of the Charter which enshrined the principle of equal rights and self-determination of peoples, and by virtue of Article 2, paragraph 7 of the same instrument which forbade the United Nations to intervene in matters essentially within the domestic jurisdiction of any State and exempted the Members from any requirement to submit such matters to settlement under the Charter. At the outset of this argument, the representative of Iran stated :

"The oil resources of Iran, like its soil, its rivers and mountains, are the property of the people of Iran. They alone have the authority to decide what shall be done with it, by whom and how. They have never agreed to share that authority with anybody else or to divide their ownership of all or part of that property or what it produces with anyone. They have not submitted and will not submit their authority in that regard, or the exercise of it, to review or judgement by any persons or body outside Iran. That ownership and that authority are inalienable. They are part of the foundations on

19 Ibid, pp.3-28

20 Ibid, p.7

which stand our national sovereignty and our admitted equality among the other sovereign States of the community of nations and of the body in which it is organized, the United Nations." 21

Apart from the bar to the Security Council's jurisdiction interposed by Article 2 (7), the Security Council could not, as the Government of the United Kingdom asked, enforce compliance under Article 94 with the provisional measures ordered by the Court under Article 41 of its Statute, because the Statute attributed binding force only to final judgement under its Article 59. However, the language of Article 41 of the Statute was exhortative and not declaratory, and the provisional measures would be binding only if the parties had been bound by an arbitration treaty which would expressly obligate them to respect such measures. 22 Insofar as the concession agreement of 1933 was concerned that instrument was a private agreement between the Government of Iran and the "former" Company. It conferred no rights, standing or competence on the United Kingdom Government in the matters to which it related. Thus, the Government of Iran was not a party to any contract with the United Kingdom Government about oil.

With respect to the suggestion that the Security Council ought to have jurisdiction because of the existence

21 Ibid, p.6. Underlining ours.

22 Ibid, p.12

of a threat or potential threat to international peace and security, the representative of Iran declared as follows :

"It hardly seems necessary to refute the United Kingdom's assertion that international peace and security require that the oil industry in Iran should continue to function under British management. If the implication of that statement is that it is the nationalization of our oil industry which has endangered peace, it is not clear why the United Kingdom Government, which has nationalized so many industries itself, should not be hauled before the Security Council for having sapped the foundations of the pillars of peace. If that is not its implication, in what way does Iran threaten world peace?"

"Ours is a country with a population of 18 million people, many of whom live in extreme poverty ... It argues a deficient source of humour to suggest that a nation as weak and small as Iran can endanger world peace ... Whatever danger to peace there may be lies in the actions of the United Kingdom Government. By overt display of force, it has sought to keep us from exercising our sovereign authority over our natural resources. It has made ominous gestures such as the dispatch of paratroops to nearby places and of vessels of war to the vicinity of our coastal waters. The irresponsible threats to land forces in Iran might have had the most disastrous consequences by lighting the flames of another world war. For these consequences, the United Kingdom Government would alone be responsible. Iran has stationed no gunboats in the Thames." 23

The representative of Iran stated that the only dispute between Iran and the United Kingdom related to latter's attempt to interfere in the internal affairs of Iran. According to the rules of international law, the expropriation of the property of aliens was governed only

23 Ibid, p.13. Underlining ours.

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by one condition, compensation, a condition which had been specifically provided for in the nationalization Act, and Iran had repeatedly expressed its willingness to reach a settlement. He concluded his statement as follows :

"Under pressure, we will not take action and we will not engage in negotiations affecting our internal affairs. To do so would not only constitute an admission that we are not a sovereign and equal nation, but would eventually be fatal to our independence."²⁴

In reply, the representative of the United Kingdom said that the representative of Iran had suggested that the United Kingdom had not accepted the principle of nationalization, which it had, and also seemed to accuse the United Kingdom of having used some kind of force, which it had not. In his view, Prime Minister Mossadegh's reception of the revised draft resolution²⁵ was simply a flat statement that

"neither the Security Council nor, indeed, His Majesty's Government has anything to do with the Iranian action in expropriating a billion-dollar concern known as the Anglo-Iranian Oil Company; that if this action should have any unfavourable effect by any chance outside Iran that is just too bad for the rest of the world; and that if His Majesty's Government does not immediately agree not only to the act of expropriation but also to carrying it out on Iranian terms at whatever loss to the United Kingdom and the free world, then it is guilty of sabotage and of interference in Iranian internal affairs."²⁶

²⁴ Ibid, p.28. Underlining ours.

²⁵ U.N. Doc. S/2358/Rev.1.

²⁶ U.N. Security Council, Official Records, 6th Year, 561st Meeting, p.8.

On the question of the competence of the Security Council, he argued that international law lays down not only the circumstances in which foreign property and rights can validly be expropriated, but also the conditions and modalities to make such expropriation proper. Moreover, it was part of the United Kingdom case that Iran had broken certain treaties between the two countries, and this in itself would be sufficient to remove the dispute from the realm of domestic jurisdiction. It was also a fallacy to argue that anything done by a Government on its own territory in relation to private persons or companies was ipso facto a matter of domestic jurisdiction, for if that were so, the admitted rules of international law governing the treatment of foreigners would be futile.

At the outset, the representative of the USSR had said that consideration of the United Kingdom complaint by the Security Council would constitute intervention in Iran's domestic affairs and "a flagrant violation of the sovereignty of the Iranian people". On October 16, the USSR representative observed that the purpose of both United Kingdom draft resolutions was to induce the Security Council to intervene in Iran's domestic affairs. Therefore, the USSR delegation was opposed to both the first and the second
²⁷
draft resolution.

²⁷ Ibid, 561st Meeting, p.21-24

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The representative of the United States, however, affirmed that the Anglo-Iranian Oil Company case was a dispute between the United Kingdom and Iran, the continuation of which was likely to endanger international peace and security.²⁸

On October 16, the provisions in the United Kingdom draft resolution concerning the provisional measures of the Court were deleted on the proposal of the representatives of India and Yugoslavia on the ground that in this respect the competence of the Security Council was in doubt. Amendments to the United Kingdom draft resolution, submitted jointly by the representatives of India and Yugoslavia,²⁹ called for the resumption of negotiations in order to make further efforts to resolve the differences in accordance with the Purposes and Principles of the Charter and the avoidance of any action which would have the effect of further aggravating the situation or prejudicing the positions of the parties.³⁰

The representatives of Ecuador and China were of the opinion that the question was not a dispute of a character likely to threaten the maintenance of international peace and security. Subsequently, the representative of Ecuador

28 Ibid, 563rd Meeting, p.1

29 Ibid, 561st Meeting, pp.15-16

30 U.N.Doc. S/2379

questioned whether the Security Council was empowered under Article 24(1) or Article 25 of the Charter to make recommendations in cases where the dispute does not constitute a threat to the peace and security. In his view, the Security Council was not competent in this case to make recommendations of the kind mentioned in Chapter VI of the Charter. Since the phrase "calls upon" conveyed the implication that the Security Council had competence in the matter, he, therefore, suggested that the Security Council should only "advise" the resumption of negotiations.³¹

On October 19, the representative of France proposed that the Security Council adjourn its debate on the revised United Kingdom draft resolution until the International Court of Justice has ruled on its own competence in the matter.³²

In the view of the representative of China, who supported the French motion, the competence of the Security Council and the competence of the Court were not identical nor interdependent. Nevertheless, the decision of the Court and the reasons on which it would be based might throw some light on the question of the competence of the

31 U.N. Security Council, Official Records, 6th Year 562nd Meeting, p.10.

32 Ibid, 565th Meeting, pp.2-3.

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Council.

After a brief consideration of the French motion,
the Security Council adopted it by 8 votes to 1, with 2
³³
 abstentions.

On August 19, 1952, the Secretary-General transmitted³⁴
 for the information of the members of the Security Council
 a copy of the judgement of the International Court of Justice
 given on July 22, 1952, in which the Court by 9 votes to 5
 found that it had no jurisdiction in the case.³⁵ The Court's
order of July 5, 1951, indicating provisional measures of
protection in the Anglo-Iranian Oil Company case, ceased,
therefore, to be operative and the provisional measures
lapsed.

The Anglo-Iranian Oil Co. case proved that anything
 done by a Government on its own territory in relation of
 foreign companies is at the present time ipso facto a matter
of domestic jurisdiction. It a very serious limitation upon
the scope of international law, and consequently of the
United Nations, that practically the entire sphere of

33. Ibid, p.12

34 U.N. Doc. S/2746

35 Anglo-Iranian Oil Co. case (jurisdiction),
 Judgement of July 22, 1952: I.C.J. Reports 1952, p.93.

international economic relations, except where concessions have been arranged by international treaty, belongs to the domestic jurisdiction.

(b) The Question of Racial Segregation in
the Union of South Africa

By a letter dated June 22, 1946,³⁶ the representative of India requested that the question of the treatment of Indians in the Union of South Africa be included in the provisional agenda of the General Assembly. Presenting his Government's case, he stated that the first Indians had come to the British colony of Natal as indentured labourers in 1860 by virtue of an agreement between the Government of India and the then Government of Natal. One of the conditions of the arrangement was that Indian labourers were not to be subjected to any special laws different from those for Europeans. Discriminatory measures were, nevertheless, enacted in South Africa in spite of objection by the Indian Government. In 1925 the Government of the Union of South Africa introduced the Areas Reservation, Immigration and Registration Bill which, inter alia, purported to introduce segregation of Indians in Natal. This measure roused wide-

36 U.N.Doc. A/149; U.N. General Assembly (1st), Joint Committee of the First and Sixth Committees, Record of Meetings 21-30 November 1946.

spread resentment among Indians in South Africa. Consequently, the Government of India tried to have the Indian problem in South Africa brought under examination by a conference which eventually took place between the Governments of India and the Union of South Africa. The result of this conference was the so-called Cape Town Agreement of 1927 concluded between the two governments. In this agreement, the Government of the Union of South Africa pledged, inter alia, "not to proceed further with the Areas Reservation and Immigration and Registration Bill". This agreement was renewed in 1932 and had not been abrogated.

In 1943, however, the province of Natal passed the Trading and Occupation of Land Restriction Act, commonly known as the Pegging Act, which imposed statutory restrictions in respect of the right of the Asiatics to acquire land. In 1946 the Union Government enacted the Asiatic Land Tenure and Indian Representation Act which completely segregated Indians with regard to both trade and residence.

On these grounds, the representative of India, and
³⁷
 later the representative of Pakistan, contended that the

37 A section of the Indian minority in the Union of South Africa originated from the parts of India which are now the State of Pakistan.

treatment of people of Indian origin living in South Africa was contrary to the Charter provision on human rights and to the Cape Town agreements of 1927 and 1932. He also held that, by that treatment, the Government of the Union of South Africa had created a situation which was likely to impair friendly relations between India and South Africa within the meaning of Article 14 of the Charter.

At the outset, when the General Committee was discussing the inclusion of the item on the Agenda of the General Assembly on October 24, 1946³⁸, the representative of the Union of South Africa pointed out that the item dealt, in fact, not with "Indian nationals", but with Indians, nationals of the Union of South Africa. The question was, therefore, essentially within the domestic jurisdiction of the Union of South Africa, and he moved that the item should be removed from the Agenda, in accordance with Article 2, paragraph 7, of the Charter. The General Committee failed to support this request and the General Assembly has so far discussed the question at its first, second, third, fifth, seventh, eighth, ninth, tenth, eleventh and twelfth sessions.

U.N. Official Records of the Second Part of the First Session of the General Assembly, General Committee. Records of Meetings 22 October - 13 December 1946, 19th Meeting, pp. 69-70.

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At the first session, ~~the~~ the General Assembly referred ³⁹ the matter to a joint committee of the First (Political) and Sixth (Legal) Committees. Then the First Committee discussed the question during the second and third sessions of the Assembly, and the Ad Hoc Political Committee during the fifth session.

At each of the sessions at which the question was discussed, the representative of the Union of South Africa objected to all the substantive draft resolutions that were submitted and contended that, since the people of Indian origin were nationals of the Union of South Africa, the matter fell essentially within the Union's domestic jurisdiction under Article 2, paragraph 7, of the Charter. That contention was supported by some representatives and disputed by others.

The question whether a matter governed by international agreement could fall essentially within domestic jurisdiction was debated at the General Assembly and various committees. This question arose from the Indian contention that the Cape Town Agreement of 1927 was an international agreement, a treaty between the Government of the Union of South Africa and the Government of India. Contrary to this contention,

39 U.N. General Assembly, Official Records, 1st Year, 46th Meeting, pp. 930-931.

it was held by the representatives of the Union of South Africa that the Cape Town Agreement was not a treaty but merely an arrangement for mutual co-operation to repatriate to India all South African Indians desirous of making use of the facilities for this afforded by the South African Government. The General Assembly, however, maintained that any solemn agreement between States constituted a treaty. It was, therefore necessary to decide on the above mentioned question.

In the course of debates, some representatives held that a matter which is governed by an international agreement could not fall essentially within the domestic jurisdiction of a party to the agreement⁴⁰. The following definition of domestic jurisdiction given by the Permanent Court of International Justice in its advisory opinion of February 7, 1923, was invoked⁴¹ in support of that contention :

⁴⁰ U.N. General Assembly, 1st Year, General Committee 19th Meeting, pp.70-72; General Assembly 1st Session, 52nd Meeting, p.1043; General Assembly 1st Session Joint First and Sixth Committees, 1st Meeting pp.3-6; General Assembly, 2nd Session 120th Meeting p.1143; General Assembly, 5th Session, Ad Hoc Political Committee, 45th Meeting, pp7; General Assembly, 7th Session Ad Hoc Political Committee, 11th Meeting; pp28; General Assembly 8th Session, Ad Hoc Political Committee, 16th Meeting, pp.5; 19th Meeting, pp.58-59; 20th Meeting, pp.143.

⁴¹ U.N. General Assembly official Records, 1st Session Joint First and Sixth Committees, 5th Meeting, p.41.

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"The question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain."

"For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, (of the Covenant of the League of Nations) then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character." ⁴²

Other representatives, however, maintained that any matter which was "essentially" within a State's jurisdiction retained that character even when it became the object of an obligation under an international agreement signed by that State. ⁴³ On October 19, 1953, the representative of Belgium submitted the following arguments in support of that contention. ⁴⁴ First, he pointed out that Article 2, paragraph 7,

⁴² Nationality Decrees issued in Tunis and Morocco (French Zone) on 8th November 1921, P.C.I.J. Series B, No. 4, 1923. Underlining ours.

⁴³ U.N. General Assembly, 3rd Session, First Committee 265th Meeting, p.276.

⁴⁴ U.N. General Assembly, Official Records, 8th Year Ad Hoc Political Committee, 14th Meeting, pp.68-69.

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of the Charter referred to matters which were essentially - and not solely - within the domestic jurisdiction of a State. Second, he argued that the Article applied to all the other Articles of the Charter and made no distinction between provisions which imposed international obligations on States and those which did not. A matter which was essentially within domestic jurisdiction therefore did not lose that character when it became the object of Charter obligation.

He continued:

"Inasmuch as most of the provisions of the Charter created international obligations, it would not have been stipulated that nothing contained in the Charter permitted intervention in the domestic field if the intention had been to permit such intervention where there was an international obligation. That reasoning, which applied to the obligations arising from the Charter, applied a fortiori to obligations entered into under special treaties, that was to say, under provisions outside the Charter system."

Arguments referring specifically to Charter provisions on human rights were, naturally, submitted in this case. Thus the question arose whether a matter dealt with by the Charter can fall essentially within the domestic jurisdiction.

Several representatives argued that the mere fact that a matter was dealt with by the Charter placed it outside the domestic jurisdiction of a member State, and, instead, brought it under the jurisdiction of the United Nations⁴⁵.

⁴⁵ U.N., General Assembly, Official Records, 2nd Year, First Committee, 107th meeting, p.437; 109th meeting, pp. 449-450.

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It was held that since the Charter was an international agreement, the matters dealt with therein were removed from the domestic jurisdiction of the parties. Thus, the representative of Egypt maintained that the Charter was a multilateral treaty and that its provisions, particularly those relating to human rights and fundamental freedoms, were binding upon Member States.⁴⁶

The opposite view was held by the representative of Australia, who stated that it was not sufficient to point to certain Articles of the Charter to justify the consideration of questions which, even if of international interest, were nevertheless a domestic concern. In his view, Article 2, paragraph 7, by reason of its position in the Charter, governed the application of all the other Articles of the Charter⁴⁷. The representative of the Union of South Africa maintained that there could be no doubt that the words "Nothing contained in the present Charter shall authorize the United Nations to intervene" in domestic affairs excluded everything in the Charter except the provisions

⁴⁶ U.N., General Assembly, Official Records, 5th Year, Ad hoc Political Committee, 42nd Meeting, paragraph 34.

⁴⁷ U.N., General Assembly, Official Records, 7th Year, Ad Hoc Political Committee, 10th Meeting, paragraph 16.

for enforcement measures under Chapter VII⁴⁸. Thus, Article 2, paragraph 7, applied to the whole Charter and made no distinction between provisions which imposed international obligations and those which did not⁴⁹.

Those representatives who would have the United Nations intervene in the treatment of people of Indian origin in the Union of South Africa, maintaining that an international agreement or treaty constituted an exception to domestic jurisdiction, cited particularly Articles 55 and 56 of the Charter. These Articles read as follows:

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 co-operations; and

⁴⁸ U.N., General Assembly, Official Records, 8th Year, Ad Hoc Political Committee, 14th Meeting, paragraph 12.

⁴⁹ U.N., General Assembly, Official Records, 8th Year, Ad Hoc Political Committee, 14th Meeting, paragraph 17.

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(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."

Thus, some representatives argued that signatories to the Charter had contracted under Article 56 certain obligations mentioned in Article 55, in particular the pledge to observe fundamental human rights and freedoms.

The representative of the Union of South Africa⁵⁰ opposed such an interpretation of Article 56 on the following grounds. First, the phrase "Nothing contained in the present Charter" of Article 2, paragraph 7, was conclusive; second, the Charter did not in any way specify which human rights and fundamental freedoms were to be observed; the rights and freedoms, although they were mentioned seven times in the Charter, were, nevertheless, nowhere defined and nowhere was any obligation indicated in that respect. He also pointed out that it had not been the intention of the founders of the Charter to provide by Articles 55 and 56 an exception to the operation of Article 2, paragraph 7.

⁵⁰ U.N., General Assembly, Official Records, 3rd Year, First Committee, Part 2 and Annexes, 1949, 265th Meeting, p. 278.

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The Stand taken by the USSR in respect of this question was contrary to its usual adherence to the principle of National Sovereignty and to its adopted role as the vigorous defender of the sphere of domestic jurisdiction. On May 10, 1949, the representative of the USSR explained the position of his Government thus:⁵¹

"The USSR was not directly concerned in the question of the Indians in the Union of South Africa. It had however supported the Indian Delegation in its aspirations from the outset, and would continue to maintain that position. In so doing, the delegation of the Soviet Union was inspired by the principles of the policy of Lenin and Stalin regarding nationalities, as they were applied in the Soviet Union, where racial discrimination and oppression had been forever rooted out.

"The USSR Government, always a defender of the rights of the oppressed and enslaved peoples, considered that the United Nations should energetically condemn the policy of discrimination practiced by the Government of the Union of South Africa and take effective steps with regard to that policy."

Thus, the USSR Government suggested the United Nations intervention in the relations between the Union Government and its citizens. The phrase "the United Nations should....take effective steps" relates to the enforcement measures under Chapter VII of the Charter.

⁵¹ U.N., General Assembly, Official Records, 4th Year, First Committee, 165th Meeting.

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The General Assembly, in connection with the treatment of people of Indian origin in the Union of South Africa, adopted resolutions 265 (III), 615 (VII) and 719 (VIII) which referred to the Purposes and Principles of the Charter of which Article 1, paragraph 3, reads as follows:

"The Purposes of the United Nations are:-

(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."

Thus, the General Assembly maintained that by adopting the Charter, Member States had made a certain renunciation of their sovereignty in connection with the fundamental human rights and freedoms.

On December 8, 1946, the General Assembly was of the opinion that the treatment of Indians in the Union of South Africa should be in conformity with the international obligations under the agreements (i.e. the Cape Town Agreements of 1927 and 1932) concluded between the two Governments and the relevant provisions of the Charter⁵².

⁵² U.N., General Assembly, Official Records, 1st Year, 52nd Meeting, p.1061; General Assembly Resolution 44 (1).

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On May 14, 1949, the General Assembly invited⁵³ the Governments of India, Pakistan and the Union of South Africa to enter into discussion at a round-table conference, taking into consideration the purposes and principles of the Charter and the Declaration of Human Rights. This resolution made no reference to the Capetown Agreements. However, the Government of the Union of South Africa did not accept the General Assembly's resolution in respect of the resumption of negotiations with the Governments of India and Pakistan. Consequently, the General Assembly, on December 2, 1950, recommended⁵⁴ the establishment of a three-member conciliation commission if the Governments concerned failed to hold a round-table conference before April 1, 1951, or to reach agreement in the round-table conference within a reasonable time.

The Government of the Union of South Africa, however, enacted further discriminatory legislation.

On December 5, 1952, the General Assembly established a United Nations Good Offices Commission⁵⁵ to arrange and

⁵³ U.N., General Assembly, Official Records, 3rd Year, 212th Meeting, p.455; General Assembly Resolution 265 (III).

⁵⁴ U.N., General Assembly, Official Records, 5th Year, 315th Meeting, p.533; General Assembly Resolution 395 (V).

⁵⁵ U.N., General Assembly, Official Records, 7th Year, 401st Meeting, p.333; General Assembly Resolution 615 (VII).

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assist in negotiations between the Government of the Union of South Africa and the Governments of India and Pakistan "in order that a satisfactory solution of the question in accordance with the Purposes and Principles of the Charter and the Universal Declaration of Human Rights" could be achieved. The resolution called upon the Union Government to suspend the implementation or enforcement of the Group Areas Act. At the same meeting, the General Assembly established a three-member Commission⁵⁶ to study the racial situation in the Union of South Africa.

The United Nations Good Offices Commission submitted its report⁵⁷ on September 14, 1953, to the General Assembly. In that report, the Commission informed the General Assembly that, the Union Government having regarded resolution 615 (VII) as unconstitutional and having refused to recognize the Commission, the Commission, despite its efforts, had been unable to carry out its task. Furthermore, the Commission reported that the Union Government had continued to implement the provisions of the Group Areas Act and to enact laws contrary to the Charter.

The Ad Hoc Political Committee considered the question at ten meetings between the 16th and 29th of October 1953. On October 16, the representative of India

⁵⁶ Ibid., p.334; General Assembly Resolution 616(VII)

⁵⁷ U.N.Doc. A/2473.

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introduced a seventeen Power draft resolution, recapitulating past action by the General Assembly on the question, taking note of the report of the Good Offices Commission, expressing its regret that the Union Government had refused to make use of the Commission's good offices or to utilize any of the alternative procedures for the settlement of the problem recommended by the previous resolutions of the General Assembly, and deciding to continue the Good Offices Commission. In the course of discussion on the draft resolution, some representatives expressed the strongest doubts about the Assembly's competence⁵⁸. They also expressed concern about the efficacy of the draft resolution.

The report of the Commission on the racial situation in the Union of South Africa established by resolution of December 5, 1952 (616A(VII)) was submitted to the General Assembly on October 3, 1953⁵⁹. The Commission reported that the Government of the Union of South Africa had maintained its position, expressed in the General Assembly, that it considered any resolution on the subject as unconstitutional, and consequently did not recognize the

⁵⁸ U.N., General Assembly, Official Records, 8th Year, Ad Hoc Political Committee, 16th Meeting, p.75; 20th Meeting, p. 97; 21st Meeting, pp.103-105.

⁵⁹ U.N., General Assembly, Official Records, 8th Year, Supplement No. 16, paragraphs 895-909.

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Commission established under the Assembly resolution. The Commission, therefore, had been obliged to base its report essentially on an analysis of the legislative and administrative provisions in force in the Union, on a study of books and documents, on statements by witnesses, and on information communicated by certain member States. As a result of this study, the Commission was of the opinion that the racial policy of the Union Government was contrary to the Charter and that the continuance of this policy was likely to impair friendly relations among nations. The Commission also maintained that the right of the General Assembly to undertake any study and make any recommendations which it might deem necessary in order to implement the principles to which the member States had subscribed by signing the Charter was incontestable, and that the exercise of its functions under that right did not constitute an intervention prohibited by Article 2, paragraph 7, of the Charter.

The Ad Hoc Political Committee considered this report between November 20 and December 5, 1953. On November 23 representative of the Union of South Africa repeated ⁶⁰ that the United Nations was not competent to deal with the matter,

60 U.N. General Assembly, Official Records, 8th Year, Ad Hoc Political Committee, 32nd Meeting, pp.155-160, Underlining ours.

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and stated that the Commission's report contained a biased analysis of the internal affairs of the Union. In its conclusions, the Commission had gone beyond its terms of reference and had set forth a series of obiter dicta which constituted an incursion into the internal affairs of the Union and an "incredible attack upon its national sovereignty"

He continued :

"For those conclusions implied direct participation by the United Nations in the internal affairs of the Union of South Africa, and the exercise over a sovereign State of a supervision comparable to that exercised by guardian over ward. They implied recognition of the United Nations as the arbiter of the destiny of the Union of South Africa and in effect the suppression of the Union of South Africa as a sovereign and independent State".

Furthermore, he declared that domestic legislation designed solely for the welfare of the people of the Union in no way affected other peoples, and could hardly be charged to constitute a threat, direct or indirect, to the territorial integrity or political independence of other States.

On November 11, 1953, the General Assembly considered⁶¹ that the racial policy of the Government of the Union of South Africa was not in keeping with its obligation and responsibilities under the Charter and decided to continue the Good Offices Commission and called again upon the Union

⁶¹ U.N. General Assembly, Official Records, 8th Year, 457th Meeting, p.288; the General Assembly Resolution 719

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Government to refrain from enforcing the provisions of the Group Areas Act. On December 8, 1953, the General Assembly in resolution 721 (VIII), requested the Commission on the racial situation in the Union of South Africa to continue its study and to suggest measures to alleviate the situation and to promote a peaceful settlement⁶². During 1954, all efforts of these Commissions failed due to the unco-operative attitude of the Union Government which regarded the establishment of the Commissions by the General Assembly as unconstitutional⁶³ and consequently refused to recognize them.

On November 4, 1954, the General Assembly passed a resolution⁶⁴ which suggested to the parties that they should seek solution of the question by direct negotiations and designate a government, agency or person to facilitate contacts between them and to assist them in settling the dispute. The Secretary-General, in a report submitted on October 25, 1955⁶⁵, explained that on April 26 and May 2 of that year the representative of India had forwarded copies of a number of telegrams exchanged between India and the Union of South

62 Ibid, 469th Meeting, pp.431-439

63 U.N. Documents A/2719 and A/2723

64 U.N. General Assembly, Official Records, 9th Session 497th Meeting, p.281; General Assembly Resolution 816 (IX).

65 U.N. Doc. A/3001/Add.1.

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Africa from which it appeared that the attempts of the three Governments concerned had undertaken to initiate new direct negotiations had broken down. Therefore, the Secretary-General had designated on June 6 Ambassador Luis de Faro, Jr. of Brazil to discharge the functions called for in the General Assembly resolution. The Governments of India and Pakistan communicated to the Secretary-General that they would extend full co-operation while the Government of the Union of South Africa informed that it was obliged, regretfully, to decline to collaborate with the Ambassador in order not to prejudice its juridical position.⁶⁶

The United Nations Commission on racial situation in the Union of South Africa submitted its third report⁶⁷ on August 26, 1955. In that report the Commission stated that the general aims of the racial policy pursued by the Union Government had not changed; that it was consistent neither with the obligation assumed by the Union of South Africa under the Charter nor with certain provisions of the Universal Declaration of Human Rights; and that the continuation of such a policy was likely to impair friendly relations among nations. Furthermore, the Commission considered that a

66 U.N. Doc. A/3137, p.21

67 U.N. Doc. A/2953

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solution should be sought in frequent inter-racial round-table discussions and other contacts. For its opinion, the United Nations should offer its co-operation including, as special technical assistance, the intellectual and material resources which the United Nations and the specialized agencies could command.

The Ad Hoc Political Committee considered the report at ten meetings held between the 24th of October and the 19th of November. At the outset of the discussion in the Committee, the representative of the Union of South Africa recalled ⁶⁸ that his Government had always challenged the right of the General Assembly to deal with the matter because there was no provision of the Charter which authorized the United Nations to discuss, or to adopt a resolution on, a matter which was essentially a domestic concern of the Union of South Africa. The delegation of the Union of South Africa had been instructed by its Government not to participate in any discussion of the question or to be present while the discussion was proceeding. His delegation would therefore withdraw from the committee room. However, he reserved his right to take part in the vote on any draft resolution which

68 U.N. General Assembly, Official Records, Ad Hoc Political Committee, Records of Meetings, 21 September to 9th December 1955, 3rd Meeting, 24 October 1955, p.5.

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might be submitted on the question.

During the ensuing debate, a number of representatives supported⁶⁹ the constitutional position of the Union of South Africa, stating that Article 2, paragraph 7, of the Charter precluded discussion of the question. In the view of those representatives, no progress could be made on such issues without the co-operation of the Member States involved.

In the course of the debate, seventeen Afro-Asian States submitted a joint draft resolution⁷⁰ which expressed concern that the Union Government continued to give effect to the Group Areas Policy (Apartheid), despite the General Assembly's request that it should reconsider its position in the light of the principles of the Charter and the pledge of all member States to respect human rights and fundamental freedoms without distinction as to race. The draft resolution called on the Union Government to observe the obligations of co-operation with the organization contained in Article 56 of the Charter; it provided further that the Commission should continue to keep under review the racial situation in South Africa.

69 Ibid, 5th Meeting, pp.13-14; 11th Meeting, pp.36-37 38-39; 12th Meeting, p.41, p.44.

70 U.N. Doc. A/Ac.80/L.1

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On November 9, 1955, the Ad Hoc Political Committee approved the draft resolution by a vote of 37 to 7, with 13 abstentions. Thereupon the representative of the Union of South Africa, who had returned to the Committee to participate in the voting, stated that once again the provisions of Article 2, paragraph 7 of the Charter had been contravened, and the Union had been denied its rights as a member State. It was on the basis of such an understanding of the meaning and scope of the Article that his Government had signed the Charter. By adopting the draft resolution, the Committee had lent its authority to a reckless measure which would do only incalculable harm. Every State had internal conflicts and policies about which it could not subordinate its own decision to that of an international organization. His Government regarded in a most serious light the inquiry into the internal affairs of the Union of South Africa. "Such a violation", he continued, "constituted the most flagrant violation of Article 2, paragraph 7, of the Charter, a violation which no self-respecting sovereign State could tolerate." In view of what had happened, his Government, after serious consideration, had decided to recall its delegation to the United Nations

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from the 10th session.

All further efforts of the United Nations to solve the question have failed due to the unco-operative attitude of the Union Government based on the legalistic argument that the United Nations had no right to interfere in a matter falling within the domestic jurisdiction of a member State.

Conclusion.

Article 2, paragraph 7, of the Charter has been used effectively to prevent any intervention of the U.N. in the internal policies of States. That Charter provision which leaves to the Government concerned and to the United Nations Organization to decide whether a matter is a domestic affair led in the case of the question of racial segregation in the Union of South Africa the Government concerned and the United Nations to make an opposite decision on the competence of the United Nations Organization. The weakness of the Charter system became especially obvious in this case when the Government of the Union of South Africa was able to resist all the United Nations'

71 U.N., General Assembly, Official Records, Ad Hoc Political Committee, Records of Meetings, September 21 to December 9, 1955, 12th Meeting, pp.45-46.

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efforts to change its policy of racial segregation and, ultimately, was able to withdraw from the 10th session.

Article 2, paragraph 7, excludes the entire sphere of international economic relations, except where concessions have been arranged by international treaty, from the authority of the United Nations, as has been seen in the Anglo-Iranian Oil Co. Case.

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The Reformation secularized the power problem in the protestant states by removing Church as a limitation of the temporal power. Then a new theory of the state -- a theory of sovereignty -- was evolved which came to claim the supreme and absolute authority of the state on its own territory. This theory was first explicitly formulated by Jean Bodin. His definition of a State implied that a supreme power is essential to the idea of the State and that the State is the government itself. With regard to the theory of Sovereignty itself, Bodin stated that Sovereignty is supreme power over citizens and subjects and that it is unrestrained by laws. Furthermore, Bodin made his Sovereign a legislator maintaining that the power to make laws is the most characteristic function of Sovereignty. Bodin's Sovereign was, nevertheless, bound by the Divine Law, the Natural Law, the law that is common to all nations and the fundamental laws of the State. For Bodin, Sovereignty was neither arbitrary nor irresponsible. It was defined by the fundamental laws of the State and subject to them.

To this new theory of state Johannes Althusius added a potentially revolutionary theory of social contract, according to which the government of a state is based on a contract between the people and the sovereign. While Hugh Grotius adopted into his political philosophy the theories of sovereignty and social contract expounded by Bodin and

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Althusius he rejected all notion of Divine Law. Now the power problem became explicitly secularized in political theory. Grotius also evolved the concept of equality of states. Through the Peace of Westphalia of 1648, the concepts of sovereignty and equality of states became universally accepted doctrines.

Thomas Hobbes adopted the theories of state of nature and social contract and conceived of government originating in two main ways, either by "natural force" or "warre", or, on the other hand, by original contract. According to him, all resistance to government is wicked and absurd. For Hobbes, Sovereignty is unlimited either by law or morality. Thus law does not make the sovereign or limit his authority as it did for Bodin. How dangerous results the secularization of the power problem could bring forth appears clearly from that view of Hobbes according to which sovereignty is unlimited by morality. Hobbes' concept of sovereignty is pure totalitarianism.

Samuel Von Pufendorf adopted the concept of social contract. For him sovereignty was supreme but not absolute and could be diminished by compact or by conquest and still exist. He treated the state as an artificial person whose will he conceived to be the will of all men in the state.

John Locke adhered still to the doctrine of an original state of nature and the doctrine of an original contract. He maintained that the majority has the right

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of decision on the form of government which, however, could not be an absolute monarchy as it is "no form of government at all". He also asserted that sovereignty is limited by Natural or Divine Law.

Jeremy Bentham rejected the natural law limitation on sovereignty asserting that the sovereignty of government was unlimited except by express convention with another state. Therefore he also rejected the natural rights of man. Instead of the Divine Law and Natural Law limitation on sovereignty he asserted that sovereignty was morally limited by utility. For Bentham the only end of government was the greatest happiness for the greatest number. With regard to the question who should wield the sovereign power, Bentham asserted that it should reside in a single legislative assembly elected annually by all male adults able to read. Thus he came to entrust sovereignty to the majority of representatives of the assembly. Thereby the theoretical perfection of the sovereignty of the people was attained removing the sovereign power from the ruler to the "people". Under the impact of European nationalism this popular sovereignty became "national sovereignty" with regard to external relations with other sovereign states.

The good of the governed had been the end of government in all political theories. Something could, therefore, still be done to perfect the concept of sovereignty on those

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lines that leaned to the political philosophy of totalitarianism. Hegel bridged up that gap. In his metaphysical exposition of the state, Hegel declared that the state is an end in itself and that it is provided with the maximum of rights over and against the individual citizens. Moreover, the highest duty of the citizens is to be a member of the state. This Hegelian definition of sovereignty contains the culmination of the development of the concept: the State is an End in Itself. Thus the rejection of the notions of Divine Law and Natural Law eventually led the political philosophers to abandon the concept of inherent rights of the individual citizens against the state. This concept of sovereignty paved the way for modern totalitarianism, such as communism, fascism and nazism, with its very unfortunate results.

In the analysis of the concept of sovereignty the writer emphatically maintains that the state is not and cannot be an end in itself, because the state is for man and not man for the state. The end of the state is the common good of all individual members of the state. To hold the concept of sovereignty as the supreme power above and separate from the body politic is an erroneous abstract idea.

The theory of State Person is fallacious. The supreme power is entrusted in political society either to one man or a group of men or several groups of men. Obviously

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these men cannot be converted into a State Person.

The idea of the independence of the state which maintains that a state is absolutely independent from other states on its own territory and claims for an independence for action of the state in its relations with other states connotes the freedom of action of the state in pursuit of national self-interest. It seems that the analogy between man and the state as expressed in the concept of the State Person has been carried further in political theory to the extent that the liberty of man in his pursuit of self-interest as expounded by Liberalism has been extended to the state. However, as already mentioned states are interdependent to one or more states for their peace and security. Since the states are not entirely independent neither can they be absolutely sovereign.

Although the concept of Sovereignty is intrinsically wrong, the governments have adhered to it as if it were an infallible dogma. The concept of national sovereignty as an absolute power above which there is not and cannot be any superior power constitutes a serious obstacle to any attempt of forming a world government with supreme power over and above the States. However, the hard lesson of the Second World War compelled Governments to seek collective security within a frame work of an international organization - the United Nations. As the concept of national sovereignty is

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incompatible with the establishment of the United Nations entrusted with the responsibility to maintain and restore international peace and security it was one of the purposes of this dissertation to find out what has been the impact of the concept of national sovereignty upon the framing of the Charter of the United Nations.

The responsibility of the United Nations to maintain or restore international peace and security is obviously in contradiction with the principle of national sovereignty because it implies supreme power over and above the States capable to prevent or stop aggression. On the other hand, the Charter of the United Nations declares allegiance to the doctrine of national sovereignty and incorporates safeguards for the sovereignty of the Member States. The clash between these two ideals naturally creates a great problem. How it was solved and with what results was the theme for research in Chapter II.

The General Assembly and the Security Council are the most influential organs of the United Nations. The former consists of all the Members of the United Nations each of whom has one single vote. It is mainly responsible for the performance of the functions of discussion, recommendation, review, election, financial control and initiation of Charter amendments. The decisions of the General Assembly are framed as "recommendations" and may be ignored by the

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parties concerned. In the Charter system, the General Assembly has been placed in a secondary role with regard to the main task of the Organization - the maintenance of international peace and security. The primary responsibility for the maintenance of international peace and security has been conferred upon the Security Council, which consists of five permanent members - France, the United Kingdom, the United States, the U.S.S.R and China - and six non-permanent members elected for a term of two years by the General Assembly. Under Articles 24 and 25 of the Charter, the Member States have agreed that in carrying out its duties the Security Council acts on their behalf and that they will accept and carry out its decisions. The Security Council is empowered, in case of a threat to, or of a breach of, the peace, to call upon the military and economic resources of any Members of the United Nations; to determine economic, diplomatic and military sanctions; to use the manpower and, within certain limits, the territories of the Member States; and to intervene in order to bring about an amicable settlement in any situation and dispute the continuance of which is likely to endanger the maintenance of international peace and security. These functions of the Security Council together with the obligation of the Member States to carry out the Security Council decisions constitutes a drastic limitation of the

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traditional extent of national sovereignty.

Although the authority of the Security Council and the General Assembly is so great that it necessarily constitutes a limitation of the national sovereignty of a Member State, the wording of the Purposes of the United Nations in Article 1 and the preliminary declarations of principles in Article 2 tend to uphold the doctrine of national sovereignty.

The chief function of the United Nations is the maintenance of international peace and security. The word "international" excludes, as has been shown, any responsibility of the United Nations with regard to peace within one and the same State and by so doing it upholds the doctrine of national sovereignty. A corollary to the first function of the United Nations is the taking of effective collective measures for the maintenance of international peace and security, which function is at the very core of the Charter system. While the United Nations has the responsibility to bring about an amicable settlement of such international disputes which "might lead to a breach of the peace", its authority is limited by the exclusion of such minor disputes the continuance of which is not likely to endanger the maintenance of international peace and security. As a further concession to the doctrine of national sovereignty the Charter leaves to the parties concerned to determine

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whether the continuance of an international dispute constitutes a threat to the peace or not. With regard to the rest of the functions of the United Nations, it was shown by the writer that the phrasing of three other functions, namely the fourth, sixth and eighth, upheld the national sovereignty of the Member States. Thus the clash between the need of an international body for checking the sovereign actions of the States and the dogma of national sovereignty is evident in the very first Article of the Charter.

Under the fundamental principles of the United Nations, set forth in Article 2, the Member States are obliged to settle their international disputes in such a way that international peace, security and justice are not endangered; to refrain from the threat or use of force against the territorial integrity or political independence of any State; to give the United Nations Organization every assistance in any action it takes in accordance with the Charter provisions; and to refrain from giving assistance to any State against which the Organization is taking preventive or enforcement measures. These obligations of the Member States with regard to the conduct of their international policies constitute a limitation of the national sovereignty of the Member States. It is highly significant that the use of force, the very core of the traditional concept of the sovereignty of a State is outlawed as an instrument of

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policy of the State in the pursuit of national self-interest.

While the above-mentioned principles of the United Nations limit the national sovereignty of the Member States, another principle limits the authority of the United Nations Organization, safeguarding the national sovereignty of the Member States. This principle, set forth in paragraph 7 of Article 2, denies the United Nations the authority to intervene in matters which are "essentially within the domestic jurisdiction of any State" and excludes specifically any obligation on the part of the Member States to submit such matters to settlement under the Charter. It was shown by the writer that a matter to be within the domestic jurisdiction of a State must be one that pertains to the affairs of the subjects and the territories of that State and at the same time is under the powers of its direct legislation. As this can be said of almost every subject matter, paragraph 7 of Article 2 leaves, in fact, the greatest part of international relations within the domestic jurisdiction of States. The only exception to this principle, - the application of enforcement measures under Chapter VII of the Charter, - was found to be of small practical importance. Its real value lies in the principle itself; for the first time in the history of mankind international peace and security have been placed by a charter above the sovereignty of the bulk of the

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States. This principle, thus, would constitute a great advance towards a world government were it not but for one single exception, namely, Article 27 of the Charter.

It was shown by the writer that Article 27 of the Charter leaves the five permanent Members of the Security Council independent from the United Nations Organization because they may use under the said Article their right of veto to prevent any collective measures from being taken against themselves. Moreover, this special position of the permanent Members of the Council was maintained by the writer to constitute a gross violation of the very fundamental principle of "sovereign equality" declared in paragraph 1 of Article 2 of the Charter. It can, therefore, be concluded that the national sovereignty of the permanent Members of the Council has been safeguarded to the extent that they are placed above the United Nations Organization. On the other hand, they have been entrusted with exceptional powers with regard to the decisions of the chief executive organ of the United Nations - the Security Council - whose decisions all Members of the United Nations are bound to obey. Furthermore, it was concluded that the right of veto ought to be removed and the permanent Members of the Council brought by that means within the United Nations Organization in order to fulfil the obligation of the principle of equality of States.

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With regard to the right of withdrawal from the United Nations Organization it was concluded in Chapter II that had the commentary of Committee I/2 of the UNCIO the same binding force as the Charter itself, then the Members of the United Nations enjoy a great deal more of their national sovereignty than the Charter provisions indicate, since they could annul their allegiance to the Charter by simply withdrawing from the Organization.

In Part II of this dissertation, the impact of National Sovereignty upon the operation of the United Nations was the theme of research made especially interesting by the clash between the two incompatible ideals of the United Nations, - namely, the responsibility of the United Nations to maintain or restore international peace and security and at the same time to safeguard the national sovereignty of the Member States.

In Chapter III, therefore, the problem of general disarmament, the United Nations Armed Force under Article 43 and the "Uniting for Peace" resolution were studied to find out what has been the influence of the doctrine of National Sovereignty upon the discussions and decisions in these crucial questions that concern the future welfare of the whole of mankind.

With regard to the problem of general disarmament, the permanent members of the Security Council acknowledged

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unanimously the need of adopting a strict policy to put an end to the armaments race. However, it became soon obvious in the course of discussions that before any agreement on the methods of reduction and prohibition of armaments could be reached, it is necessary to agree first on the control or safeguards. Consequently, the main problem was to find safeguards which could be accepted by all permanent members of the Security Council.

The United ~~Nations~~^{STATES} and the other so-called Western countries wanted such a thorough international control of armaments that it would be impossible for any State to avoid disclosing all its arms and means of waging war. This control plan was rejected by the USSR on the grounds that it would constitute an interference in the domestic affairs of States, in their economic life and in all parts of their internal organization and would, therefore, render inapplicable paragraph 7 of Article 2 of the Charter. Thus, the USSR did not desire to surrender that necessary amount of her sovereignty which is indispensable for the establishment of an effective international control organ to ensure compliance with the rules of prohibition and disarmament. Consequently, the United Nations has been so far unable to provide the world with an agreement on prohibition and reduction of armaments mostly because of the USSR who is upholding the doctrine of National Sovereign-

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ty as incorporated in paragraph 7 of Article 2 and using her right of veto under Article 27. This fact is a further proof for the aforestated argument that the United Nations should be developed on democratic lines by removing the aristocratic right of veto of the permanent members of the Security Council.

The United Nations' Armed Force under Article 43 of the Charter was supposed to be established by earmarking elements of the national armed forces of the Member States for use upon the call of the Security Council. However, the permanent members of the Security Council could not reach an agreement on the composition of the armed forces. With regard to the question of stationing foreign troops on the territories of other States, the USSR maintained that it would give rise to a feeling of anxiety among member states for their national independence. In the view of the USSR, the United Nations forces should be garrisoned in their own territories or territorial waters. The suggestion that Member States should provide bases for the United Nations armed forces was also strongly opposed by the USSR on the ground that such bases would affect the sovereignty of nations. All attempts made to create such an armed force of the United Nations in which the permanent members of the Security Council would contribute their national contingents

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have been frustrated by the USSR arguing that such an armed force would constitute a violation or threat to the national sovereignty of States and, as such, would be contrary to those Charter provisions which safeguard the national sovereignty of Member States. Therefore, the transitional security arrangements under Article 106 are still operative, but the political impasse which made it impossible for the permanent members to put their national contingents at the disposal of the Security Council will very likely make impossible any joint action under the said Article. This failure to provide the Security Council with armed forces under Article 43 might also prevent the conclusion of any agreements for the reduction and limitation of national armaments and armed forces.

The "Uniting for Peace" resolution, adopted by the General Assembly on the 3rd of November, 1950, transferred the ultimate responsibility for the maintenance of international peace and security from the Security Council to the General Assembly. This new system is based on the power of the General Assembly to discuss and make recommendations with respect to any questions and matters within the scope of the Charter. Thus the veto of one single permanent member of the Security Council cannot stop any more the United Nations from taking collective measures. This

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