U.N. PEACE-KEEPING POLICY: SOME BASIC SOURCES OF ITS IMPLEMENTATION PROBLEMS AND THEIR IMPLICATIONS

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Policy, as defined by students of public administration[1] and public policy,[2] is succinctly, a principle, plan, course of action or means by which one intends to achieve given or perceived goals. The stage between policy and the pursued goal is implementation. Thus, to achieve the goals in question, one must implement, that is, carry out or execute the chosen policy. In short, implementation is an interaction or social mechanism between the perceived goals and the actions deliberately geared to achieving them.

Therefore, the concept "U.N. Peace-Keeping Policy," means the method by which the United Nations plans to achieve its goal which, in this case, is "world peace." The concept "Implementation Problems," refers to those obstacles either inherent or temporarily embedded in peace-keeping policy execution.

Viewing the international political situation today, a number of persistent crises constituting potential threats to international peace and security are observed. For instance, there exist:

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My gratitude is due to those prominent students of International Law whom I met at The Hague Academy of International Law, The Hague, Netherlands, during the summer of 1969, including Professors H.W. Briggs, the late W. Friedmann, S. Oda, G. Balladore-Pallieri, P. Well, J.G. Castel, V. Koutikor, M. Ferid, B. Goldman, G. van-Heckle, P. Bonassies, and L.I. deWinter. This work is partially a product of their penetrating and motivating ideas; however, any mistake or error is entirely my own. Also, I express my gratitude to Professor Marcello Pagano of the Statistical Science Division at SUNY/Buffalo, and San Le Tran, for their statistical assistance and advice; to Professor Rudolf Widenmann of the University of Mannheim, West Germany, and Philip Speser for their criticisms on the first draft; and finally to San Le Tran who worked with me on the final draft.

1. *See generally* H. SIMON, ADMINISTRATIVE BEHAVIOR (1959); J. MARCH, ORGANIZATIONS (1958); J. PFIFFNER, MUNICIPAL ADMINISTRATION (1940); F. SHERWOOD, ADMINISTRATIVE ORGANIZATION (1960); C. JACOB, POLICY AND BUREAUCRACY (1966).

2. *See generally* T. DYE, AMERICAN PUBLIC POLICY, DOCUMENTS AND ESSAYS (1969); I SHARKANSKY, THE ROUTING OF POLITICS (1970); R. PRESTHUS, ORGANIZATIONAL SOCIETY, AN ANALYSIS AND THEORY (1962); R. HOFFERBERT, STATE AND URBAN POLITICS (1971).

Published by CWSL Scholarly Commons, 1976

California Western International Law Journal, Vol. 6, No. 2 [1976], Art. 5

1. A chronic war in the Middle East between the Arab states and the state of Israel. The fourth war remains partially unresolved since October 6, 1973. Moreover, the United States and the Soviet Union have intervened in the dispute by helping the Israelis and Arabs, respectively, with war materials.[3]
2. Racial confrontation in Southern Africa. In the Republic of South Africa and Namibia, the policy of *apartheid* is employed by a ruling white minority to oppress an indigenous black majority. Rhodesia, with an overwhelming black majority of fifteen to one, is experiencing open conflict, in the form of guerrilla warfare, fueled in part by British Commonwealth aid to Mozambique, a firm opponent of white rule in Rhodesia.[4]
3. A chronic anti-semitic policy deliberately instituted and enforced by the government of the Soviet Union against the minority Jewish population in the area.[5]
4. And, protracted Irish self-annihilation between the Catholics and Protestants.[6]

At the end of World War II the United Nations was created and legally charged, under the U.N. Charter, with responsibility for world peace-keeping,[7] and preservation of human rights.[8] Why has the United Nations failed to fulfill its mission of eliminating chronic wars, genocide, and other inhumane acts and policies? It must also be asked, what progress has the United Nations made so far in conformity with its responsibilities? What are the major obstacles preventing it from executing its responsibilities? In the event of such obstacles, what can be done by the U.N. to overcome them and fulfill its obligations?

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3. CBS Television Evening News, Oct. 10, 1973.

4. W. FRY, IN WHITEST AFRICA: THE DYNAMICS OF APARTHEID (1968).

5. P. LEUDUAI, ANTI-SEMITISM WITHOUT JEWS: COMMUNIST EASTERN EUROPE (1971).

6. *Nightmare of History*, 215 NATION 644 (1972); *Grim Saviors for Doomsday*, TIME, Nov. 4, 1974, at 47.

7. *See* U.N. CHARTER chs. VI, VII; R. HIGGINS, UNITED NATIONS PEACE-KEEPING 1946-1967, DOCUMENTS AND COMMENTARY (1969); J. BOYD, UNITED NATIONS PEACE-KEEPING OPERATIONS: A MILITARY AND POLITICAL APPRAISAL (1971); Papadopoulos, *The Maintenance of International Peace and the U.N., A Legal Analysis*, 6 INTERNATIONAL RELATIONS 800-56 (1975).

8. That is, the fundamental principles of human rights—the belief in equality of man under the law. U.N. CHARTER preamble, art. 1, para. 3; art. 55. For further definition of the concept, see L. SOHN, CASES ON UNITED NATIONS LAW 645-46 (1956).

Because of these concerns, the substance of this article is three-fold. First, the author will re-examine the fundamental sources of the United Nations' administrative responsibilities relating to world political crisis. Second, he will analyze the nature and scope of those obstacles which might interfere with the United Nations' administrative progress. The goal of this analysis is to present these obstacles in quantitative form, to support a theory which will both explain and predict the phenomena controlling United Nations policy implementation and law enforcement. Finally, he will attempt to critically analyze and prescribe some remedial steps which must be taken to enable the United Nations to restore its legal administrative responsibilities, and to implement these responsibilities in order to eradicate the recurrent international hostilities which constitute threats to world peace and human development.

The underlying propositions in this article are that: 1) The United Nations is a bureaucratic organization. It is *rational* and *goal-oriented.* However, because of the complexity of its goal, the management of world crises, the U.N. will formulate rational policies and rigorously execute those policies in pursuing its goals. 2) Formulation and execution of foreign policies among nation-states are rooted in and guided by what Professor Hans Morgenthau calls "international politics defined in terms of power."[9] Man has always sought to *maximize*[10] or to *satisfy*[11] his options or gains in transactions with his fellow man. Therefore, it should be expected that a nation which is no more than the sum total of individuals, and whose foreign policy-making apparatus is staffed and guided by individuals, would be "self-seeking." The more a nation is self-seeking, the more its national interests on the world chessboard will conflict with those of the United Nations. This conflict, and the United Nations' lack of powerful enforcement mechanisms *vis à vis* "criminal" states will paralyze the U.N.'s competence. Thus, the U.N.'s efforts will be disrupted by states' egocentric political attitudes and activities favoring their individual national interests.

Based on these premises, the author's final argument will be that it is imperative for the United Nations to immediately inno-

9. H MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 5 (4th ed. 1967).

10. A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 11 (1957).

11. H. SIMON, ADMINISTRATIVE BEHAVIOR 39 (1957).

vate new concepts to cope with the complexity of today's world. Such innovation would remove the afore-mentioned responsibilities from states and restore them to the United Nations. In performing this task, the U.N. must develop more organs and appendages which are powerful enough to withstand and counteract states' obsessive passions, and effective enough to execute its peace-keeping policy for attainment of the goals for which it was established.

I. AN OVERVIEW OF THE LEGAL NATURE OF THE U.N.'S RESPONSIBILITIES AND OBSTACLES IN WORLD POLITICAL CRISES

A. The Birth and Responsibilities of the United Nations

Geo-politically, the headquarters of the United Nations is located in New York City.[12] The International Court of Justice is based at The Hague. In December, 1946, the Second General Assembly of the United Nations adopted a resolution providing for a light-blue U.N. flag with the official emblem of the United Nations at its center, a symbol of the reality of the United Nations.[13]

Endowed with international personality in the World Community, the United Nations became a juristic person *sui generis*. In spite of the fact that the U.N. is neither a state nor a sovereign,[14] factors which make the U.N.'s legal personality quite distinct from that of its Member-States, the U.N. has the right to "enjoy in the territory of each of its Members such legal capacity as may be

12. On June 26, 1947, the United Nations and the United States put into effect the General Assembly resolution adopted in December, 1946, establishing the seat of the United Nations in New York City. The agreement extended to the United Nations substantial privileges and freedom in its headquarters district, including the right to establish and maintain its own independent receiving and sending wireless stations. Although United States federal, state and local laws apply to acts and transactions carried out in the U.N.'s headquarters district, the U.N. has its own full executive power. *See* Agreement Between the United Nations and the United States regarding the Headquarters of the United Nations, *done at Lake Success*, June 26, 1947, 11 U.N.T.S. 11. *See also* Brandon, *The Legal Status of the Premises of the United Nations*, 28 BRIT. Y.B. INT'L L. 90 (1951).

13. G.A. Res. 92, U.N. Doc. A/204 (1946).

14. It has been pointed out by the International Court of Justice that the legal nature of the United Nations is more akin to a confederation of States than it is to a federation. For instance, the right of Member-States to withdraw from the Organization, the practical absence of any strong legislative powers, and the presence of the bond of sand between Member-States and the U.N. are good illustrations of handicaps to the competence of the world body. Clark, *Introduction to World Peace Through World Law*, PEACE IS POSSIBLE: A READER ON WORLD ORDER 108-33 (1966).

necessary for the exercise of its functions and the fulfillment of its purposes."[15]

It must not be misconstrued that these provisions purport to overpersonify the United Nations to a super-state status *vis à vis* the sovereignty of its Member-States. The Convention of the Privileges and Immunities of the United Nations provides that "the United Nations shall possess juridical personality."[16] It also states that the U.N. shall have the capacity to contract, to acquire and dispose of immovable and movable property, to institute legal proceedings,[17] and, finally, that this juridical personality is not limited to the capacity of action within the spheres of municipal law.[18] However, the United Nations "is based on [and respects] the principle of the sovereign equality of all its Members."[19] Nevertheless, as will be noted hereafter, the scope of the Law of the United Nations is comparatively broad. For instance, the Charter recognizes the contractual capacity of the organs of the United Nations in a wide sphere of treaties.[20]

Article 62 of the Charter provides another extension of the legal personality with regard to the Economic and Social Council's contractual prefecture over various specialized international organizations which operate under the auspices of the United Nations. In addition, the powers of the Security Council, aided by the powers of the Secretary-General and General Assembly, in coping with solving situations threatening international peace and security, are well within the scope of legislative action. Moreover, the Charter's concern for fundamental human rights and freedoms is highly important.

For example, the United Nations has the power "to maintain international peace and security . . . ,"[21] "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character . . . ,"[22] and "to be a center for harmonizing the actions of nations in the attain-

15. U.N. CHARTER art. 104.

16. Convention of the Privileges and Immunities of the United Nations, art. 1, G.A. Res. 22, U.N. Doc. A/43 (1946).

17. *Id.*, art. 2.

18. *Id.*, art. 5.

19. U.N. CHARTER art. 2, para. 1.

20. *See, e.g., Id.*, arts. 57, 63.

21. *Id.*, art. 1, para. 1.

22. *Id.*, para. 3.

ment of these common ends."[23] The provisions of article 35 require both Members and non-Members of the United Nations to bring their disputes to the attention of the Security Council or the General Assembly as envisioned in article 34.[24] Under articles 33 and 36, the Security Council may make recommendations to the parties concerned as to the settlement of their disputes, or *ipso facto*, may recommend that the dispute be referred to the International Court of Justice[25] in accordance with its Statute.[26] Furthermore, under chapter VII of the Charter, the Security Council has full competence *vis à vis* article 2 to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations . . ."[27] to "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."[28] In addition, the Council may "decide what measures . . ."[29] to "take . . . by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[30] And, finally, it may establish a military staff for advisory purposes "on all questions relating to the Security Council's military requirements for the maintenance of international peace and security. . . ."[31]

These provisions are indispensable indicators of the legal competence of the U.N.'s political organs over the duties for which it was created. The International Court of Justice is the primary judicial organ of the United Nations.[32] Under the Statute of the International Court of Justice, "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by . . . the Charter of the United Nations. . . ."[33]

However, there is one fundamental problem which always confronts the United Nations in its duties. The problem is that of "domestic jurisdiction," emanating from article 2(7) of the U.N. Charter.

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23. *Id.*, para. 4.
24. *Id.*, art. 35, paras. 1, 2.
25. *Id.*, art. 33, para. 2; art. 36, paras. 1-3.
26. I.C.J. STAT.
27. U.N. CHARTER art. 39.
28. *Id.*, art. 40.
29. *Id.*, art. 41.
30. *Id.*, art. 42.
31. *Id.*, art. 47, para. 1.
32. I.C.J. STAT. art. 1.
33. *Id.*, art. 65, para. 1.

As will be discussed subsequently, the problem of domestic jurisdiction has gravely disrupted the United Nations' peace-keeping duties. It has made the organization ineffective and too slow to carry out the duties for which it was established. It has also created numerous new disputes between and among the Member-States, when existing disputes were brought before the Security Council, General Assembly or International Court of Justice. In retrospect, unlike all other articles in the U.N. Charter, article 2(7) has always been a great handicap to the United Nations. Article 2(7) is often invoked against United Nations' attempts to intervene against oppressive Member-States. The 1951 Anglo-Iranian Oil Company Case, the 1956 Suez Crisis, the 1947 Indonesia conflict, the Algerian question, the Congo dispute and the Vietnam War all show that it remains a chronic source of bitter argument in the United Nations, especially in the Security Council.[34]

In these disputes, many opposing views exist concerning interpretation of article 2(7). One side upholds the U.N.'s legal right and necessity of intervention in such disputes, while the other bitterly criticizes the United Nations on the ground that nothing contained in the present Charter authorizes the United Nations to intervene in matters which are essentially within the *domestic jurisdiction* of a state.[35] Nevertheless, all but one of the aforementioned disputes[36] were finally surrendered to the United Nations for settlement. It is possible that these disputes could have led to World War III[37] had there not been a United Nations,

34. *See* A. Auma-Osolo, The Law of the United Nations as Applied to Interventions within the Framework of Article 2(7) of the U.N. Charter, A Comparative Analysis of Selected Cases, 1969 (thesis, Univ. of N. Carolina Library, Chapel Hill, N.C.) with respect to the following selected cases:

(a) Nationalization problems:
  (i) The 1951 Anglo-Iranian Oil Company Cases
  (ii) The 1956 Suez Canal Company Case
(b) Nationalism versus Colonialism problems:
  (i) The 1958 Indonesia Case
  (ii) The 1955 Algerian crisis
(c) Establishment of order within a nation:
  (i) The 1960 Congo (Zaire) problem
  (ii) The Vietnam War, 1954-1974.

[hereinafter cited as Auma-Osolo].

35. These five cases are not the only ones in which this problem occurred. It has become a traditional tool of Member-States to deny the competence of the U.N. whenever they engage in international politics, the struggle for power.

36. The Vietnam dispute was never submitted to the U.N. for settlement.

37. The Suez Canal and Congo issues were especially volatile.

and had the United Nations not been *rational* enough to intervene in spite of objections of the parties involved.

But, what seems to be the precise *source* of such problems, and, how can this phenomenon be systematically explained?

B. The U.N.'s Obstacles: The Problem of Domestic Jurisdiction

As noted above, the U.N. Charter, which authorizes the United Nations to be an international weapon for world peace and security is the same Charter which attempts to prohibit the United Nations from executing these duties. The prohibition clause in the Charter reads as follows:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but this principle shall not prejudice the application of enforcement measures under Chapter VII.*[38]

This double phraseology in article 2(7) has caused some confusion to Member-States concerning those political and legal organs of the United Nations responsible for peace-keeping and preservation of human rights. At the same time, heated debates have erupted among a number of students of International Law as to the relative weight between the domestic jurisdiction and peace-keeping provisions under article 2(7), and chapters VI and VII respectively, of the U.N. Charter.[39]

This article will attempt not only to reconcile those differing schools of thought, but also to measure the relative weights of article 2(7) and chapters VI and VII of the Charter. This analysis will concentrate on the terms of those provisions as they relate

38. U.N. CHARTER art. 2, para. 7 (emphasis added).

39. *See, e.g.*, H. KELSEN, THE LAW OF THE UNITED NATIONS (1951); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950); M. RAVAN, UNITED NATIONS AND DOMESTIC JURISDICTION (1958); Miller, *Legal Aspects of the United Nations Action in the Congo*, 55 AM. J. INT'L L. 10 (1961); Wijewardane, *Criminal Jurisdiction over Visiting Forces with Special Reference to International Forces, Some Legal Problems*, 37 BRIT. Y.B. INT'L L. 351, 396-97 (1961); Auma-Osolo, *A Retrospective Analysis of United Nations Activity in the Congo and the Significance for Contemporary Africa*, 8 VAND. J. TRANSNAT'L L. 451-74 (1975).

to the peace-keeping mission. To do this, three questions will be examined in detail.

1. *Is domestic jurisdiction a serious problem to the Security Council and the General Assembly?* In the words of F. Ermacora, "[t]he domestic jurisdiction problem is a *key problem* interesting both international law and national law."[40] Article 2(7) is, of course, a centrifugal phenomenon of two different principles. One attempts to prohibit the Security Council and General Assembly from intervention "in matters which are essentially within the domestic jurisdiction of any state . . . ,"[41] while the other exempts Member-States from submission of "such matters to settlement under the . . . Charter. . . ."[42]

The first principle forbids both organs from interfering in the domestic jurisdiction of its Member-States. The second principle authorizes the Member-States to be masters of their domestic affairs, and to have complete liberty at all times to do as they desire in that sphere without fear of sanction by higher authority. Or, if they so desire, they may forward their disputes to the United Nations for settlement. Moreover, it could also mean that parties to such disputes are willy-nilly free either to accept or refuse any recommendations they are given by the United Nations.

In fact, the first principle, if examined meticulously, has, as does the second principle, a multiplicity of contradictions. For instance, its assumed prohibition concerns only the United Nations but not the Member-States while the latter seem to be free to act as they please. Thus, any Member-State is seemingly free to intervene in the domestic affairs of other Member-States, provided that it does not use the flag of the United Nations.[43]

However, it is evident that under article 2(3), the Charter bids all Member-States to "settle their international disputes by peaceful means . . ."[44] in order not to endanger international peace and security. Article 2(4) requires all Member-States to *"refrain in their international relations from the threat or use of force against the territorial integrity or political independence of*

40. F. Ermacora, Human Rights and Domestic Jurisdiction, The Hague Academy of International Law (1968) (emphasis added).

41. U.N. CHARTER art. 2, para. 7, cl. 1.

42. *Id.*, cl. 2.

43. Such intervention has been staged by nations such as Belgium in the Congo, the U.S. in Cuba, and the U.S.S.R. in Czechoslovakia. *See also* Table 1 *infra.*

44. U.N. CHARTER art. 2, para. 3.

any state, or in any other manner inconsistent with the Purposes of the United Nations."[45] But, do the Member-States observe these obligations?

On examining those purposes of the U.N. mentioned in the last clause of article 2(4) it can be seen that the U.N. is charged with the following four duties:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character . . .;
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.[46]

Since this study concerns the management of peace and security more than economic, social and cultural matters, the most pertinent purposes for consideration here are the first, second, and fourth. Upon analysis of these three purposes, it is noted that the political organs of the U.N. are charged with the responsibility to foster and nurture world peace and security,[47] to cultivate and preserve the principle of human rights and self-determination of all peoples,[48] and to be a world forum to this end.[49] Consequently, since article 2(7) is a contradiction repugnant to these three principles, its interpretation is open to question.

Lauterpacht states that "the extent to which the purpose of the Charter in the matter of the protection of human rights is affected by Article 2, paragraph 7 . . . has justly been regarded as of

45. *Id.*, art. 2, para. 4 (emphasis added).
46. *Id.*, art. 1, paras. 1-4.
47. *See id.*, para. 1.
48. *See id.*, para. 2.
49. *See id.*, para. 4.

crucial significance."[50] Furthermore, he warns that although "paragraph 7 of article 2 refers only to such action on the part of the United Nations as amounts to intervention; it does not rule out measures falling short of intervention."[51]

Here, Lauterpacht exposes another concept, the meaning of which must be understood in international relations theory. In his definition of "intervention", Lauterpacht writes:

> Intervention is a technical term of . . . unequivocal connotation. It signifies dictatorial interference of the State. It implies a peremptory demand for positive conduct or abstention —a demand which . . . involves a threat of or recourse to compulsion, though not necessarily physical compulsion, in some form. This has been the current interpretation of the term "intervention."[52]

Referring to Professor James Brierly's definition of the concept, Lauterpacht maintains that in a more precise definition, intervention is an action in which "the interference must take an imperative form," and that "it must either be forcible or backed by the threat of force."[53] Lauterpacht concludes that "intervention is thus a peremptory demand or an attempt at interference accompanied by enforcement, or threat of enforcement in case of noncompliance."[54]

It was due to the problem of *interventionphobia* that the framers of the Charter incorporated article 2(7) into the Charter, to the detriment of the responsibilities of the United Nations. But, as Lauterpacht questions, in the event of disputes likely to constitute a threat to peace,[55] what is the essence of article 2(7)?

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50. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 166 (1950) [hereinafter cited as LAUTERPACHT].

51. *Id.* at 167.

52. *Id.*

53. *Id. See also* BRIERLY, THE LAW OF NATIONS 284 (4th ed. 1949). Furthermore, by referring to other definitions of "international law," Professor Lauterpacht offers numerous interpretations: Oppenheim (1912)—intervention is "dictatorial interference by a State in affairs of another State;" Lawrence (1905) —intervention is an "action aiming at enforcement;" Strupp (1934), and Lauterpacht (1948)—"[i]n its accepted scientific connotation, intervention is to impose the will of one or more States upon another State in an imperative form." LAUTERPACHT, *supra* note 50, at 166.

54. LAUTERPACHT, *supra* note 50, at 168.

55. *Id.* at 170. For examples of such behavior see *inter alia,* the cases of Indonesia, Anglo-Iranian Oil Company, Suez and Zaire in Auma-Osolo, note 34, *supra.*

Again, Professor Lauterpacht notes:

> One of the reasons for the comprehensive formulation of Article 2, paragraph 7, as finally adopted, was the desire to exclude the possibility of the Economic and Social Council's making a specific recommendation, addressed to the parties to the dispute, in a matter which is primarily within their domestic jurisdiction. This does not mean that Article 2, paragraph 7 excludes recommendations either general or specific, with regard to all other spheres of the activities of the United Nations.[56]

He further states that:

> The wide limitation of Article 2, paragraph 7 was inserted at San Francisco—in contrast with the limitation in the Dumbarton Oaks Proposals, which excluded intervention only in connection with the settlement of disputes—for the reason that; the United Nations and, especially, its Economic and Social Council were granted broader powers and authorities it was necessary expressly to exclude the possibility of their interfering directly in the domestic economy, social culture, or cultural or educational arrangement of the Member-States.[57]

Thus, by incorporating article 2(7) into the Charter, the framers' aim was "to rule out direct legislative intervention by the United Nations in matters normally reserved to the Legislature of the State."[58]

But, is direct legislation by the United Nations which imposes rules of conduct upon States a legal right of the U.N. under chapters VI and VII of the Charter, or does it constitute *intervention* under article 2(7) of the Charter? According to Professor Hans Kelsen, "*article 2, paragraph 7, does not mean, that Members are authorized to settle such matters, and particularly disputes, by the employment of force.*"[59] Although Member-States have an option to peacefully settle their disputes in accordance with the provisions of chapter VI, under the same chapter they "*are not allowed to settle their disputes by the threat or use of force be-*

56. LAUTERPACHT, *supra* note 50, at 170.

57. *Id.* at 171.

58. *Id.*

59. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 295 (1966) (emphasis added) [hereinafter cited as KELSEN].

cause a threat or use of force may always be considered by the Security Council to constitute a threat to or breach of the peace."[60]

Under this view, the monopoly of centralized force in the United Nations for peace-keeping missions under chapter VII is not affected by article 2(7) of the U.N. Charter.

2. *Is domestic jurisdiction a serious problem to the International Court of Justice?* Article 2, paragraph 7 has not only been a problem to the legislative organs of the United Nations but also to its judicial organ, the International Court of Justice.

Occasionally, "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."[61] Similarly, other organs of United Nations *may* "request advisory opinions of the Court on legal questions arising within the scope of their activities."[62] On the other hand, in cases which seem to be entirely legal, the Security Council *must* refer them to the International Court.[63] Under the Statute of the International Court of Justice, the Court may give "an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."[64]

Contrary to the provisions above, article 2(7)'s prohibition against interference in domestic matters has occasionally been invoked against the Court. For example, when the U.N. General Assembly requested the Court for an advisory opinion on the interpretation of the Peace Treaties with Bulgaria, Hungary, and Rumania the parties to this dispute challenged the Court's jurisdiction. The grounds for this objection were that by requesting an opinion on observance of human rights, the General Assembly was indeed intervening in matters *essentially* within the domestic jurisdiction of those Member-States, and therefore allegedly in violation of article 2(7).[65] In the Anglo-Iranian Oil question, Iran, the defendant, questioned the Court's competence. Iran maintained that under article 2(7) neither the Court nor any other organ of the United Nations had jurisdiction over the case which, Iran asserted, was essentially within Iranian domestic jurisdiction.[66]

60. *Id.* (emphasis added).
61. U.N. CHARTER art. 96, para. 1.
62. *Id.*, para. 2.
63. *See id.*, art. 36, para. 3.
64. I.C.J. STAT. art. 65, para. 1.
65. 5 INTERNATIONAL ORGANIZATION 588-91 (1951).
66. Anglo-Iranian Oil Company Case, [1951] I.C.J. 281-319.

Generally, some Member-States of the U.N. contend that the Court, as an organ of the United Nations, should fall under the prohibition clause of article 2(7).[67] On the other hand, in spite of the fact that the Court is subject to limitations under article 2(7) it should be noted that the Court, as a judicial organ of the organization designed to maintain international order, is bound to execute its peace-keeping responsibilities under chapter VII as stressed in article 2(7).[68] Moreover, if the Court were to defer to the parties concerned in every dispute involving a potential threat to international peace and security, then why should it be called a World Court? Similarly, if the framers of the U.N. Charter concluded that Member-States possessed the exclusive right to pursue their own course and to handle their international problems as they pleased, then the very reason for the creation of the U.N. is called into question.

Addressing itself to similar questions during the Algerian crisis in 1955 between France and the Algerian people, the General Assembly strongly protested:

> If France were permitted to decide, on the basis of her own unilateral interpretation of Article 2, paragraph 7 of the Charter, what a body of the United Nations could or could not discuss, then France would in effect have a veto power over the business of the Assembly and this was not the manner in which the framers of the Charter intended Article 2(7) to be applied.[69]

Professor Kelsen argues that both the International Court of Justice and Member-States, especially those who are parties to disputes in question, should decide independently whether certain matters fall within the jurisdiction of the Court, since the latter is also subject to the intervention restrictions.[70] To M.S. Rajan, however, Kelsen's idea "seems palpably absurd, particularly with respect to the Court (where such a view has fatal implications), that the point need not be laboured any further."[71]

In 1935, Professor Kelsen asserted:

> It goes without saying that, within an international legal community whose centre of gravity is in the administration of in-

67. Auma-Osolo, *supra* note 34, at 42-48.
68. *See* U.N. CHARTER art. 2, para. 7, cl. 2.
69. 10 U.N. GAOR 181 (1955).
70. KELSEN, *supra* note 59, at 258.
71. M. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION 121 (1958).

> ternational justice, there must be a place for an organism whose special function it is to prevent disputes between States, or, in the event of them having arisen, to endeavor to get them settled out of court, in short, by bringing the parties together to make an amicable settlement. Such an organism is exemplified in the League of Nations Council and the Permanent Court of Justice. The members of the community ought not to have the option of pleading their case before one or the other tribunal. The authority of the judicial organism should only be set aside when the Council has successfully intervened and when the dispute has been removed by amicable arrangement.[72]

Thus, Professor Kelsen anticipated a powerful international judicial operation superior to any national legislative and judicial apparatus for maintenance of world order. This apparatus would be built on the premise that the contemporary international legal system must abandon the primitive forms of hue and cry and *posse comitatus*. The Court was envisioned as being powerful enough to compel compliance. It would have to compel Member-States subject to its compulsory jurisdiction to follow specific rules of conduct; and it would impose definite sanctions so that a state would not proceed in any disorderly fashion, by instituting, as necessary, acts of coercion against that criminal state.

Yet when the Court was finally established in 1946 with the "Kelsenian Compulsory Jurisdiction" incorporated into the Statute,[73] Kelsen reversed the table against the Court in favor of Member-States' domestic jurisdiction! But, if the Court's competence were to be equated to that of the Member-States' courts as Professor Kelsen now suggests, then how could the Court function effectively, as anticipated by article 36(6) of the Statute? Furthermore, given that article 36(6) of the Statute provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court,"[74] why should the Court's role in its peace-keeping mission against aggressor states be affected by article 2(7) of the Charter? This is a contradiction of purposes.

3. *What are the roots of article 2(7)*? Article 2, paragraph 7 defined in terms of domestic jurisdiction protection against

72. H. KELSEN, THE LEGAL PROCESS AND INTERNATIONAL ORDER 30 (1935) [hereinafter cited as THE LEGAL PROCESS].

73. *See* I.C.J. STAT. art. 36, para. 5.

74. *Id.* para. 6.

United Nations' intervention is essentially a transplant of article 15(8) from the Covenant of the League of Nations to the Charter of the United Nations.[75]

> Article 15(8) of the League Covenant reads as follows: If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendations as to its settlement.[76]

By this paragraph, the Council of the League of Nations' competence did not extend to international disputes arising out of matters which were found to be "solely within the domestic jurisdiction of a party" to the dispute. This prohibition had its genesis in assumptions by the authors of the existence of solely domestic matters which would not require consideration by an international body. For instance, "[t]hey considered, especially, immigration and tariff matters as being solely within the domestic jurisdiction of the States,"[77] and therefore, out of bounds to all non-domestic authorities. As a result, defendant Member-States refused the Council's jurisdiction whenever their cases were referred to it.

As one of the critics of this prohibition, Professor Kelsen argues that there is no such thing as a matter "solely within the domestic jurisdiction" of a state.[78] Even though a given matter is not directly regulated by the rules of international law, it is not necessarily outside the limits of international law. Maltreatment of nationals by a state, and disputes arising between or among states claimed by one to be solely within its domestic jurisdiction are technically not domestic.[79] More generally, *any* domestic event is likely to affect the international public, and vice versa. When article 15(8) of the League Covenant speaks of a "matter which by *international law* is solely within the domestic jurisdiction,"[80] *then it is self-explanatory that there is hardly any matter which is solely domestic as being without some international significance.* The

75. *See* KELSEN, *supra* note 59, at 295. *See also* H. KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS (1951) [hereinafter cited as THE LAW OF THE UNITED NATIONS].

76. LEAGUE OF NATIONS COVENANT art. 15, para. 8.

77. KELSEN, *supra* note 59, at 295. Hence the fallacy of States' assumptions, since there is no act which is solely or essentially outside the rule of law.

78. KELSEN, *supra* note 59, at 109.

79. *Id.* at 85.

80. LEAGUE OF NATIONS COVENANT art. 15, para. 8.

grave fallacy of article 15(8) is that while the Council was given the competence to examine disputes as to its jurisdiction[81] it was not allowed by its Member-States to make any recommendations, a circumstance which encouraged some Member-States to act to the detriment of the League.[82]

The difference between article 2, paragraph 7 of the United Nations Charter and article 15, paragraph 8 of the League Covenant may be summarized around five main points:

1. Whereas, under article 15(8) of the League Covenant, intervention prohibition was only restricted to intervention by the League Council, under Article 2(7) of the U.N. Charter, prohibition applies to all organs of the United Nations except for the enforcement measures of chapter VII.[83]
2. Whereas, under article 15(8) only matters *solely* within the domestic jurisdiction were out of bounds for intervention by the League, under article 2(7), the prohibition applies only to matters *essentially* within the domestic jurisdiction of any state.[84]
3. Whereas, article 15(8) conferred competence upon the League Council to determine whether a matter was solely within the domestic jurisdiction of a state, article 2(7) requires that a dispute be brought before the Security Council, General Assembly or the International Court of Justice by a party or Member-State. If a party refuses to acknowledge the jurisdiction of the United Nations by claiming that the matter is essentially within its domestic jurisdiction, then the United Nations is competent to decide whether the matter is genuinely within the party's domestic jurisdiction.[85]

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81. That is, whether a given dispute was solely within the domestic jurisdiction of one of the parties or within the domain of international law.

82. The political crisis confronting the U.N. today is akin to the crisis which confronted the League of Nations between 1931 and 1939. The League's "leukemia," similar to the situation in the U.N. today, was initiated by Japan's aggression against Manchuria in 1931 followed by Mussolini's aggression against Ethiopia in 1935. These acts were followed by a war-by-proxy between Italo-Germany and the U.S.S.R. in the Spanish Civil War (1936-1939), Japan's aggression against China in 1937, and finally Hitler's consecutive aggressions against Austria and Czechoslovakia in 1938, and Poland in 1939—events which not only led to World War II, but also destroyed the League of Nations. *See* F. WELLBORN, DIPLOMATIC HISTORY OF THE UNITED STATES 312-26 (1964).

83. *Compare* LEAGUE OF NATIONS COVENANT art. 15, para. 8 *with* U.N. CHARTER art. 2, para. 7.

84. *Id.*

85. 6 U.N. SCOR 560th Meeting 3-4 (1951). This can be exemplified by

California Western International Law Journal, Vol. 6, No. 2 [1976], Art. 5

4. Whereas, under article 15(8), the jurisdiction of the matter was to be decided within the framework of international law, this rule is specifically absent from article 2(7).
5. Whereas, under article 15(8), there is no provision which governs whether Member-States were at liberty *not* to submit their disputes to the League Council or any other organ of the League for settlement, under article 2(7) Member-States are expressly authorized *not* to submit such disputes to either the Security Council, International Court of Justice or any other organ of the United Nations for settlement.[86]

As Lauterpacht notes, "[i]n interpreting the terms of Article 2, paragraph 7 commentators have concentrated their attention on the meaning of the phrase 'matters which are essentially within the domestic jurisdiction of any state.' "[87] As will be noted hereafter, "the replacement of the term 'solely' by the term 'essentially' [has had] very undersirable consequences."[88]

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the Anglo-Iranian Oil Company Case, [1951] I.C.J. 89. Although Iran argued that neither the Security Council nor the International Court of Justice had jurisdiction in this case, it was, however, up to the Court to decide whether it had jurisdiction. Similarly, in the Indonesian case, the Netherlands, together with its chief supporters, France and Belgium, had strongly warned the Security Council that it had no competence in the case; however, the Netherlands eventually surrendered the case to the Security Council's competence. *See* note 123, *infra.*

86. M. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION 404 (1958). For instance, during the Anglo-Iranian Oil Company case, Iran refused to acknowledge the jurisdiction of either the Security Council or the World Court on the grounds that "[t]he United Kingdom had made 'abusive use' of the International Court of Justice" which, to Iran, had no jurisdiction over the case. *See* note 85, *supra.*

Thus, the Government of Iran contended that: 1) the United Kingdom had misrepresented the 1933 agreement between the Iranian Government and the Anglo-Iranian Oil Company, and that the agreement was really an abridgement of the sovereign rights of Iran in favor of the company; 2) the United Kingdom had erroneously taken a nonjusticiable question to the Court; and, 3) the United Kingdom had erroneously invoked a tribunal which could not be competent to hear the complaint without Iran's express consent.

The Government of Iran denied that it had flouted the Court's decisions, and asserted that in this case the Court had no jurisdiction and, therefore, its provisional measures were invalid. It also maintained that the Security Council had no competence to implement the Court's order on the grounds that both article 94 of the Charter and article 41 of the Statute provide that only final decisions are binding. *See* 6 U.N. SCOR, 560th Meeting 9-12 (1951). *See also* M. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION 404 (1958).

87. LAUTERPACHT, *supra* note 50, at 167-70.

88. THE LAW OF THE UNITED NATIONS, *supra* note 75, at 777-78 (footnote omitted).

The roots of the "essentially" concept, in article 2(7) of the Charter are no longer alien to the exponents of international law. For instance, Kelsen states that:

> During the discussion of Article 2, paragraph 7 at the [San Francisco Conference] the delegate of Australia declared with regard to the substitution of the word "essentially" for "solely" he agreed with the opinion, expressed previously by the delegate of the United States, "that matters *solely* within domestic jurisdiction were constantly contracting. For example, international agreement to promote full employment would have been unheard of a few years ago and even now, although this matter remained within domestic jurisdiction . . . it was, however, "essentially" within domestic jurisdiction and that was a better criterion to apply."[89]

To many students of international law,[90] the replacement of the word "solely" with "essentially,"[91] together with the omission of any reference to "international law" hardly reduced the domain of international law.

For instance, in the words of Professor Kelsen, "the fact that Article 2, paragraph 7 of the Charter does not speak of matters which are 'solely' but of matters which are 'essentially' within the domestic jurisdiction of a state, is no improvement."[92] Lauterpacht also notes that even in the age of the League of Nations, there were some matters, for example, conferment of nationality, admission of aliens, or regulation of tariffs which were essentially within the domestic jurisdiction of the state concerned. However, they "ceased to be matters which, 'according to international law,'

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89. *Id.* at 777 n.2.

Similarly, to Georg Schwarzenberger, "[t]he word 'essentially' has been substituted for 'solely'." G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 281 (1967). To P.E. Corbett, "Article 2, paragraph 7 of the United Nations Charter omits the explicit reference of international law and substitutes the word 'essentially' for the Covenant's 'solely'." P. CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES 81 (1951). To both Oppenheim and Lauterpacht, "[t]he expression 'essentially within the domestic jurisdiction of any state' is one capable of divergent interpretations," and that to them "[i]t seems that the expression was deliberately substituted for that used in Article 15(8) of the Covenant which referred to matters which, *according to International Law*, are exclusively within the domestic jurisdiction of the State." L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 414-15 (8th Ed. 1967).

90. *See, e.g.*, M. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION (1958); L. SOHN, CASES AND MATERIALS ON UNITED NATIONS LAW (1963); J. BRIERLY, THE LAW OF NATIONS (1949).

91. G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 281 (1967).

92. THE LAW OF THE UNITED NATIONS, *supra*, note 75, at 776.

are exclusively within the domestic jurisdiction of the State as soon as they became the subject of regulation by customary or conventional international law."[93]

Therefore, it is open to question why, under the Charter, such matters, though not *directly* regulated by international law, should still be "essentially" within the domestic jurisdiction of the State. Just as there are no matters which, by their very nature, are "solely" within domestic jurisdiction of a State, there are no matters which are "essentially" within the domestic jurisdiction of a State. By analogy, whatever families, clubs, non-international organizations or other entities may do behind closed doors, their activities are neither "solely" nor "essentially" outside the limits of their sovereign's law.

Since the principle of human rights is founded on fundamental customary law of protection for the oppressed, the activities of every individual, group, club, and state are regulated not only by municipal law, but also by international law. Behavior which is *essentially* a matter of one's personal affairs may also be criminal and thus subject to the rule of municipal law. Therefore, by analogy, conduct between States, and between States and individuals is not essentially domestic.

As municipal law must intervene in personal disputes between its nationals in order to maintain law and order, so must international law intervene in every dispute which has any element of potential threat to international peace and security. And as Lord Gordon emphasizes:

> No one can lawfully be restrained or punished, or condemned in damages, except for a violation of the law established to the satisfaction of a judge or jury or magistrate in one of the ordinary Courts of Justice. . . . The plea of "act of state" is not permissible as a defense to an action in respect of anything done in the realm or to any action by a British subject. . . . No one who is charged with violation of the law can effectively plead . . . that his act was done in obedience to the command of a superior, even the command of the King. "The King can do no wrong" imparts not only that the King cannot be proceeded against for any alleged wrong, but also that he cannot authorize any wrongful act so as to justify the wrongdoer.[94]

93. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 175 (1950).
94. G. HEWART, THE NEW DESPOTISM 35 (1929). *See also* Auma-Osolo

By the same token, both individuals and States are automatically under the umbrella of international law.[95] States fail to realize that in the same manner which they expect their nationals to be patriotic and peace loving, so the United Nations expects these States to behave *ethically* in order to uphold the four basic "Purposes of the United Nations."[96] Even if matters were not explicitly regulated by any rule of international law because of its present lack of codification, this does not mean that such matters are therefore "essentially" within the domestic jurisdiction of any State. In fact, even if some matters were not regulated by a rule of customary international law or contractual international law, no single matter can simply become "solely" domestic until and unless international law confirms them so. Specifically:

> The question whether a matter is solely within the domestic jurisdiction of a state can be decided only by examining the status of international law with respect to this question; that is to say, *it can be decided only "by international law."*[97]

And, as both Kelsen and Lauterpacht note, the change in phraseology of article 15(8) of the Covenant to article 2(7) of the Charter, and the omission of the reference to international law has not made any improvement.[98] That is to say, by replacing the word "solely" with "essentially" one creates a connotation that it is up to a sovereign State to decide whether the matter is essentially within its sovereignty. If this were the case, every Member-State would be at liberty to refuse to submit its disputes to the U.N. for settlement as required of all Member-States and Non-Member-States.[99]

Why and how did this confusion come about? Why was it allowed to take place, and who is to blame for it? More important, can the confusion be rectified? Confusion with the domes-

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Shall the Rule of Law Speak, The Daily Tar Heel (University of North Carolina, Chapel Hill), April 11, 1968, at 3; Auma-Osolo, Law, The Courts and the Legal Profession in Great Britain, Spring 1968 (unpublished paper, Department of Political Science, University of North Carolina, Chapel Hill, N.C.) at 3-4.

95. *See* LAUTERPACHT, *supra* note 50, at 27-69.

96. *See generally* U.N. CHARTER art. 1, paras. 1-4.

97. THE LAW OF THE UNITED NATIONS, *supra* note 75, at 777.

98. LAUTERPACHT, *supra* note 50, at 166-200; THE LAW OF THE UNITED NATIONS, *supra* note 75, at 776.

99. *Cf.* U.N. CHARTER art. 34, 35.

tic jurisdiction clause is hardly novel. At the San Francisco Conference, the Australian delegate fumbled in reference to article 2(7), stating that an organization which " 'is genuinely *international* in character' need not intervene in those domestic matters in which, by definition, international law permits each . . . entire liberty of action."[100] Professor Kelsen explains that "he interpreted the term 'domestic' to mean the opposite of 'international.' "[101] Again, at the Security Council meeting concerning the Spanish question, the same Australian delegate raised a question contradicting the opinion he had expressed at San Francisco: "Is the existence of the Franco regime a matter of international concern and not essentially within the domestic jurisdiction of Spain?"[102]

> Because of this phrasal confusion, Lauterpacht warns that: *It is arguable that a matter is essentially one of domestic concern if it is incapable by its nature of assuming an international complexion,* [that is], *if it cannot have international repercussions.* It may be difficult to adduce examples of such matters. There is no technical —or immutable—sense attaching to the term "essentially."[103]

Lauterpacht concludes that "[i]n the modern age of socio-economic and political interdependence, most questions which, on the face of it, appear to be essentially domestic are, in fact, essentially international."[104] And, as Kelsen acknowledges, "[i]t is obvious that this interpretation would completely paralyze the effect of the first sentence of [a]rticle 2, paragraph 7."[105]

II. A COMPARATIVE ANALYSIS

A. Analysis

As previously noted, article 2(7) of the U.N. Charter still remains the favorite grounds for Member-States of the United Nations to decry international interests in matters they erroneously conclude to be "essentially within their domestic jurisdiction," and to explain why the United Nations should not have any legal right

100. *See* THE LAW OF THE UNITED NATIONS, *supra* note 75, at 775 n.5.

101. *Id.*

102. *See* 1 JOURNAL OF THE SECURITY COUNCIL 602f (1946). *See also* THE LAW OF THE UNITED NATIONS, *supra* note 75, at 780 n.5.

103. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 175 (1950).

104. *Id.*

105. THE LAW OF THE UNITED NATIONS, *supra* note 75, at 791.

to intervene. Every Member-State recognizes that the United Nations was created for maintenance of world peace and security and to save succeeding generations from the scourge of war. Despite this, most are basically preoccupied with what Professor Hans Morgenthau calls national interest defined in terms of power.[106] Resort to article 2(7) when the United Nations has attempted to intervene is an example of this.[107]

Chapter VII of the U.N. Charter empowers the United Nations Security Council to investigate "action with respect to threats to the peace, breaches of the peace, and acts of aggression."[108] Under article 39:

> The Security Council shall determine the existence of any threat to the peace, . . . or act of aggression and shall make recommendations, or decide what measures [to take] . . . to maintain or restore international peace and security.[109]

Moreover, articles 43 through 50 explicitly provide measures that the Security Council may employ in the event of "any threat to the peace" as envisaged in article 39. In addition, "[a]ny member of the United Nations may bring any dispute, or any situation of the nature referred to in article 34, to the attention of the Security Council or of the Generaly Assembly."[110]

Similarly, article 35(2) provides that:

> A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.[111]

Apart from the authority granted by chapter VII of the Charter, the Security Council is *fully* authorized to "recommend appropriate procedures or methods of adjustment."[112] In addition, the Council "should also take into consideration that legal disputes

106. H. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 63 (4th ed. 1966).

107. *See generally* L. SOHN, RECENT CASES ON U.N. LAW 271-812 (1963).

108. U.N. CHARTER ch. VII.

109. *Id.*, art. 39.

110. *Id.*, art. 35, para. 1.

111. *Id.*, para. 2. *See, e.g.*, discussion of the Congo (Zairian) question in Auma-Osolo, note 34, *supra*; Auma-Osolo, *A Retrospective Analysis of United Nations Activity in the Congo and the Significance for Contemporary Africa*, 8 VAND. J. TRANSNAT'L L. 451 (1975).

112. U.N. CHARTER art. 36, para. 1.

should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."[113] Furthermore, although the Charter provides that the Security Council is the only U.N. organ with "primary responsibility for the maintenance of international peace and security, . . ."[114] and that, "the General Assembly shall not make any recommendations with regard to [a] dispute or situation . . . [w]hile the Security Council is exercising in respect [to that] dispute or situation the functions assigned to it . . . ,"[115] the Charter explicitly provides that *maintenance of peace is one of the purposes of the United Nations in toto, and not solely of the Security Council per se.*[116]

In the 1956 Suez Canal crisis, after the Security Council's action had been blocked by the British and French vetoes it was the General Assemly which saved this planet from what could have been World War III by establishing the U.N. Emergency Force (UNEF).[117] Similarly, in the 1960 Zairian case, when the Security Council was blocked by the Soviet veto, it was the General Assembly which adopted a resolution supporting Dag Hammarskjold's plan for United Nations Operations in the Congo (ONUC).[118] The General Assembly also played a key role in Korea in 1950.[119]

Despite these facts, the question may be asked whether the U.N. is rational enough to maintain international peace and security whenever and wherever there is an "existence of any threat to the peace, breach of the peace, or act of aggression. . . ."[120]

While Member-States seem to be committed to the United Nations' obligation, they are also committed to their egocentric

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113. *Id.*, para. 3. *See also* Anglo-Iranian Oil Company Case, [1952] I.C.J. 131.

114. *Id.*, art. 24, para. 1.

115. *Id.*, art. 12, para. 1.

116. *See id.*, art. 1, para. 1.

117. *See* G.A. Res. 1000, 11 U.N. GAOR, 1st Emergency Sess. at 2, U.N. Doc. A/3353 (1956).

118. *See* G.A. Res. 1474, 15 U.N. GAOR (1960).

119. G.A. Res. 376, 5 U.N. GAOR Supp. at 20, U.N. Doc. A/1775 at 9 (1950); G.A. Res. 384, 5 U.N. GAOR Supp. at 20, U.N. Doc. A/1775 at 15 (1950); G.A. Res. 498, 5 U.N. GAOR Supp. at 20A, U.N. Doc. A/1775/Add. 1 at 1 (1950); G.A. Res. 500, 5 U.N. GAOR Supp. at 20A, U.N. Doc. A/1775/Add. 1 at 2 (1951).

120. *Cf.* U.N. CHARTER art. 39.

"national interests."[121] Because of this ambivalence, friction between the United Nations and its Member-States can be extremely intense. For instance, in the Algerian, Anglo-Iranian Oil Company, Moroccan, Tunisian, South West African, Rhodesian, Czechoslovakian, Hungarian, and Vietnamese disputes, one or both parties vehemently warned the United Nations to keep out of the dispute when that organization attempted to intervene under chapter VII of the Charter.

In the Algerian dispute, France bitterly ordered the United Nations to keep out, stating that if the U.N. attempted to intervene in the dispute, it would be violating article 2, paragraph 7 of the U.N. Charter. France also threatened that if the U.N. did not comply, it would quit the U.N.[122]

In the Indonesian case, the Netherlands warned the United Nations not to intervene in Indonesian affairs on the grounds that this was a matter essentially within the domestic jurisdiction of the Netherlands.[123] In the 1951 Anglo-Iranian Oil Company Case, Iran challenged the United Nations' jurisdiction when the plaintiff, The United Kingdom, commenced the action in the International Court of Justice.[124]

During the Vietnam war, the United States kept the conflict out of the U.N.'s reach by denying the United Nations the right to settle the dispute between the Vietcong and South Vietnamese.[125] In the South West African case, Dutch settlers in South Africa have constantly deprived the United Nations of supervisory access to the South West African territory, thereby disabling the U.N. in its attempt to examine apartheid and other forms of segregation in the territory.[126]

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121. E. GROSS, THE UNITED NATIONS: STRUCTURE FOR PEACE 124 (1962).

122. U.N. Docs. A/2915, A/2942, A/2949 Add. 1 (1955).

123. A. TAYLOR, INDONESIAN INDEPENDENCE AND THE U.N. (1950); U.N. Docs. S/729, S/787, S/842, S/848, S/918-19, S/1117, S/1129 Add. 1 (1948); Auma-Osolo, *supra* note 34, at 84.

124. Bishop, *Juridical Decisions: Jurisdiction over Nationals for Acts Done Abroad*, 47 AM. J. INT'L L. 325-27 (1953); Anglo-Iranian Oil Company Case, I.C.J. Pleadings 74-75 (1951).

125. This case was not brought before the U.N.; however, on the U.N.'s concern for human rights in the Vietnam war, see U.N. Doc. S/10104 (1971), at 3.

126. *See, e.g.*, L. SOHN, CASES ON UNITED NATIONS LAW 627-70 (1956); U.N. Doc. E/CN.4/1050 (1971); U.N. Doc. A/C.4/SR (1971); U.N. Doc. A/8424 (1971).

Regarding the chronic problem in Ireland, the United Nations' power has been blocked by the United Kingdom.[127] In Cyprus, the acts of Greece and Turkey have made it practically impossible for the U.N. to settle the problem.[128]

From the foregoing examples we can see that article 2(7)'s ambiguous treatment of domestic jurisdiction does more than hinder the U.N.'s attempts at maintaining world peace. It *suggests*, and for some Member-States *encourages* unilateral action. Furthermore, some members erroneously equate the Principles of the Charter to those of the League Covenant which was, in fact, a simple political document. As Professor J.L. Brierly defined the League, "[it] was hardly more than a name. . . . Through the Covenant, it was not the League but the Members of the League that were to act in certain ways . . . ."[129]

Nonetheless, unlike the League, the U.N.'s successful management of numerous wars[130] is an indicator of the United Nations' extra-rationality and effectiveness in spite of article 2(7). Also, it shows that even though article 2(7) by its phraseology suggests contradictions, the U.N. could be a very reliable managerial instrument over world crises barring interference by self-centered Member-States. But, if this is not so, why then, was the United Nations created with a multiplicity of *ad hocs* such as the Economic and Social Council if these nations wished to exclude its competence and personality from international and social problems? Why was a great deal of time spent at the San Francisco Conference planning a Charter containing, for example, a Declaration Regarding Non-Self-Governing Territories,[131] if the framers truly believed that colonial policy was strictly a domestic matter of the state concerned? Why were Member-States committed to a cooperative effort to provide fundamental principles of human

127. This case was not officially brought before the U.N. as provided under article 35(1) and (2) of the Charter, despite appeals by some Irish nationals for U.N. intervention. However, for the U.N.'s concern for the problem, see U.N. Doc. A/C.3/L18906/Rev. 2 (1971), at 4.

128. This impasse has resulted from reinforcement of Turkish and Greek Cypriots with men and war materials by Turkey and Greece, respectively.

129. J. BRIERLY, THE LAW OF NATIONS 106 (6th ed. 1963).

130. *E.g.*, Greek (1947), Korean (1951), Suez Canal (1956), Lebanon (1958), Zairian (1960), West New Guinea (1962), Yemen (1963), and Cyprus (1964). *See* UNITED NATIONS, EVERYMAN'S UNITED NATIONS 79-84 (1968); L. SOHN, RECENT CASES ON U.N. LAW 271-812 (1963); Table 1, *infra.*

131. U.N. CHARTER ch. 11.

rights if it was believed that article 2(7) permitted every Member-State to do as it pleased within its domestic jurisdiction? Finally, are there such things as "matters essentially within the domestic jurisdiction of a state"?

B. A Theory of International Policy and Law

What can be gleaned from the foregoing study? Is there anything significantly new? If so, to what extent is it new and, therefore, instrumental to further understanding of this complex world? And if, as Dror advocates, social scientists must begin to be instrumental as policy-makers with ideas essential to the elimination of problems inherent in prevailing public policies,[132] what must be done now for and to the U.N.?

The U.N. peace-keeping experience to date confirms that because of the amorphous and acephalous nature of the prevailing international system, any large-scale policy or law is likely to perish unless the support it initially receives remains constant throughout its implementation. Significant diminution of the initial momentum of any given policy process by implementors is likely to disrupt or completely destroy the policy and its goals.[133]

The prognosis in this study shows that the U.N. peace-keeping policy has not only proven less than completely successful, but also that its future success is critical to the maintenance of world peace. It is given that the U.N. was, *inter alia*, charged with legal responsibilities superior to those of the League of Nations,[134] that the Charter is a reflection of the U.N.'s peace-keeping policy, and finally, that the Security Council, General Assembly and International Court of Justice, with the assistance of the Secretary-General, and the Secretariat are charged with execution of this policy.[135] But, in reality, can the U.N. execute it? Has it been successful in doing so since 1946? If so, to what degree?

The findings to these inquiries show that the U.N. has not been successful. See Table 1 below.

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132. *See* Y. DROR, PUBLIC POLICY-MAKING REEXAMINED (1968).

133. *See* J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION 7-165 (1971).

134. Under article 39 and chapter VII of the Charter, the Security Council is more powerful than was the League Council under article 15 of the League Covenant.

135. *See generally* U.N. CHARTER ch. I.

TABLE 1[136]

A TYPOLOGY OF MAJOR INTERNATIONAL DISPUTES BETWEEN 1946 AND 1975

DISPUTES		
Genuinely Settled by the U.N.	Settled by Self-Seeking Member-States	Prevailing Unsettled crises
Algeria (1951)	Berlin (1948, 61, 70)	Angola
Anglo-Iranian Oil Co. (1951)	Cambodia (1975)	Ireland
Cyprus (1964)	Chile (1974)	Middle East
Greece (1947)	China-India (1962)	Namibia
Hungary (1956)	China-USSR, along Amur-Issuri Rivers (1969)	Portugal
Indonesia (1947)	Cuba Bay of Pigs (1960)	Rhodesia
Kashmir (1950)	Cuba Missiles (1962)	South Africa
Laos (1959)	Cyprus (1975)	Spanish Sahara
Suez (1956)	Czechoslovakia (1968)	USSR's Anti-Semitism
Syria-Lebanon (1946)	Dominican Republic (1962)	
Tibet (1959, 1961)	East Germany (1953)	
Yemen (1963)	Goa, Domoa and Diu (1961)	
West-New Guinea (1962)	Guatemala (1954)	
Zaire (1960-62)	Guinea Bissau (1974)	
	Jordan (1958)	
	Korea (1950)	
	Laos (1975)	
	Lebanon (1958)	
	Middle East (1967, 1972)	
	Mozambique (1974)	
	Panama (1959)	
	Tibet (1950)	
	U.S.S. Mayaquez (1975)	
	U.S.S. Pueblo (1968)	
	Vietnam (1975)	
TOTAL = 15 (29%)	TOTAL = 28 (54%)	TOTAL = 9 (17%)

136. Unless otherwise indicated, all figures and tables presented are the author's work-product.

As noted in Table 1, of fifty-two world problems, the U.N. has genuinely settled only fifteen, as opposed to twenty-eight settled by self-seeking Member-States.[137] Furthermore, it is noted that nine of the total number of disputes have not yet been settled. In reality, these have been deliberately excluded from the U.N.'s management.

Another heuristic observation derived from this study is that the U.N.'s peace-keeping strength diminishes in roughly inverse proportion to the level of activity concurrently exercised by self-seeking Member-States. This phenomenon is illustrated by Figure 1.

FIGURE 1

A COMPARATIVE PEACE-KEEPING ROLE BETWEEN THE U.N. AND ITS SELF-SEEKING MEMBER-STATES

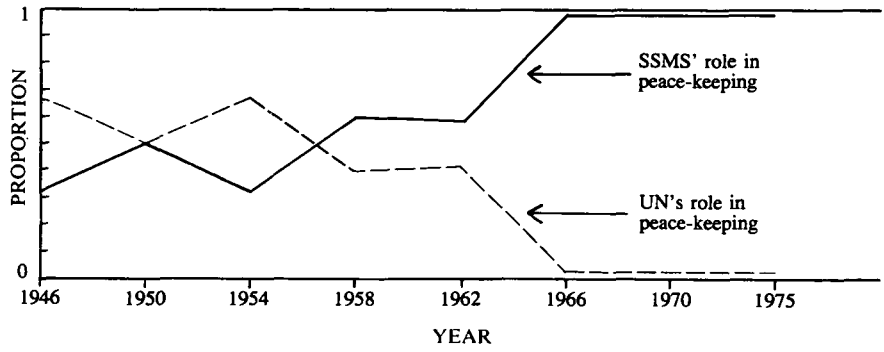


Figure 1 shows that the U.N. peace-keeping policy was launched with great enthusiasm. Between 1946 and 1949, the U.N.'s role was very significant. But within four years, the U.N. began to encounter serious challenges from some Member-States. By 1950, during the Korean War, this challenge had grown so great that the peace-keeping role in Korea was no longer a U.N. effort but rather a United States enterprise. Of course it was the U.N. flag under which the forces in Korea operated. But, technically speaking, the force there was a single Member-State's force.

137. The "self-seeking Member-States" are those states which have involved themselves in a dispute, while discouraging the U.N. from an active peace-keeping role.

When its commanding general, Douglas MacArthur, was relieved from command in Korea, that decision was made by the United States.

As a result of this increasing challenge to the U.N.'s responsibility in the peace-keeping process, its competence in this process has been significantly weakened. This weakening is illustrated in Table 2 and Figure 2.

TABLE 2

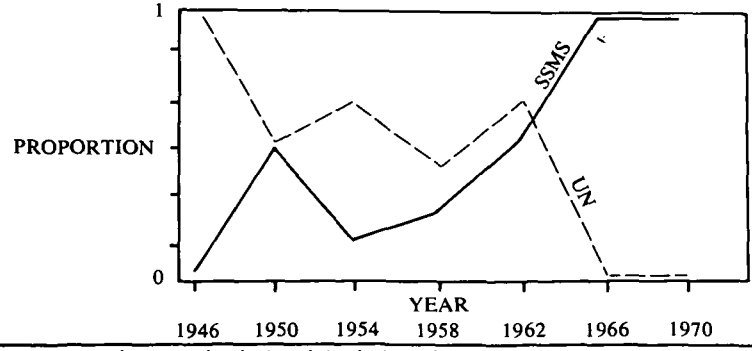
U.N. AND SELF-SEEKING MEMBER-STATES IN PEACE-KEEPING ROLE

PERIOD	DISPUTES		
	GSUN* NO. (%)	SSSMS** NO. (%)	TOTAL NO.
1946-1949	3 (75)	1 (25)	4
1950-1953	3 (50)	3 (50)	6
1954-1957	2 (67)	1 (33)	3
1958-1961	4 (40)	6 (60)	10
1962-1965	3 (43)	4 (57)	7
1966-1969	0 (0)	3 (100)	3
1970-1974	0 (0)	5 (100)	5
1975-	0 (0)	5 (100)	5
1946-1975	15 (38)	28 (62)	43

* Genuinely settled by the U.N.
** Settled by Self-Seeking Member-States.

FIGURE 2

PROPORTION OF DISPUTES SETTLED BY THE U.N. AND ITS SELF-SEEKING MEMBER-STATES BETWEEN 1946 and 1970



As noted in both Table 2 and Figure 2 the U.N.'s initial effectiveness in 1946 was 75%. Four years later, its role began dwindling toward zero. Conversely, the self-seeking Member-States' initial activity in this enterprise was 25%. At the end of four years, they had begun to challenge the U.N.'s role. While the U.N.'s role today equals zero, the role of self-seeking Member-States equals one. Furthermore, it has been noted that in 100% of the recent disputes wherein the U.N. intervened or attempted to do so, it received a rebuff.[138]

This study systematically shows the United Nations' present strength in world peace-keeping to be far inferior to that of its self-seeking Member-States. This raises the possibility that the U.N. will cease to exist as did the impotent League of Nations in 1941.[139] This prediction is well supported by the negative correlation in Figures 1 and 2 and Table 2 between time and the U.N.'s peace-keeping role between 1946 and 1975.

This study shows also that the United Nations' problems in peace-keeping policy implementation are a function of *political* and *technical* cataracts built into the U.N. system.

The *political cataracts* are the self-seeking Member-States which oppose the U.N.'s role in the peace-keeping process. This problem was enhanced by the cold war between the U.S. and U.S.S.R. As a result of the cold war, conflict intensified, and the more it increased, the more these actors resorted to self-seeking adventures conflicting with the U.N.'s peace-keeping role. By so doing, the two principal actors have not only made it difficult for the U.N.'s peace-keeping responsibilities to be met, but have also made it impossible for smaller Member-States to remain independent and impartial. Figure 3 provides a model of this phenomenon.

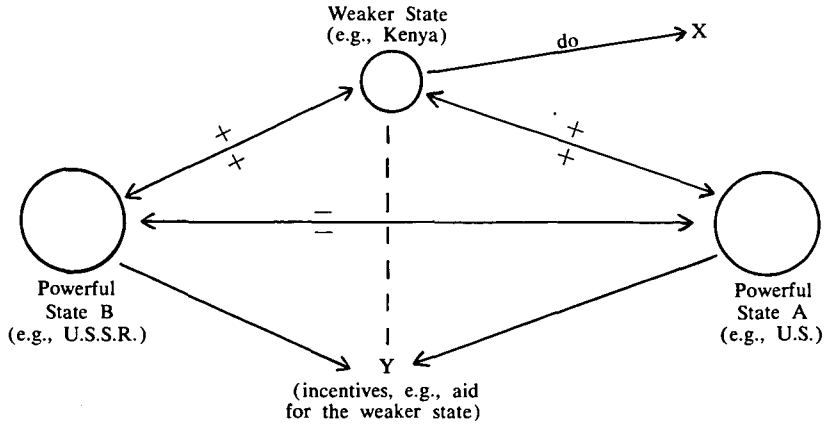
Figure 3 hypothesizes that States A and B are adversaries as in the cold war example of the U.S. and U.S.S.R. Further, it assumes that they are equally powerful militarily, that they have relatively equal thermonuclear capabilities, and that one's first strike is as powerful as the other's second strike. Finally, apart from A and B, there are other states, all having relatively less military capability.

138. This rebuff occurred in the disputes in Cyprus, South and South West Africa, Ireland, and Vietnam.

139. The collapse of the League was a result of actions of the self-seeking states of that period, specifically, Italy, Germany, and Japan. *See* note 82, *supra*.

FIGURE 3

ROLE AND EFFECT OF POWERFUL STATES ON WEAKER STATES: MODEL 1



+ = positive perceptions; — = negative perceptions; X = Act

Because of this antipathy and equal "physical" capability, any perceptive mechanism between A and B is likely to be negative, but relatively positive toward weaker states. Also, because a weaker state has nothing to gain by attempting to engage in a confrontation which, in fact, could destroy it, the latter is likely to develop a positively neutral or non-aligned attitude towards both A and B. However, owing to the fact that neither A nor B can risk loss of political prestige to the other, A and B may independently engage in alliance-cultivation.[140] These activities may be conducted even though A and B know such activities to be for their own egocentric advantage and inconsistent with international law. But, because A and B cannot afford to be identified as criminal, both may independently advance excuses to support their activities.[141]

To fulfill self-seeking goals, B, for example, may use its social powers. It may either *reward* or use *coercive power* to influence the weaker state. For example, if the latter did an act, such as disassociating from A politically, economically, or ideologically, then B might reward that weaker state with certain economic, military,

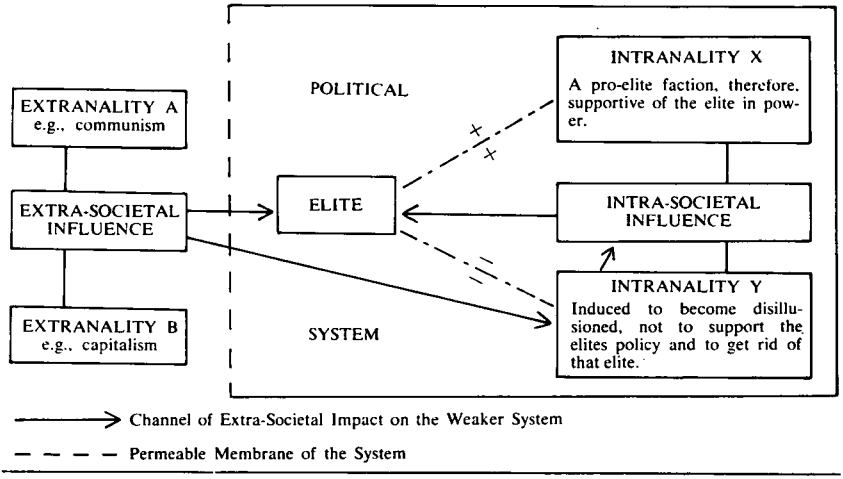
140. This is exemplified by the U.S. action in creation of NATO, SEATO, and so on, and the U.S.S.R. *vis à vis* the Warsaw Pact.

141. *See* THE SHAPING OF AMERICAN DIPLOMACY 1083-1100 (W. Williams, ed. 1956).

or technical incentives.[142] As a result of this propaganda warfare, antagonistic pro-A and pro-B factions are likely to develop within the weaker state, as illustrated in Figure 4.[143] As a consequence of this development, political strife is highly likely which may, in turn, cause the political system of that weaker state to become disrupted and to malfunction.[144]

FIGURE 4[145]

A STRATEGIC MODEL OF THE EFFECTS OF EXTRANALITIES ON THE FATE OF A WEAKER STATE: MODEL 2



In Figure 4, a weaker political system is likely to develop antagonistic factions (Intranalities X and Y) due to extra-societal influence from either Extranality A or B.[146] This phenomenon occurs in almost every weaker Member-State of the U.N.,[147] and weaker non-members as well.

The magnitude of the political confusion and conflict initiated

142. *See* FRENCH & RAVEN, *The Bases of Social Power*, GROUP DYNAMICS 259-69 (3d ed. 1968).

143. Auma-Osolo, *The Goals of the Nations of Africa Reconsidered: Some Sources of Problems and Their Prescriptions*, 6 PAN-AFRICAN J. 20-23 (1973). *See* INTERNATIONAL ASPECTS OF CIVIL STRIFE (J. Rosenau, ed. 1964).

144. Auma-Osolo, *supra* note 143, at 20-23.

145. *Id.* at 21 (revised figure).

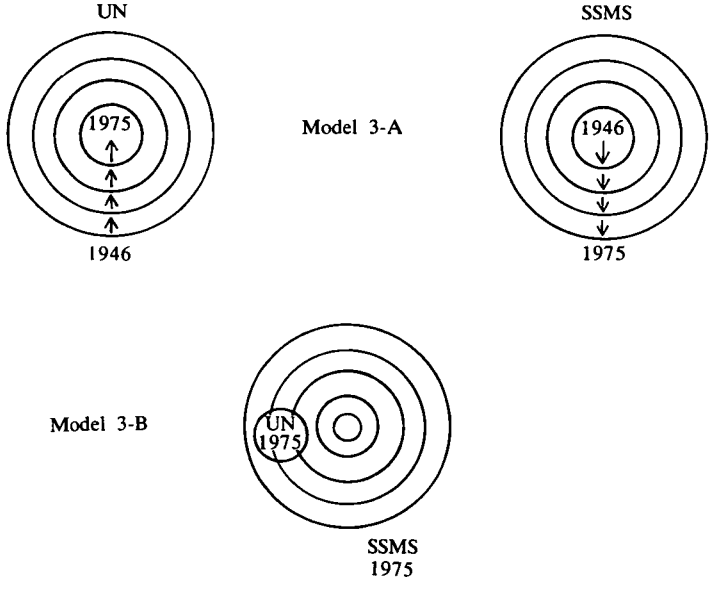
146. As in the case of the Korean, Vietnamese and Zairian questions.

147. *E.g.*, Cuba, Chile, Nicaragua, Laos, Cambodia, Cyprus, Turkey, Greece, are obvious examples of such target states. *See* Auma-Osolo, *supra* note 143, at 20-23.

and promoted by the major parties to the cold war, shows that self-seeking behavior among the most powerful U.N. Member-States is potent indeed. The more this behavior has mounted, the more numerous the multi-international defense systems have come into competition with the U.N.'s peace-keeping role.[148] This theory is illustrated in Figure 5, Model 3-A. The increase in the major actors' behavior has also caused the multi-international defense systems to overshadow the U.N.'s peace-keeping role. This is illustrated in Figure 5, Model 3-B.

FIGURE 5

DECREASE IN U.N. PEACE-KEEPING ROLE AND THE GROWTH OF SELF-SEEKING ROLE, 1946-1975.



The *technical cataracts* are, succinctly, those prohibitive norms either accidentally or erroneously built into the Charter such as article 2, paragraph 7, which counteract the U.N.'s peace-keeping responsibility. As previously noted these cataracts are centered around the principle of sovereign equality.

Because of the interaction between these two interdependent variables, the *political* and *technical* cataracts, what the U.N.

148. Examples include the North Atlantic Treaty Organization, Warsaw Pact, Southeast Asia Treaty Organization, Organization of American States, and the Organization of African Unity.

does or can do is determined by a tug-of-war between the anti-U.N. and the pro-U.N. forces.[149] In the course of this tug-of-war, consensus within the U.N. implementational apparatus is critically important indeed. But the prime determinants of the rate at which a given crisis can be addressed or settled will typically be the number of decisions and clearances required for any given policy implementation. Because of these variables, U.N. peace-keeping programs are nearly always delayed, distorted, and at times destroyed.

The United Nations difficulties in policy implementation and enforcement are compounded by the tendency towards dominance which is common to all states. This universal trait of national behavior conflicts directly with the guarantee of cooperation required for the success of any U.N. peace-keeping policy.

What should a social scientist do to help the U.N. overcome such a problem? Given that failure is likely to be fatal, what must be done now for future advancement?

III. CONCLUSION

This inquiry has re-examined and analyzed the usurped legal role of the United Nations, its competence, and the obstacles to its dispute settlement potential in the present world. A number of contradictions which make it difficult for the U.N. to function effectively as a rational, goal-oriented institution have been noted.

The data show that endowed with its *universal* international personality, the United Nations has been extremely instrumental in a number of furious political disputes potentially leading to World War III.[150]

On the other hand, the findings show that in spite of its position of apparent power, the United Nations remains virtually paralyzed by its own Charter and self-seeking Member-States. Succinctly, the Charter which authorizes the United Nations to maintain world peace and security[151] is the same Charter which attempts to prevent the United Nations from executing this obligation. Because of this confusing dualism inherent in the Charter,

149. The pro-U.N. faction mainly includes the Afro-Asian and Scandinavian Member-States.

150. For instance, it has played a very decisive role in the Indonesian crisis (1947), the Korean crisis (1951), the Algerian crisis (1956), the Suez crisis (1956), the Zairian crisis (1960), the West New Guinea crisis (1962), and the Cyprus crisis (1964).

151. *See generally* U.N. CHARTER chs. VI, VII.

the U.N. has encountered threats from Member-States when attempting to intervene in those disputes potentially leading to international crises.[152] The U.N.'s role as international peace-keeper is at present eclipsed by the unilateral enforcement activities of the stronger self-seeking Member-States. This encourages the exertion of extra-societal influence by stronger states towards the weaker, a phenomenon which at once heightens world conflict by increasing the likelihood of collision between two adverse self-seeking Member-States competing to influence the same target state, and also works towards the tragic demoralization of the most sought after weaker states.

In re-examining the effect of article 2, paragraph 7, *vis à vis* the United Nations' competence under chapter VI and especially chapter VII, it was concluded that the latter is *in toto* paramount to the former. This is demonstrated by the positive results in several of the cases noted in Table 1, showing that the United Nations' competence over the problem of domestic jurisdiction can be superior. The findings also suggest that although today's international political life has not yet reached a point which would permit the U.N. to become a supra-international person exceeding states' sovereignty,[153] the means by which the present and future world problems can be resolved is through rigorous innovation within the U.N. itself.

To bring about this metamorphosis, the U.N. must become extra-rational,[154] and it must *innovate*. Accordingly, the U.N. should seriously consider development of an independent World Military Command composed of:

152. A prime example is the 1956 Algerian question where France threatened to withdraw from the United Nations unless the U.N. stopped "interfering" in the Algerian problem. *See* note 122 *supra*. In the Indonesia question in 1947, the Netherlands was similarly embittered against the United Nations. *See* note 123, *supra*. In the Vietnam issue, the United States kept the case out of the United Nations' reach; in the "Rhodesian unilateral Declaration of Independence," Britain did the same.

In the apartheid problem in both South and South West Africa, the minority Dutch settlers' government of South Africa has completely paralyzed the United Nations' right of intervention since 1947. In 1947, South Africa submitted its first and last report to the United Nations on the League of Nations mandated territory of South West Africa. However, while in both 1950 and 1960 the International Court of Justice found the government of South Africa's actions to be inconsistent with the mandatory obligations, in 1966, the Court reversed its position in favor of that government. *See* South West African Case, [1966] I.C.J. 4.

153. F. SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 412-26 (1966).

154. Y. DROR, PUBLIC POLICY-MAKING REEXAMINED 149-53 (1968).

> A military unit in the United Nations to advise the Secretary-General in his capacity as Commander-in-Chief of peace-observation and peace-keeping mission.[155]

To augment this Command, one supervisory military unit in each continent should be established to collect intelligence and to inform the Secretary-General of any situation which threatens world peace and security. The consent of either or both parties to the dispute must be irrelevant to the determination of such a threat. The U.N. must also obtain a mandatory guarantee from its Member-States assuring the United Nations that they will be at the disposal of the United Nations whenever a United Military Force must be deployed to forestall deterioration of the peace. Finally, the United Nations must immediately resume its world peace-keeping mission as originally planned under the U.N. Charter.[156]

With these capabilities, the United Nations should deploy its resources in striving toward the rule of international law and the establishment of a peaceful world order. Moreover, the United Nations must recognize the need for immediate action because any delay in the control and containment of these policies in international political life threatens world order and advancement.

To this end, it is hoped that, with this *inherent* power, the U.N. will be innovative and pragmatic, finally resuming its mandatory role in world peace-keeping, and preservation of human rights. This proposal must be executed immediately if prevailing and future breaches of world peace and crimes against humanity are to be eliminated. It is time that resources and knowledge be directed not toward self-destruction but toward self-improvement. The U.N. cannot achieve this objective without collective support from Member-States and individuals alike. It is neither necessary nor likely that given this support, the U.N. will enjoy full or total success. Rather, all that can be hoped for is *optimal* satisfaction. It is not expected that Member-States should relinquish their sovereignty to the U.N.; what is called for here is simply that some responsibility be assumed by Member-States. The more they are *extra-rational*, the greater the chances for the existence of an extra-rational and effective U.N. peace-keeping mission.

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155. D. WAINHOUSE, INTERNATIONAL PEACE OBSERVATION, A HISTORY AND A FORECAST 618 (1966).

156. J. BOYD, UNITED NATIONS PEACE-KEEPING OPERATIONS: A MILITARY AND POLITICAL APPRAISAL 225 (1971).