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The Authority Of The United Nations To 'Intervene'
Within The Meaning Of Article 2(7) Of The Charter.

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Introduction.

No subject within the discipline of Public International Law is more topical at the present time than that of intervention. The war in Viet-Nam and the American action in the Dominican Republic have, once again, brought this most controversial subject to the fore. These are, however, examples of unilateral intervention and it is not the purpose of this study to elaborate the principles of law, if any, which apply to them. The present purpose is to study certain aspects of the law of intervention under the Charter of the United Nations, itself a topic which engenders a lot of feeling and which has been the subject of controversy ever since the inception of the Organization.

The present study is timely, the United Nations itself at last having turned its thoughts to the study of this question. It is hoped that the following study may shed some light on the practice which has ensued in the organs of the United Nations and the trends which have developed therein in this regard.¹

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1. At its eighteenth session, the General Assembly of the United Nations established a Special Committee on Principles of International Law concerning Friendly Relations and Co-operations among States, the task of this Committee being to prepare a report for the purpose of the progressive development and codification of the four principles designated by the 17th session of the Assembly as of priority concern, so as to secure their more effective application. One of these four principles was that which states that nations shall not intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter. See Hazard, *New Personalities to Create New Law*, 58 A.J.I.L., p. 952, (1964).

Chapter I.

Intervention and the United Nations

The Delimitation of the Problem.

Prior to 1919 and the Treaty of Versailles, intervention in the affairs of other States tended to be a unilateral act by individual countries. History does know of a few attempts at collective intervention, such as, for example, that by Austria, Prussia, Russia and France under the system known as the Concert of Europe, and that by the western European powers and Russia in the internal affairs of the Ottoman Empire. General speaking, however, collective intervention by the international community was an unknown quantity. By contrast, today, collective intervention in the name of the society of nations is one of the commonest types of intervention to be found in the affairs of individual nations. Whereas formerly States acted alone or in ad hoc associations, today the vast majority are linked together in the United Nations and in this collective capacity are frequently charged with intervening in the affairs of individual States.

Under the aegis of the Charter of the United Nations, there has been erected a system which is unique in the history of international relations and international law. The United Nations is not a super-state and yet it bears little resemblance to the conference diplomacy of the nineteenth century. Whereas, prior to 1919 and the establishment of the League of Nations, the international community was diffuse and devoid of any organs through which it could make its feelings known, today it is a closely knit body, drawn together, in the between-war period in the Assembly of the League of Nations and presently in the General Assembly of the United Nations. It is in this latter Assembly that most of the controversial questions and burning issues of the day are raised and debated. It is in the

General Assembly that are heard the panegyrics on the dignity of man and his inalienable rights, the tirades against the suppression of human rights and fundamental freedoms, against colonialism and on the iniquity and inevitably disastrous consequences of the arms race, and the pressing pleas for efforts to raise the standards of living of the underdeveloped two-thirds of the world. But it is also in this Assembly that the charge of illegal intervention in a country's affairs by the United Nations as an entity is most frequently heard.

The United Nations is a many-faceted body, its various characteristics being derived from a duality found in the Charter. The Charter of the United Nations is both a legal and a political document. It is a legal document in that it comprises the constitution of an international organization, imposes legal obligations upon that organization as an entity and on the members severally, and confers rights upon the organization and the members. It is a political document in that it forms a programme of proposed political action, covering matters which had not heretofore been dealt with in international compacts.¹

This dichotomy in its nature has been the fundamental cause of most of the problems of interpretation to be found in the Charter, not least that of interpreting the word 'intervene'. The United Nations has two sides to it - the legal and the political - but there is no easy guide as to which is to have

1. Vallat, Law in the United Nations, 1955 Annual Review of United Nations Affairs, p. 142: " .. In fact the Charter is a threefold instrument. It contains a declaration of faith. It is a constitution. It also contains rules of positive law. This opens wide the doors to differences in interpretation...."

See also the statement by the Australian delegate [G.A., (X), Ad Hoc Pol.Com., 11th mtg., para. 48] to the effect that some delegations appeared to confuse obligations imposed upon the Members by the Charter with the objectives of the United Nations proclaimed in the Charter.

preference. The priority to be accorded to these two facets of the nature of the United Nations is of the greatest importance for it will determine the entire course of the work of the Organization. This question of priority is, of course, fundamentally one of interpretation of the Charter. Interpretation, however, is no touchstone for all the problems inherent in that document. "There are no precise rules of customary or conventional International Law concerning the interpretation of treaties."¹ Interpretation is, of course, primarily a legal matter, but it has important political implications which often influence the direction it will take.²

The complex Charter system is based on two complementary sets of provisions - those which define the functions and powers of the United Nations and establish the field within which those are to be exercised, and those which specify the rights and obligations of the Members, vis à vis the Organization and each other. In a well-ordered system, these two sets of provisions should establish either exclusive zones of competence for the entity and its members, or areas of clearly-defined concurrent jurisdiction. Unfortunately, in the Charter system, the field of activity of the United Nations is not clearly defined and even within this ill-defined area, there appears to be some overlapping of function between the Organization and its Members which is itself not clear. There is some concurrence of power in certain matters, but it is not clearly specified. The drafting of the Charter is inexact, a fact not conducive to the smooth working of a complex international system.

The purposes for which the United Nations was founded are set out in Article 1 of the Charter. These purposes are:

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1. Oppenheim-Lauterpacht, International Law, 8th ed, (London, 1955) para. 553, p. 950.
 2. Bailey, The General Assembly, (London, 1960), p. 99.

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

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

The attainment of these ends is entrusted to the principal organs of the United Nations, viz., The General Assembly, The Security Council, the Economic and Social Council, The Trusteeship Council, The International Court of Justice, and the Secretariat.

To the General Assembly is entrusted the greatest number of functions.

Under Chapter IV of the Charter, the General Assembly is empowered to discuss any questions or any matters within the scope of the Charter or relating to the powers and functions of the other organs and to make recommendations thereon to the Members or to the Security Council or both.¹ In particular it may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments and make recommendations thereon.² Again, it is empowered to

1. Art. 10.

2. Art. 11(1).

discuss any question relating to the maintenance of international peace and security brought before it by a Member State, a non-Member, or by the Security Council and to make recommendations thereon¹ and it may, further, call the attention of the Security Council to any situation which is likely to endanger international peace and security.² The General Assembly is empowered to recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the Charter setting forth the purposes and principles of the United Nations.³ Furthermore, under Chapter VI of the Charter, the Pacific Settlement of Disputes, any State, whether a Member⁴ or non-Member⁵ of the United Nations, may bring before the General Assembly any dispute or situation which might lead to international friction or give rise to a dispute and which might thus endanger the maintenance of international peace and security.

The General Assembly is also given wide powers in the economic and social fields to carry out studies and make recommendations. By Chapter IV of the Charter, it is empowered to make studies and recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁶

1. Art. 11(2).

2. Art. 11(3).

3. Art 14.

4. Art, 35(1)

5. Art. 35(2).

6. Art. 13(2).

The powers of the General Assembly in the economic and social fields are further elaborated by Chapter IX of the Charter, International Economic and Social Co-operation. Under this Chapter, the United Nations, through the medium of the General Assembly and, under its authority, the Economic and Social Council,¹ with a view to the creation of the conditions of stability and well-being which are deemed necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, is enjoined to 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 co-operation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.²

The provision made for economic and social co-operation through the medium of the Economic and Social Council is elaborate.³ This body may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect thereto to the General Assembly, to the Members of the United Nations and to the specialized agencies concerned.⁴ It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.⁵ It may prepare draft conventions for submission

1. Art. 60.

2. Art. 55.

3. Chapter X.

4. Art. 62(1).

5. Art. 62(2).

to the General Assembly, with respect to matters falling within its competence,¹ and call international conferences thereon.²

In the field of the Pacific Settlement of Disputes³ and the action to be taken with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression,⁴ the organ with primary responsibility is the Security Council.⁵ In pursuance of its functions under Chapter VI, the Security Council may, in the case of any dispute the continuance of which is likely to endanger the maintenance of international peace and security, call upon the parties to such dispute to attempt a settlement by negotiation, enquiry, mediation, judicial settlement or other peaceful means.⁶ It may, of its own accord, investigate any dispute or situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of such dispute or situation is likely to endanger the maintenance of international peace and security.⁷ It may investigate and consider any such dispute brought to its attention by a Member⁸ or non-Member.⁹ Furthermore, at any stage of a dispute likely to endanger international peace and security, the Security Council may recommend appropriate procedures or methods of adjustment,¹⁰ or even, in more

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1. Art. 62(3).
 2. Art. 62(4).
 3. Chapter VI.
 4. Chapter VII.
 5. Art. 24(1).
 6. Art. 35(2).
 7. Art. 34.
 8. Art. 35(1).
 9. Art. 35(2).
 10. Art. 36(1).

pressing cases, such terms of settlement as seem to it to be appropriate.¹

The power of the United Nations to take active measures against threats to the peace, breaches of the peace and acts of aggression is confided primarily to the Security Council.² It is the function of the Security Council to determine the existence of any threat to the peace, breach of the peace or act of aggression and to decide what counter measures should be taken.³ To preserve the status quo in any such situation, the Security Council may decree that certain provisional measures are necessary.⁴ In countering threats to the peace, breaches of the peace or acts of aggression, there is no limit to the action which the Security Council can decree, once it has established the existence of such a threat to the peace etc. Such measures can take the form of economic or diplomatic sanctions, or the rupture of some or all means of communication.⁵ The use of armed force is specifically provided for.⁶

A further wide, though rapidly diminishing, field of United Nations activity was provided for in Chapters XII and XIII of the Charter, The International Trusteeship System and The Trusteeship Council. However, the functions of the Trusteeship System and the Trusteeship Council being directed towards territories which have been subjected to an international regime, cannot, by reason of their origin, have any relevance to a consideration of possible United Nations interventions in the domestic affairs of Member States and hence need not be elaborated here.⁷

1. Art. 37(2).

2. Chapter VII of the Charter.

3. Art 39.

4. Art. 40.

5. Art. 41.

6. Art 42.

7. No case is recorded in the Repertory of Practice of United Nations Organs in which the defence of domestic jurisdiction was raised in connection with a Trust Territory.

Similarly, the functions of the International Court of Justice need not be given detailed consideration. While the defence of domestic jurisdiction, and hence the imputation of intervention if jurisdiction were assumed, is often heard in the International Court, once the Court has decided that a dispute does fall within its jurisdiction, no question of intervention can arise. In all cases which have been heard by the Court no State, having had a preliminary objection to the jurisdiction of the Court dismissed, has refused to present its side of the story for the consideration of the Court.

The activities of the United Nations thus appear to range over the entire spectrum of inter and intra-State life. It is difficult when perusing the terms of the Charter to find any subject which is not, in some way, covered by an Article thereof, at least in some degree. The United Nations is concerned not only with the prevention of inter-State disputes, of a purely international character but also, through its economic and social work, with the developments within each State in such seemingly domestic matters as standards of living, full-employment and conditions of economic and social progress and development. The scope of the activities of the United Nations appears almost limitless. However, the area within which the United Nations is free to implement the Purposes for which it was created, and to exercise the powers with which it was endowed was supposedly limited by the San Francisco Conference on International Organization by the insertion into the Charter of the following provision:¹

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.

1. Art. 2(7).

The presence of this Article appears prima facie to clarify the sphere of United Nations jurisdiction. The system foreseen by the Charter would seem thereby to have been clearly divided between the area of full competence of the United Nations and the domain of domestic jurisdiction of the Members from which it was excluded. Unfortunately, however, the system does not work as smoothly as that and for this there are four main and to some extent overlapping reasons.

First, the jurisdiction of the United Nations is defined with reference to the domestic jurisdiction of its Members. Unfortunately, there is no clear distinction between matters which are internal and those which are external. The reservation of matters of domestic jurisdiction from international conventions is one which has had a long history in International Law. Many writers have attempted to elaborate the distinction and treaties providing for the judicial settlement of international disputes have frequently included such a reservation.¹ In the case of the United Nations, the reserved domain of domestic jurisdiction has been the subject of a large periodical literature and has formed the subject of at least one major treatise.² But in none of these has a satisfactory definition of the distinction between matters which are domestic and those which are not, been worked out.

In the case of the United Nations the dubious nature of any definition of competence by reference to the domestic jurisdiction of the Members is shown by a consideration of Articles 10, 13, 14 and 55.

Article 10 states that:

The General Assembly may discuss any questions or any

1. See, Lauterpacht, H., Function of Law in the International Community, (Oxford, 1933), Chaps. 1 and 2.

2. Rajan, United Nations and Domestic Jurisdiction, 2n. ed., (London, 1961).

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

Article 13 states that:

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;

b) promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph (b) above are set forth in Chapters IX and X.

Article 14 states that:

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

Article 55 states that:

With a view to the creation of conditions of stability and well-being necessary for peaceful and friendly relations among nations based on respect for the principles 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-operation; and

c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The General Assembly is empowered to discuss everything within the scope of the Charter and by the terms of Articles 13, 14 and 55 that scope is very wide. These three Articles, together with Articles 1 and 2, which are included

by reference in Article 14, can be deemed to cover almost every aspect of a State's life, both internal and external. The question arises as to whether the mere fact that a subject is mentioned in the Charter brings it within the scope of that document and hence outwith the reserve domain of domestic jurisdiction? If such an interpretation is accepted the result will be to empty the reserve domain of its entire content.

The complexity of this problem can easily be seen by examining, even cursorily, the terms of Article 14. According to the terms of this Article, any situation, regardless of origin, which the General Assembly deems likely to impair the general welfare or friendly relations among nations may be the subject of a recommendation, including situations resulting from a violation of the provisions of the Charter setting forth the Purposes and Principles of the United Nations.

The possibilities of this provision appear to be limitless, unless some check is placed upon them. Indeed the terms of this provision are so wide as to seemingly erase, single handed, whatever restriction was intended by Article 2(7). What subject could not be considered as a situation likely to impair the general welfare or friendly relations among nations? Furthermore, not only is the scope of the provision in its entirety uncertain, but its wording is, to say the least, contentious. When is there an impairment of friendly relations among nations? And when to this already vast field of action is added that resulting from the inclusion of the Purposes and Principles of the United Nations into the terms of Article 14, the resultant jurisdiction seems capable of completely obliterating the domain of jurisdiction reserved to the Member States.

The definition of the competence of the United Nations by referenc to the concept of domestic jurisdiction is completely unsatisfactory. It leaves

that competence vague and ill-defined. The United Nations as an entity cannot know with any certainty to what subjects its mandate extends. The Members as a consequence cannot be sure of the extent of their obligations under the Charter.¹

Secondly, there is no clear definition of what constitutes a threat to the peace, a breach of the peace or an act of aggression, these three occurrences forming an exception to the general prohibition of intervention in the internal affairs of Member States. Is an act of aggression or a breach of the peace necessarily some physical act of force directed against the political independence or territorial integrity of another State?² Many delegations in the United Nations answer this question in the negative. For example, while discussing the racial situation in South Africa the Indian delegate, Mr. Pathak, said that the concept of a threat to the peace was not confined to the case of a threat to the territorial integrity or political independence of a State. A threat to the peace, he said, could assume various forms. In his opinion, flagrant breaches of human rights by the Government of a State could have serious repercussions outside that State and could affect international peace. Peace and the observation of human rights were, in his opinion, closely linked.³

Thirdly, while in general the obligations undertaken by the Members of the United Nations are stated with clarity in the Charter, certain sections which

1. See *infra*, Thirdly.

2. Much work has, of course been done on this problem, but without copious success; see the bibliography on the subject in Sohn, *Cases and Other Materials on World Law*, (Brooklyn, 1950), pp. 801-803; and for extracts from United Nations debates on the subject, see Sohn, *Cases on United Nations Law*, (Brooklyn, 1956), pp. 848-858; for a recent comment on the complexity of the matter, and present United Nations efforts to deal with it, see Hazard, *New Personalities to Create New Law*, 58 *A.J.I.L.*, p. 952 at 956, (1964).

3. G.A., (VII), Ad Hoc Pol.Com., 18th mtg., para. 17.

purport to impose obligations on the Members fail to make clear the exact nature thereof. In particular, the sections dealing with International Economic and Social Co-operation and Non-Self-Governing Territories are obscure in this regard. These provisions impose obligations on the Members but their extent is not clear.

The definite obligations assumed by the Members are: To settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered;¹ to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;² to give to the United Nations every assistance in any action which it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action;³ to pay their duly apportioned shares of the expenses of the Organization;⁴ to accept and carry out the decisions of the Security Council taken in accordance with the Charter;⁵ to make available to the Security Council armed forces in order to contribute to the maintenance of international peace and security;⁶ and to carry out the decisions regarding the maintenance of international peace and security taken by the Security Council under Article 48. Further obligations regarding the pacific settlement of disputes are assumed by those States which have entered into 'regional arrangements

1. Art. 2(3).

2. Art. 2(4).

3. Art. 2(5).

4. Art. 17(2).

5. Art. 25.

6. Art. 43.

or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action'.¹ Members also undertake to comply with the decisions of the International Court of Justice in any case to which they are a party.² Finally, the Members of the United Nations undertake to respect the international character of the responsibilities of the Secretary-General and his staff and not to seek to influence them in the discharge of their responsibilities.³

Chapter IX, however, fails to state the obligations which it purports to impose on the Members with the same clarity. As already noted, Article 55 gives the United Nations a certain authority over a large variety of matters which, prior to the signing of the Charter, had been regarded as within the domestic jurisdiction of States. However, in mentioning these subjects in the Charter, the drafters omitted to make clear, from the terms of the Articles in question, to what extent the United Nations was empowered to deal with them. Whether the mere fact of their mention in the Charter removes these subjects from the domain of domestic jurisdiction is a source of continual friction. Article 56 further confuses the issue. This Article states that 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. To what obligation does this pledge subject the Members? Are they thereby bound to permit the United Nations to prescribe the way in which the domestic life of each shall be organized? Are they, as Kelsen suggests,⁴ committed to

1. Art. 52(1) and (2).

2. Art. 94(1).

3. Art. 100(2).

4. See *infra*, Chap. III, p.63 ; Kelsen, *The Law of the United Nations*, (London, 1950), p. 773.

allowing the United Nations to intervene in their domestic affairs? On the other hand, can this pledge be construed as amounting only to an undertaking to make efforts on the international, as opposed to domestic plane, to achieve those purposes, efforts which are to have a purely exhortatory as opposed to practical value and which leave each State, in the ultimate analysis, free to go its own way? The answer to this is not clear from the Charter.

Chapter IX of the Charter appears to bring into the sphere of international relations subjects which heretofore had not been dealt with on this level. However, it fails to make clear to what extent these have become international matters. It confers a certain concurrence of powers on the United Nations and the Members with respect thereto, but fails to specify the exact extent of this concurrence. What can the United Nations do with respect to these matters and what are the Members bound to do?

Similar observations can be made with respect to the obligations of Member States under Chapter XI, Declaration Regarding Non-Self-Governing Territories.

The failure to specify the exact extent of the obligations of Member States reflects directly on the competence of the United Nations. As soon as a State contracts a definite international obligation with respect to any matter, that matter ceases ipso facto to be within its domestic jurisdiction. It ceases to be a matter with respect to which it can act as it pleases. The competence of the United Nations is delimited with respect to the domestic jurisdiction of its Members. When the content of the reserve domain is uncertain, the competence of the United Nations is correspondingly vague.

Lastly, the word 'intervene' used in Article 2(7) has itself been a source of much controversy. There has been, since the inception of the United Nations,

an inability to agree on what that term means at least in relation to the United Nations as an entity. This is especially unfortunate for on a clear understanding of what is intended by that term must hang the entire case for United Nations action in certain circumstances. Where a matter is clearly not within the domestic jurisdiction of a State then the United Nations is free to act. Where, for example, there has been a clear case of a threat to the peace, a breach of the peace or an act of aggression, the United Nations has a free hand. Such occurrences, irrespective of their origin, cease to be within the domestic jurisdiction of any State and become subject to the plenum of powers of the United Nations.¹ Similarly, where there is a dispute between two States which, though not amounting to a threat to the peace etc., nevertheless is likely to endanger the maintenance of international peace and security, action can be taken by the Security Council under Chapter VI or, subject to Article 12(1), by the General Assembly under Chapter IV. In any of these circumstances the prohibition of intervention has no importance for none of these situations could be said to fall essentially within the domestic jurisdiction of any one State. But where a matter with which the United Nations is asked to deal concerns ^{of} ~~one~~ the penumbral regions of United Nations competence, an area where its authority is obscure and not without uncertainty, or further, concerns something which all, or nearly all, admit falls essentially within the domestic jurisdiction of a State and hence is

1. At San Francisco in 1945, there appeared to be present an intention to prevent the Security Council from passing recommendations under Chapter VII with respect to any such threat to the peace, where the matter concerned arose from the domestic jurisdiction of a State; see *infra*, Chap. VI. In practice, however, this restriction does not appear to have been insisted upon, for the simple reason that no one considers any such matter to be essentially domestic.

subject to the limitations of Article 2(7), then the extent to which the United Nations can deal with it will depend in the ultimate analysis on the definition accorded to the word 'intervene'. The problem of the meaning of the word 'intervene' can be put quite simply: Does 'intervene' mean any kind of action by an organ of the United Nations concerning an essentially domestic matter, no matter how mild and inconsequential, or does it, on the contrary, bear some other more technical meaning. Which ever of these two approaches is adopted will have a profound effect on the functioning of the United Nations as a whole.

The competence of the United Nations is thus defined with reference to two dubious terms - 'domestic jurisdiction' and 'intervention'. It is hardly surprising therefore that objections to the competence of the United Nations should be frequently heard.

Whenever a question arises over which the jurisdiction of the United Nations is in doubt the competence problem can be approached in one of two ways. First, it can be asked whether the matter is within the domestic jurisdiction of a particular State. If the answer is in the negative no problem arises. Frequently, however, as has been pointed out, it will not be possible to give a satisfactory answer to this question. In those circumstances it then becomes imperative to ascertain the meaning of the word 'intervene'. It is with this latter problem that this work is concerned. No attempt will be made to examine the nature of domestic jurisdiction, and indeed every effort will be made to avoid this problem. Much has already been written on this subject and it has amply been demonstrated that no satisfactory general definition thereof can be found, at least vis à vis the United Nations.

The two principal organs of the United Nations in which the charge of intervention has most often been heard are the General Assembly and the Security

Council and it is therefore on their proceedings that this study concentrates. Although Article 2(7) was drafted not least with the Economic and Social Council in mind,¹ this provision has not proved to be the stumbling block to the functioning of that organ that it has in the other two. The plea of domestic jurisdiction has been heard in the Economic and Social Council, but the debates concerned have not been instructive on the question of the definition of intervention accepted by the United Nations, and are not therefore dealt with.²

To be meaningful, the prohibition of intervention by the United Nations in the domestic affairs of any State must be related to the purposes and principles for and on which the Organization was established and to the powers with which it is endowed in order to carry those out.

The General Assembly has the power to discuss³ all questions falling within the scope of the Charter and may, further, make recommendations⁴ thereon. It may consider some matters⁵ and make studies of others.⁶ Furthermore, it is

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1. See, inter alia, The Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, June 26, 1945, (Department of State Publication 2349, Conference Series 71, 1945). The Report is reprinted in 'Hearings before the Committee on Foreign Relations, United States Senate, July 9, 10, 11, 12 and 13, 1945'. This Report is hereinafter referred to as 'American Report - Hearings'. The reference cited here is to be found on p. 58.
 2. For references to debates in the Economic and Social Council in which the plea of domestic jurisdiction was raised, see Repertory of Practice of United Nations Organs, Vol. 1, and Supplements, under the heading of Article 2(7). The Repertory of Practice is hereinafter referred to as 'Repertory'.
 3. Art. 10.
 4. ibid.
 5. Art. 11.
 6. Art. 13.

enjoined to promote certain ends in the economic and social fields.¹

For the Security Council, the problem of intervention arises principally under Chapter VI, the Pacific Settlement of Disputes,² for under Article 2(7) no Member is obliged to submit domestic matters to settlement under the Charter. Thus the question of the extent to which the Security Council can exercise its powers under Chapter VI in relation to domestic matters is of crucial importance. Under Chapter VI, the Security Council may call upon the parties to a dispute to settle it.³ It may conduct investigations of disputes and situations⁴ or recommend appropriate procedures or methods of adjustment.⁵ It may even recommend such terms of settlement as it may consider appropriate.⁶

Each of these powers has to be related to the prohibition of intervention in the domestic affairs of States and in some way rationalized therewith. To do this numerous questions have to be asked and situations examined. Is discussion of the domestic affairs of Members, in general, intervention? Is such a definition too wide? If it is, is intervention by discussion limited to the discussion of the domestic affairs of one State in particular or of a group of States? Is even the mere inclusion of such matters on the agenda of the General Assembly or of the Security Council intervention? Similarly, it has to be considered whether recommendations addressed to all States dealing with their

1. Art. 55.

2. But see Chapter VI on the drafting history of Article 2(7), *infra.* pp. 159-162.

3. Art. 33(1).

4. Art. 34.

5. Art. 36(1).

6. Art. 37(2).

domestic affairs are intervention. If they are not, is intervention by recommendation limited to recommendations addressed to individual States on matters falling within their domestic jurisdiction?

Posed in this fashion, the problem is broad. However, the practice of the United Nations has narrowed it somewhat. It is generally agreed that recommendations addressed to all Members, dealing with matters which, though they might be said to fall within domestic jurisdiction, are common to all, are not intervention. This is the only common sense interpretation of the Charter. The Charter deals in some measure with matters which can be said to be within the domestic jurisdiction of States despite the fact that they are mentioned in the Charter. The fact that these subjects are mentioned in the Charter must mean that the United Nations has some authority to deal therewith. To suggest, for example, that because Members have undertaken no definite obligation with respect to human rights and fundamental freedoms, these subjects remain essentially within the reserve domain and consequently that the United Nations can deal with them in no way would be to render nugatory important provisions of the Charter which could not have been the intention of the founders. The United Nations must be able to consider problems which, though the subject matter thereof is within the domestic jurisdiction of States individually, are nevertheless common to all. Any other interpretation would be ridiculous and is not one which has been pressed in the debates in the United Nations.¹

Thus the problem of attaching a meaning to the word 'intervene' is essentially reduced to considering it in relation to the affairs of particular States or of groups of States.

1. See Preuss, Article 2, paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction, 74 H.R., pp. 584-586, (1949).

The essential purpose of this study is not, however, to discuss these questions in the abstract. It is rather to examine the practice of the General Assembly and of the Security Council on the point to find out whether any coherent pattern of interpretation has developed and if it has to attempt to evaluate it in the light of the provisions of the Charter. Some attention must of necessity be paid to the meaning of intervention in general International Law and also to the views of other commentators on the Charter, but this is principally as a backdrop to the practice of the United Nations itself. Similarly, the drafting history of Article 2(7) is dealt with only in order to demonstrate how far the practice of the organs of the United Nations has adhered to or deviated from the intentions of the original Members.

The practice concerning this problem is considerable. However, to keep the whole matter in perspective, it is necessary to state one qualification at the beginning. The charge of intervention is frequently heard in the councils of the United Nations, but that is not to say that its entire functioning is hampered or vitiated by Article 2(7). The vast majority of the work of the United Nations is quite unaffected by this provision. Albeit that the activities of the United Nations range over the entire spectrum of inter and intra-State life, the charge of intervention though frequently heard in some situations does not have too great an effect on the work of the Organization at large and for this there are two main reasons. First, the paramount purpose of the Charter system is to establish a comprehensive system for the settlement of disputes which arise in the course of a State's external relations. Thus all disputes which are plainly of that nature - and there are many - are by definition included within the ambit of the competence of the United Nations. Secondly, by far the greatest part of the work of the United Nations which concerns matters which appear in many respects to be essentially within the domestic

jurisdiction of the Members takes the form of the encouragement and promotion of genuine international co-operation. Under the aegis of the General Assembly and of the Economic and Social Council there is done a vast amount of work directed towards the betterment of mankind's material position. These activities are made possible because of international co-operation through the United Nations. The United Nations has become the clearing house of international co-operation on a scale hardly contemplated by the founders of the League of Nations some fifty years ago, though its contribution in this field was also not inconsiderable. This international co-operation in economic, health, cultural and other fields, too numerous to list, finds expression in the vast network of Specialized Agencies of the United Nations and special projects organized under the aegis of the United Nations. In these specialized agencies and projects, the importance of which is so often overlooked because they are not controversial and do not hit the headlines, States work together, not principally for themselves, but to further the principal purpose of the operation. Peoples who in times past were implacable enemies, peoples who were formerly in apposition as colonial subjects and imperial masters, are able, in these areas, to work together. This in itself is no mean feat.

However, the reason for this success is not hard to find. It is precisely because this work is in the economic, health, cultural and other fields where vital political interests are not at stake, and more precisely because it does take the form of genuine co-operation, that it meets with almost universal acceptance and approval. But in the political field, where vital national interests are affected, the harmony and desire to co-operate, so evident in non-political, or non-contentious matters, is not so apparent. In the political field national sovereignty is regarded as something to be guarded

assiduously against any erosion perpetrated from outside. Sovereignty, regarded by some writers as an outmoded and even harmful and restrictive doctrine,¹ is carefully protected, though in admittedly varying degrees, by all States. It is this concern for their sovereign rights which makes States so quick to raise the objection of intervention whenever some matter is raised in the United Nations which appears to fall within their domestic jurisdiction and over which they have not expressly renounced their exclusive competence.

The problem of relating the powers of the General Assembly and the Security Council to the prohibition of intervention is not new. Indeed it is as old as the United Nations itself. However, of recent years, a new situation has arisen which has resulted in accusations of intervention being levelled at the United Nations. This is the situation arising from the existence of United Nations peace keeping forces in certain States. Does the existence of such forces, and in particular the United Nations operation in the Congo, render the Organization liable to the charge of unlawful intervention? Where the United Nations takes action under such circumstances, has the prohibition of intervention in the domestic affairs of a nation any importance?

It is not proposed to deal with this subject in any great detail for the simple reason that from a prima facie consideration of the material, it does not appear feasible that Article 2(7) can have much, if any, application to situations such as that which arose as a result of the United Nations operations in the Congo. There seem to be a number of good reasons why this is so. One, when the Charter was drafted, such operations on the part of the United

1. Lauterpacht, H., The Problem of Jurisdictional Immunity of Foreign States, 28 B.Y.I.L., p. 220 (1951).

Nations were never contemplated and hence the word 'intervens' could not have been used by the drafters in a way which could be applicable to the present difficulties. This, of course, would not prevent it acquiring some meaning were the other provisions of the Charter conducive to this, but it is on this point that this particular vessel runs aground. Two, it is the ratio of the advisory opinion of the International Court of Justice on Certain Expenses of the United Nations, that both U.N.E.F. and O.N.U.C. were peace keeping operations. The Court did not indicate what was the legal basis for these. Nevertheless it held that as these were peace keeping operations and as the maintenance and the restoration of peace are two of the principal functions of the United Nations, these two operations were legal, the expenses of which were expenses of the Organization. The following extracts from the Court's opinion illustrate this point. Re U.N.E.F., the Court said:¹

On the other hand, it is apparent that the operations were undertaken to fulfil a prime purpose of the United Nations, that is, to promote and to maintain a peaceful settlement of the situation.

.....
So far as concerns the nature of the situations in the Middle East in 1956, they could be described as 'likely to impair friendly relations among nations', just as well as they could be considered to involve 'the maintenance of international peace and security'.

Re the United Nations operations in the Congo, the Court said:²

The operations in the Congo were initially authorized by the Security Council in the resolution of 14 July 1960 which was adopted without a dissenting vote. The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, was clearly adopted with a view to maintaining international peace and security.

1. I.C.J. Reports 1962, p. 151, at 171, and 172.

2. I.C.J. Reports 1962, p. 175.

Later on the Court continued:¹

It is not necessary for the Court to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operation of O.N.U.C. did not include or use armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve 'preventive or enforcement measures' against any State under Chapter VII and therefore did not constitute 'action' as that term is used in Article 11.

If these operations, and O.N.U.C. in particular, were 'peace keeping' in nature, what room is there for the concept of domestic jurisdiction? The whole purpose of the Charter is to make it clear that once any situation reacts unfavourably on the maintenance of international peace and security, it ceases to be domestic to any one particular State and of course, once this happens no question of intervention can arise for all practical purposes.² Intervention according to the letter of the Charter can arise only where a matter is essentially within the domestic jurisdiction of a particular State. Matters which affect the maintenance of international peace and security are, by definition, not essentially domestic.

This interpretation is supported by the works of the late Professor Lauterpacht, with reference to the general interpretation of the Charter, and also by Dr. D. W. Bowett with particular reference to the Congo operations.

Dealing with the general question of the meaning of 'intervene' in Article 2(7) Professor Lauterpacht said:³

1. *ibid*, p. 177.

2. See Bowett, *United Nations Forces*, (London 1964), pp. 282-285, 424 for minor qualifications of the statement.

3. See Oppenheim-Lauterpacht, *op.cit.*, pp. 418-419, para. 168f(h).

In general, it is doubtful whether, in its present formulation, Article 2, paragraph 7, serves any legally relevant purpose. The action of the Security Council can legally extend to intervention, but seeing that, as a rule, that body is competent only with regard to matters which affect or constitute a threat to international peace and security, such matters, having become the subject of direct international concern, are no longer essentially within the domestic jurisdiction of a State and as such excluded from intervention on the part of the Security Council.

Dealing with the legal basis of the O.N.U.C. force and the question of intervention Dr. Bowett has recently said:¹

In the second place, even where action is undoubtedly under Article 40, since the whole of Chapter VII is predicated upon the assumption that there exists a threat to or breach of international peace, the situation cannot be realistically described as one of "domestic jurisdiction". Hence, as has already been suggested, the Security Council's adherence to the principle of non-intervention during the Congo operations, on the assumption that because O.N.U.C. was not "enforcement action" it was therefore bound by Article 2(7), was unnecessarily rigid and absolute - and indeed had to be departed from in practice.

It is true that from the outset of the Congo operations the Secretary-General considered that the concept of domestic jurisdiction was applicable to the situation.² However, why he did so is not altogether clear. In particular, it is not understood why he continued to lay such stress on the general prohibition of intervention when decisions of the Security Council are binding upon Members under Article 25³ and when the scope for action beyond the terms of Security Council resolutions was, in the event, limited. Under the circumstances which prevailed in the Congo, the only real scope left for the concept of intervention would have been where any action contemplated by the United Nations Force

1. Bowett, op.cit., p. 283; see also, pp. 198, 424.

2. See, in particular, 1st Report by the S-G. on the implementation of S. C. Res. S/4537 of 14 July (S/4389, p. 5); and 2nd Report (S/4417, pp. 6, 11).

3. In its resolution of 9 August, 1960 the Security Council expressly invoked Article 25; for a discussion of this aspect of the Congo Question, see E.M. Miller, Legal Aspects of the United Nations Action in the Congo, 55 A.J.I.L., p. 6, (1961).

was not covered by Security Council decisions nor related to the maintenance or restoration of peace.¹

The whole tenor of the proceedings in the Security Council concerning the Congo affair was to the effect that the United Nations was competent to send a force into the Congo because international peace and security was being threatened.² This being so it is not really understood why the Security Council failed to accept the full implications of this and admit that for most purposes the concept of non-intervention was inapplicable. That it failed to do so may be due, as Dr. Bowett suggests, to the desire not to establish a precedent which would enable the United Nations, in the future, to intervene in the domestic affairs of a State and also to the fact that the whole Congo affairs became embroiled in the East-West conflict.³

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1. As Dr. Bowett points out, even where the United Nations is freed from restrictions upon its freedom of action, because the matter with which it is dealing is no longer essentially within the domestic jurisdiction of a particular State, this would not give it the right, in a situation such as the Congo, to perform such actions as the nationalization of railways, etc., which were not necessitated by the elimination of the threat to international peace. See Bowett, op.cit., pp. 282-5.
 2. See E. M. Miller, op.cit., p. 14.
 3. Bowett: op.cit., p. 191. For further discussions of the Congo situation see Higgins, The Development of International Law Through The Political Organs of the United Nations, (London, 1963) pp. 87-88, 106-110.

Chapter II

The Classical Meaning of 'Intervention'.

1. Early Classical Writers.

The comprehensive treatment of the subject of intervention was not an early phenomenon in the history of international law. For example the subject of intervention, per se, receives no treatment in the works of the early classical writers on international law.¹ It was not in fact till the middle of the eighteenth century that writers came to be concerned with the concept of the duty of non-intervention or non-interference in the affairs of other sovereign States, a duty which is an offshoot of and a necessary

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1. For example, it is absent from the following works: Gentilis, *De Jure Belli Libri Tres*, Classics of International Law, ed. by James Brown Scott, published under the auspices of the Carnegie Endowment for International Peace, (hereinafter referred to as "Classics"). While Gentilis does deal with the subject of self-defence, there is no treatment per se of intervention from this point of view. See also, Pufendorff, *De Jure Naturae et Gentium Libri Octo*, Classics; id. *Elementorum Jurisprudentiae Universalis Libri Duo*, Classics; Bynkershoek, *Quaestionum Juris Publici Libri Duo*, Classics; where, though the term intervention is used, there is no treatment of the subject itself; and Grotius, *De Jure Belli Ac Pacis, Libri Tres*, Classics. Grotius, in fact, did not conceive of an intermediate state between war and peace, and which we today refer to as intervention, and went so far as to state that there could be no such thing. (Bk. III, Chap. XXI, para. I, sub-sec. 1, p. 832.) The modern concept of intervention being concerned with the utilisation of coercive measures short of actual war, it is perhaps not surprising that it should have found no place in a treatise dealing fundamentally with what were the grounds for a just war and in which such circumstances as the need of self-defence, and the grounds of humanity, which are today frequently cited as grounds for intervention, were there treated as themselves grounds for a just war. (On self-defence see *op.cit.* Bk. II, Chap. I, para. III, p. 172; and on humanity, Bk. II, Chap. XXV, para. VIII, p. 583.) See further, Winfield, *The History of Intervention in International Law*, 3 B.Y.I.L.p. 130, 132, (1922-23), (hereinafter referred to as "Winfield, History").

corollary to that fundamental principle of international law, state sovereignty.¹ One of the first writers to enunciate this duty was Vattel, who was closely followed by Wolff.² As a consequence of their sovereignty and independence, all States, in the opinion of these two writers, had the right to resist any interference in their affairs on the part of the other members of the international community.³ However, while both these eighteenth century writers agreed on the principle of the right of States to resist interference in their affairs on the part of other countries, they differed as to how far one

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1. Sovereignty is defined by Grotius, op.cit. Bk. I, Chap. III, p. 91, at p. 102 in the following terms: "That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will."
 2. Vattel, The Law of Nations or The Principles of Natural Law, Classics, para. 54, p. 131: "It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper and that no one of them has the least right to interfere in the government of another. Of all the rights possessed by a nation that of sovereignty is doubtless the most important, and one which others should most carefully respect if they are desirous not to give cause for offence." For a detailed analysis of Vattel's contribution to the development of the doctrine of intervention, see Winfield, History, pp. 132 et seq. Wolff, Jus Gentium Methodo Scientifica Pertractatum, Classics, Chap. II, p. 84 at p. 131, para. 257: "Since by nature no nation has a right to any act which pertains to an exercise of the sovereignty of another nation, since, moreover, the ruler of a state exercises the sovereignty of a State, and since the government consists in the exercise of sovereignty; no ruler of a state has the right to interfere in the government of another, consequently cannot urge that another should establish anything in its state or do anything or not do anything, and the government of the ruler of one state is not subject to the decision of the ruler of any other state."
 3. Vattel, op.cit. Chap. 4, para. 57, p. 132: "Having shown that foreign Nations have no right to interfere in the government of an independent State, it is not difficult to prove that the latter is justified in resisting such interference. To govern itself after its own good pleasure is the adjunct of its independence. A sovereign may not be constrained in this respect, except with reference to certain specific rights which others may have acquired by treaty, and which, since a Nation is naturally jealous of interference in its government cannot be extended beyond the clear and express terms of the treaty. Apart from that case a sovereign has the right to treat as enemies, those who undertake to interfere in its domestic affairs otherwise than by their good offices." Similarly, Wolff, op.cit. para. 269, pp. 137-138.

government could intermeddle in the affairs of another without violating some norm of public international law. In Wolff's opinion, where a ruler treated his subjects harshly, no foreign ruler could resist that by force, though he could intercede on behalf of the oppressed people.¹ But beyond intercession the foreign ruler could not go. Intercession would seem, in Wolff's opinion, not to be within the prohibited degree of interference. In Vattel's opinion, however, oppression of a people by its ruler, oppression amounting to "insupportable tyranny", could found a right in other States to interpose on its behalf, using methods amounting to more than mere intercession.² This right of interposition was, Vattel claimed, particularly applicable where the oppression concerned involved a denial of religious freedom. Where the denial of religious freedom was carried to an "intolerable degree", then in order to help such a people, resort could be had, in his opinion, to measures amounting to more than mere intercession.³

1. Wolff, op.cit. para. 258, p. 132.

2. Vattel, op.cit., para. 56, p. 131; "But if a prince, by violating the fundamental laws; if by his insupportable tyranny, he brings on a national revolt against him, any foreign prince may rightfully give assistance to an oppressed people who have asked for its aid.... To give help to a brave people who are defending their liberties against an oppressor by force of arms is only the part of justice and generosity... But this principle should not be made use of so as to authorize criminal designs against the peace of nations. It is a violation of the Law of Nations to call on subjects to revolt when they are actually obeying their Sovereign, although complaining of his rule."

3. Vattel, Op.Cit., para. 62, p. 134: "Where a form of religion is being oppressed in any country, foreign Nations professing that form may intercede for their brethren; but that is the extent to which they can lawfully go, unless the persecuion is carried to an intolerable degree, when it becomes a case of evident tyranny, against which all Nations may give help to an unfortunate people. Moreover, in the interests of their own welfare they may be justified in defending the oppressed. A King of France answered to the ambassadors who begged him to let his Protestant subjects live in peace that he was master in his Kingdom. But the Protestant sovereigns, who saw a general conspiracy of Catholics bent upon their ruin, had on their part a right to give assistance

The term 'intervention' is nowhere used by either of these two authors in any technical sense.¹ However, both of them sought, in some measure, to formulate some exceptions to the complementary doctrines of state sovereignty and non-interference. Both differed in the extent to which they were willing to allow one State to 'deal with' the affairs of another without being guilty of an infraction of some norm of Public International Law, but nevertheless their writings do point the way to the later developments in the subject. In Wolff's opinion,² while a foreign ruler could not 'interfere' by force to prevent oppression of another people by its ruler, he could 'intercede' on its behalf. Similarly, Vattel drew a distinction between the utilisation of forces to make one sovereign change his methods of administration and 'friendly representations', counselling a wiser course of action.³ Again 'intercession'⁴ and the employment of 'good offices'⁵ were not, in his opinion, prohibited by the doctrine of state sovereignty.

Both these writers were in accord in their willingness to permit one State to

Fn. 5 contd. from p.

to persons who might strengthen their party and help them to avert the ruin with which they were threatened."

We see here the conjunction of what was to become known as humanitarian intervention, with other cogent reasons for intervention. Whenever, in fact, humanitarian reasons have been put forward for an intervention, it is rare for them not to have been backed with some other more tangible political reasons, such as the one given here, self-preservation. See further on this point, Phillimore, Commentaries upon International Law, 3rd ed., (London 1879), Vol. I, Part Fourth, Chap. I, p. 569; and also, Wheaton, Elements of International Law, Dana's ed. Classics, para. 69, pp. 95-97, re the intervention of France, Russia and Great Britain in the affairs of the Ottoman Empire in 1827, for the purpose of the pacification of Greece.

1. Winfield, History, p. 133.

2. *supra*, p. 31., fn. 1.

3. Vattel, *op.cit.*, para. 55, p. 131.

4. *ibid*, para. 62, p. 134; *supra*, p. 31., fn. 3.

5. *ibid*, para. 57, p. 132; *supra*, p. 30., fn. 3.

make representations to another, without being in any way guilty of unlawful interference.

2. Developments of the nineteenth and twentieth centuries.

The subject of intervention received considerable attention during the nineteenth and first half of the twentieth centuries. The history of the period affords numerous examples of its utilisation and practically every major writer on international law has something to say on the subject. However the practice of States does not lead to any very convincing conclusions as to the legality of the various instances of intervention, and it has been cogently pointed out that in the rationalisations of the major text writers we find nothing but confusion.¹ "International Law is at its weakest, and its writers are least convincing, on the subject of intervention...."² This weakness and confusion which surrounds the subject was neatly summed up by Winfield when he wrote:³

"The subject of intervention is one of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all. A reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland. In what purports to be a code of international law, Bluntschli gives no leading definition of a word which is employed in three distinct portions of the book with at least two different meanings. Yet these methods of treating intervention are but natural consequences of the darkness which besets a subject, at no time clear and even now in a fluid condition."

1. Fauchille, *Traité de Droit International Public*, (Paris, 1923) Vol. I (1) para. 305, p. 558; Sibert, *Traité de Droit International Public*, (Paris, 1951), para. 228, p. 546.

2. Smith, *International Law*, 5th ed., by Coleman Phillipson, (London, 1918), p. 88.

3. Winfield, *History*, p. 130.

The circumstances which have most commonly been held to justify an intervention in the affairs of another State include:¹ self-preservation, or self-defence,² these two terms often being used synonymously;³ the terms of a treaty, giving one State the "right" to intervene in the affairs of

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1. The word "justify" is used here in preference to the phrase "bestow a right to intervene", as it can not be said to be settled whether circumstances give a state a right to intervene, thus placing upon the state, subjected to that intervention, the duty to submit to it, [see for example the opinion expressed in Oppenheim - Lauterpacht, para. 135, p. 306] or on the other hand merely justify what would otherwise have been an illegal act; [see for example the opinion expressed by F. de Martens in Traité de Droit International (Paris, 1835), Tome I, para. 76, p. 394.] Among the writers who speak of intervention as a right, without however going so far as to postulate a duty on the part of the subject state to submit to it, are the following: Wheaton, op.cit. Dana's ed. para. 63, p. 76; G.F. de Martens, Précis du Droit des Gens, (Paris, 1858), Tome I, ed. by M.Ch. Verge, p. 212; Heffter, Le Droit International de L'Europe, (Berlin and Paris, 1873), para. 44, p. 94, where he speaks of the exceptional right of intervention; Smith, op.cit. p. 88. Other writers speak rather of the justifications for intervention, e.g. Hyde International Law Chiefly as Interpreted and Applied by the United States, (Boston, 1922), Vol. I, p. 118; Westlake, International Law, Part I, (Cambridge, 1910), p. 318.
 2. Wheaton, op.cit. 6th ed., by A. Beridale Keith, (London, 1929), Vol. I, p. 155; G.F. de Martens, op.cit. p. 211; and in the English edition, The Law of Nations, (London, 1829), p. 69; Manning, The Law of Nations, ed. by Sheldon Amos, (London and Cambridge, 1875), p. 97; Heffter, op.cit. para. 45, p. 96; Phillimore op.cit. p. 560; Hall, Treatise on International Law, 8th ed., by A. Pearce Higgins, (Oxford, 1924), para. 90, p. 338; Oppenheim - Lauterpacht op.cit. para. 136, p. 310; Hyde, op.cit. para. 69, p. 116; Smith, op.cit. p. 89; Westlake, op.cit., p. 318; Cavare, Le Droit International Public Positif, (Paris, 1951), Tom II, p. 444; Breirly, The Law of Nations, 5th ed., (Oxford, 1955), p. 308; Winfield, The Grounds of Intervention in International Law, 5 B.V.I.L. p. 149, atp. 151, (1924); Waldock, The Regulation of the Use of Force By Individual States in International Law, 81 H R., p. 455, at p. 461, (1952).
 3. Winfield, Grounds, p. 151. The terms are used interchangeably, in for example, Oppenheim - Lauterpacht op.cit. However, it is maintained by at least one eminent publicist, (Waldock, op.cit. p. 461) that the better term is self-defence, the term self-preservation being too wide a concept and one which leads only to the doctrine of necessity, which is the rejection of law.

another;¹ a request from one or both of the parties;² the countering of a previous unlawful intervention by another power,³ or of any other breach of international law;⁴ the violation of a treaty to which the intervening State is a party,⁵ and the protection of nationals abroad.⁶ On two other grounds which have been postulated as affording justifications for intervention in the affairs of another State - intervention to maintain the balance of power, and on the grounds of humanity - there has been considerable dispute, not only

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1. See inter alia, Wheaton, loc.cit. 6th ed; G.F.de Martens, loc.cit; Précis; Phillimore, loc.cit; Hall, loc.cit; Oppenheim - Lauterpacht op.cit. para. 135; p. 307; Cavare, loc.cit; Brierly, loc.cit; Waldock, loc.cit; but cf; Smith, op.cit. p. 99; and the opinion of Winfield, Grounds, p. 159, that in general, no statement can be made as to the effect of a treaty on the justifications for intervention. Before any conclusion can be drawn, "A clear knowledge of the parties between whom, and the circumstances in which, the compact was made is necessary;" and cf. the opinion expressed by Oppenheim - Lauterpacht, op.cit. para. 135, p. 309, that one state may obtain a right of intervention from a treaty guaranteeing the form of government or dynasty of a certain country, with that expressed to the contrary by Hall, op.cit. para. 95, p. 345.
 2. G.F.de Martens, Précis, loc.cit; Heffter, loc.cit; Phillimore, loc.cit; but cf. the opinion of Fauchille, op.cit. para. 500², p. 541, that when there is an invitation from the state concerned, there is no intervention at all; and see also, Sibert, op.cit. para. 224, p. 342; and cf. also the opinion of Hall, op.cit. para. 94, p. 346.
 3. Wheaton, loc.cit. 6th ed; F.de Martens, loc.cit; Heffter, loc.cit; Hyde, op.cit. para. 69, p. 116; Hall, op.cit. para. 92, p. 342; Winfield, Grounds, p. 154.
 4. Wheaton, loc.cit. 6th ed; Oppenheim - Lauterpacht op.cit. para. 135, p. 308.
 5. Manning, loc.cit; F.de Martens, loc.cit; Oppenheim - Lauterpacht op.cit. para. 135, p. 307.
 6. Wheaton, loc.cit. 6th ed; Oppenheim - Lauterpacht op.cit. para. 135, p. 309; Waldock, op.cit. 461; but cf. on this point, Hyde, op.cit. para. 69, p. 117, who does not consider interference in the affairs of another country for this purpose as intervention strictu sensu; and similarly, Jessup, A Modern Law of Nations, (New York, 1949), p. 172.

as to their scope, but also whether, due to their manifest possibilities for misuse, they can properly be included in any code of international law.¹ Again, some writers suggest that the total breakdown of government in any country may afford a justification for intervention on the part of the other members of the international community.²

These justifications have one thing in common. They all represent actions undertaken for the protection or enforcement of the international rights of the actor State. In classical writings, therefore, intervention

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1. On the subject of the balance of power, see inter alia, Wheaton, op.cit. Dana's ed. Classics, para. 63, p. 76; G.F.de Martens, Précis, p. 214; F.de Martens, loc.cit; Phillimore, op.cit. p. 560; Oppenheim -Lauterpacht, op.cit. para. 136, p. 310; Whether or not this is still a valid ground for intervention must remain a question of some dispute. It was recognized by Stowell, Intervention in International Law, (Washington, 1921), p. 414; and in the most recent edition of Oppenheim, and was of course the prime moving factor in the recent American intervention in the affairs of Cuba.
On the subject of Humanitarian intervention, see inter alia, Wheaton, op.cit. Dana's ed. para. 69, p. 95-97; Manning, loc.cit; F.de Martens, loc.cit; Phillimore, op.cit. p. 569; Hall, op.cit. para. 92, p. 341 Oppenheim - Lauterpacht, op.cit. para. 137, p. 312; Hyde, op.cit. para. 72 p. 120; Smith, op.cit. p. 98; Stowell, op.cit. p. 51; Winfield, Grounds, p. 161. Again, while doubt has been expressed as to the validity of this ground for intervention, some of the above authors are inclined to accept it, particularly if it is collective; e.g. Oppenheim - Lauterpacht, op.cit. para. 137, p. 313; Smith, op.cit. p. 97.
 2. See Hyde, op.cit. para. 75, p. 123: "A State through neglect, or design, may continuously and increasingly fail to respond to its several international obligations. It may cease to be capable of maintaining adequate government within its territory; it may be persistently guilty of tortious conduct for which no means of redress through any channels are available; it may flout its fiscal or other contractual undertakings and invite national bankruptcy. In a word, it may relapse into a condition of chronic impotence to perform the common duties of a member of the family of nations. Under such circumstances the State forfeits the right to complain if a foreign power or group of powers which have suffered direct injury from its misconduct resorts to intervention." See also Westlake, op.cit. p. 318.

would appear to have been justifiable when necessary for the protection or enforcement of those rights.¹

Having indicated some of main criteria by which, in classical International Law, the legality of an intervention was assessed, it remains to define, with some degree of precision, the actions which are covered by this term.

The definition of such a vague term and one in which there are such diverse opinions is not an easy task. Indeed, some writers, considering that intervention belongs more to the domain of politics than to that of law, doubt whether it can, with advantage, be defined at all.² The Prince of Talleyrand, for example, on being asked to define the meaning of non-intervention, replied facetiously:³

Madame, non-intervention est un mot diplomatique et énigmatique, qui signifie à peu près la même chose qu'intervention.

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1. Stowell, *La Théorie et La Pratique de L'intervention*, 40 H.R., p. 92 (1952): "Le mot 'intervention' considéré du point de vue de droit international, peut être défini: L'emploi juridique de la force à l'égard d'un autre Etat ou à l'égard de ses ressortissants en vue d'assurer le respect du droit international. Si nous acceptons cette définition, il est tout d'abord nécessaire de comprendre ce que signifie l'emploi juridique de la force. Bien entendu, la force ne peut pas s'employer dans un sens juridique, à moins de l'employer en conformité avec la procédure reconnue et de suivre méticuleusement, à chacun de leurs stades, les règles de procédure pratiquées par les Etats dans leurs rapports réciproques. En outre, il convient de remarquer que la force furment appliquée doit, conformément à la procédure reconnue, être légitime, c'est à dire, utilisée pour assurer l'exécution d'un principe reconnu de droit international." See further, *ibid*, pp. 98-99; and also G. F. de Martens, *Précis*, p. 213, see *infra*, p. 38; and Hall, *op.cit.* para. 89, p. 338, see *infra*, p. 38.
 2. Grob, *The Relativity of War and Peace* (London, 1949), p. 226; Fawcett, *Intervention in International Law*, 105 H.R., p. 547 (1961): "Nor shall we start with an attempted definition of intervention, for not only do we broadly recognise intervention when we see it, but it is better to be content with a description of its various aspects than to strive to reduce it to a comprehensive concept, to which intervention does not easily lend itself."
 3. Stapleton, *Intervention and Non-Intervention*, (London, 1866), p. 15.

The nature of an action which could be considered as intervention in the affairs of another State was indicated by G.F. de Martens in his work Précis de Droit des Gens. In that work the author said:¹

.....L'intervention, cette atteinte aux droits souverains d'un Etat, ne peut être justifiée que par la nécessité de sauvegarder les droits également souverains de l'intervenant, et n'est légitime que quand ces droits sont sérieusement menacés. L'intervention, en d'autres termes, c'est la guerre, et toutes les circonstances qui donnent à un Etat une cause légitime de guerre, lui donnent en même temps une juste sujet d'intervention.

To the same effect is the following passage from Hall:²

.....The permissibility of an infringement of the right of independence being thus dependent upon an incompatibility of respect for it with a right which may claim priority over it, the legality of an intervention must depend on the power of the intervening state to show that its action is sanctioned by some principle which can, and in particular does, take precedence over it.

Such wide, general, definitions of the legality of an intervention are, of course, subject to the inherent defect that they are, or can be, subject to widely differing interpretations. However, in this instance, these general definitions, albeit that they relate primarily to the permissibility or legality of an intervention, are not of inconsiderable help in trying to establish criteria by which an act can be classified as intervention or not. From both these definitions, it is clear that intervention is an action, carried out by one State, ostensibly for the purpose of protecting its own sovereign rights, but which at the same time violates, or constitutes a derogation from, the sovereignty of another.

When, therefore, one State is accused of intervention in the affairs

1. At p. 213.

2. Op.cit., para. 89, p. 338.

of another, it has two possible defences. First, it can claim that the act in question was justified by the necessity of defending its own sovereign rights. Secondly, it may claim that the action in question was not intervention strictu sensu. In the case of the first defence, if the interposing State has no sovereign rights to protect, or if the rights which it seeks to protect are not of such a nature as to override the fundamental principle of the inviolability of state sovereignty, then its act may constitute illegal intervention. In the case of the second defence, however, if the sovereign rights of the complainor State have not, because of the nature of the action in question, been violated, then there has been no intervention at all and the particular act does not need to be justified by one of the above reasons in order to escape the general prohibition of unjustified acts of intervention.

In treating with the subject of intervention, some publicists exclude from its purview all actions which, they claim, are either non-political or are not aimed at the political independence of the State concerned. Thus Hyde excluded even a temporary invasion of the territory of another State, undertaken on the grounds of self-defence, or for the protection of nationals abroad, but with no other purpose in mind.

This distinction is certainly useful and one which should always be borne in mind when debating whether or not a particular action is intervention. Intervention, being in the nature of an 'atteinte aux droits souverains d'un Etat', certainly cannot include actions which are not orientated in that direction. However, whether or not a particular act has a political character must remain dependent upon the circumstances in which it is carried out and upon the intention which lies behind it and the resolution of this question itself is sure to raise controversy. For example, it could certainly be argued that one of

Hyde's examples, the temporary invasion of another State's territory, certainly constitutes intervention for the aim here must, in almost all cases, be to ensure the safety of one State by threatening the political independence of another.¹

Other writers draw a distinction between interference in the external and the internal affairs of another State, claiming that only interference in internal affairs can constitute intervention.² The better view, however would seem to be that intervention can take place in either the external or internal affairs of another State.³

It is generally accepted today in general International Law that for an action to constitute an intervention, it must be carried out against the will of the subject state.⁴ The act in question must be dictatorial⁵ or imperative,⁶ and be

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1. Hyde, op.cit., para. 69, p. 117: "It (intervention) is not employed to refer to those cases where, for example, territory is temporarily invaded on the grounds of self-defence, or for the protection of nationals resident therein, and with no further object or result. There are also eliminated the numerous instances of essentially non-political interference in which a State interposes on behalf of nationals deemed to have been denied justice at the hand of another, and merely seeks to attain compensatory damages in their behalf. Nor is there included the demand for redress of a public wrong where the form of reparation involves no impairment of political independence or sacrifice of territory in opposition to the will of the sovereign." See further, Jessup, op.cit., p. 172; but cf. Fauchille op.cit., para. 300³(5), p. 545; and Sibert, op.cit., para. 225. p. 543.
 2. See the authors cited in Fauchille, op.cit., para. 300¹, p. 539, fn. 5; also Cavarré, op.cit., p. 442; and F. de Martens, op.cit., p. 399, where though he recognizes that intervention can take place in either the external or the internal affairs of a country, maintains that there is an essential difference between the two; viz: "Cette dernière est presque toujours un attentat contre l'indépendance et l'autonomie d'une nation, tandis que la première n'a pas, par elle même, ce caractère." The distinction between the two is fully elaborated in Winfield, History, and id. Grounds.
 3. Inter alia, Fauchille, op.cit., para. 300¹, p. 539 and the authors cited therein fn. 4; Oppenheim-Lauterpacht, op.cit., para. 134, p. 305; Grob, op.cit. p. 230; Waldock, op.cit., p. 461; and Brierly, op.cit., p. 308.
 4. Fauchille, op.cit., para. 300, p. 539; Sibert, op.cit., para. 223, p. 451.
 5. Oppenheim-Lauterpacht, op.cit., para. 134, p. 305.
 6. Brierly, op.cit. p. 308.

calculated to impair the territorial integrity or political independence of the state concerned,¹ leaving it no possibility to refuse.² Perhaps one of the best summations of the classical doctrine on the nature of an act of intervention was given by the late Sir Hersch Lauterpacht, in his work International Law and Human Rights, where he said:³

....Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State. It implies a peremptory demand for positive conduct or abstention - a demand which, if not complied with, 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'. In the words of Professor Brierly, in order that we may speak of intervention in its scientific as distinguished from its popular connotation, 'the interference must take an imperative form; it must either be forcible or backed by the threat of force'.⁴ Oppenheim described intervention as a 'dictatorial interference by a State in the affairs of another State,' and emphasized that 'intervention proper is always dictatorial interference, not interference pure and simple.'⁵ Professor Verdross speaks of intervention as taking place when a State threatens another with evil if the latter refuses to yield in a matter which international law leaves to its exclusive jurisdiction.⁶ Professor Stowell in the leading monograph on intervention, refers to it throughout as action aiming at enforcement.⁷ There are few topics of international law in which the uniformity of definition is so impressive and instructive. In order to justify the use of the term 'intervention' in its accepted scientific connotation, there must be an attempt to 'impose the will',⁸ of one or more States upon another State/

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1. Waldock, op.cit., p. 461.
 2. Fauchille, op.cit., para.300², p.540.
 3. Lauterpacht, H., International Law and Human Rights, (London 1950), p.167; but see infra p.44. This work is herein often referred to as 'Lauterpacht, Human Rights'.
 4. Brierly, op.cit.,(4th ed.1949),p.284.
 5. Oppenheim, op.cit.,(2nd ed.1912), para.134.
 6. Verdross, Volkerrecht, (1937), p.203.
 7. Stowell, Intervention in International Law, (1921).
 8. See, Spiropoulos, Traité théorique et pratique de droit international public, (1933), p.131; Accioly, Traité de droit international public Vol. I, (translated from the Portuguese, 1940), p.279.

in an 'imperative form.'¹

Intervention is thus a peremptory demand or an attempt at interference accompanied by enforcement or threat of enforcement in case of non-compliance.

The essence therefore, of an intervention is to be found, not so much in its form, as in its intention. To constitute an intervention, there must be present an intention to impose one will on another,² such imposition constituting a violation of the subject State's sovereignty. Such intervention can take many forms and vary in degree.³ It can be in the form of diplomatic representations, written or spoken, formal or informal. It may be armed. It can be direct or disguised, positive or negative, the direct or positive variety taking the form of an effective interference in the affairs of another state, the disguised or negative form being represented by the prevention of intervention on the part of other states.⁴ Again, it may be manifest, or on the other hand, secret and dissimulated.⁵ But whatever

1. Strupp, in 47 H.R., p. 513 (1934).

2. See further, Sibert, op.cit. para. 223, p. 341; Cavarié, op.cit. p. 442; Fauchille, op.cit. para. 300, p. 538.

3. Sir William Harcourt, Letters by Historicus on Some Questions of International Law, reprinted from The Times (London and Cambridge, 1865), A Letter on the Perils of Intervention, p. 41: "Now, Intervention may be of various kinds and of different degrees. As a famous physician said of scarlet fever, it may be anything from a fleabite to the plague. And it is by no means impossible that it may begin with one and end with the other. There are many persons with whom the milder or fleabite form seems to be highly popular. Remonstrance, advice, moral force and mediation, are the phrases which pass glibly current, and are assumed to be at once innocuous and efficacious, yet it is not to be wondered at if those on whom devolves the responsibility of actions should pause to consider whether, in fact, they are likely in the result to prove either."

4. Fauchille, op.cit. para. 300³, p. 543.

5. *ibid.* "On peut distinguer encore à l'époque moderne une intervention ouverte, et une intervention occulte ou dissimulée. La première a lieu par l'emploi de la force armée ou par la remise de notes diplomatiques, verbales ou écrites. La seconde, plus dangereuse parce qu'elle est sournoise et se cache, se fait au moyen d'agents qu'on envoie à l'étranger ou qu'on y recrute en les achetants, de journaux qu'on y crée ou qu'on stipendie, de tracts et de brochures qu'on expédie ou qu'on repand après les avoir établis sur place dans les imprimeries spéciales. Cette dernière intervention est avant tout une intervention de propagande."

form it takes, to constitute an intervention, there must be present that essential element - the imperious wish of one State to impose its will on another.

In the development of the doctrine on intervention, there has been general agreement among writers, that such types of 'interference' as, mediation, intercession, good offices, or as Oppenheim termed it,¹ "interference pure and simple," were not within the prohibited degree of intervention,² although the matter is not without some confusion.³ No conclusion however, can be drawn from the mere name under which any action may be masquerading. Thus, while in normal circumstances diplomatic representations, demands for explanations and offers of mediation etc., do not constitute intervention, they may, in certain circumstances, conceivably do so. Fauchille conveniently summed up the position when he said:⁴

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1. Oppenheim - Lauterpacht, op.cit. para. 134, p. 305.
 2. Wheaton, op.cit. 6th ed. p. 156: "It, (intervention) need not take the form of military or naval action, but it is distinguished as dictatorial, making a claim of right, from mere friendly representations or mediation or the use of good offices between States at war or in danger of war."
ibid. Dana's ed., Classics, p. 100, para. 73: "The approved usage of nations authorizes the proposal by one State of its good offices or mediation for the settlement of the intestine dissensions of another State. When such an offer is accepted by the contending parties, it becomes a just title for the interference of the mediating power."
ibid. fn. 40: "Publicists have assigned the words 'intervention' and 'interposition' to express the interference of one State in the affairs of another by force or with force as the known ultimate sanction.....But the term 'mediation' is limited to an offer of advice or of assistance in the way of arbitration, leaving the acceptance of the offer to the free will of the other party."
 See also, F.de Martens, op.cit. p. 394; Heffter, op.cit. p. 95; Westlake, op.cit. p. 320; Cavare, op.cit. p. 443; Fauchille, op.cit. para. 300², p. 540; Erierly, op.cit. p. 308; Stapleton, op.cit. pp. 8, 9.
 3. See, for example Phillimore, op.cit. particularly at p. 620, where no clear distinction is maintained between dictatorial and other types of interference.
 4. Fauchille, op.cit. para. 300² (1), p. 540.

".... Il résulte de la qu'une demande d'explications ou des représentations diplomatiques au sujet d'une mesure projetée, que des conseils, une offre des bons offices ou une proposition de médiation ne sont pas constitutives d'une intervention. - Ce n'est pas à dire cependant que l'intervention exige une certaine violence, matérielle ou morale; une ingérence qui use de ruse ou de dissimulation bien plus que de violence constitue une intervention. Ce qui caractérise l'intervention, c'est que l'acte d'immixtion est imposé à celui qui le subit, ne peut être par lui librement accepté ou refusé; une médiation sera donc une intervention si elle est imposée."

Similar views find expression in Jessup's, A Modern Law of Nations, viz:¹

".....Intervention may or may not involve the use of force. It is frequently possible for a powerful state to impair the political independence of another weaker state without actually utilising its armed forces. This result may be accomplished by lending open approval, as by the relaxation of an arms embargo, to a revolutionary group headed by individuals ready to accept the political or economic dominance of the intervening state. It may be accomplished by the withholding of recognition of a new government, combined with various forms of economic and financial pressure until the will of the stronger state prevails through the resignation or overthrow of the government disapproved."

Care must therefore always be exercised when considering a case of purported intervention, for in classical doctrine it mattered not how force manifested itself. Where there has been coercion, utilised to impose the will of one State on another, then whether this force was manifest or dissimulated, an intervention has taken place.

3. A Caveat: Dictatorial Interference.

The acceptance of the apparently simple definition of intervention as 'dictatorial interference' contains a hidden danger. What is 'dictatorial' is very much a question of opinion and of the surrounding circumstances. Force, or the desire of one State to impose its will on another, can take many forms. However, despite the warnings to this effect contained in such authors as

1. Jessup, op.cit. p. 172.

Fauchille and Jessup, this appears to be overlooked on occasions. The judgement of the International Court of Justice in the Asylum Case¹ and the comments thereon by the late Sir Hersch Lauterpacht aptly demonstrate this.

In its judgement, the International Court stated that, in its opinion, the granting of asylum to Haya de la Torre in the Colombian Embassy in Lima, contrary to the terms of the 1928 Havana Convention on Asylum, constituted intervention by Colombia in the domestic affairs of Peru, intervention 'in its least acceptable form.'² In Professor Lauterpacht's opinion this dictum appears to constitute a departure from the accepted definition of intervention, outlined above, for in the grant of asylum there is, it is claimed, little that could be said to be dictatorial.³

There seems to be no inherent reason why the grant of asylum to Haya de la Torre by the Colombian Embassy cannot be regarded as a dictatorial act. Colombia, by her action, sheltered a Peruvian national from the operation of the law of his own State and asked that he be granted a safe conduct in order that he might escape altogether the punishment due to him thereunder. It could easily be argued that by such an act, Colombia was seeking to force on Peru her own views as to the merits of the case.

To maintain that this dictum of the International Court constitutes a departure from the accepted definition of intervention, appears unnecessarily to limit the types of action which can be grouped under the heading 'dictatorial interference'. It appears, as indeed does Professor Lauterpacht's whole definition, to confine 'intervention' to acts which are backed by what might

1. Colombian Peruvian Asylum Case, I.C.J. Reports, 1950, p. 266.

2. *ibid*, p. 285.

3. Lauterpacht, H., The Development of International Law by the International Court, (London, 1958), p. 82.

be called 'paramount force', such as, for example, armed force, or the imposition of an economic blockade in an effort to bend the will of the State concerned. There appears to be no apparent reason why 'intervention' or 'dictatorial interference' need be so narrowly construed.¹ As Fauchille pointed out, in order to constitute intervention, neither material nor moral force is required. Guile will suffice just as well. What is required is the intent of one State to impose its will on another and it matters not how it goes about doing this.²

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1. Professor Lauterpacht himself, in the same place, did remark that a definition which limits intervention to dictatorial interference, as he understood that term, might itself be open to question; see loc. cit. p. 82.
 2. "Intervention" as that term is used in classical international law, thus comprises various manifestations of force, up to and including the use of armed force itself. The question must therefore arise in what way intervention differs from war proper.

Since the international community, if not still, at least prior to the establishment of the League of Nations, lacked any centralized enforcement agency to ensure respect for national rights, each State had the right to resort to measures of self-help, which could be carried as far as outright war. Indeed, in the opinion of some writers, war was the most extreme form of intervention. (See, for example, Brierly, op.cit., p. 308; G.F. de Martens, Précis, p. 215). Nevertheless, with the decline in popularity of the distinction between just and unjust wars, a distinction was developed between forcible measures of self-help falling short of actual war and war itself. Such a distinction is not, of course, easy to maintain, for whatever it is called 'a fight remains a fight.' (Winfield, History, p. 147. Winfield in fact maintains that there is no distinction between war and belligerent external intervention.) Furthermore, the fact that till classical international law became subject to the cumulative influence of the Covenant of the League of Nations, the General Treaty for the Renunciation of War and the Charter of the United Nations, war was a licit estate, makes it difficult to see why writers and statesmen should have gone to such lengths to distinguish between minor uses of armed force and outright war, when no legal approbation attached to the latter. (For a short explanation on this point, see Waldock, op.cit., p. 457.) Nevertheless this distinction was drawn, though the fact that it is, in logic, difficult to maintain, may have

added grist to the mill of those who contend that the subject of intervention pertains more to the realm of international politics rather than of law.

The difference between war proper and intervention in its most forceful form would appear to lie solely in the intention of the party who undertakes these actions. The nature of this distinction has been explained by Fawcett thus: [Fawcett, *Intervention in International Law*, 103 H.R., p. 384 (1961); see further, Hall, op.cit., para. 88, p. 337; and Winfield, *Grounds*, p. 141:] "The purpose of intervention in force, which is not defensive, is commonly limited to the attainment of a few specific objectives and it is this limitation of purpose which might be said to differentiate intervention and war: for the purposes of war are unlimited in the sense that, subject to the rules of war which may be applicable and observed, a belligerent regards every point in the enemy's position, political, economic or military, as an object for attack. Though intervention may well initiate war, its objectives normally fall short of the larger objectives of war."

According to this definition, therefore, the intention of the party undertaking the act of intervention is the determining criterion, and no matter how forceful that action may be, if the intention is limited, in the above fashion, then it may not be considered as war and may even, in theory, be considered compatible with friendship towards the subject state. (Hall, op.cit., para. 88, p. 337.)

This distinction seems, however, very artificial and it is doubtful if, in practice, it would today serve any useful purpose at all.

The artificiality of this distinction between intervention and war proper seems to add another reason for not confining "intervention" to 'dictatorial interference' of the more 'paramount' type. To confine 'intervention' to forceful measures of this variety would be to blur the distinction between this type of action and war. If the concept of intervention is to serve any useful purpose in international law, it is surely better to comprehend by that term dictatorial measures of a less forceful variety.

Chapter III.

The Meaning of the Word 'Intervene' and the Views of Commentators on the Charter.

Juristic opinion on the meaning of intervention in the law of the United Nations is divided. First, there is the 'technical' or 'narrow' school of interpretation which contends that the word 'intervene', as used in the Charter bears its classical meaning of dictatorial interference, elaborated above. Second, there is the 'non-technical' or 'broad' school of interpretation which maintains that, as used in the Charter, the word 'intervene' connotes 'interference, pure and simple' in the domestic affairs of a State. To the former belong such authorities as Cassin, Bentwich and Martin, Cohen, Higgins, Rajan, Wright and Lauterpacht. In the latter are included Goodrich and Hambro, Preuss, Kelsen, Robinson and Ross.

Before reviewing the differences between these two schools of thought, however, one point of agreement should be noted. With one important exception, it is generally agreed by all these writers that a general recommendation addressed to all Member States and dealing with a matter which, though its domestic-international status is in doubt, is none the less common to all, does not constitute intervention in the domestic affairs of any one of them. In this respect, therefore, the views of commentators on the Charter, of all shades of opinion, is in accordance with the actual practice of the United Nations itself. This point apart, however, there seems to be a fundamental difference of approach to the interpretation of this term by the two schools.

1. The Technical or Narrow School of Interpretation.

At the Hague Academy, in 1951, Professor Rene Cassin defined intervention, in relation to Article 2(7) thus:¹

1. La Declaration Universelle et La Mise en Œuvre Des Droits de L'Homme, 79 H.R., p. 253 (1951).

.....L'Article 2, § 7, n'interdirait que l'intervention des Nations-Unies dans les affaires de droits de l'homme supposées réservées à la compétence nationale des Etats, c'est à dire, l'immixtion au sens technique et impératif du mot se manifestant par des injonctions ou des ordres. Mais il n'interdit ni les conseils, ni les études, enquêtes ou rapports, ni les recommandations ou projets de conventions.

In their commentary on the Charter, Bentwich and Martin agree that general recommendations, not addressed to a particular State are not intervention. However, they go much further than this and in general support the technical interpretation. They say:¹

.....the Organization's activities must stop short of intervention. 'Intervention' has a technical meaning in international law. It means 'dictatorial interference by a State in the affairs of another State for the purpose of maintaining or altering the actual condition of things'² - a direct pressure exercised through force or the threat of force or, at least, through a demand purporting to be made by right. The discussion or study of a problem, or an inquiry into it, by an organ of the United Nations is not 'intervention'; not even a formal recommendation is intervention if it does not purport to decide the issue against one or several of the parties. Recommendations not addressed to an individual State but disposing of a problem in general terms cannot, as a rule, be regarded as intervention.

Cohen, in the Oliver Wendel Holmes Lectures, delivered at Harvard in 1961, came to more or less the same conclusions, though his reasons for doing so seem to be related more to the nature of a domestic matter than to the criteria of intervention.³

1. A Commentary on the Charter of the United Nations, (London, 1950), p. 17.

2. Oppenheim-Lauterpacht, op.cit., 6th ed., p. 272.

3. Cohen, The United Nations: Constitutional Developments, Growth and Possibilities, (Harvard Univ. Press, 1961), p. 25:

".....Although one form of recommendation may be less wise or less expedient than another in a particular situation, I do not see the basis in Article 2, paragraph 7, for excluding recommendations as constituting intervention unless they call for sanctions."

In support of this conclusion, he gives, inter alia, the following reasons:
" Take the troublesome Algerian question. Of course if it became a threat to, or caused a breach of, international peace within the meaning of Article 39

In his exhaustive study of the domestic jurisdiction problem in Article 2(7) of the Charter, Rajan appears to come to the conclusion that the technical interpretation of intervention is borne out by the practice of the organs of the United Nations. He says:¹

In determining the field of United Nations jurisdiction in relation to the domestic jurisdiction of states under the Charter, two criteria need to be used. The criterion of intervention envisages that, subject to one exception, United Nations organs, in acting in concrete cases that come before them, cannot go beyond discussion, recommendation (addressed whether to a specified state or states generally), study, investigation, conciliation and mediation, and that the only sanction behind these actions is the high moral authority and prestige of a great international forum.

The most far reaching, and even devastating analysis of the meaning of the word 'intervene' as used in the Charter, undertaken by writers of this persuasion, is that of the late Professor Lauterpacht. As was seen above,² in general

Fn. 3 contd. from p. 49

of Chapter VII, the Security Council could take cognizance of it. But should Article 2, paragraph 7, be construed to deny the Security Council the power to consider it at an earlier stage, if the Council finds in the language of Article 34 of Chapter VI that 'the continuance of the dispute or situation is likely to endanger international peace and security'? Or should the General Assembly, if the Security Council is not dealing with the situation, be denied the power to consider the situation if in the language of Article 15 of Chapter IV the situation is one which the Assembly 'deems likely to impair the general welfare or friendly relations among nations?'

To be sure, it may be wiser for the Council or the Assembly to defer, as the Assembly has on occasions, discussions of the situation in the hope that deferment will facilitate peaceful settlement. But that is quite different from maintaining that unless and until the Algerian situation has become an imminent threat to international peace under Chapter VII, it must be considered an internal French problem not appropriate for discussion, mediation, or recommendation by the United Nations."

1. Rajan, United Nations and Domestic Jurisdiction, (London, 1961), pp. 385-6.
2. Chapter II.

international law he adopted a strict technical definition of intervention. For him, intervention signified 'a peremptory demand or an attempt at interference accompanied by enforcement or threat of enforcement in case of non-compliance'.¹ He applied this definition to the United Nations Charter, but with such rigor as to render the apparent content of Article 2(7) meaningless, a fact which he himself was the first to recognize. As a result of his analysis of the Charter, on this basis, he came to the conclusion that in its present form Article 2(7) served little, if any legally relevant purpose at all.²

Professor Lauterpacht's entire approach to the problem of Article 2(7) is perhaps best illustrated by reference to a short sentence which he used in his eighth edition of Oppenheim on the subject. That Article, he said, contained a negative principle of 'alarming comprehensiveness,' which unless put in the perspective of the Charter as a whole, could obscure the meaning of its most significant provisions.³ It is inherent in this dictum, and indeed, in his whole approach to the interpretation of Article 2(7), that this Article must be read subject to the rest of the Charter, and not the other way round, as would seem, on the face of it, to be the intention. In adopting this view, he is diametrically opposed to the views of such writers as Kelsen,⁴ and even of some of the authorities who in general share his views on the technical meaning of intervention.⁵

As a consequence of his interpretation of the word 'intervene' Professor

1. Lauterpacht, Human Rights, p. 168.

2. Oppenheim-Lauterpacht, op.cit., para. 168f(h), p. 418.

3. *ibid*, para. 168b (5) p. 408.

4. see *infra*, p.62.

5. e.g. Rajan, op.cit., p. 36.



Lauterpacht concluded that the several functions of the General Assembly, the Economic and Social Council and of the Security Council under Chapter VI of the Charter, cannot amount to intervention. Thus, he said:¹

The exclusion of the right of 'intervention' on the part of the United Nations must be interpreted by reference to the accepted technical meaning of that term. It excludes intervention conceived as dictatorial, mandatory interference intended to exercise direct pressure upon the State concerned. It does not rule out action by way of discussion, study, inquiry and recommendation falling short of intervention.

In the same work, he examined the complex problem of the nature of recommendations and came to the conclusion that, in general, a recommendation, even if addressed to one specific State, does not constitute intervention. He concluded that as recommendation, discussion and inquiry cannot amount to intervention, and that as the General Assembly, the Economic and Social Council and the Security Council under Chapter VI of the Charter, have only those powers, those organs are not capable of intervention at all, and hence that Article 2(7) as far as they are concerned is meaningless.² The final position is summarized thus:³

In general, it is doubtful whether, in its present formulation, Article 2, paragraph 7, serves any legally relevant purpose. With regard to the General Assembly and the Economic and Social Council the prohibition of intervention seems irrelevant for the reason that these bodies, lacking as they normally do, the power to take enforceable decisions legally binding upon the members of the United Nations, cannot intervene. The action of the Security Council can legally extend to intervention, but seeing that, as a rule, that body is competent only with regard to matters which affect or constitute a threat to international peace and security, such matters, having become the subject of direct international concern, are no longer essentially within the domestic jurisdiction of a

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1. Oppenheim--Lauterpacht, op.cit., para. 168f(b), p. 415.
 2. *ibid*, para. 168f(e), p. 416.
 3. *ibid*, para. 168f(h), p. 418.

State and as such excluded from intervention on the part of the Security Council..... It is probable that the only legally relevant - and efficacious - purpose of that provision is to prevent intervention by way of legislative action of the United Nations in such matters as regulation of tariffs, and admission of aliens, with reference to which some States have traditionally exhibited particular apprehension of international interference.

However, Professor Lauterpacht did formulate one exception to his very narrow definition of intervention. In certain circumstances United Nations action, though taking the form of a recommendation, may amount to intervention. Recommendations though phrased in the permissive language common to such documents, may amount to a directive and in such cases, if the matter with which they deal is essentially within the domestic jurisdiction of any State, intervention will have taken place. Thus he said:¹

In so far as a 'recommendation', although not implying a legal obligation to accept it, is calculated to exercise direct pressure, likely to be followed by measures of enforcement, upon a State in a matter which is essentially within its domestic jurisdiction, it is probable that it would come within the terms of Article 2, paragraph 7.

Again, in his work, International Law and Human Rights he said:²

.....Undoubtedly, when a 'recommendation' is in fact in the nature of a decision the disregard of which may in certain eventualities involve coercion, it is arguable - we cannot put it higher than that - that it may fall within the terms of Article 2, paragraph 7. This might be the case with regard to recommendations of the Security Council acting, at an advanced stage of the dispute, under Chapter VI of the Charter, i.e., in connection with a dispute likely to constitute a threat to the peace - although in such cases, because the dispute has assumed an international character and is no longer essentially within the domestic jurisdiction of the State, the applicability of Article 2, paragraph 7, may become altogether doubtful.

However, apart from this admittedly unusual and, it seems, almost impossible

1. *ibid*, para. 168f(c), p. 416.

2. p. 170.

case, the fact that a recommendation, inquiry or discussion, either by the General Assembly or the Economic and Social Council or by the Security Council under Chapter VI of the Charter, may be phrased or conducted in such a fashion as to mould a State's attitude towards the question or be calculated to focus world opinion upon the conduct of the so-called recalcitrant State, will not render any such organ guilty of intervention in the domestic affairs of that State. In Professor Lauterpacht's opinion, persuasions of that kind cannot be prevented by any provision of the Charter.¹

1. *ibid.*, pp. 169-170.

In all his writings on this subject, Professor Lauterpacht evinced the same opinion. For example in his lectures on the subject of The International Protection of Human Rights, delivered at the Hague Academy [70 H.R., p. 5, (1947)], he explained why recommendations concerning this subject could not amount to intervention. Though the citation of this work does involve a certain amount of repetition, the following passage is set out as it does contain certain points not in the other explanations of this point of view. Here he said: (*loc.cit.* p. 19: emphasis added).

".....In order to justify the use of the term 'intervention' in its accepted scientific connotation, there must be an attempt to 'impose the will' by one State upon another in 'an imperative form'.....

Intervention is thus a peremptory demand accompanied by enforcement or threat of enforcement in case of non-compliance. This interpretation of the term 'intervene' supplies an answer to the question of the limits of the action of the organs of the United Nations undertaken in order to encourage and promote the observance of human rights and freedoms. Thus it would follow that the General Assembly or the Economic and Social Council, or any other competent organ of the United Nations, are authorized to discuss a situation arising from any alleged non-observance by a State or a number of States of their obligation to respect human rights and freedoms. The object of such discussion may be the initiation of a study of the problem under the aegis of the United Nations; it may be a recommendation of a general nature addressed to Members at large and covering in broad terms the subject of the complaint; or it may even be a recommendation of a specific nature addressed to the State directly concerned and drawing its attention to the propriety of bringing about a situation in conformity with the obligations of the Charter. None of these steps can be considered as amounting to intervention. None of them constitutes peremptory, dictatorial, interference. None of them compels or bends

the unwilling determination of a State. They may mould its attitude, but this is a matter different from compulsion. There is no legal obligation to accept a recommendation or take into account the general sense of a discussion or to act upon the results of an inquiry. There may be pressure of the public opinion of the world as expressed through these channels. That kind of persuasion no provision of the Charter would have been able to prevent. Undoubtedly, when a 'recommendation' is in fact in the nature of a decision the disregard of which may in certain eventualities involve coercion, it may fall within the terms of Article 2, paragraph 7. This would be the case with regard to recommendations of the Security Council acting under Chapter VI of the Charter, i.e., in connection with disputes likely to constitute a threat to peace - although in such cases, because the dispute has become international and is no longer essentially within the domestic jurisdiction of the State, the application of Article 2, paragraph 7, may become altogether doubtful. One of the reasons for the formulation of Article 2, paragraph 7, as finally adopted, was the desire to exclude the possibility of the Security Council making a specific recommendation, addressed to the parties to the dispute, in a matter which is essentially within their domestic jurisdiction. This does not mean that Article 2, paragraph 7, excludes recommendations, either specific or general, with regard to other spheres of the activities of the United Nations. In these other spheres a recommendation, even if specifically addressed to a State, not being in the nature of a binding decision the disregard of which may entail legal consequences, does not constitute intervention. Neither is it certain that an enquiry would amount to intervention so long as it does not take place in the territory of the State concerned against its will. The wide limitation of Article 2, paragraph 7, was inserted at San Francisco - in contrast with the limitation of the Dumbarton Oaks Proposals which excluded such intervention only in connection with the settlement of disputes - for the reason that, as in the meantime the United Nations and, especially its Economic and Social Council were granted broader powers and authority, it was necessary expressly to exclude the possibility of their 'interfering directly in the domestic economy, social structure, or cultural or educational arrangements of the member State'. The intention was to exclude direct legislative intervention by the United Nations in matters normally reserved to the legislature of the State.Direct legislative interference by the United Nations - i.e., an attempt to impose upon States rules of conduct as a matter of legal right - would clearly come within the orbit of intervention.

In view of this it is somewhat startling to observe that in 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' and that they have taken for granted that the term 'intervention' is synonymous with interference and any other kind of active concern with matters falling within that sphere. There is no warrant for any such interpretation."

In arriving at this view of intervention, Professor Lauterpacht appeared to have placed considerable emphasis on the non-binding

quality of a recommendation. A recommendation, not having any binding effect, could not, in his opinion, amount to a peremptory demand. However, several years later while delivering his separate opinion in the South-West Africa - Voting Procedures Advisory Opinion, (1955 I.C.J. Reports, p. 67), he appeared to have changed his opinion somewhat on the legal effect of a recommendation. The view expressed in this opinion, if carried over to his analysis of the meaning of intervention, could have profound effects thereon. On this subject he said, p. 115 et seq.

" Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited effect in other spheres, it may be said, by way of a broad generalization, that they are not legally binding upon the Members of the United Nations. In some matters - such as the election of the Secretary-General, election of members of the Economic and Social Council and of some members of the Trusteeship Council, the adoption of rules of procedure, admission to, suspension from and termination of membership, and approval of the budget and the apportionment of expenses - the full legal effects of the Resolutions of the General Assembly are undeniable. But, in general, they are in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them..... Now 'resolutions' cover two distinct matters: They cover occasional decisions which have a definite binding effect either in relation to Members of the United Nations or to its organs or both, or the United Nations as a whole. But normally they refer to recommendations, properly so-called, whose legal effect, although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation.

This, in principle, is also the position with respect to the recommendations of the General Assembly in relation to the administrations of trust territories. The Trusteeship Agreements do not provide for a legal obligation of the Administering Authority to comply with the decisions of the organs of the United Nations in the matter of trusteeship. Thus, there is no legal obligation on the part of the Administering Authority to give effect to a recommendation of the General Assembly to adopt or depart from a particular course of legislation or any particular administrative measure.

.....
 However, even in relation to the Administering Authority the question of the effect of the decisions of the General Assembly cannot accurately be answered by the simple statement that they are not legally binding. In general it is clear that as the General Assembly has no power of decision - as distinguished from recommendation - imposing itself with binding force upon the substantive action of the Member States, its Resolutions have

per se no binding force in relation to the Administering State. Thus that State is not bound to comply with any specific Resolution recommending it to undertake or to abstain from any particular legislative or administrative action. What has been challenged - and, I believe, properly challenged - is its right simply to ignore the recommendations and to abstain from aducing reasons for not putting them into effect or for not submitting them for examination with a view to giving effect to them. What has been questioned is the opinion that a recommendation is of no legal effect whatsoever. A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision. These obligations appear intangible and almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation; they have been acknowledged as such by the Administering Authorities.

Both principle and practice would thus appear to suggest that the discretion which, in the sphere of the administration of Trust territories or territories assimilated thereto, is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly, is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised. This is particularly so in relation to a succession of recommendations on the same subject and with regard to the same State, solemnly affirmed by the General Assembly. Whatever may be the content of the recommendation and whatever may be the nature of the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which the Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly. The same considerations apply to Resolutions in the sphere of territories administered by virtue of the principles of the System of Trusteeship. Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An Administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has been guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State

The distinction contained in Professor Lauterpacht's analysis of Article 2(7), between recommendations which violate the prohibition of intervention and those which do not, between recommendations which are, in fact, in the nature of decisions and those which are not legally binding, finds some support in the work of Professor Quincy Wright. He too draws a distinction between recommendations which, though dealing with the domestic affairs of a particular State, are nevertheless permissible and those which are not. The type of distinction which he draws is different from that of Lauterpacht. Nevertheless it is important to note that there are at least two authorities who have tried in some measure to differentiate between various kinds of recommendations and who have not made the bald assertion that no recommendation, irrespective of

Fn. 1 contd. from p.

which consistently sets itself above the solemnly and repeatedly expressed judgement of the Organization, in particular in proportion as that judgement approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it had exposed itself to consequences legitimately following as a legal sanction."

Admittedly these dicta were uttered in very particular circumstances. Nevertheless, they don't appear to be confined to recommendations made in any particular situation. Professor Lauterpacht appears to claim that in all recommendations there is a certain element of legal obligation, the disregard of which is not a matter of unfettered will. If this is so, to what extent does this affect his analysis of the meaning of intervention which seemed to be based on the complete absence of that element.

For a full discussion of the legal effect of recommendations of the General Assembly see Sloan, The Binding Force of a 'Recommendation' of the General Assembly of the United Nations, 25 B.Y.I.L., p. 1 (1948), and Johnson, The Effect of Resolutions of the General Assembly of the United Nations, 32 B.Y.I.L., p. 97 (1955-6); also the separate opinion of Judge Klaestad in the South-West Africa - Voting Procedures Advisory Opinion, I.C.J. Reports, 1955, pp. 87-88; and also Corfu Channel Case, I.C.J. Reports, 1948, pp. 51-52 - Joint opinion of seven judges and Dissenting opinion of Judge Daxner, *ibid*, pp. 53-55.

its character, can amount to intervention.¹

1. In Professor Wright's opinion the United Nations was prohibited "from addressing resolutions to, or concerning, a particular state, critical of its behaviour or mobilizing action against it, except in reference to its international obligations or consequent upon their breach." See, Wright, International Law and the United Nations, (1956), p. 386. (Quoted from Higgins, op.cit., p. 82).

In his work, International Law and the United Nations, (London, 1960), p. 60 et seq., Professor Wright expressed himself thus:

"The Charter permits the Security Council to 'call upon' members or to 'utilize' regional agencies to preserve international peace and security; permits the General Assembly and Security Council to 'recommend' action by members to carry out the purposes and principles of the Charter, and permits the Economic and Social Council and the Trusteeship Council, within the scope of their functions, to make 'recommendations' to members. Such resolutions, while they might in some instances urge 'intervention' in the affairs of a state by members or regional agencies, would not usually constitute intervention by the United Nations itself. To place a matter on the agenda, to discuss it, to study it or to pass a general resolution on principles would clearly not be to intervene. It thus appears that few otherwise permissible activities of United Nations organs are subject to the limitations of Article 2(7).

.....

To summarize, Article 2(7) does not prevent the organs of the United Nations from passing a resolution on matters within the domestic jurisdiction of a member provided the resolution is not in a form constituting intervention....."

As one would expect, Professor Wright does not feel that general recommendations addressed to all States on matters within domestic jurisdiction constitute intervention. In the same work, p. 62 he said:

"United Nations organs have felt free to pass resolutions dealing with matters which are essentially within the domestic jurisdiction of a state so long as the resolution applies a principle and is formally addressed to all members or to all members of a particular class, such as members administering non-self-governing territories, and does not propose action against, or in the territory of a particular state. Such resolutions are generally conceded not to constitute 'intervention' by the United Nations....."

See further, Wright, Is Discussion Intervention, 50 A.J.I.L., p. 102 (1956): for a criticism of Professor Wright's views on this subject see further, Higgins, op.cit., pp. 82-83.

The views held by the 'technical' school of interpretation are quite devastating in their effect. If their interpretation is applied to Article 2(7), it appears that there are no limitations of any magnitude upon the power of the United Nations to deal with matters which are essentially within the domestic jurisdiction of a particular State, a result which seems to be at variance with the explicit terms of the Charter.

2. The 'Non-Technical' or 'Broad' School of Interpretation.

Opposed to the technical or narrow school of interpretation are the views of those commentators who can be grouped under this heading. These are exemplified by the work of Goodrich and Hambro who, in their work "The Charter of the United Nations"¹ state their case thus:

The practice of the United Nations makes it clear, as indeed does the phraseology of Article 2, paragraph 7, that the word 'intervention' as used in the paragraph is not to be given a narrow technical interpretation. While discussion does not amount to intervention, the creation of a commission of enquiry, the making of a recommendation of a procedural or substantive nature, or the taking of a binding decision constitutes intervention under the terms of this paragraph. To limit intervention to coercive measures would have the result of limiting the application of the paragraph to the field of the exception which obviously could not have been intended.

Other commentators who have followed in the wake of Goodrich and Hambro have gone much further. For example, Preuss and Kelsen are not prepared to allow even discussion of the domestic matters of a particular State. Furthermore, it appears that Kelsen even considers a general recommendation dealing with matters within the domestic jurisdiction of all States to constitute intervention, even though these matters are common to all and the recommendation is addressed to members generally.

1. (London, 1949), p. 120: see also Goodrich, The United Nations, (London, 1960), pp. 78-79.

Preuss accepts that general recommendations are not intervention.¹ However, his views on any dealings with the affairs of one particular State are much more stringent. In his lectures at the Hague Academy, in 1949, on this subject, he said:²

The above conclusions are reinforced by considerations suggested by the general scheme of the Charter, which is based upon a differentiation between the activities of the Organization which relate to the promotion of the general welfare of nations and the removal of the underlying causes of war, and those which relate to the maintenance or restoration of international peace and security. The General Assembly and its associated organ, the Economic and Social Council, are entrusted with the responsibility in the former fields, and so long as they fulfil their primary functions of discussing, considering and making recommendations concerning the general principles of international co-operation, their activities are not restricted by the limitation contained in the domestic jurisdiction clause. Only if they should attempt to exceed their powers by penetrating into the domestic life of states (which is beyond their general competence under the Charter), by engaging in censorious discussions of the domestic affairs of a particular state, or by addressing to a particular state recommendations implying or expressing criticism of the conduct of its domestic policies, would their action come within the prohibition of intervention under the Charter.

Likewise he held that the Security Council could not exercise any of its

1. Preuss, op.cit. p. 586;

".....From these discussions, there emerges a distinction between recommendations addressed to member states generally and relating to matters 'within the scope of the present Charter', and recommendations addressed to specific states and relating to matters essentially within their domestic jurisdiction. General recommendations, and any discussion leading thereto, are consistent with the pledge of member states to take joint and separate action in co-operation with the Organization for achieving the economic and social goals set forth in the Charter. Applicable to all Members, they would not be viewed as interventions, even if they should concern a matter regarded in principle as falling within the domestic jurisdiction of individual states. Specific recommendations relating to matters within that sphere would, on the other hand, constitute a form of interference which the framers plainly wished to avoid, and which, by common understanding, they considered to be prohibited under the Charter."

2. *ibid.*, p. 586.

functions under Chapter VI with respect to a domestic matter.¹

Of the views grouped together under this heading those of Kelsen are the most stringent. Just as Lauterpacht in his zeal to see the United Nations, and the provisions respecting human rights and fundamental freedoms in particular, effective, so extended the competence of the Organization, and of the General Assembly and the Economic and Social Council in particular, as to virtually destroy the restrictions of Article 2(7), so Kelsen by his withering logic so restricted the powers of the United Nations by reference to this Article as to make the Charter, to a large extent, appear unworkable.

Whereas, for Lauterpacht, Article 2(7) was a principle which had to be read together with and subject to the other provisions of the Charter, for Kelsen this Article assumed the position of one of the three governing Articles of the Charter.²

Kelsen acknowledges that in general international law the term 'intervention' has a technical meaning.³ Nevertheless, in his opinion, the usage of the term

1. *ibid*, p. 537.

2. Kelsen, *The Law of the United Nations*, (London, 1950), p. 769:

"The general provisions of the Charter conferring functions upon the Organization and obligations upon the Members are subject to the important restrictions established by Article 2, paragraph 7, concerning matters of domestic jurisdiction, Article 51 concerning the right of self-defence, and Articles 55 and 107 concerning action in relation to former enemy states.

.....
This paragraph [Article 2(7)] comprises two different rules. One prohibits intervention on the part of the Organization in matters which are essentially within the domestic jurisdiction of any state; another releases the Members from submitting such matters to settlement under the Charter. The first rule establishes a restriction on the competence of the Organization, the second a restriction on the obligations of the Members."

3. *ibid*, p. 770.

in the Charter connotes a much wider range of activities than just dictatorial interference in another State's domestic affairs. For him, it covers all the activities of the United Nations. Thus he says:¹

Article 2, paragraph 7 of the Charter prohibits not only - as Article 15, paragraph 8, of the Covenant did - recommendations by the Council but any kind of intervention by any organ of the United Nations (except the case referred to in the second sentence of Article 2, paragraph 7). By the term 'intervene' any activity of the Organization may be understood.

As has been pointed out, these activities comprise, on the part of the General Assembly, discussion, consideration and recommendation, and the initiation of studies and promotion of economic and social welfare; on the part of the Security Council investigation and recommendation; and on the part of the Economic and Social Council, the making or initiation of studies and recommendations. Under the definition adopted by Kelsen, none of these activities would be possible with reference to a matter which fell within domestic jurisdiction.

This definition, though restrictive, is certainly possible. However, it produces serious conflicts with other Articles of the Charter, in particular with those of Chapters IX and X, International Economic and Social Co-operation, and the Economic and Social Council. Kelsen noted that, particularly with reference to Articles 55 and 62, it is hardly possible for the United Nations to fulfil its stated functions without intervening in matters which fall essentially within the domestic jurisdiction of States. Thus, he found the Charter to be inconsistent. Again, in his opinion, Article 56 which obliges Members to take joint and separate action in co-operation with the Organization for the achievement of the purposes set out in Article 55 appears to be inconsistent with Article 2(7). In Kelsen's opinion, Article 56 can be construed to mean that Members are obliged to

1. *ibid*, p. 772.

permit intervention by the United Nations in the matters referred to in Article 55, even if these are essentially within their domestic jurisdiction, an obligation obviously at variance with the terms of Article 2(7).¹

Because of his interpretation of the word 'intervene', serious conflicts arise within the Charter. However, in general, Kelsen contents himself with noting the resultant conflicts and inconsistencies and refrains from trying to elaborate some other meaning of that term which will eliminate these. However, in defence of his interpretation it may be said that confining the competence of the United Nations within such narrow limits may be no worse than the corresponding extreme definition of Professor Lauterpacht. The one so restricts the powers of the Organization as to seemingly destroy its prima facie intention; the other, however, so enlarges its power as to make the restrictions written into the Charter, for the protection of the Members virtually meaningless.

However, Kelsen does make one concession in favour of the stricter and, in this case, more common sense interpretation of the term, although he points out it is not one which is justified by the terms of the Charter.² Where the question as to whether a matter is or is not essentially within the domestic jurisdiction of a State, is to be decided by an organ of the United Nations, then, in his opinion, discussion and investigation of the subject are not prohibited by Article 2(7). This is an obvious exception to make and yet, as will be seen in later Chapters, it is not one which is accepted by some of the most important members of the United Nations, and is not specifically provided for in the Charter. In the Charter, the power to make investigations is expressly

1. *ibid*, p. 773.

2. *ibid*, pp. 772-773.

conferred only on the Security Council, and then only for the purpose of determining whether the continuance of a dispute or situation is likely to endanger the maintenance of international peace and security,¹ not to enable any organ to decide whether a matter is domestic or not.² Common sense here clashes with logic.³

1. Art. 54.

2. Kelsen, op.cit., p. 773.

3. The full effect of Kelsen's approach to the Charter and the place which Article 2(7) occupies therein is seen in the following extract from Chapter 19 of The Law of the United Nations, pp. 786-788:

".....The enforcement measures under Chapter VII are certainly methods - the most radical methods - of intervening in matters of the Members. Hence the prohibition of intervention proclaimed in the first sentence must be interpreted as restricted by the second sentence. This sentence authorizes the Organization to intervene even in a matter which is essentially within the domestic jurisdiction of a state.

The second sentence of Article 2, paragraph 7 does not allow any kind of intervention. Only enforcement measures are allowed in case the matter is essentially within the domestic jurisdiction of a state.

Are 'enforcement measures' only measures involving the use of armed force as determined in Article 42; or also measures taken in accordance with Article 41, not involving the use of armed force? It is probable that the latter interpretation corresponds to the intention of those who drafted the Charter. If so, in the case of domestic jurisdiction, the following acts of intervention on the part of the United Nations are excluded by Article 2, paragraph 7: recommendations by the General Assembly referred to in Article 10; Article 11, paragraph 2 and Article 14; calling upon the parties on the part of the Security Council to settle their dispute by peaceful means of their own choice under Article 33, paragraph 2; investigation of the dispute or situation by the Security Council referred to in Article 34; determination by the Security Council whether the continuation of the dispute or situation is likely to endanger the maintenance of international peace and security under the same Article; recommendation of appropriate procedures or methods of adjustment by the Security Council under Article 36, paragraph 1, or Article 37, paragraph 2; recommendation of terms of settlement by the Security Council under Article 37, paragraph 2; further recommendations of the Security Council referred to in Article 39; 'provisional measures' taken by the Security Council under Article 40 if not taken as 'enforcement measures', that is to say, under the sanction provided for in Article 39. There can be no doubt that the continuance of a dispute arising out of a matter which according to the opinion of one of the contesting parties is essentially within its domestic jurisdiction may

3 contd. endanger the maintenance of international peace and security. But, according to the wording of Article 2, paragraph 7, the Security Council is not allowed to investigate such dispute and to determine whether its continuance is likely to endanger the maintenance of international peace and security under Article 34 of the Charter, since this is not an enforcement action. But the Council may decide to take enforcement action according to Article 39. This Article must be interpreted to mean that to 'make recommendations or decide what measures should be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security' is only possible after the Security Council has determined 'the existence of a threat to the peace, a breach of the peace or an act of aggression.' This determination has about the same character as the action of the Security Council provided in Article 34 by the terms, 'to determine whether the continuance of a dispute or situation is likely to endanger the maintenance of international peace and security.' The latter action is forbidden by Article 2, paragraph 7 as an intervention which has not the character of an enforcement measure under Chapter VII. To determine the existence of a threat to the peace, breach of the peace or act of aggression, is certainly a measure under Chapter VII; but it is in itself no enforcement measure under Chapter VII. If Article 2, paragraph 7 is taken literally, the Security Council is not allowed to determine, in a domestic matter, the existence of a threat to the peace, breach of the peace or act of aggression."

Kelsen, noting that such an interpretation is hardly possible, and that therefore Article 2(7) cannot be interpreted too literally, continues:

".....If intervention by enforcement measures under Chapter VII in matters of domestic jurisdiction is allowed, then intervention by determining the existence of a threat to the peace, breach of the peace, or an act of aggression in such matters of domestic jurisdiction must be allowed as well. Then it is not understandable why the Security Council just in domestic matters should be allowed to determine the existence of a threat to the peace, but not allowed to investigate a dispute and to determine whether its continuance is likely to endanger the maintenance of international peace and security; why the Security Council should be allowed to take enforcement actions but not to recommend procedure or methods of adjustment and terms of settlement, and how it can take such enforcement measures without investigating the dispute and determining its dangerous character. A reasonable application of the second sentence of Article 2, paragraph 7, is possible only if it is interpreted to mean that the principle laid down in the first sentence shall not prejudice the application of Chapter VII (instead of application of 'enforcement measures under Chapter VII')."

For other statements supporting the broad or non-technical interpretation of intervention see, Robinson; Human Rights and Fundamental Freedoms in the Charter of the United Nations, (1946), pp. 41-46, 70, 74-76, and 79; Ross, The Proviso Concerning 'Domestic Jurisdiction' in Article 2, paragraph 7 of the Charter of the United Nations, 1949-50 *Osterreichische Zeitschrift Für Öffentliches Recht*, pp. 566-568. While Ross is in favour of general recommendations by the General Assembly and the Economic and Social Council, which are not 'pointedly directed towards a particular country,' he opposes any other activity by any organ of the United Nations, and in particular any activity on the part of the General Assembly or the Security Council under Chapter VI; and Vallat, The Competence of the United Nations General Assembly, 97 H.R., pp. 236-238 (1959).

3. Conclusions.

Neither of these two approaches to the interpretation of Article 2(7) and the word 'intervene' is entirely satisfactory. The technical or narrow school, by their tenacity to a classical definition, worked out in and fitted for circumstances vastly different from those which obtain today, interpret the restrictions upon the Organization's competence out of existence. The non-technical or broad school, by the very flexibility and breadth of their definition, considerably reduce the effectiveness of other important sections of the Charter; and if Kelsen's views are accepted, much of the rest of the Charter is virtually interpreted out of existence.

The technical definition has the advantage that it enables the United Nations to function with relative ease. Under this doctrine, the apparent restrictions contained in Article 2(7) cease to have any major importance and the United Nations is able to deal with virtually any matter without being harassed by the plea of domestic jurisdiction and intervention. The disadvantage lies in the seeming disregard for the plain words of the Charter and the corresponding lesion to those States which joined the United Nations under some other comprehension of that Article. This interpretation opens the door dangerously wide to undesirable political developments in the United Nations. It leaves individual nations vulnerable to attacks, based not on any bona fide application of an Article of the Charter, but on political malice.

The non-technical interpretation has the advantage that it gives full protection to the concept of national sovereignty, as the term is used in the Charter. It protects each member of the United Nations from political attacks of the type which appear to be encouraged by the other definition. Nevertheless, it has the great disadvantage of restricting the power of the United Nations in the economic, social and humanitarian fields, matters of paramount concern to everyone.

Chapter IV.

The Apparent Accepted Definition of 'Intervention' in the General Assembly.

In the practice of the United Nations statements on the meaning of the word 'intervene' in Article 2(7) have tended to crystallize round the views of the two schools of thought examined in Chapter III.¹ Some Members adhere to the view that intervention in United Nations law must bear its normal meaning of interference; others that it means dictatorial interference in the sense in which that term was used, particularly by the late Professor Lauterpacht.

Arguments concerning the nature of intervention in United Nations law have been particularly important in the debates on the adoption of the agenda. Some Members have maintained that as intervention must mean 'interference pure and simple', no matter which concerns the domestic affairs of a particular State can be discussed in the General Assembly or made the subject of recommendations thereof, and hence that no such item can be included in the agenda. This argument is perhaps best set out in syllogistic form thus:

1. The item concerned deals with matters which are essentially within the domestic jurisdiction of State X;
2. Discussion of such matters and the adoption of recommendations thereon constitutes intervention and is therefore prohibited by Article 2(7);
3. Therefore, the General Assembly cannot include such items on its agenda.

The core of this proposition is that substantive discussion constitutes intervention. Discussion is the most elementary power of the General Assembly and the one on which the fulfilment of all others depends. If it cannot discuss, it cannot do anything. It is not unnatural, therefore, that States which have adhered to the non-technical definition of intervention should have been particularly careful to

1. For a list of references to statements citing the works discussed in Chapter III, see Repertory, Vol. I, p. 150, pp. 313-314; *ibid*, Supplement No. 1, Vol. I, p. 56, fn. 153; *ibid*, Supplement No. 2, Vol. I, p. 164, fn. 162.

condemn even discussion of the domestic affairs of a particular State as intervention for if they succeeded in establishing this, then the United Nations would be unable to take any action with respect to such an item.

There are three aspects to the problem of the nature of discussion - the substantive, the preliminary or jurisdictional and the procedural.

Discussion is substantive when it is concerned with the merits of a particular matter. It is preliminary or jurisdictional when it is concerned with the claim of one State or a group of States that a certain item lies within domestic jurisdiction. When a matter is claimed to be within domestic jurisdiction, it is essential that there be some discussion of and decision on this claim. Such discussion and resultant decision are essentially preliminary matters. Discussion is essentially procedural in character when it is concerned with, inter alia, when that preliminary debate is to be held and decision taken.

The prohibition of intervention has to be related to each of these aspects of discussion. What is the extent of this prohibition and how does it affect each of these aspects? Is the General Assembly thereby prohibited from even discussing the substance of any matter brought to its attention which in any way falls essentially within the domestic jurisdiction of a particular State? The issue is quite simply this: Is the General Assembly powerless in a case where a dispute, situation or complaint has arisen between two or more States regarding a matter which is admitted to be within the domestic jurisdiction of one of them? For example, would the General Assembly be powerless to discuss a situation resulting from the immigration policy of one State in particular? In such circumstances, must the General Assembly decline even to hear one of the parties because to do so would intervene in the domestic affairs of the other? Can the General Assembly not, for example, offer its good offices to the States concerned in an effort to resolve the matter? Alternatively, must it depend for

its power of discussion and further action upon the consent of the State within whose domestic jurisdiction the matter falls?

The answer to these questions fundamentally affects the procedure and substantive powers of the United Nations with respect to such matters. If it were established that in the practice of the General Assembly substantive discussion is not considered as intervention in the domestic affairs of a particular State, it would then become necessary to consider in some detail just exactly what kind of recommendation, if any, the Assembly could adopt with respect thereto. It would not, however, be necessary to give any consideration to the status of preliminary or jurisdictional discussion or to that of procedural discussion and inclusion for, if substantive discussion were found not to constitute intervention, a fortiori neither would any of these.

On the other hand, if it were established that, in practice, the majority of Members consider substantive discussion of the domestic affairs of a particular State as intervention, it would not be necessary to consider further the status of recommendations on and studies of the domestic affairs of a particular State. These, a fortiori, would constitute intervention. However, the establishment of such an interpretation would render it necessary to consider the status of preliminary or jurisdictional discussion, procedural discussion and the actual inclusion of an item on the agenda. It would become necessary to consider whether the General Assembly has the power to discuss a matter in order to take a decision on its status. It would become necessary to consider when such a discussion should take place - before or after the inclusion of an item on the agenda.

Since many of the arguments regarding the nature of intervention have been put forward in an effort to justify the inclusion of items in or their exclusion from the agenda, attention has, at this stage, been concentrated on the debates on the adoption of the agenda. If regard is had principally to these debates, it appears

that the majority of States which have considered this question adhere to the non-technical definition of intervention and consider substantive discussion of and recommendations on the domestic affairs of a particular State as intervention.

1. Case Histories and Relevant Arguments Put Forward by the Various Delegations.

(a) The Non-Technical Definition - Substantive Discussion Does Constitute Intervention.

In the period under review, objections to the inclusion of items on the agenda of the General Assembly on the ground that any discussion thereof would constitute intervention were voiced in the following cases: The Treatment of People of Indian Origin in South Africa; The Observance of Human Rights in the Union of Soviet Socialist Republics; The Observance of Human Rights in Bulgaria, Hungary and Romania; The Question of Morocco; The Tunisian Questions; The Question of Race Conflict in South Africa; The Question of Cyprus; The Question of West Irian; The Algerian Question; The Question of Hungary; The Question of Tibet; The Question of Oman; The Angolan Question and the Question of Southern Rhodesia.

Case 2. The Treatment of People of Indian Origin in the Republic of South Africa.¹

The question of the treatment accorded to the peoples of Indian origin living in the Republic of South Africa has been subject to constant United Nations attention ever since the foundation of the world body. In the period under review, it was discussed at the first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth and seventeenth session, i.e., at all but one of the

1. The numbering of cases in the following pages is that used in the Repertory of Practice of the United Nations Organs, relevant to Article 2(7).

sessions of the General Assembly.¹

It was first brought to the attention of the General Assembly by the representative of India, in a letter dated 22nd June 1946.² The Indian representative, and later the representative of Pakistan,³ maintained that the treatment accorded to the people of Indian origin living in South Africa, as a result of the South African Government's racial policy, was contrary to the Charter provisions on human rights and to the Cape Town Agreements concluded in 1927 and 1932 between the Governments of South Africa and India.⁴ They further maintained that by such treatment, the Government of the Union of South Africa had created a situation which impaired friendly relations among nations within the meaning of Article 14 of the Charter.

At each of those sessions, South Africa opposed, on the grounds of Article 2(7), all the substantive resolutions which were proposed, but, initially at least, did not oppose the inscription of the item on the agenda of the General Assembly. At the first, second, third, and fifth sessions of the General Assembly, the item was included on the agenda without vote, there being no formal objection by South Africa or any other nation to its inclusion.⁵ At the first session of the General Assembly, for example, it was not until the subject was taken up in

1. In this and subsequent cases, where convenient, the summary of the case history and relevant facts has been taken from the Repertory.

2. G.A., (I/2), Joint 1st and 6th Com., pp. 52-53, Annex 1; Doc. A/149.

3. A certain number of the people concerned had originated in that part of the Indian subcontinent which is now Pakistan.

4. For the text of those agreements and other facts relevant to the position of Indians in South Africa, see G.A., (I/2), Joint 1st and 6th Com., Annex 1a (A/68), pp. 53/81; Annex 1b (A/167), pp. 81-114; and Annex 1c (A/167/Add1), pp. 114-131.

5. Repertory, Vol. 1, p. 67, para. 45.

the Joint First and Sixth Committee, to which the matter had been referred, that Field Marshal Smuts raised the question of the competence of the United Nations to deal with the matter. Here he maintained that the treatment of those people was a matter essentially within the domestic jurisdiction of South Africa,¹ and indeed wished to refer this legal question to the International Court of Justice for an advisory opinion,² a proposal which was not accepted.³ In this first session however, as in the second, third and fifth, no formal objection was made, in the debate on the adoption of the agenda, to the inclusion of this item. South Africa did not immediately adopt its attitude that inscription of an item was barred because it was domestic.

While, at the third session of the General Assembly, no formal objection was made by South Africa to the inclusion of this item on the agenda, it is from this session that can be traced the development of the idea that perhaps even to include an item in the agenda constituted intervention, when that item dealt with matters which one state considered to be within its domestic jurisdiction. During the debate on the adoption of the agenda, the South African delegate, Mr. Louw, declared that the treatment of those South Africans of Indian origin was a domestic matter and that the United Nations was not competent to decide it.⁴ South Africa objected, he said, to interference in the conduct of its domestic affairs by any nation or international organization.⁵ However, despite South African views on the competence of the Organization to

1. G.A., (I/2), Joint 1st and 6th Com., 1st mtg., p. 3 et seq.

2. *ibid*, p. 4.

3. G.A., (I/2), Plen., 52nd mtg., p. 1061.

4. G.A., (III/1), Plen., 146th mtg., p. 221.

5. *ibid*, p. 222.

consider the item, he did not make a formal objection to inclusion at this session, because he obtained from the President of the Assembly a ruling that the mere fact of inclusion did not settle the question of competence, which could still be raised in committee. Mr. Louw said that:¹

The South African delegation considered that a decision to place an item on the agenda was in fact tantamount to a decision that consideration of the item in question was within the competence of the General Assembly. It believed, however, that there was some difference of opinion on that point and that there were those who maintained that the question of competence could be more appropriately dealt with and decided upon by the 1st Committee before it proceeded to examine whether the allegations of the complaining party were well founded or not.

Mr. Louw went on to say that if he were assured that he could raise the question of competence in committee before the issue of substance were dealt with, he would not press the matter at this juncture. In reply to this statement, the President of the Assembly, Mr. H. V. Evatt of Australia, stated that² if this item was placed on the agenda, it would be referred to the First Committee and that the South African representative could then, as he had stated he intended to do, raise the question of the competence of the General Assembly. In that case, in accordance with rule 110 of the rules of procedure, (now rule 122) the motion regarding competence would be put to the vote immediately before the vote was taken on the proposal in question. While it will be noted that Mr. Louw's request and the President's reply do not at all correspond, Mr. Louw declared himself satisfied with this procedure.

Mr. Louw was evidently under the impression that he had obtained the assurance he had asked for. He was soon to discover his mistake. At the beginning of the discussion of the item in the First Committee, the South African representative

1. *ibid*, p. 224; emphasis added.

2. *ibid*, p. 225.

asked the Chairman to rule that under rule 110 of the rules of procedure "the matter of competence must be discussed and decided upon by the First Committee before the substance of the question was discussed!"¹ The Chairman, however, did not make a ruling on this point but rather treated the South African request that the question of competence be dealt with first as a motion to that effect, which he proceeded to put to the vote. This motion was defeated and the Committee proceeded to discuss the substance of the item, without first deciding, even provisionally, on its competence to do so.² The South African delegation thereupon withdrew from the table. No decision on the question of competence was taken until after the general debate on substance, when a South African motion denying the competence of the United Nations to deal with the matter was defeated.³

At the fifth session, a similar attempt by the South African delegation to have the question of competence dealt with prior to any discussion of the substance of the matter was also to no avail.⁴ It may with confidence be

1. G.A., (III/2), 1st Com., 263rd mtg., pp. 246-7.

2. *ibid*, p. 255. There was no roll-call vote. Argentina and Belgium also favoured priority for the discussion on competence.

3. G.A., (III/2), 1st Com., 268th mtg., p. 321. The details of voting were as follows:

In favour: Argentina, Brazil, Greece, Netherlands, Union of South Africa,

Against: Venezuela, Yemen, Yugoslavia, Afghanistan, Byelorussian S.S.R., Chile, China, Colombia, Costa Rica, Cuba, Denmark, Ecuador, Egypt, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Mexico, Norway, Pakistan, Panama, Philippines, Poland, Saudi-Arabia, Siam, Syria, Ukrainian S.S.R., U.S.S.R., U.S.A., Uruguay.

Abstaining: Australia, Belgium, Burma, Canada, Dominican Republic, France, New Zealand, Nicaragua, Peru, Sweden, Turkey, U.K.

4. G.A., (V), Annexes, Vol. II, a.i.57 p. 3, A/1548, para. 5; see also, *ibid*, Ad Hoc Pol. Com., 42nd mtg., para. 75. The Chairman ruled that competence and substance would be discussed together and his ruling was not challenged.

asserted that it was because of these reverses that the South African delegation, from the sixth session of the General Assembly onwards, formally objected even to the inclusion of the item on the agenda on the grounds that even this action constituted intervention in her domestic affairs.

At the sixth session, both in the General Committee and in the Plenary session, the South African delegation attempted to block the inscription of this item on the agenda. In the Plenary session, the South African delegate, Mr. Jooste, maintained that the treatment by South Africa of its citizens was a domestic matter and one in which the South African Government could not share its authority. In terms of Article 2(7), he claimed that such matters could not even be discussed. He said:¹

It is also suggested that discussion of a matter, whether that matter falls within the domestic jurisdiction of a State or not, does not necessarily constitute intervention. My Government must of necessity challenge this view. The right of discussion can only result from the competence of the Organization to concern itself with a matter which, in our view at all events, is no less than interference and intervention. Proof of this contention is to be found in our actual experience in this organization. The discussion of matters of whatever nature invariably brings with it criticism, often ill informed, and in many cases condemnation, often unwarranted. Moreover, it brings with it almost without exception the adoption of resolutions. It is the view of my Government that the Assembly can adopt a resolution only in regard to a matter which clearly falls within its jurisdiction.

Despite the rejection of this attempt to have the General Assembly delete the item from its provisional agenda,² South Africa repeated her objections to its inclusion at the subsequent sessions, but always without success.³

1. G.A., (VI), Plen., 341st mtg., para. 37.

2. *ibid*, para. 41: voting - 40:1:12.

3. See G.A., (VII), Plen., 380th mtg., paras. 130-133; and 140.

G.A., (VIII), Plen., 435th mtg., para. 7.

G.A., (IX), Plen., 476th mtg., paras. 117-120.

G.A., (X), Plen., 530th mtg., paras. 228-235.

G.A., (XI), Plen., Vol. I., 577th mtg., paras. 75, 82-125; *ibid*, Gen. Com. 107th mtg., paras. 20-27.

G.A., (XII), Gen. Com., 111th mtg., para. 52.

G.A., (XIII), Plen., 752nd mtg., para. 31; *ibid*, Gen. Com., 117th mtg., para. 59.

Case 11. The Question of the Race Conflict in the Republic of South Africa.

While this subject was not raised till the seventh session of the General Assembly, and hence is somewhat out of chronological order here, it is convenient to deal with it now, to show the depth of South Africa's hostility to the discussion of any subject which she considered to be within her domestic jurisdiction.

This item was brought to the attention of the United Nations in 1952, by a letter dated 15th September,¹ in which the representatives of thirteen states requested the General Assembly to include on its agenda the item, "The question of the race conflict in South Africa resulting from the policies of apartheid of the Government of the Union of South Africa."² The states which made this request contended that, by its racial policy, the South African Government was "creating a dangerous and explosive situation, which constitutes both a threat to international peace and a flagrant violation of the basic principles of human rights and fundamental freedoms which are enshrined in the Charter."

The discussion of this issue which ensued in the debate on the adoption of the agenda is of great importance, for it dealt not only with the question of whether or not discussion and inclusion constitute intervention within the meaning

Fn. 3 contd. from p.

G.A., (XIV), Gen.Com., 122nd mtg., para. 1; *ibid*, Plen. 803rd mtg., paras. 228-229.

G.A., (XV), Gen. Com., 127th mtg., para. 36; *ibid*, Plen. Part I, Vol. 1, 898th mtg., paras. 15-36.

G.A., (XVI), Gen.Com., 135th mtg., para. 16, *ibid*, Plen, Vol. I, 1014th mtg., paras. 127-142.

G.A., (XVII), Gen.Com., 143th mtg., para. 92, *ibid*, Plen., Vol. I, 1129th mtg., paras. 322-334.

1. For the text, see G.A., (VII), Annexes, Vol. II, a.i.66, pp. 1-3, A/2183.
2. The countries which requested inclusion were: Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, Philippines, Saudi-Arabia, Syria and the Yemen. This question will be referred to hereafter as "The Racial Conflict in South Africa".

of Article 2(7), but also with when a decision on competence should be taken. However, at this stage the treatment of this debate will be confined to the former points.

As was to have been expected, the South African delegation vigorously opposed the inclusion of this item on the agenda of the General Assembly. The South African delegate, Mr. Jooste, claimed that the Charter did not confer on the Organization the competence to deal with this question in any way whatever.¹ In an effort to drive home his point, Mr. Jooste undertook a long and detailed examination of the content of Article 2, paragraph 7.

In examining the meaning of Article 2(7), Mr. Jooste began by stating what the South African Government understood by the word "nothing", a word which he maintained was clear and unequivocal.² He said:³

....It [nothing] means simply that nothing in the Charter, no provision therein, be it interpreted as it may, shall authorize intervention by the United Nations in the domestic affairs of a Member State. No possible interpretation of any provision of the Charter can serve to alter the meaning of the word 'nothing'.

The only exception to this was, he claimed, that contained in the proviso to Article 2(7), adding that as this exception was specifically stated, all others were, by the normal canons of interpretation, excluded.⁴ It was clearly intended by the founders of the United Nations, he said, that Article 2(7) should have overriding effect.⁵

1. G.A., (VII), Plen., 381st mtg., para. 9.

2. *ibid*, para. 15.

3. *ibid*.

4. *ibid*, para. 16: Expressio unius est exclusio alterius.

5. *ibid*, para. 17.

Turning to the term 'intervene', the South African delegate, referring to the technical definition of intervention given at the third session of the General Assembly by the Indian representative,¹ said:²

This argument was ingenious but entirely misleading. Dictatorial interference is, under general international law, an illegal intervention by a state in the affairs of another affecting the latter's political independence or territorial integrity. This is the sort of intervention which is prohibited by paragraph 4 of Article 2. The word 'intervention' is not specifically used in that paragraph, but by necessary implication the obligation contained therein is the obligation not to intervene, that is to say, to refrain from dictatorial interference or intervention in the technical sense. In paragraph 7 of Article 2, however, the word 'intervene' bears its ordinary dictionary meaning and includes interference. There is no indication that it must be used in the narrow sense.

To stress his interpretation, he compared the General Assembly with the Security Council. That body had, he admitted, power to interfere dictatorially in the domestic affairs of member states. But the General Assembly did not have this power. He continued:³

....It (the General Assembly) may only make recommendations and discuss questions or matters within the scope of the Charter. The word 'intervene' in relation to the General Assembly can, therefore, only have the wider meaning of interference.

It was evident he claimed, that the terms of Article 2(7) applied to the whole Charter, and therefore to all the functions of the General Assembly. Thus it followed that all the functions of the General Assembly in relation to any matters which were essentially within the domestic jurisdiction of a member, were forbidden. Mr. Jooste continued:⁴

1. G.A., (III/1), Plen., 146th mtg., p. 226.

2. G.A., (VII), Plen., 581st mtg., para. 22.

3. *ibid*, para. 23.

4. *ibid*, para. 24.

....Intervention must, therefore, be understood to apply to all the activities of the General Assembly, clearly including the making of recommendations, the passing of resolutions and the discussion of matters within the scope of the Charter. If any of these activities is of such a nature as to amount to an interference in the essentially domestic affairs of a Member State, it is forbidden by Article 2, paragraph 7, of the Charter. Discussion is one of these activities, but if discussion amounts to interference in matters of essentially domestic concern, it is forbidden, and the same applies to all other activities of the General Assembly.

That discussion did constitute interference in the domestic affairs of other states was clear, he claimed, from the practice of the Organization.¹ Discussions of domestic problems inevitably had, he said, local political repercussions which lent encouragement to malcontents and dissidents who were to be found in every country whether it was badly or well governed. Such discussions stimulated intransigence and stultified genuine efforts to find solutions to problems which often involved the very existence of the state concerned.

At the eighth session of the General Assembly, the South African delegation, again seeking the deletion of the item from the agenda, made similar statements which, though somewhat repetitious, merit quotation. Mr. Jooste said:²

Secondly, the word 'intervene'.....has its ordinary dictionary meaning and includes interference. It cannot mean dictatorial interference, as has repeatedly been alleged, since only the Security Council can interfere dictatorially when it concerns a question of the enforcement measures under Chapter VII of the Charter. Since the General Assembly has no competence in this regard, the prohibition not to intervene in a country's domestic affairs would be tantamount to prohibiting the Assembly from doing something which in any case it has no competence to do, namely, interfere dictatorially.

1. *ibid*, para. 25.

2. G.A., (VIII), Plen., 435th mtg., para. 32.

Mr. Jooste noted further on in his speech that discussion in the United Nations could constitute one of the most insidious and effective forms of intervention of which the Organization was capable, and that it was only natural that the South African Government, in company with others, should wish to protect itself from it.¹

The South African arguments here are strong and no ready answer can be found to them. It cannot be assumed, as it often the case, that South African arguments concerning domestic jurisdiction and intervention are specious and without foundation. No greater mistake could be made in this respect, and it should not be overlooked that this extreme position has to a large extent been forced on the Republic of South Africa because of the failure of the General Assembly and its committees to evolve some regular procedure whereby the question of the competence of the United Nations in any particular matter could be dealt with first, before the merits of the question are entered into.² South Africa had, at the first session of the United Nations, attempted to devise such a procedure, and offered to submit the question of the Assembly's competence in a similar matter to the International Court of Justice for an advisory opinion on jurisdiction, but the offer was rejected.³

As in the case concerning the treatment of people of Indian origin in South Africa, South Africa continued, despite her earlier defeats on this point, to object to the inclusion of this item in subsequent agenda, but again,

1. *ibid*, para. 47.

2. See *infra*, Chap. VII, pp. 201-221.

3. See *supra*, p. 73.

her objections were always overruled.¹

In this case, the South African Government's interpretation of the term 'intervene' was supported in the debates on the adoption of the agenda by the United Kingdom and Australia. The United Kingdom delegate, Sir Gladwyn Jebb explained his Government's position thus:²

.... it is the opinion of Her Majesty's Government that, as a broad general rule, the General Assembly must be said to intervene in the internal affairs of a Member State when it not only places an item concerning those affairs on the agenda, but also proceeds to consider and discuss it and, whether by means of a formal draft resolution or otherwise, attempts to indicate to the Member State concerned what policy it ought to pursue. If such action as that does not constitute intervention, then it is indeed difficult to know what the term can possibly mean.

Case 7. The Observance of Human Rights in the Union of Soviet Socialist Republics.

Leaving now the troubles of South Africa, we turn to those of the communist bloc, for it too has had occasion to attempt to block inscription of items on the agenda of the General Assembly. The subject of the observance of human rights in the U.S.S.R. was raised in the General Assembly in 1948 by the

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1. See G.A., (IX), Plen., 476th mtg., paras. 130-152, and 157.
 G.A., (X), Plen., 550th mtg., paras. 261-264 and 267.
 G.A., (XI), Plen., Vol. I, 577th mtg., para. 75, 82-125; *ibid*, Gen.Com., 107th mtg., paras. 20-27.
 G.A., (XII), Plen., 682nd mtg., paras. 68-70; *ibid*, Gen.Com., 111th mtg., para. 52.
 G.A., (XIII), Plen., 752nd mtg., para. 51; *ibid*, Gen.Com., 117th mtg., para. 39.
 G.A., (XIV), Gen.Com., 122nd mtg., para. 1; *ibid*, Plen., 803rd mtg., paras. 228-229.
 G.A., (XV), (XVI) and (XVII) as in case 2; see *supra*, p. 76., fn. 3.
 2. G.A., (VII), Plen., 581st mtg., para. 91, emphasis added; see also G.A., (XII), Plen., 682nd mtg., para. 85. For Australian statements on the subject see, G.A., (VII), Plen., 581st mtg., paras. 111-113; and G.A., (XII), Plen., 682nd mtg., paras. 75-80.

representative of Chile. In a letter dated 27th May, 1948, the representative of Chile, invoking Article 14, requested that the item, "Violation by the U.S.S.R. of fundamental human rights, traditional diplomatic practices and other principles of the Charter," be included on the agenda for the third session of the General Assembly. The Chilean representative alleged that certain Soviet measures taken to prevent Soviet "wives of foreign nationals from leaving the U.S.S.R. either in company with their husbands or in order to rejoin them," violated the Charter provisions on human rights and "could impair the friendly relations among nations". He further contended that when these measures affected the wives of members of foreign diplomatic missions they violated diplomatic practices. The central feature of this case was the separation of the son of the Chilean ambassador in Moscow from his Soviet-born wife. The son of the Chilean ambassador had, while living in Moscow, married a Soviet citizen who, as a result of these Soviet measures, had been denied permission to leave the country with the family of the ambassador. However, the Chilean representative to the United Nations contended that he was not raising the matter just because the son of Chile's ambassador was involved. These measures affected, he claimed, a large number of allied officials who had married Soviet women who were subsequently refused exit visas from the Soviet Union.¹

Both in the General Committee and in the Plenary Session the Soviet delegation tried to secure the deletion of this item from the definitive agenda, on the ground that it was a matter of domestic jurisdiction which the United Nations was not competent to decide.² During the debate on the adoption of

1. G.A., (II I/1), Plen., 142nd mtg., p. 106.

2. For the Soviet view, explained in the General Committee, see G.A., (I II/1), Gen. Com., Part I, 43rd mtg., p. 11.

the agenda in the Plenary Session, the Soviet delegate, Mr. Malik, invoking Article 2(7), stressed that the matters raised by this item were internal to the Soviet Union.¹ The legislation of which the Chilean representative complained was, he claimed, enacted in the first place "to protect Soviet women and had been caused by the inimical atmosphere of hatred and mockery which surrounded Soviet citizens in some countries, including Chile."² He maintained that the Chilean request to have the matter included in the agenda of the United Nations was nothing but an attempt to compel the United Nations to interfere in the internal affairs of a member state.³ In this he was supported by the Polish representative who maintained that to insert this item in the agenda would constitute interference in the domestic affairs of a member.⁴ Their arguments were in vain however for, in a roll call vote, the Soviet proposal to delete the item from the definitive agenda was defeated.⁵

The Soviet protests that this was a domestic matter which the United Nations, because of Article 2(7), was not at liberty to discuss, "in any circumstances" were continued during the substantive discussion of the question during the second part of the Plenary Session,⁶ but again to no avail, for the General Assembly adopted a resolution on the subject.⁷

1. G.A., (III/1), Plen., 142nd mtg., p. 97/98.

2. *ibid*, p. 98.

3. *ibid*.

4. *ibid*, p. 107.

5. *ibid*, p. 108. Voting: 50:7:17.

6. G.A., (I II/2), Plen., 196th mtg., pp. 151-153.

7. G.A. Res., 285(III); G.A., (III/2), Plen., 197th mtg., p. 163.

The actual speeches made here are of little help when considering an overall definition of intervention, for the Soviet delegate, supported by the representative from Poland, merely stated that as the subject was within the domestic jurisdiction of the Soviet Union, it could not be discussed. However, this bland statement is itself of considerable importance. For the stand taken here by the Soviet bloc, in matters which they considered to be within their domestic jurisdiction, is virtually the same as that of South Africa. They wished to see it deleted out of hand, without any discussion at all. In Soviet minds inclusion and discussion are just as much intervention as they are to South Africa. Indeed, it is perhaps worthy of notice, that at the same session, the South African delegation had not formally proposed the deletion of the item, the "Treatment of Peoples of Indian Origin in South Africa," from the agenda but had been content at this stage to attempt to have the competence question discussed in committee, a procedure which was not adopted by the Soviet Union.

Case 8. The Observance of Human Rights in Bulgaria, Hungary and Romania

Again, during the third session of the General Assembly, the Communist bloc tried to rely on Article 2(7) to block discussion of another item which it considered to fall within the domestic jurisdiction of some of its members, but again without success. This time, the item concerned the Observance of Human Rights in Bulgaria and Hungary.

During the second part of the third session of the General Assembly, the Australian and Bolivian representatives presented a joint request to the General Assembly to include in its agenda the item, "Having regard to the provisions of the Charter and of the peace treaties (with Bulgaria and Hungary), the question of the observance in Bulgaria and Hungary of human rights and fundamental freedoms, including questions of religious and civil liberties, with special

reference to recent trials of church leaders".¹ The subject matter of the item was enlarged during the fourth session of the General Assembly to include the subject of human rights and fundamental freedoms in Romania as well.²

At the time of this complaint, none of the states whose conduct was in question was a member of the United Nations, and the members of the communist bloc were quick to seize upon this and ask how Bulgaria or Hungary, and by implication, Romania, could be guilty of breaches of the Charter.³

The extension of the Charter provisions to non-members, today an almost defunct subject, is covered by Article 2(6), which states: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security". In order then for this subject to be

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1. Initially the representatives of Bolivia and Australia had each presented separate requests which were roughly in the same terms. The Bolivian request, presented in a letter dated 16th March 1949, (G.A., (III/2), Plen., Annexes, p. 31, A/820) asked that the item, "Study of the legal proceedings against Cardinal Mindszenty of Hungary in relation to Articles 1, paragraph 3, and 55, paragraph c, of the Charter," be included in the agenda of the General Assembly.

The Australian request, dated 3rd March, 1949, (G.A., (III/2), Plen., Annexes, pp. 31 and 32, A/821), asked that the item, "Observance of fundamental freedoms and human rights in Bulgaria and Hungary, including the question of religious and civil liberty in special relation to recent trials of church leaders," be similarly included.

These two items being substantially the same, the two representatives agreed at the 59th meeting of the General Committee to their being presented as a single item, the wording of which is quoted above. For details, see G.A., (III/2), Gen. Com., 59th mtg., p. 34.

2. On the proposal of Australia, the General Committee altered the title of the item on the provisional agenda to include the subject of Romania. G.A., (IV), Gen. Com., 65th mtg., para. 73.
3. G.A., (III/2), Plen., 190th mtg., p. 20, per the Yugoslav delegate.

dealt with under the human rights provisions of the Charter, it would have had to be shown that the actions of the Governments concerned constituted some threat to international peace and security.

The delegates of the communist states took the line that the subject dealt with in the joint Australian-Bolivian complaint was in no way connected with matters of human rights or with international peace and security. The trials which had taken place were conducted under the ordinary criminal law of the countries concerned, and hence were entirely internal to those countries. To include the item in question on the agenda of the General Assembly would therefore, in their opinion, be an interference in the domestic affairs of the states concerned.

At the third session, the delegate from the Byelorussian S.S.R. stated that, in his opinion, inclusion of this item constituted interference in the domestic affairs of Bulgaria and Hungary,¹ and that the items were concerned with the ordinary criminal law of the states concerned. In this he was supported by the delegates from the U.S.S.R.,² Yugoslavia,³ Poland⁴ and Czechoslovakia.⁵ At the fourth and fifth sessions of the General Assembly, the inclusion of the item was again opposed on similar grounds⁶ - the matter was domestic and therefore to include it was to intervene in the domestic affairs of the states concerned.

1. *ibid*, p. 26.

2. *ibid*, p. 22.

3. *ibid*, p. 20.

4. *ibid*, p. 13.

5. *ibid*, p. 6.

6. G.A., (IV), Plen., 224th mtg.; Poland, paras. 2-6; Czechoslovakia, para. 7; Ukrainian S.S.R., para. 9; *ibid*, Gen.Com., 65th mtg., U.S.S.R., paras. 65-72; G.A., (V), Plen., Vol. I, 284th mtg., Poland, paras. 138-142; U.S.S.R., para. 145; Ukrainian S.S.R., para. 153.

It will be remembered that in his speech to the seventh session of the General Assembly, the South African delegate, Mr. Jooste, in an attempt to have the question of competence decided before the subject of the racial conflict in his country was inscribed on the agenda, had stressed the qualifying effect of Article 2(7) on the whole Charter. In South African opinion, the word 'nothing' meant what it said. It is of considerable interest therefore to note that during the agenda debate of the fifth session, the Soviet delegate took exactly the same view, and stressed that in no circumstances could the General Assembly discuss the question of the observance of human rights in Bulgaria, Hungary and Romania. The Soviet delegate reminded the members of the Assembly that certain of their number had endeavoured to justify the discussion of a similar item at earlier sessions by reference to Article 55 of the Charter.¹ But, he said, that Article provided no justification for such a course. Apart from the fact that Article 55 in no way modified the provisions of Article 2, paragraph 7, it should not be forgotten that at the San Francisco Conference, it had been agreed and included in the records of Committee II/3 that nothing contained in Chapter IX of the Charter, of which Article 55 forms part, could be construed as giving authority to the Organization to intervene in the domestic affairs of the Member States.²

Case 9. The Question of Morocco.

The question of the French rule of the protectorate of Morocco was raised at the sixth, seventh, eighth, ninth and tenth sessions of the General Assembly. At the sixth session, however, it was not included on the agenda,

1. *ibid.*, paras. 145-151.

2. See *infra*, Chap. VI, pp. 156.

and in her speeches opposing its inclusion, France did not raise the question of competence.

The question was raised again however at the seventh session by a letter dated 3rd September, 1952, in which the representatives of thirteen states requested that the item, "The Question of Morocco," be included on the agenda.¹ The representatives in question claimed that certain measures taken by the French administration in Morocco were contrary to the Charter provisions on human rights and to the principle of self-determination. They contended further that France had violated the sovereignty of Morocco which she had undertaken to respect by signing the Act of Algeiras and the Protectorate Treaty. Finally they claimed that the resultant situation in Morocco was a "menace to international peace in that part of the world".²

France took the attitude, as one might expect, that whatever measures she might have taken in Morocco were part of her internal affairs. During the discussion of the item in the General Committee, the French delegate, M. Hoppenot, said that while he did not intend at this preliminary stage, to take shelter in procedural arguments, France considered that any interference by the United Nations in its internal affairs was wholly unacceptable and that therefore he could not take part in any discussion of or vote on the inclusion of this item. Nevertheless the General Committee decided without vote to recommend the inclusion of the item on the agenda.³ The General

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1. G.A., (VII), Annexes, a.i. 65, pp. 1-5, A/2175 and Add. 1 and 2. The States making the request were: Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, the Philippines, Saudi-Arabia, Syria, and the Yemen.
 2. The situation in question was caused of course by the removal of the Sultan of Morocco, Mohammed V, from his position as Sovereign of the country.
 3. G.A., (VII), Gen.Com., 79th mtg., para. 18.

Assembly without debate included the item on its agenda,¹ and referred it to the First Committee. France, however, took no part in ensuing discussions. The French delegation informed² the Chairman of the First Committee that the "French Government could not accept any interference by the United Nations in its relations with.... Morocco" and that "the French delegation.... will be unable to participate in the impending discussions". The attitude of France could not be clearer. The question of Morocco was raised again at the eighth, ninth and tenth Sessions of the General Assembly. In each case it was included on the agenda, there being no objection raised.³ As in previous sessions however, France refused to take part in any discussions on the subject.

Case 10. The Tunisian Question.

The statements quoted above in connection with the Moroccan Question were made to cover the Tunisian Question as well. The question of Tunisia had been raised by the representatives of the same thirteen states, in a letter dated 30th July, 1952.⁴ The complaint alleged, invoking Article 11(2), that the French authorities had suppressed civil liberties and had violated human rights and the principle of self-determination. Again, as in the case of Morocco, it was contended that France had violated Tunisia's sovereignty which she had undertaken to respect by signing the Protectorate Treaty.

1. G.A., (VII), Plen., 380th mtg., para. 202.

2. By a letter dated 4th December, 1952; G.A., (VII), Annexes, Vol. II, a.i.65, p. 5, A/C.1/737.

3. 8th Session, G.A., (VIII), Plen., 435th mtg., para. 67.
 9th Session, G.A., (IX), Plen., 477th mtg., para. 1.
 10th Session, G.A., (X), Plen., 530th mtg., para. 270.

4. G.A., (VII), Annexes, a.i. 60, p. 1-4, A/2152.

As in the case concerning Morocco, the French delegation refused to take part in any of the discussions which ensued.¹ As far as France was concerned, Tunisia was also within her domestic jurisdiction and therefore not open to United Nations consideration.²

Case 24. The Question of Cyprus.

In the period under review, the Question of Cyprus was raised at the ninth, tenth, eleventh, twelfth and thirteenth sessions of the General Assembly. It was not included on the agenda for the tenth session. At the ninth session, the United Kingdom strongly objected to its inclusion, basing her arguments on Article 2(7) and while at the last three sessions she did not press her objections so strongly, it remained quite clear that in the opinion of the United Kingdom discussion of a matter which she considered fell within her domestic jurisdiction constituted intervention.

The subject was first brought to the attention of the United Nations by a letter, dated 16th August, 1954, from the Prime Minister of Greece in which he requested³ the General Assembly to include on its agenda for the ninth session the subject "Application, under the auspices of the United Nations, of the principles of equal rights and self-determination of peoples in the case of the population of the island of Cyprus." The Greek Government stated that it based its request for the inclusion of this item on the relevant provisions of the Charter and specifically on Articles 10 and 14 and on Article 1,

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1. For references, see those cited supra, Case 9.
 2. This item was included in the agenda for the 8th session, G.A., (VIII), Plen., 455th mtg., para. 67; 9th session, G.A., (IX), Plen., 477th mtg., para. 1. No objections to inclusion were raised and as in the case of Morocco, the French delegation refused to take part in the discussions which ensued.
 3. For text see, G.A., (IX), Annexes, a.i.62, p. 1. A/2705.

paragraph 2. The Hellenic Government also specifically reserved the right to refer to Article 35, paragraph 1. The issue in question was, of course, that of the demand of the Greek Cypriots and of the Greek Government for Enosis, or the Union of Cyprus with Greece, a demand to which the United Kingdom would not accede. The United Kingdom vigorously opposed the inscription of this item in the agenda of the General Assembly. At the ninth session, in the General Committee, the then Foreign Secretary, Mr. Selwyn Lloyd, stated that the question of the British administration of the island of Cyprus fell within the domestic jurisdiction of Great Britain, and that for the United Nations to discuss it constituted intervention in our affairs.¹ A discussion of the British administration in Cyprus, based on the avowed objective of transferring sovereignty over that island to another member of the United Nations was, he said,² a violation of Article 2(7) of the Charter so flagrant that the United Kingdom felt compelled to take a firm stand on the principle enunciated in that paragraph. Mr. Lloyd stated that while some delegations might consider discussion not to be intervention, the British Government could not accept such an argument. Moreover, in this case, the Assembly was being asked not only to discuss, but also to act. It was being asked to transfer the territory of one country to another.³ The British point of view was supported in the General Committee by the French delegation.⁴ Nevertheless, despite these objections, the General Committee recommended the inclusion of the item in the agenda of the ninth session,⁵ a recommendation which the General Assembly

1. G.A., (IX), Gen.Com., 95rd mtg., para. 21.

2. *ibid*, para. 22.

3. *ibid*, para. 21.

4. *ibid*, para. 30.

5. *ibid*, para. 49. Voting: 9:3:3.

accepted.¹

During the discussion of the adoption of the agenda at the plenary meeting of the ninth session of the General Assembly Mr. Lloyd, while he asked for the rejection of the recommendation of the General Committee more on political grounds, i.e., that inclusion and discussion would not benefit the situation at all and indeed would tend to exacerbate it, gave a clear statement of the United Kingdom's views on the subject of inclusion of a matter which it considered to be within its domestic jurisdiction. Here Mr. Lloyd specifically stated that in the view of Her Majesty's Government, inscription of an item in the agenda of the General Assembly which referred to the domestic affairs of a Member State constituted intervention. Furthermore, he made it clear that in the opinion of the British Government the whole Charter was subject to the qualification of Article 2(7), a view which as has already been seen he shared with the Soviet Union, among others. He said:²

.....It could not be more clearly stated that, whatever powers of discussion or intervention may be conferred by other Articles, whatever capacity there may be to receive information, these do not override Article 2, paragraph 7.

Mr. Lloyd made it perfectly clear to the General Assembly that if the item was inscribed on the agenda, the United Kingdom would not take part in any of the discussions and would not regard them as having any validity.³

At the tenth session, the General Committee recommended that the item be not included on the definitive agenda,⁴ which recommendation was accepted by the General Assembly, though more on political grounds than on the basis of the legal

1. *ibid*, Plen., 477th mtg., para. 209. Voting: 30:19:11.

2. *ibid*, para. 119.

3. *ibid*, para. 121.

4. G.A., (X), Gen.Com., 102nd mtg., para. 50.

argument that inscription amounted to intervention.¹ In particular, at this session, the United Kingdom based her arguments against inclusion on the political wisdom of such an act and did not, in this instance, rely heavily on Article 2(7).²

At the eleventh session there were two items on the provisional agenda dealing with the question of Cyprus. One, proposed by Greece entitled 'Application, under the auspices of the United Nations, of the principle of equal rights and self-determination of peoples in the case of the population of the Island of Cyprus' raised the question of domestic jurisdiction and intervention.³ The other, proposed by the United Kingdom, entitled 'Support from Greece for terrorism in Cyprus' did not.⁴

In the General Committee, the United Kingdom proposed that both these items might be considered together, and this despite the fact that she considered the United Nations incompetent to deal with the part of the item proposed by Greece.⁵

At the twelfth session of the General Assembly Greece proposed the inclusion in the agenda of an item entitled "Cyprus: (a) Application under the auspices of the United Nations of the principle of equal rights and self-determination of peoples in the case of population of the Island of Cyprus; (b) Violations of human rights and atrocities by the British Colonial

1. *ibid*, Plen., 521st mtg., para. 167; voting: 28:22:10.

2. *ibid*, para. 48.

3. See G.A., (XI), Annexes Vol. II, a.i.55, p. 1, A/3120 and Add. 1.

4. *ibid*, p. 4, A/3204 and Add. 1.

5. G.A., (XI), Gen.Com., 107th mtg., para. 34; *ibid*, Plen. Vol. I, 578th mtg., paras. 14-15.

Administration against the Cyprians."¹

In the General Committee the United Kingdom delegate, Mr. Lloyd, objected to the inclusion of that item, though he would not have objected, he said, to a general discussion of the Cyprus Question. The United Kingdom objected to the item in the form proposed by Greece because, he said, the application of the principle of self-determination was essentially a domestic matter. The United Kingdom also objected to part (b) of that item not because, Mr. Lloyd explained, the United Kingdom would have any difficulty in refuting the charges but because one of the fundamental principles of the Charter was at stake. Under Article 2(7), he claimed, the United Nations was not competent to consider complaints against the internal administration of a Member State.²

On the proposal of Norway, the title of the item was altered to 'The Question of Cyprus' and to the inscription of this the United Kingdom did not object.³

In the Plenary session, the United Kingdom stressed that while she did not object to a discussion of the international aspects of the Cyprus question, she entirely reserved her position on those aspects of the matter which she considered fell within her domestic jurisdiction.⁴

At the thirteenth session, Greece proposed the inclusion on the agenda of an item entitled "Question of Cyprus".⁵ The attitude of the United Kingdom was similar to that which she had adopted at the previous session. She did not

1. G.A., (XII), Annexes, a.i.58, p. 1, A/3616 and Add. 1.

2. G.A., (XII), Gen.Com., 111th mtg., paras. 15-19.

3. *ibid*, para. 38.

4. *ibid*, Plen., 682nd mtg., para. 58.

5. G.A., (XIII), Annexes, a.i.68, p. 1, A/3874 and Add. 1.

object to a discussion of the international aspects of the Cyprus Question but protested against any intervention on the part of the United Nations in those aspects of the matter which she contended fell within her domestic jurisdiction.¹

Thus while at the eleventh, twelfth and thirteenth sessions of the General Assembly, the United Kingdom did not stress the element of domestic jurisdiction and consequent illegal intervention to the same extent as she had done at the ninth, nevertheless she took care to maintain her thesis that any discussion of her domestic affairs would be equivalent to intervention therein.

The objections of the United Kingdom to the inscription of these items were supported by Australia,² France,³ Turkey⁴ and the Republic of South Africa.⁵ These States all maintained that the General Assembly was incompetent to discuss the domestic aspects of this case.

Case 25. The Question of West Irian.

The question of West Irian was under consideration by the General Assembly from its ninth session onwards. However, it was only at the ninth session that any particular emphasis was laid on the prohibition of intervention contained in Article 2(7).

The matter was brought to the attention of the United Nations in 1954 by

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1. *ibid*, Gen.Com., 117th mtg., para. 46.
 2. G.A., (XI), Plen., Vol. I, 578th mtg., paras. 41-44; G.A., (XIII), Gen.Com. 117th mtg., para. 48.
 3. G.A., (XII), Gen.Com., 111th mtg., para. 34.
 4. G.A., (IX), Plen., 477th mtg., para. 186; G.A., (X), Gen.Com., 102nd mtg., para. 28; G.A., (XI), Gen.Com., 107th mtg., para. 35; *ibid*, Plen. Vol. I, 578th mtg., paras. 22-35; G.A., (XII), Gen.Com., 111th mtg., paras. 20-22.
 5. G.A., (XI), Plen., Vol. I, 578th mtg., para. 16.

the representative of Indonesia. Requesting that this matter be considered by the Assembly at its ninth session,¹ he recalled that in 1949 the Netherlands had agreed to transfer 'unconditionally and irrevocably' complete sovereignty over Indonesia to the Republic of the United States of Indonesia. In the Charter of Transfer of Sovereignty, special arrangements had been made respecting the Residency of New Guinea, or as Indonesia called it, West Irian. It had been agreed that the political status of this part of the former Dutch possessions would be settled by negotiations. The Indonesian representative claimed that the negotiations which had been held since 1950 had led to no positive results. Indonesia contended that West Irian was an integral part of the territory of Indonesia and that as long as this problem, representing the remnant of Dutch colonial rule in Indonesia, remained unsolved, it would continue to be a latent threat to the peace and security of that part of the world.

In the General Committee, and in the General Assembly, the Netherlands objected to the inclusion of this item on the agenda, basing her arguments on Article 2(7).² In both these organs, she reserved her rights under that Article of the Charter. On both occasions she received the oral support of France.³ The item was, however, included, despite these objections.⁴

Case 27. The Question of Algeria.

The question of Algeria was first brought to the attention of the United Nations in 1955, when the representatives of fourteen States requested that

1. G.A., (IX), Annexes, a.i.61, p. 1, A/2694.

2. G.A., (IX), Gen.Com., 92nd mtg., paras. 27-30; *ibid*, Flen., 477th mtg., para. 12.

3. *ibid*, Gen.Com., 92nd mtg., para. 36; *ibid*, Flen., 477th mtg., paras. 53-54.

4. *ibid*, para. 92.

this item be included on the agenda for the tenth session.¹ Referring to the Charter provisions on self-determination and to Article 14, those representatives stated that "the continuance of the situation (in Algeria) is creating a serious threat to the peace in the Mediterranean area." In requesting that this matter be included in the agenda for the tenth session, they expressed the hope that "full consideration of the Algerian question by the General Assembly will facilitate a solution which would realize the national aspirations of the Algerian people in accordance with the United Nations Charter."

The French delegation, as might have been expected, opposed the inclusion of this item in the agenda. In the General Committee, the French delegation pointed out that Algeria had been part of metropolitan France since 1834 and that the question was therefore domestic and thus unsuitable for discussion by the General Assembly. It was cogently pointed out that if the United Nations were to assume the right to question all frontiers resulting from wars there would no longer be any security for any Member of the United Nations possessing such frontiers.²

In this instance the French objections to inclusion were supported by the delegations of Belgium, Colombia, the Netherlands, New Zealand, the United Kingdom and the United States.³ The American reasons for objecting to

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1. Letter dated 26th July, 1955 - G.A., (X), Annexes, a.i.64, p. 1. A/2924 and Add. 1. The States concerned were: Afghanistan, Burma, Egypt, Indonesia, Iran, Iraq, Jordan, Lebanon, Lybia, Pakistan, Saudi-Arabia, Syria, Thailand, and the Yemen.
 2. G.A., (X), Gen.Com., 103rd mtg., paras. 2-7.
 3. Belgium: *ibid*, Plen., 530th mtg., paras. 28-40.
Colombia: *ibid*, 525th mtg., paras. 167-178.
The Netherlands: *ibid*, paras. 108-110.
New Zealand: *ibid*, Gen.Com., 105rd mtg., paras. 59-61.
United Kingdom: *ibid*, paras. 45-47; *ibid*, Plen., 529th mtg., paras. 145-160.
United States: *ibid*, Gen.Com., 103rd mtg., paras. 55-56; *ibid*, Plen., 530th mtg., paras. 108-113.

inclusion in this case are of special interest. The United States delegate noted that Algeria was, in French law, an integral part of the French Republic and that by its very terms the request for inclusion sought United Nations action to alter that state of affairs. It was clear, Mr. Cabot Lodge said, that the sponsors of this item sought Assembly sanction for a course of action intended to bring about fundamental changes in the French Republic. Therefore, in American opinion, the proposed item, viewed in the context of the proposed action, fell within the prohibition of Article 2(7).

The General Committee recommended the General Assembly not to include this item on its agenda,¹ a recommendation which was not accepted in plenary session.²

At subsequent sessions of the General Assembly the French delegation sometimes opposed the inclusion of this item, and sometimes did not. However, on each occasion she made it perfectly plain that she did not consider the United Nations competent to discuss, of its own volition, her domestic affairs and that it was able to do so was entirely due to French co-operation. Albeit that France on occasions found it convenient to discuss the matter in the General Assembly, she did not waver from her essential position that uninvited discussion of domestic affairs constituted intervention therein.³

1. G.A., (X), Gen.Com., 103rd mtg., para. 68.

2. *ibid*, Plen., 530th mtg., paras. 219 and 223.

3. See G.A., (XI), Gen.Com., 108th mtg., para. 2; *ibid*, 12th session, 111th mtg., para. 51; *ibid*, 13th session, 117th mtg., para. 42; *ibid*, 14th session, 121st mtg., paras. 25-27; *ibid*, 15th session, 127th mtg., para. 42; *ibid*, 16th session, 136th mtg., para. 38; See also the objections of South Africa - G.A., (XI), Plen., Vol. I, 578th mtg., paras. 49-50; and of Australia - G.A., (XIII), Gen.Com., 117th mtg., para. 43.

Case 30. The Question of Hungary.

In 1956 the General Assembly met in emergency session to consider the situation which had arisen as a result of the Hungarian uprising. This emergency session had been called by the Security Council because it had been unable to deal effectively with the matter due to the exercise of the veto power.¹

The inclusion of this subject on the agenda of the second emergency special session of the General Assembly was vigorously opposed by the Kadar regime in Hungary and by the Soviet Union. Mr. Janos Kadar, who had replaced Mr. Imre Nagy as Premier of Hungary, sent a cablegram to the Secretary-General of the United Nations protesting the inclusion of this matter on the agenda. His government, he said, protested against the discussion of this, a domestic matter.² A similar stand was taken by the Soviet Union in the debate on the adoption of the agenda.³

Consideration of this matter was continued at the eleventh regular session. Again however, the inscription of this item on the agenda was opposed by the communist countries. The U.S.S.R., Hungary and Czechoslovakia all claimed that the United Nations was not competent to deal with this matter and therefore could not include it in the agenda.⁴ Nevertheless it was included.⁵

At subsequent sessions the inclusion of this item was opposed by the

1. See S.C., Res. of 4 November, 1956 - S.C., 11th Yr., 754th mtg., para. 70.

2. G.A., (ES-II), Annexes, a.i.5, p. 3, A/3511

3. G.A., (ES-II), Plen., 564th mtg., paras. 10-17.

4. U.S.S.R. - G.A., (XI), Gen.Com., 106th mtg., para. 11; ibid, Plen. Vol. I, 576th mtg., paras. 141-2; Hungary, ibid, para. 134-5; Czechoslovakia, ibid, Gen.Com., 106th mtg., para. 14; ibid, Plen., 576th mtg., paras. 168-9.

5. ibid, para. 206.

communist bloc for the same reasons."

Post Repertory Cases

Since the publication of the last supplement to the Repertory of Practice of United Nations Organs four more cases have been raised in the United Nations to the inclusion of which objections have been raised on the grounds of Article 2(7). These cases are those of Tibet, Oman, Angola and Southern Rhodesia.

i. The Case of Tibet:

When, at the fourteenth session, the oppression of the Tibetans by the Chinese Government was raised in the General Assembly, the Communist bloc, as was to have been expected, opposed its inclusion in the agenda. These states maintained that the actions of the Chinese Government in Tibet were a purely domestic matter and therefore not fit for United Nations discussion. This attitude was maintained every time the Tibetan question was raised in the

1. Bulgaria: G.A., (XV), Gen.Com., 128th mtg., para. 43.

Czechoslovakia: *ibid*, 12th session, Gen.Com., 112th mtg., para. 7; *ibid*, Plen., 684th mtg., para. 33; *ibid*, 13th session, Gen.Com., 117th mtg., para. 52; *ibid*, Plen., 752nd mtg., paras. 90-95; *ibid*, 14th session, Gen.Com., 125th mtg., para. 14.

Hungary: *ibid*, 12th session, Gen.Com., 112nd mtg., paras. 3-4; *ibid*, Plen., 684th mtg., paras. 3-9; *ibid*, 13th session, Gen.Com., 117th mtg., paras. 49-50; *ibid*, Plen., 752nd mtg., paras. 53-74; *ibid*, 14th session, Plen., 848th mtg., para. 122; *ibid*, 15th session, Gen.Com., 128th mtg., para. 34; *ibid*, Plen., Part I, Vol. 1, 898th mtg., paras. 152-162; *ibid*, 16th session, Gen.Com., 137th mtg., para. 5; *ibid*, Plen. Vol. I, 1014th mtg., para. 206.

Romania: *ibid*, 13th session, Gen.Com., 117th mtg., para. 54; *ibid*, 15th session, Gen.Com., 128th mtg., para. 41.

U.S.S.R.: *ibid*, 12th session, Gen.Com., 112nd mtg., para. 5; *ibid*, 13th session, Gen.Com., 117th mtg., para. 61; *ibid*, Plen., 752nd mtg., paras. 76-89; *ibid*, 14th session, Gen.Com., 125th mtg., para. 25; *ibid*, Plen. 844th mtg., para. 42; *ibid*, 15th session, Gen.Com., 128th mtg., para. 29; *ibid*, 16th session, Gen.Com., 136th mtg., para. 52.

United Nations. This view also found some support among western States who were not sure of the legal status of Tibet and were inclined to view any discussion of this matter as intervention in the domestic affairs of China.¹

ii. The Case of Oman.

At the fifteenth session of the General Assembly the question of British assistance to the Sultan of Muscat and Oman was brought up. It was contended by those who sought the inclusion of this item in the agenda of the General Assembly that the United Kingdom was guilty of aggression against the State of Oman. The United Kingdom objected to the inclusion of this item on the Assembly's agenda because she contended there was no such thing as the sovereign State of Oman. The United Kingdom, her delegate maintained, was engaged in helping the Sultan to put down an insurrection against his authority. This insurrection and the help which the United Kingdom was giving in suppressing it were, the United Kingdom maintained, internal affairs of the Sultan of Muscat and as such outwith the competence of the General Assembly.²

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1. U.S.S.R.: G.A., (XIV), Gen.Com., 124th mtg., para. 15; *ibid*, Plen., 826th mtg., paras. 77-78; *ibid*, 15th session, Gen.Com., 127th mtg., para. 48; *ibid*, Plen. Part I, Vol. 1, 898th mtg., para. 86; *ibid*, 16th session, Plen., Vol. I, 1014th mtg., paras. 161-162.
Bulgaria: *ibid*, 15th session, Gen.Com., 127th mtg., para. 53.
Czechoslovakia: *ibid*, 14th session, Gen.Com., 124th mtg., paras. 28-29; *ibid*, 16th session, Gen.Com., 136th mtg., para. 45.
Romania: *ibid*, 14th session, Gen.Com., 124th mtg., paras. 35-36; *ibid*, 15th session, Gen.Com., 127th mtg., para. 58.
France: *ibid*, 14th session, Gen.Com., 124th mtg., para. 48.
South Africa: *ibid*, paras. 20-24.
Belgium: *ibid*, para. 33 voted for the inclusion of this item but with reservations as to the question of competence.
U.K.: had similar doubts on the competence of the United Nations to discuss the matter, but nevertheless supported its inclusion; see *ibid*, 14th session, Gen.Com., 124th mtg., paras. 25-27; *ibid*, 15th session, Gen.Com., 127th mtg., para. 51.
2. G.A., (XV), Gen.Com., 131st mtg., para. 2. This item was again included on the agenda of the sixteenth and seventeenth sessions, but the question of competence was not greatly stressed.

iii. Angola.

The next 'colonial' territory to come under the scrutiny of the General Assembly was Angola. Like Algeria, this African possession of Portugal had been made, under the Portuguese constitution, an integral part of Portugal. Thus, when at the fifteenth session a request was made for the General Assembly to consider the situation in that territory, Portugal objected claiming that the General Assembly was prohibited by Article 2(7) from discussing her internal affairs.¹

iv. Southern Rhodesia.

The question of Southern Rhodesia was raised at the sixteenth session of the General Assembly. However, while the United Kingdom opposed the inclusion of this item on the agenda, it was not principally because of Article 2(7). Nevertheless, it appeared from the substantive debates that she did not consider the General Assembly competent to deal with the matter.²

(b) The Technical Definition of Intervention.

By contrast with the substantial volume of practice in support of the broad or non-technical definition of intervention, there are relatively few statements of the opposing point of view. Furthermore such statements as there are vary considerably. Some States were willing, for example, to allow discussion of domestic matters and the adoption of certain types of recommendations thereon. However, only three - Egypt, Greece and India - espoused the full technical definition which would allow virtually the adoption of any recommendation. It is indeed evident that few States on this side were willing to take up the highly complex question

1. G.A., (XV), Gen.Com., 134th mtg., para. 10; *ibid*, Plen., Part II, 966th mtg., paras. 10-11; *ibid*, 16th session, Gen.Com., 135th mtg., para. 13; *ibid*, Plen., Vol. 1, 1014th mtg., para. 61.

2. G.A., (XVI), Gen.Com., 146th mtg., paras. 5-6; *ibid*, Plen., Vol. III, 1109th mtg., paras. 14-16. At the seventeenth session, the United Kingdom refused to take part in the vote on the proposals before the Fourth Committee because she considered it to be incompetent to deal with the matter.

of the nature of intervention and its relationship to Article 2(7). Most of the States which voted in favour of the items to which objections were made preferred to base themselves on the claim that the matter was not domestic anyway and so no question of intervention arose.

Case 2. The Treatment of People of Indian Origin in the Republic of South Africa

During the debates on whether or not to include this subject on the definitive agenda of the various sessions, there were, surprisingly enough, few occasions on which a delegate took up, at this stage, the arguments of South Africa that even to discuss a domestic matter constituted intervention in her domestic affairs. On each occasion that delegate was, not unnaturally, that of India.

During the debate on the adoption of the agenda for the first part of the third session of the General Assembly the Indian delegate, Sir Benegal Rau, put forward the argument that the word 'intervene' as used in the Charter bore the well-defined meaning it had in general international law, namely that of dictatorial interference in the affairs of other States.¹ Thus, in his opinion, if the General Assembly were to discuss a matter and were to make certain recommendations thereon which might help the governments concerned to find a solution to the particular problem, such action could not be called intervention. In his reply, Mr. Louw dismissed this argument as a legalistic quibbling.²

At the tenth session the Indian delegate, Mr. Sen, took up the same line of reasoning. He said:³

..... Initiating discussions and bringing about recommendations for the purposes mentioned in the Articles which I have read (Arts. 13(1), 14, 55 and 56), do not, in my view, and cannot in the view of any reasonable

1.G.A., (III/1), Plen., 146th mtg., p. 226.

2. *ibid.*

3.G.A., (X), Plen., 530th mtg., paras. 251-2.

person, amount to intervention in the domestic affairs of a state.

.....the prohibition against intervention which has a technical meaning in matters essentially domestic cannot possibly rule out discussion and recommendation and other functions prescribed in the Charter in relation to matters touching on fundamental human rights.

At the eleventh session, this line of argument was further elaborated by

Mr. Menon who said:¹

My delegation has always argued.....that debate in terms of the Charter is not intervention. We are not interventionists. If you want interventionists, look beyond us. We do not ask for intervention.

What has the Assembly done in these various cases? It has merely asked, requested in many cases and called upon South Africa in other cases to observe the provisions of the Charter. One of the obligations that rests upon Member Nations here is to draw attention to infringements of the Charter when they are such grave infringements as to violate human freedom in the way it has been violated.

We are told that all this is domestic legislation. I cannot agree more. Under the Charter of the United Nations and in view of the composition of the Organization - that is to say we are a concert of sovereign Governments - there is no way of implementing any international decision except by domestic legislation. If it were true that Article 2, paragraph 7, went so far as to say that nothing concerning domestic legislation could be discussed or argued here, it would mean that we could not debate any subject, because all the peoples of the world today are under one sovereign State or another. They are all bound by the laws of sovereign States. Therefore, we would not be able to discuss anything. How could we, for example, discuss disarmament, a question concerning which we are asking other States to cut down their arms? We are criticizing their policy on this question. Such an interpretation would make a mockery of Article 56. That Article would have no meaning if it meant that, as a result of violations of paragraphs a, b and c of Article 55, no action could be taken under Article 56.

Case 11. The Question of the Racial Conflict in South Africa.

The position adopted by the South African Government on this topic was the same

1. G.A., (XI), Plen., Vol. I, 577th mtg., paras. 133-4, 143-50; see also G.A., (XV), Plen., Part I, Vol. 1, 398th mtg., para. 46-47.

as that adopted in the previous item, and in turn was opposed by the same arguments, i.e. that the matter was not domestic, and that in any case to discuss it did not amount to intervention. The principal statement of the doctrine that discussion does not amount to intervention was this time made by the Chilean delegate, Mr. Santa Cruz, during the seventh session. In reply to Mr. Jooste's contention that the United Nations was not competent to deal with the matter in any way, Mr. Santa Cruz took up the point made by the South African delegate, that according to the records of the San Francisco Conference, it had been agreed in Committee II/3 that nothing in Chapter IX would authorize the United Nations to intervene in the domestic affairs of a member.¹ He said:²

.....Furthermore, when the decision states that this provision cannot be interpreted as authorizing interference in the internal affairs of States, it means that the United Nations cannot oblige a State to take steps, either separately or jointly to achieve the purposes of Article 55 of the Charter. It cannot, however, have referred to the powers of the Assembly to discuss the conduct of a State in relation to fundamental human rights and the other obligations which flow from Articles 55 and 56 and to make recommendations thereon, for that would have been tantamount to ignoring the express provisions of Articles 10 and 14 of the Charter.....

This interpretation, furthermore, is the one which the General Assembly and the other organs of the United Nations have consistently accepted. The General Assembly and the Economic and Social Council have on many occasions discussed infringements of fundamental human rights affecting countries in all geographical areas and in all political sectors, including the Union of South Africa. They have dealt with the infringements resulting from the existence of slavery in some countries, with charges of forced labour, with racial discrimination, with infringements of trade union rights. And they have made recommendations to Member States addressed, it is true, not to individual countries but to groups of countries - which is the same thing - regarding the national measures which might be adopted to ensure full employment or raise the standard of living of the people of those countries or throughout the world.

1. See *infra*, Chap VI, p. 156.

2. G.A., (VII) , Plen., 381st mtg., paras. 102-103.

3. While it is not strictly relevant to the topic under discussion, one other speech made during the agenda debate of the seventh session deserves notice, for it is a good example of the reluctance of many of the delegates to

At the tenth session of the General Assembly, the Indian delegate, Mr. Sen, repeated substantially the views he had expressed during the discussions of whether or not the item, the treatment of people of Indian origin in the Union of South Africa, should be included in the agenda of the seventh session, but without significant addition.¹

Case 8. Observance of Human Rights in Bulgaria, Hungary and Romania.

At the third session of the General Assembly the Soviet bloc request for the exclusion of the joint Australian-Bolivian item concerning human rights in Bulgaria and Hungary from the definitive agenda was opposed, inter alia, by the United States.² Apart from contending that the subject matter of the item was not domestic the American delegate stated that in his view Article 2(7) did not prevent discussion of the item as it stood. Discussion, he contended, could not normally be construed as intervention within the meaning of Article 2(7) but added that any further action by the General Assembly would have to be examined on its merits and in the light of the relevant Articles of the Charter.

Fn. 3 contd. from p.

consider the legal aspect of many matters and their tendency to rely entirely on the moral one. At the seventh session, G.A., (VII), Plen., 381st mtg., para. 118, the Iraqi delegate, Mr. Al-Jamali, said that he did not wish to see the issue of inscription decided on the basis of "small legalistic matters," or by "legalistic routine procedural ways." This is a typical example of the approach of many delegates to the problem of the inclusion of subjects on the agenda of the General Assembly. Over and over again we hear the same argument: "Let us not be tied down by the legal aspect of the matter". Many, like Mr. Al-Jamali, seem to think that because a subject is of international concern, the United Nations in its present form is competent to deal with it. This, of course, if not necessarily so. The United Nations, like any other body corporate, is bound by the terms of its constitution, the application of which is a matter of law.

1. G.A., (X), Plen., 550th mtg., para. 265.
2. G.A., (III/2), Plen., 189th mtg., p. 12.

Case 24. The Cyprus Question.

At the ninth session of the General Assembly the view that discussion did not constitute intervention was espoused by the Canadian delegation, though it too refrained from giving support to the full technical definition. On this occasion the Canadian delegate, Mr. Martin, said:¹

In our judgement the generally accepted interpretation of the Charter does not preclude the inscription of the Cyprus item. From the past voting record of our delegation, I think it is clear that we have consistently taken the position that the General Assembly has very wide competence to discuss. Although Canada has always supported in principle the right to discuss matters of international concern, we have reserved the right to oppose any item which we think should not at a given time be discussed.

Greece, however, gave support to the full technical definition.²

Case 27: The Algerian Question.

In the General Committee French objections to the inclusion of this item on the agenda were answered by Egypt which supported the technical definition.³ Later, in the plenary debate on the adoption of the agenda, support for the inclusion of this item was given by Thailand and India.

Thailand put forward an interesting definition, but like the United States in similar circumstances, refrained from giving outright support to the full technical approach. The Thai representative said⁴ that the United Nations would only be going beyond its power if it were to recommend intervention; i.e., whether or not the United Nations, through the General Assembly, could be said to be intervening

1. G.A., (IX), Plen., 477th mtg., para. 211. On this occasion Canada voted for the exclusion of this item from the agenda, but for political reasons.

2. G.A., (IX), Gen.Com., 93rd mtg., para. 40; see too the statement of the Indian delegation G.A., (X), Plen., 521st mtg., para. 129.

3. G.A., (X), Gen.Com., 103rd mtg., para. 16.

4. G.A., (X), Plen., 529th mtg., para. 155.

in the domestic affairs of a particular State depends on the type of action recommended. From this it would seem that the essential characteristics of intervention are to be found, not in the outward form of the action, but in its substance. He stressed that the French Government had no need to fear the outcome of such a discussion, for it would only consist of "an exhortation to a peaceful adjustment of the situation, such as an appeal for direct negotiations between the parties concerned". In explaining his views the Thai representative said:¹

Such a discussion in the General Assembly is not an action in the sense of the Charter and is therefore not intervention in the sense of Article 2, paragraph 7, nor is it a requirement to submit the matter to settlement under the Charter. Article 10 of the Charter says that 'the General Assembly may discuss any question or any matter within the scope of the present Charter,' while Article 2, paragraph 7 says, in effect, that such provisions do not authorize the United Nations to intervene. In other words, the General Assembly may discuss, but is not to recommend intervention.

The stress placed by the Thai representative on the substance of the proposed action by the General Assembly rather than on its outward form was taken up and more fully elaborated by the Indian representative. Mr. Menon, in denying that discussion per se constituted intervention, said:²

In presenting the views of my delegation on the present discussion of the inclusion or non-inclusion of the question of Algeria in the agenda, we desire, in order that there be no misunderstanding about it, to restate what we are addressing ourselves to.....

The item proposed for the agenda is, 'the Question of Algeria.' There are no draft resolutions, there are no proposals in regard either to condemnation of the French policy or in support of Algerian independence; there are no draft resolutions which

1. *ibid*, para. 154; emphasis added. See also the statement of the Liberian delegation, *ibid*, 530th mtg., para. 106.

2. *ibid*, 530th mtg., paras. 114-141.

call for the United Nations to take any action by way of intervention or to call upon the French Government to submit to United Nations authority in this matter. The purposes before us are, therefore, extremely limited and specific; that is, to discuss the question, to take into consideration a 'situation' which is very clearly set out in the Charter as different from 'disputes' or different from war, conflict etc. That a 'situation' exists in Algeria is not denied by anybody, and all that we have before us is the consideration of the 'Algerian question'.....

(Para. 139).....Let us first take the words 'authorize the United Nations to intervene.' No authority is being sought at the present moment from the United Nations for intervention. First of all, there is no seeking of any authority. All that is being asked for is the inscription of an item, to consider a question. Authority for intervention is not being sought. Secondly, if, after inscribing the item, we discuss it, it is the submission of my delegation that the discussion of an item is not intervention. If that were so, we would discuss no subject here in the United Nations, because all of us here are sovereign States, and by definition all authority lies within the territorial limits and the legislative, executive and judicial organs of our countries. So if discussion in the United Nations were intervention, it would be governed by Article 2, paragraph 7, and this would reduce the Charter to an absurdity. If there was a motion before the United Nations to take collective action, or to impose sanctions, or anything of that kind, then it could be argued as a matter of intervention. Then the question would arise as to whether the Article is applicable or not. At the present moment, there is no request for giving any authority to anybody, and there is no request for intervention. It is the submission of my delegation that discussion of an issue is not intervention. Who are we to say that public discussion of such complex problems is not likely to assist in solutions?

..... We believe seriously that consideration by the United Nations, or even a decision to consider by the United Nations, would be an aid to conciliation, and not a hindrance. Thus there is no intervention and no request, much less any seeking of authority to intervene. Intervention is an act, and there is no act taking place in this matter, an act which intrudes the personality of the United Nations into the territory concerned.....

We are not requiring anybody to submit to settlement. We have not in any of these questions, whether it concerns South Africa or Tunisia or Morocco or West Irian. What we have said is: please try to get together in order to resolve these problems. We should like these things to be considered in terms of the provisions of the Charter and of the Universal Declaration of Human Rights. We should like you to take into account the fact that

people outside are disturbed by this and so on.¹

2. The Apparent International Consensus of Opinion.

In drawing any conclusions from the agenda debates it must be remembered that debate on the inclusion of an item on the definitive agenda, the inclusion of which has been recommended by the General Committee is limited by the rules of procedure to three speakers for and three against.² Thus any conclusions which can be drawn from these debates are based on minority views.

Viewing each of the ballots on the inscription of items on the agenda, individually, in none of them is there a majority for or against the proposition that discussion of a domestic matter constitutes intervention in the domestic affairs of the State concerned. In those cases where an item was included despite objections based on Article 2(7), the majority of States was of the opinion that the matter was not domestic and so no need to consider the question of intervention arose for them. Where inclusion was rejected, it was so more for political reasons than for legal. In fact, comparatively few States have taken a definite line on this question.

With these qualifications in mind the ballots on inclusion of items on the agenda may be looked at collectively. If this is done it is clear that of the States which have given serious thought to the definition of intervention in the context of the United Nations Charter, a majority have expressed themselves as of the opinion that even discussion of the domestic affairs of a particular State constitutes intervention and a fortiori, they consider any recommendation which

1. This statement of the problem, though in many ways clear, to a certain extent obscures the issue. Other nations may be disturbed by certain happenings inside the territory of another state, but does this confer competence on the United Nations?

2. Rule 25.

deals therewith as similarly tainted. The majority have not been willing to adopt the technical definition of intervention championed particularly by India.

The break-down of this majority is of considerable interest, for it appears that about an equal number of communist and western or western-aligned states have upheld the non-technical definition of intervention. In all nineteen States supported this view in the agenda debates, the composition of which was as follows: Bulgaria, Byelorussian S.S.R., Czechoslovakia, Hungary, Poland, Romania, Yugoslvaia, U.S.S.R., Australia, Belgium, Colombia, France, Netherlands, New Zealand, Portugal, Republic of South Africa, Turkey, United Kingdom and the United States. To this can be added also Albania and the Ukrainian S.S.R., which in substantive debates strongly supported this point of view. The fact that this view is held on both sides of the iron curtain lends considerable wight to its validity.

Against this line up of States can only be put eight nations: Canada, Chile, Egypt, Greece, India, Liberia, Thailand, and... the United States. (The United States has rather been trying to have the best of both worlds, for she has supported both points of view.)

Thus there does not appear to be much doubt, if attention is focused on the debates on the adoption of the agenda, where the weight of opinion lies. Few States appear to be willing to allow the General Assembly to discuss a domestic matter. On the contrary, the majority appear to view such actions with considerable disfavour and to treat them as examples of United Nations intervention.

Chapter V.

An Evaluation of the Two Interpretations.

From the debates on the adoption of the agenda in the General Assembly, it is clear that the non-technical or broad interpretation of the word 'intervene' is favoured by more States than the technical or narrow. Now it is necessary to evaluate this interpretation and to see whether it is really concomitant with the actual terms of the Charter, taken as a whole. To do this it is necessary to look first at the principles of interpretation which can be applied to a multilateral treaty of this type. The United Nations Charter is a many faceted document,¹ but above all it is a multilateral treaty and whatever force and effect the United Nations has in any capacity depends on the interpretation of this treaty.

1. The Principles of Interpretation Applicable to Treaties.

In the opinion of Lord McNair, there is no part of the law of treaties which the text writer approaches with more trepidation than the question of interpretation.² Interpretation of treaties is a subject fraught with controversy, in which there are various 'schools' of thought as to what element should predominate, some of which are complementary, many of which are mutually exclusive. "There are no precise rules of customary or conventional International Law concerning the interpretation of treaties."³ There is a wealth of signposts and guides as to how one should go about the task of interpretation. These, however, lead in themselves to no easy automatic answer for they frequently point in different directions. Indeed taken

1. *Supra*, Chap. I, p. 2.

2. *McNair*, *The Law of Treaties*, (Oxford, 1961), p. 364.

3. *Oppenheim-Lauterpacht*, *op.cit.* p. 950.

as a whole the principles and rules of interpretation, together with the views propounded by eminent publicists, are conducive to the view that the interpretation of treaties is a subjective matter rather than one guided by objective criteria. Views on the correct way in which to interpret a treaty are so diverse that the impression is often gained that the various rules and principles are merely recited in order to provide some theoretical foundation for a conclusion otherwise arrived at.¹

Lord McNair defines the task of interpretation as "the duty of giving effect to the expressed intention of the parties, that is, the intention as expressed in the words used by them in the light of the surrounding circumstances."² This, however, is only one of a number of possible approaches to the problem.

Sir Gerald Fitzmaurice points out that there are, in fact, three different approaches to the task of interpretation.³ He refers to them as the 'intentions', the 'textual' and the 'teleological' schools. In the intentions school,⁴ it is considered that the "prime and only legitimate object of interpretation is to ascertain and give effect to the intentions

1. On the Realist approach to interpretation in general, see Willis, Statute Interpretation In A Nutshell, 16 Can.Bar Rev., p. 1, (1938); and also, Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 B.Y.I.L., pp. 53-55, (1949); at p. 55 he says: "It thus appears that the importance of the rules of interpretation is limited in the sense that when used by the Court, they are not necessarily the decisive factor in reaching the decision and that a decision reached by reference to what is generally described as a rule of interpretation is often arrived at without any specific mention of the rule in question."

2. McNair, op. cit., p. 365.

3. Fitzmaurice, The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Points, 28 B.Y.I.L., p. 1-2, (1951); hereinafter referred to as "Fitzmaurice, 1951."

4. ibid.

or presumed intentions to the parties". In the textual school, the "prime object is to establish what the text means according to the ordinary or apparent signification of its terms".¹ In the teleological school, "it is the general purpose of the treaty itself that counts, considered to some extent as having, or as having come to have, an existence of its own, independent of the intentions of the framers. The main object is to establish this general purpose and construe the particular clauses in the light of it: hence it is such matters as the general tenor and atmosphere of the treaty, the circumstances in which it was made, the place it has come to have in international life, which for this school indicate the approach to interpretation".²

The choice between these three "schools" is made more difficult because of the controversy over whether or not the 'rules' of interpretation are useful or merely a hindrance; over whether the intentions of the founders are relevant or not; and how these intentions are to be ascertained.³

Reliance on the intentions of the parties as the principal guide to interpretation, is a principle derived from private contract law and applicable here because in bygone days most treaties were in the form of bi-lateral, interstate contracts. However some people argue that this principle cannot be applied to the modern multilateral treaty. It is argued that numerous factors make the intentions of the parties, in such multilateral treaties, irrelevant. These factors include "the haste and confusion in which multilateral conventions are often drawn up, the mixed aims, motives, interests and ideologies of the

1. *ibid.*

2. *ibid.*

3. *ibid.*, pp. 3-4.

countries represented at the drafting conference; the fact that many of those States which took a share in the framing of the convention subsequently fail to become parties to it, while on the other hand many States which took no share in the framing do become parties by subsequent accession; the fact that States may accede to these conventions many years after they were originally drawn up, when the exact intentions of the framers, even if ascertainable at all, have become overlaid by a long process of practice and application, and that a position may well have been reached in which the majority of the actual parties to a convention are states which did thus accede and had no hand in the original drafting".¹

Even if it is accepted that the intentions of the framers of a multi-lateral treaty must be decisive, there is no easy guide to the ascertainment of those intentions. Are they to be found in the words used therein, and in those words alone? What attention should be paid to the 'surrounding circumstances'? What are 'surrounding circumstances'? To what extent can the travaux préparatoires be consulted?²

These and similar questions indicate the subjectivity of the entire matter of interpretation. Which ever view is taken will depend very much on one's

1. *ibid.* This is particularly true of the Charter of the United Nations. X

2. These and other considerations are highlighted by the separate and dissenting opinions appended to the advisory opinion of the I.C.J. in the matter concerning 'Certain expenses of the United Nations (Article 17, paragraph 2 of the Charter)', Advisory Opinion of 20 July 1961: I.C.J. Reports 1962; p. 151; in particular see the opinions of Sir Percy Spencer p. 184 et seq; Sir Gerald Fitzmaurice, pp. 201-209; Judge Koretsky, p. 268, para. 5 and Judge Winiaszki, p. 230.

predisposition.¹

One of the most coherent expositions of the principles applicable to treaty interpretation is that of Sir Gerald Fitzmaurice, in two articles in the *British Year Book of International Law*,² in which he sets out the principles of interpretation which have been followed by the International Court of Justice and its predecessor, the Permanent Court of International Justice. According to Sir Gerald, the International Courts have tended to follow six principles, which are:³

- I. The Principle of Actuality (or Textuality). Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.
- II. The Principle of the Natural and Ordinary Meaning. Subject to Principle VI below, where applicable, particular words and phrases are to be given their normal, natural and unstrained meaning in the context in which they occur. This meaning can only be displaced by direct evidence that the terms used are to be understood in another sense than the natural and ordinary one, or if such an interpretation would lead to an unreasonable or absurd result. Only if the language employed is fundamentally obscure or ambiguous may recourse be had to extraneous means of interpretation, such as, consideration of the surrounding circumstances, or travaux préparatoires.
- III. The Principle of Integration. Treaties are to be interpreted as a whole, and particular parts, chapters or sections also as a whole.

1. The following works may be consulted on the subject of the interpretation of treaties: McNair, *The Law of Treaties*, Part IV, p. 345; Fitzmaurice, 1951; Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: Treaty Interpretation and Other Points*, 33 B.Y.I.L., p. 203 et seq., (1957), hereinafter referred to as Fitzmaurice 1957; Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 B.Y.I.L., p. 48, (1949); Lauterpacht, *Development*; Oppenheim-Lauterpacht, *op.cit.*, and Reports by Sir Humphrey Waldock to the International Law Commission on the Law of Treaties, see I.L.C. Yearbook 1962, Vol. II, p. 27; *ibid*, 1963, Vol II, p. 95; and *ibid*, 1964, Vol. I, p. 23 - the discussion of the third report. The text of the third report has not yet been issued as an I.L.C. Document.

2. Fitzmaurice, 1951; Fitzmaurice, 1957.

3. Fitzmaurice, 1957; p. 211-214.

Subject to the Foregoing Principles

- IV. The Principle of Effectiveness. (ut res magis valeat quam pereat.) Treaties are to be interpreted with reference to their declared or apparent objects and purposes, and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and meaning can be attributed to every part of the text.
- V. The Principle of Subsequent Practice. In interpreting a text, recourse to the subsequent conduct and practice of the parties in relation to the treaty is permissible, and may be desirable, as affording the best and most reliable evidence, derived from how the treaty has been interpreted in practice, as to what its correct interpretation is.
- VI. The Principle of Contemporaneity. The terms of a treaty must be interpreted according to the meaning they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.

As one would have expected, the International Courts have adopted a relatively conservative approach to the interpretation of international treaties. The International Court of Justice and its predecessor have, on the whole, tended to favour a textual interpretation, and have avoided recourse to the travaux préparatoires. Both Courts have tended to relegate to secondary importance "any direct inquiry into the intentions of the parties as being per se the object of interpretation".¹ They have asked themselves, not what the text "was intended to mean, (still less of course what ought it to mean or be made to mean,) but what it does in fact mean on its actual wording".²

2. The Application of the above Principles to the Charter.

The principles of interpretation generally applied by the International

1. Fitzmaurice, 1951, p. 7.

2. *ibid.*

Court of Justice in dealing with treaties do not lead to any magical answer to the problems of interpretation to be found in the Charter. Nevertheless they do point the way and indicate that of the two interpretations of the word 'intervene' current in United Nations practice, the broad or non-technical is more in keeping with the provisions of the Charter as a whole.

The first problem to be tackled is whether Article 2(7) qualifies the rest of the Charter provisions or is itself to be read subject to the general scheme of the Charter. By its position in the Charter, by being created a principle subject to which the Organization is to act and by its own wording, it is difficult to avoid the conclusion that this Article does qualify the rest of the Charter and not the other way round, as some publicists and not a few States would have it. To contend that Article 2(7) had to be read subject to the rest of the provisions of the Charter would run counter to the first three cardinal principles of interpretation followed by the International Court. It would violate principles 1 and 3 in that if it were held to be subject to the other terms of the Charter and not the other way round it would not be possible to interpret the Charter as it stands and on the basis of its text. It would not be possible to interpret the Charter as a whole but it would be necessary rather to have regard to the terms of each section in isolation. When a treaty states that it is to operate subject to a particular principle, then the rest of the document must be read subject to that condition. To do otherwise is to make a mockery of the written word. It would run counter to principle 2 for the same reason. When a particular provision of the Charter is established as a governing principle that does not mean that it itself is subject to the following provisions. To contend otherwise is to nullify the natural and ordinary meaning of the word 'principle'.

The principal objection to the technical interpretation of the word 'intervene' is that it runs counter to the structure of the United Nations and to the provisions of the Charter. The prohibition of intervention, by virtue of its position in the Charter and its own wording, applies to all the functions of the Charter. Article 2 commences with the words "The Organization ... in pursuit of the Purposes stated... shall act in accordance with the following principles". Discussion is an "action" of the General Assembly and therefore must be presumed to be prohibited whenever it touches on the domestic affairs of any one nation in particular. To interpret the word 'intervene' to mean 'dictatorial interference' as that phrase was elaborated in Chapter II, would render Article 2(7) to all intents and purposes redundant, an interpretation which would not be in keeping with the principles of interpretation followed by the International Court, in particular principle II. Even assuming for the sake of argument that the drafters of the Charter did intend this word to bear the meaning of dictatorial interference, and that this had to be taken as the natural and ordinary meaning of the word, such an interpretation would have to be displaced for it would lead to absurd results. It would mean that the General Assembly was prohibited from doing that which it has no power to do. The General Assembly has two principal powers. It can discuss and it can recommend. It does not have the power to interfere dictatorially in the domestic affairs of States as has, for example, the Security Council. If the natural and ordinary meaning of the word 'intervene' is 'dictatorial interference' as that term is elaborated in Chapter II, it must be concluded that those who drafted this particular provision were intent on writing into the Charter a mere nullity. If such an interpretation is accepted it must be concluded that the drafters were desirous of merely adorning the Charter with high-sounding safeguards but which they

knew in fact to be worthless. Such an intention is not only unlikely but to attribute it to the drafters would be positively wrong, for the drafting history¹ of this provision shows that it was intended to govern each and every activity of all organs of the United Nations. The fact must be faced that Article 2(7) was intended to apply to each organ of the United Nations and to all the functions thereof. Discussion and recommendation are the principal function of the General Assembly and hence are prohibited whenever they touch on matters which fall essentially within the domestic jurisdiction of a particular State or group of States.

There is, however, a second objection to interpreting intervention to mean 'dictatorial interference'. To restrict the meaning of intervention thus, as certain jurists and States wish to do is, to a large extent, merely another formula without a definite meaning. What is dictatorial interference? Diplomatic representations, offers of mediation or good offices may not normally constitute intervention but they may conceivably do so, as Fauchille so cogently pointed out.² It is true that in the nineteenth century, 'intervention' did acquire the meaning of dictatorial interference, but the acceptance of this proves nothing for Charter purposes. Those who contend that, in the Charter, 'intervene' means something dictatorial appear to be under the impression that 'dictatorial interference' is something static the meaning and form of which are immutable. This is obviously not so. What was considered as permissible in the nineteenth century may not necessarily be so today. Actions which were legal in the nineteenth century may well be

1. See *infra*. Chap. VI, pp. 142-165.

2. Fauchille, *op.cit.*, para. 300², p. 540; see *supra*, Chap. II, p. 43.

viewed as illegal now. The whole history of the interpretation of this Article of the Charter has been bedevilled by attempts to fit United Nations actions into a plan which was conceived in entirely different circumstances. What was permissible to States individually in the days prior to the establishment of the United Nations, is not necessarily so today. An action which is perfectly legal when performed individually may well be viewed as a dictatorial act of interference and hence illegal, when performed collectively by States, in their capacity of the General Assembly of the United Nations. It is idle to state that because, according to classical international law, one State is permitted, in its representative organs, to discuss the affairs of another, collective discussion in the world representative organ, the General Assembly, of the domestic affairs of a particular State is not, a priori, intervention. Generalizations of this kind are of small import in the law of the United Nations, especially as a good deal of the confusion which surrounds the Charter is there because of just this kind of statement.

It must be appreciated that a definition or categorization of dictatorial actions, suited to the international conditions of the nineteenth century, is unlikely to apply today. The entire international pattern has changed. It is, in fact, necessary to categorize anew, particularly with the United Nations in mind, the types of actions which are today regarded as dictatorial and hence as intervention. Such a categorization, to be inclusive, must of necessity be vague. Nevertheless, it will serve a useful purpose, provided it is realized that the categorization is not finite but subject to modifications and developments which become necessary with the passage of time and the change in world circumstances.

Today, States have surrendered part of their national sovereignty to the

United Nations. They have assumed certain imperfect obligations with respect to such matters as human rights and fundamental freedoms, and social and economic conditions in their territories, matters which heretofore were not usually dealt with in international compacts but were regarded as solely within the jurisdiction of each individual State. This fact immediately sets the second half of the twentieth century apart from former times, and in turn suggests the need to revise certain legal notions, one of which is intervention.

In the conditions of the modern world, it is perfectly reasonable to argue that as States have submitted themselves to a certain increased amount of international authority and have curtailed their own freedom of action in many respects, they have likewise curtailed the powers which can be exercised against them by the collectivity of nations by widening the scope of actions which can be considered as dictatorial. It is a valid line of argument to say that whereas in former times States individually were and in fact still are free to discuss the domestic affairs of another, at the present time collective discussion of such affairs by States in their capacity as members of the General Assembly would be considered as dictatorial and hence illegal. It would seem reasonable to suggest that when States confer on an international body powers to discuss certain topics, any discussion of topics not within the mandate will be considered as dictatorial.

It is suggested that it is not feasible to take a definition from nineteenth century International Law and apply it to the changed circumstances of a world which operates within a legal framework different from that which formerly obtained. The question which is important today is not whether intervention, under the Charter, is confined to dictatorial interference but rather what, considering the circumstances of the Charter, constitutes dictatorial

interference.

If the problem is looked at in this fashion, it is quite feasible to suggest that discussion by the General Assembly of the domestic affairs of a particular nation falls into the category of dictatorial interference. Those who have maintained the contrary have done so on the basis of nineteenth century conceptions of intervention. They have not looked afresh at the concept of dictatorial interference and tried to reappraise it in the light of the Charter provisions. Such an approach to the Charter is doubly defective for, on the one hand, it seeks to apply a rule to circumstances for which it is hardly suited and, on the other, leads to unsatisfactory results for, as has been noted, its application leads to the conclusion that the prohibition of intervention does not apply to the principal powers of the General Assembly, a fact which renders one of the principles on which the Organization was founded almost, if not entirely, nugatory.

The broad or non-technical interpretation of the word 'intervene' is more in keeping with the structure of the United Nations, the internal division of powers among the various organs and the actual terms of the Charter. It is not altogether satisfactory, leading as it does to certain anomalies and conflicts among the various provisions. However, the conflicts and anomalies to which it leads are of a lesser nature than those to which the technical definition gives rise. It has to be admitted that neither interpretation is altogether satisfactory, both of them leading to certain apparent absurdities. However, with this qualification, it is submitted that the broad or non-technical interpretation is the better one, given the actual terms of the Charter.

The anomalies to which this interpretation admittedly gives rise are particularly noticeable in connection with the social and economic functions of the United Nations. Both the General Assembly and the Economic and Social

Council have large responsibilities in these fields. The General Assembly is enjoined, inter alia, to initiate studies and make recommendations for the purpose of promoting international co-operation in the economic, social, cultural, educational and health fields and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.¹ The Economic and Social Council has similar responsibilities. It is arguable - it can be put no higher than that - that if neither of these two bodies can discuss the domestic affairs of particular States, they will be unable to carry out their mandate. It can be contended that as, for example, violations of human rights and fundamental freedoms occur in particular States, to fulfill its mandate the United Nations must be able to discuss the affairs of particular States whether they are domestic or not.

This contention is, however, rather extreme. It fails to take account of the fact that the United Nations is competent to take cognizance of such subjects as human rights and fundamental freedoms in general, and not in relation to any particular State, without being in any way guilty of intervention. No State has contended that as, for example, economic conditions and development are subjects essentially within the domestic jurisdiction of States, they cannot even be discussed on a general plane and efforts made to improve them on a world scale.²

1. Art. 13(b).

2. Not even South Africa, the most vigorous opponent of any kind of intervention in her affairs, has made this claim: see, e.g., the statement of the South African delegate to the 8th session of the General Assembly, [G.A., (VIII), Plen., 435th mtg., para. 37]: "But it was argued again and again that if the General Assembly could not discuss and make recommendations in regard to the promotion of human rights, how was the pledge contained in Article 56 to be carried out? Articles 55 and 56 read with Article 13 of the Charter provide the answer. There are the functions of the Economic and Social Council in the social and economic fields, the establishment of specialized agencies, reports by governments, the making of studies and general recommendations etc. There is the Commission of Human Rights which drafted the Universal Declaration of Human Rights, and is now drafting covenants on human rights which will define human rights and have internationally binding force in respect of all signatories. All these things may be done without interfering in the domestic affairs of a State."

It is generally accepted that such general discussions and the recommendations emanating therefrom are within the competence of the United Nations.

The worst that can be said against the broad or non-technical interpretation of the word, 'intervene', given the terms of the Charter, is that it curtails or limits certain of the most important functions of the United Nations. If this interpretation is accepted, the United Nations will not be able to undertake certain tasks which certain Articles of the Charter, taken in isolation, might have authorized. However, against this must be set the fact that if the technical interpretation is accepted, the principle of non-intervention, subject to which the United Nations is directed to act, becomes meaningless in relation to the General Assembly. In choosing between the two possible interpretations, we are faced with the alternatives: Either we accept the broad or non-technical definition and to a certain extent curtail the portée of certain of the ordinary operative Articles of the Charter, or we choose the narrow technical definition and thereby severely limit the effect of one of the Principles subject to which the Organization was supposed to function. It is submitted that in these circumstances, the choice must be made in favour of the fuller functioning of the Principle rather than of the subordinate Articles of the Charter.

3. Article 2(7) and the Principle of Effectiveness.

Some of the delegates who voted for the inclusion of items on the agenda of the General Assembly did so because they contended that unless that body were able to discuss any subject, whether it were within the domestic jurisdiction of a particular State or not, it would be unable to fulfil the functions for which the United Nations was established. Such States were here relying on the principle of effectiveness - the principle contained in the maxim ut res magis valeat quam pereat. This, for example was the core of the arguments presented by Mr. Santa Cruz of Chile,¹ and Mr. Krishna Menon, of India.² In so far as

1. Supra, Chap IV, p. 106.

2. Supra, Chap. IV, p. 109.

the principle of effectiveness was used here to justify the technical interpretation of intervention, it is essentially unsound.

The extent of this principle of interpretation and the limits within which it may be used are by no means certain. In his work, *The Development of International Law by the International Court*, the late Professor Lauterpacht said that the principle contained in the maxim ut res magis valeat quam pereat was:¹

.... a major principle, in the light of which the intention of the parties must be interpreted even to the extent of disregarding the letter of the instrument and of reading into it something which, on the face of it, it does not contain so long as 'something' is not contradicted by the available and permissible evidence of the intention of the parties.

Professor Lauterpacht was of the opinion that this principle had to be used sparingly² but contended that both world courts had constantly acted upon it as the expense of the literal meaning or the application of the principle of restrictive interpretation.³ This view of the practice of the International Court is not shared by Sir Gerald Fitzmaurice, who has given it as his opinion that:⁴

.... it is through the principle of effectiveness that the Court has given its legitimate place to the teleological element in interpretation (objects and purposes). But.... precisely because of its teleological tendencies and the dangers of falling into judicial legislation that the teleological principle may involve, the Court has always subordinated the principle of effectiveness to that of the textual meaning, in the sense that it is never legitimate, even with the object of giving maximum effect to a text, to interpret it in a manner actually contrary to, or not consistent with, its plain meaning.

The extent to which these two summations of the practice of the International

1. Lauterpacht, H., *Development*, p. 228.

2. Lauterpacht, H., *Restrictive Interpretation*, p. 75.

3. *ibid*, p. 68.

4. Fitzmaurice, 1957, pp. 222-225.

Court of Justice diverge is no doubt open to debate, a great deal depending on the meaning these two eminent publicists intended to convey by the words they used. This very divergence, however, serves well to emphasize the complex nature of this principle and the difficulties attendant upon its application. It is submitted that it would be extremely unwise to place great reliance upon it as the main plank in any interpretation of the Charter. An interpretation of an international multilateral treaty, affecting so many interests, which has to rely principally upon such a dubious principle would hardly receive anything like universal acceptance. To base the technical interpretation of 'intervention' on this principle is, to this extent, therefore, unsound.

In this case, there is, moreover, a further objection to relying to heavily on the principle of effectiveness as a justification for the technical interpretation of 'intervention'. There are present in the Charter various conflicts. Principally, there is a conflict between Article 2(7) and those Articles of the Charter which confer on the United Nations social and economic functions. If the General Assembly is allowed to discuss and pass resolutions on the domestic affairs of particular States, a principle subject to which the Organization is directed to function is rendered almost nugatory. If the General Assembly is not allowed to discuss and pass resolutions on the domestic affairs of particular States, the Articles of the Charter conferring economic and social functions on the United Nations are greatly restricted in their scope.

This conflict cannot be resolved in favour of the technical interpretation of 'intervention' by the simple application of the principle of effectiveness. All that such a use of the principle of effectiveness does is to give currency to one section of the Charter as against another. It seeks to make the social and economic clauses of the Charter more effective and the prohibition of intervention

less so.

The principle of effectiveness, in fact, cuts both ways, on this occasion. It can be adduced in support of both Article 2(7) and the social and economic clauses of the Charter. Some further justification is therefore required before one Article can be given currency over another.

Those who contend that the social and economic provisions of the Charter should be given effect at the expense of Article 2(7) do so on the basis of the supposed objects and purposes of the United Nations. They contend that it was to further certain economic and social ends that the United Nations was established. This is true, but it overlooks the fact that those objects and purposes were framed in such a manner as not to infringe a certain reserve domain of jurisdiction of the Member States. It is submitted that if the Charter is looked at in its entirety, not with any preconceived desire in mind, the social and economic Articles of the Charter will not be given full effect at the expense of Article 2(7). Article 2(7) is the fundamental principle, not the other Articles concerned. If effect must be given to one Article as opposed to another, it is surely reasonable to give effect to the fundamental principle, rather than the Article which, in terms of the text, it is supposed to qualify.

4. Evaluation of the Practice of the General Assembly in the Agenda Debates.

(a) The Narrow or Technical Interpretation.

Of the arguments presented in support of the narrow or technical interpretation of 'intervention', only those of Chile, Thailand, and India added anything other than the bland claim - a claim in any case entirely unfounded¹ - that the founders of the Charter intended this term to mean 'dictatorial interference'.

1. See *infra*. Chap. VI, pp.142-165.

The representative of Chile claimed that before the General Assembly could be guilty of intervention, it would have to attempt to "oblige a State to take steps, either separately or jointly to achieve the purposes of Article 55 of the Charter".¹

At first sight, this argument appears attractive. It is at least a plausible interpretation. How can any discussion which does not oblige a State to do anything be regarded as intervention? This argument depends, of course, on an underlying view of intervention as something dictatorial. The flaw in the Chilean contention is, of course, due to the fact that the General Assembly does not have the power to oblige any State to do anything. Budgetary questions aside, the most that the General Assembly can do is to recommend, and recommendations are not binding on any Member of the United Nations. Therefore, while it might, on other grounds, still be true that discussion does not constitute intervention in the domestic affairs of a State, this particular Chilean argument is essentially false, for it seeks to attribute to the General Assembly a power which it in no capacity possesses. It is therefore pointless to say that discussion cannot be intervention in the domestic affairs of a State because it does not seek to oblige that State to do anything. The General Assembly has no power to 'oblige' anyone.

Chile has also maintained that the interpretation of Chapter IX of the Charter and its relationship to Article 2(7) recorded in the records of the San Francisco Conference on International Organization cannot impose an eternal obligation on the Organization.² This argument must also be disputed. It is a

1. *Supra*, p. 106.

2. G.A., (VII), Plen., 381st mtg., para. 102.

common practice at drafting conferences of this kind to record an agreed interpretation of certain provisions. If such agreed interpretations are not binding, until formally altered according to the amendment procedure provided in the international instrument concerned, international conferences and the conventions which result therefrom become of doubtful validity, for they will thereby cease to establish definite legal obligations for the signatories. States are not often going to append their names to conventions which place upon them some kind of obligation, which is liable to be altered at any minute, in a way which they cannot foresee and over which they have no shred of control.

The arguments of Thailand on this subject, delivered at the tenth session of the General Assembly, fall into three parts. First, arguments similar to those of Chile, discussed above, were presented. The Thai representative asserted¹ that as discussion is not a requirement to submit a dispute regarding a domestic matter to settlement under the Charter, it cannot be regarded as intervention. But can the General Assembly require that a State does submit such a matter to settlement under the Charter? Quite apart from the terms of Article 2(7), the General Assembly can 'require' nothing of a State except that it pay its share of the bills. This Thai argument is therefore open to the same objections as was that of Chile on a similar point.

Secondly, the representative of Thailand asserted that discussion is not an action in the sense of the Charter and is not therefore intervention. It cannot be denied, however, that discussion is a 'function' of the General Assembly. Of course what Prince Wan Waithayakon, the Thai representative, presumably meant was that discussion is not an executive action, on the one hand, or a command that something be carried out, on the other - both actions which would fall under the heading of enforcement actions. However, the General Assembly can

1. *Supra*, Chap IV, p. 109.

do neither of these things. Again, the objections posed to the Chilean views on discussion apply here. The General Assembly cannot act in the sense in which the Thai representative used that term. But it can discuss. Surely then, discussion, a power of the General Assembly, is also an action of that body to which the terms of Article 2(7) apply. If it does not, Article 2(7) means nothing in relation to this action of the General Assembly.

The third part of the Thai representative's analysis of the idea of intervention is, however, more meaningful. He claimed that the General Assembly can discuss, but that it cannot recommend intervention. This, at least, puts a limit to the results which can flow from a discussion of the domestic affairs of a particular State. Whatever the other results of such a discussion, no recommendation can be made to Member States to intervene in the domestic affairs of the State in question. However, the essence of this part of the argument depends on the premise that discussion is not an action in the sense of the Charter and not therefore intervention, an interpretation to which there are sound contrary arguments.

Undoubtedly, the most able defence of the argument that 'intervention' in United Nations law must be understood in its classical sense of dictatorial interference, was that given by Mr. Krishna Menon of India during a debate, at the tenth session of the General Assembly, on whether or not to include the Algerian Question on the agenda.¹ Mr. Menon pointed out that in seeking to inscribe an item on the agenda of the General Assembly, no one was seeking authority to intervene in the domestic affairs of France. There were before the General Assembly at that time, he said, no draft resolutions, condemning French policy in Algeria or calling for United Nations action, or requiring

1. *Supra*, Chap. IV, p.109.

the French Government to submit the dispute with the Algerian people to settlement under the Charter.

All this is very true, but it does not take us very far, for it is largely irrelevant to the question at issue, which is whether discussions leading up to the adoption of such resolutions are themselves illegal if they deal with matters which fall within the domestic jurisdiction of a State.

Mr. Menon then went on to suggest that discussion per se did not constitute intervention because if it did, the United Nations would be able to discuss nothing at all, as all subjects, in his opinion, lay within the limits of State territory and within the powers of the legislature, executive and the judiciary of the several States.

This argument is ingenious, but essentially specious. It is based either on clever semantics or on a complete misconception of International Law. What purpose does it serve to remind us that the world is divided up into geographical areas which are called sovereign and within whose power lie all possible forms of action? This is merely repeating the obvious to no good purpose. International Law fully recognizes that each sovereign State has the plenum of powers and that each and every subject is within the power, legislative, executive or judicial of each. However, International Law regulates the fashion in which certain State powers can be exercised. It curtails the complete freedom of action of each State. The field of jurisdiction which it does not regulate is known as the reserve domain of domestic jurisdiction, in which States are free to act as they please. The Charter did not bring every form of State activity within the sphere of International Law. It purposely left a certain quantum of State power outside, that quantum being referred to as the domestic jurisdiction of States. Mr. Menon's argument tries to obscure this fact of International

Law, without success however.

Mr. Menon further suggested that intervention is an act which intrudes the personality of the United Nations into the territory of the State concerned. Discussion, he claimed, is not such an action. Against this argument must be set, however, those of the United Kingdom and South Africa that where the purpose of a discussion is to modify the situation inside a certain State, and that where the result of such a discussion is to produce the desired changes, intervention has taken place.¹ Paraphrasing Mr. Menon, Great Britain and South Africa would probably conclude that discussion with such purposes in mind and producing such results was indeed an action which intruded the personality of the United Nations into the territory of the State concerned. Indeed, South Africa has maintained that discussion 'constitutes what is perhaps one of the most insidious and effective forms of intervention of which this Organization is capable'.² It is difficult not to agree with this contention, especially when a discussion is undertaken for the specific purpose of putting pressure on a particular State.

None of the arguments presented in support of the technical definition of intervention really stand up to very close examination. Each such argument seeks to overlook the fact that Article 2(7) is a principle of general application and subject to which each and every organ of the United Nations is directed to function.

(b) The Broad or Non-Technical Interpretation.

The arguments presented in support of this interpretation of Article 2(7) are particularly strong, given the terms of the Charter as they actually are. In almost all cases, States which support this interpretation start from the proposition - well founded in the Charter - that Article 2(7) overrides and qualifies the

1. See *infra*, p.137.

2. G.A., (VIII), Plen., 435th mtg., para. 47; see *supra*, Chap. IV, p.81.

rest of the Charter. It is the condition subject to which all other Articles of the Charter must be read. 'Nothing' means simply what it says - a view which is very hard to refute.¹

The principal exponent of this view of intervention has been South Africa. In the debates on the adoption of the agenda South Africa, opposing the technical interpretation of intervention, has cogently pointed out that only the Security Council has the power to intervene dictatorially in any matter and that it was on the Security Council alone that this power was conferred. Hence, argued South Africa, if the term 'intervene' is to have any meaning in relation to the other organs of the United Nations, as on the face of the Charter it was intended to do, it must be interpreted so as to include the functions of those organs, otherwise the prohibition in Article 2(7) would be meaningless. Intervention, it is argued, must carry its ordinary dictionary meaning of interference, for if it does not, Article 2(7) prohibits the organs of the United Nations, and the General Assembly in particular, from doing that which they have no power to do - an obvious absurdity.

The functions of the General Assembly are discussion, recommendation and the study of certain topics. Therefore, it is argued, none of these can be carried out in relation to any matter which is within the domestic jurisdiction of a particular State. The argument is logical and, from a textual point of view, sound.

1. It is important to note that this view of Article 2(7) is supported not only by certain western States, but by the entire Soviet bloc; see generally G.A., (III/2), Plen., 189th mtg., - The Observance of Human Rights in Bulgaria and Hungary and Romania, in particular, the views expressed by Mr. Houdek of Czechoslovakia (p. 6 et seq); and also G.A. (V), Plen., Vol. I, 284th mtg., particularly the views of the Soviet Union, at para. 146.

Apart from the strict textual, interpretative reasons for considering discussion as intervention, other arguments, based on the results produced by and the purpose behind, discussion, have been adduced in support of the proposition. Viewed from the standpoint of the results in the territories concerned, it is claimed that discussion obviously constitutes intervention. Opposing the inclusion of the item, the Racial Conflict in South Africa, on the agenda of the seventh session of the General Assembly, the South African representative, Mr. Jooste said¹ that discussions of such matters:

.....inevitably have local political repercussions which lend encouragement to malcontents and dissidents, who are to be found in every country, whether it be badly or well governed. Such discussions stimulate intransigence and stultify genuine efforts at finding solutions to problems which often involve the very existence of the State concerned.

Professor Lauterpacht opposed the view here expressed by the South African delegate. In his opinion,² the fact that a recommendation, discussion or inquiry by the General Assembly, the Economic and Social Council or the Security Council under Chapter VI, may be phrased or conducted in such a way as to mould a State's attitude towards a particular question, or be calculated to focus world opinion upon a State, cannot amount to intervention. In his opinion, persuasions of that kind could not be prevented by any provision of the Charter.

Were Professor Lauterpacht's remarks confined to the incidental results of such discussions and recommendations, then it would be arguable that more weight should be attached to them than to those of the South African Government. But where such discussions are undertaken and recommendations adopted with the express intention of producing such results, then it is more reasonable to consider them as intervention.

1. G.A., (VII), Plen., 381st mtg., para. 25.

2. Oppenheim-Lauterpacht, op.cit., pp. 169-170.

Where the intention of a discussion was to produce a certain result in a member state, that, in the opinion of the British Government, did constitute intervention. Speaking in the Ad Hoc Political Committee of the seventh session of the General Assembly, the British representative, Lord Llewellyn, said that the term 'intervene' meant to come between, to interfere, so as to prevent or modify the result. Was this not the precise aim of those governments which asked for the inclusion of the item, the Racial Conflict in South Africa, on the agenda, he asked? He suggested that if there was no intention of coming to a definite conclusion to be embodied in a resolution, there was no point in discussing the item, unless discussion itself was intended to modify the result.¹

Where the purpose of any discussion in the General Assembly is to pressure a Member State into a certain course of conduct, such actions must be considered as intervention. Where, as a result of such discussions in the General Assembly, internal disorder or changes are produced, it can hardly be claimed that they are incidental. Persuasions of this kind can be prevented by the terms of the Charter.

The arguments presented in support of the view that discussion does constitute intervention, strong in themselves, have been substantiated by reference to the records of the San Francisco Conference on International Organization. Thus, for example, at the fifth session of the General Assembly, the Soviet representative supported his contention that to discuss the subject, the Observance of Human Rights in Bulgaria, Hungary and Romania, constituted intervention, by the following reference thereto:²

1. G.A.,(VII), Ad Hoc Pol.Com., 14th mtg., para. 11.

2. G.A.,(V), Plen., 284th mtg., para. 146.

Certain delegations have endeavoured to justify the discussion of a similar question at previous sessions by reference to Article 55 of the Charter. But that Article provided no justification of such a course. Apart from the fact that Article 55 in no way modifies the provisions of Article 2, paragraph 7, it should not be forgotten that at the San Francisco Conference it was agreed and included in the records of Committee II/3 that nothing contained in Chapter IX, of which Article 55 is an integral part, should be construed as giving authority to the Organization to intervene in the domestic affairs of Member States.

The records of the San Francisco Conference were also quoted frequently by the South African delegation, and in particular, the argument put forward by the Soviet Union in reliance on the records of Committee II/3 was echoed by South Africa on more than one occasion.¹

The South African delegation also contended on several occasions that the original intention of the founding members of the United Nations having been that Article 2(7) should qualify the entire Charter, this intention could not be altered by any process of interpretation or development. In the opinion of South Africa, the only way in which the original intention could be altered was by a formal revision of the Charter, in accordance with the procedure provided in the body of the treaty.²

The strength of this last argument will be patent. It is true that subsequent practice of parties to a treaty can alter the meaning of a clause thereof. But it cannot do so in the face of repeated protest by some of the parties to the treaty and in particular in the face of protest by a State against which the subsequent practice is directed. The only correct way in which to alter the purport or scope of a treaty in these circumstances is to secure the formal revision thereof.³

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1. G.A.,(VII), Plen., 381st mtg., para. 42; G.A.,(VIII), Plen., 435th mtg., para. 55 ; for fuller treatment of the subject see *infra*, Chap. VI, pp. 142-165.
 2. G.A.,(VII), Plen., 381st mtg., paras. 12-14; G.A.,(VI), Plen., 341st mtg., para. 35.
 3. See Report of Committee IV/2, U.N.C.I.O., Vol. 13, p. 709-710, para. 7; Doc. 955, IV/2/42(2); and also Vallat, *The Competence of the United Nations General Assembly*, 97 H.R., p. 209 (1959).

It might possibly be suggested that where, as in the case of the Charter, a formal amendment, to be effective, must be ratified by a two-thirds majority of the Members, an informal amendment produced by subsequent practice, accepted by a similar majority should likewise have similar force and bind States which oppose it.¹ However, it is suggested that such a course would be very dangerous in an international organization of the nature of the United Nations and it is highly doubtful if such a practice would find general acceptance.

Perhaps one of the most succinct presentations of the reasons why domestic matters cannot be discussed by the General Assembly was given by M. Spaak, of Belgium when he said, with reference to the inclusion of the Algerian Question on the agenda for the tenth session:²

.....As I see it, the vote we are about to take involves more than the prestige of the Assembly. It is a question which challenges the essential principles on which this Organization was founded and, in my view, if the Assembly were guilty of contravening in what seems to me an all too obvious manner, Article 2, paragraph 7, of the Charter, many of us would be faced with the agonizing question: How can we possibly remain in an Assembly which so palpably violates the contract that links us one with another?

The other day, and again this morning, I listened to speeches which dumbfounded me. I heard it said this morning that we were competent to discuss this tragic and painful case of Algeria because blood was being spilled in Algeria at this moment. Is the United Nations, then, to seize upon every question where it can be shown that blood is being spilled?

Another speaker this morning said.... that any "human group" having a claim to assert should be able to bring it before this Assembly. Are we going to transform the Assembly into a sort of international court? Beware gentlemen: it is not only collective national claims which may one day be brought before such an international court, but also other social claims, human rights other than that of self determination. Is that the course on which we

1. See Article 108 of the Charter for the amendment provisions.

2. G.A., (X), Plen., 530th mtg., paras. 30-34; see also the British statement, *ibid*, 529th mtg., paras. 145 et seq; and that of the Colombian representative, *ibid*, 525th mtg., para. 167 et seq.

are going to embark?

Yet another speaker said that we were competent because many of us were anxious about what was happening in Algeria. But shall our proceedings henceforth be governed, and our competence be decided, on the basis of notions as vague and as sentimental as these - notions deserving of respect, but nevertheless purely sentimental?

If words such as these had been uttered at San Francisco I assure you that I would have hesitated long before advising my Government to enter the United Nations, for I should have felt that I was advising it to join, not an orderly assembly capable of constructive work, but a chaotic and nondescript body in which no rule would ever be respected and any individual would be at the mercy of decisions taken by fortuitous majorities.

If the Charter is looked at in its entirety, rather than attention concentrated on particular provisions thereof and account taken of the over-all object and purpose of the Organization, rather than of just certain aspects of it, it is difficult to avoid the conclusion that the arguments presented by those who favour the broad or non-technical interpretation of intervention have right on their side. The Charter does say that nothing shall authorize the United Nations to intervene in the domestic affairs of a State or require the Members to submit such matters to settlement under the terms thereof. No amount of juggling with the terms of this Article will conjure it out of the way or somehow lessen the import of its wording. The awkward historical fact remains that this provision was placed in Article 2 of the Charter so that it would apply to the whole Organization, to every organ thereof and to all their respective powers. The Charter is a multilateral treaty and it is this treaty alone which is the source of the rights, powers and obligations of the United Nations as an entity and of the Members. The rights and duties of the Members of the United Nations are governed by the treaty to which they have become parties. The functions and powers of the United Nations vis à vis those Members and such States as still remain outside its membership are governed by the instrument which created it,

and the fact that the United Nations has, largely, a political character cannot release it from "the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgement".¹

The strength of these conclusions and the rectitude of the broad or non-technical interpretation of intervention are amply demonstrated by the drafting history of the Charter, to a brief examination of which it is now necessary to proceed.

1. See, Admission of a State to the United Nations (Charter, Article 4), Advisory Opinion: I.C.J. Reports, 1948, p. 64.

Chapter VI

The Drafting of the Charter

The drafting history of the Charter is, of course, relied upon by almost every commentator on the Charter to support his interpretation of any Article. With reference to Article 2(7), detailed analyses of the travaux préparatoires have been undertaken by several of the authors quoted in Chapter III.¹ Unfortunately, as their conclusions would indicate, they are unable to agree on the portée of those documents. Each is able to find in the Conference records support for his own theory. This has led some commentators to conclude that the Conference discussions are ambiguous and that to arrive at any coherent interpretation of Article 2(7), the practice of the United Nations itself has to be relied upon.² Nothing could be further from the truth. The general trend of the Conference on this question was quite clear. The delegations most intimately connected with the drafting of Article 2(7) indicated that by the term 'intervene' they understood any 'action' by any organ of the United Nations concerning a matter which was within the domestic jurisdiction of a particular State; i.e., any discussion of or recommendation, inquiry or study concerning the domestic affairs of one State in particular would amount to intervention.

Of course, it is true that contradictions can be found in the records of the San Francisco Conference. However, that is hardly surprising. What would have been surprising would have been if no such contradictions could be found. At that Conference, as at any other international gathering of any importance, many interests were represented. Each delegation was trying to ensure the protection of the interests dearest to its country. The interaction of political interests as diverse and numerous as the States represented was bound to lead to a certain amount

1. See inter alia, Goodrich and Hambro, op.cit., pp.110-121; Preuss, op.cit., pp.570-604; Rajan, op. cit., 32-47.

2. See, in partic., Higgins, op.cit., 68-69.

of confusion in the conference records. But what is important in a study of this kind is not the inconsistencies to be found in the debates leading up to the adoption of a particular wording, but the measure of agreement which existed among those most intimately connected with its adoption, concerning the scope of the provision which they have framed. What is important is not the divergent use of a term in preambulatory debates, but the existence of any measure of disagreement with the explanations of the portée of a particular formulation, given by the delegates most directly concerned. Of what use is it to record divergent usage of the term 'intervene' by the delegates of, for example, Argentina, Iran and Mexico in debates in Committee I/1 of the 1945 San Francisco Conference when the States most intimately connected with the formulation of Article 2(7) were the United States, the Soviet Union and Australia and when much of the most revealing work, in this respect, was done in Committee II/2?¹

It is true that nowhere in the records of the United Nations Conference on International Organization is there to be found an explicit statement of the meaning to be attached to the term 'intervene'. However, this is all that is lacking. If the records are approached with an open mind and not with the desire to produce either evidence in support of a particular interpretation or a reason for examining the practice on a particular point, no other reasonable conclusion is possible than that 'intervention' was intended to mean discussion, and recommendations, etc., concerning the domestic affairs of a particular State. If the statements of the United States, the Soviet Union and Australia, in particular, are looked at, together with the apparent acceptance by the Conference of the explanations given by them, then a clear intention to this effect will be seen. The material is so clear that contradictory inferences have almost to be read into the Conference records before these begin in any way to seem

1. See, e.g., Rajan, op.cit., p.66, fn.2.

ambiguous.¹

It is not intended to deal minutely with the drafting history of Article 2(7). This has been fully done by others, to whose works reference can be had for all the minutiae of contradiction.² However, it is necessary to set out the major statements made during the San Francisco Conference which are relevant to this subject. These show the overall intention to exclude any activity on the part of any United Nations organ with reference to the domestic affairs of one State in particular; and besides these, contradictory inferences pale into insignificance.

1. The General Assembly

As originally conceived, the prohibition of intervention in the domestic affairs of a State did not extend to the general powers of the General Assembly. The original prohibition, in the Dumbarton Oaks Proposals, was located in what eventually became Chapter VI, The Pacific Settlement of Disputes. The original formulation was follows:³

The provisions of paragraph 1 to 6 of Section A (Chapter VI) 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.

With the prohibition on this position, the General Assembly was only prohibited from dealing with the domestic affairs of a State in so far as they were a source of a dispute or situation. Its other powers were unaffected.

1. The research dealing with the records of the San Francisco Conference was the last part of this study to be undertaken. The author was therefore surprised to find that the general trend which he had established from an earlier examination of the practice (see *infra*, Vol. II) was negated by the apparent intention of the drafters.
2. See, in partic., Rajan, *op.cit.*, Chs. II & III.
3. United Nations Conference on International Organization, Documents, Vol. 3, p. 13, para. 7. (These Documents are hereinafter referred to as 'UNCIO'.)

Several States submitted comments on and amendments to this provision,¹ but before these could be considered the situation had been altered by the submission, by the four sponsoring² Governments, of their amendment, the positioning of which altered the entire complexion of the prohibition. The four sponsoring Governments proposed to move the prohibition from its location in the Dumbarton Oaks Proposals and to place it in the section which set out the Principles subject to which the entire Organization was to function. Their amendment was phrased as follows:³

Nothing contained in this Charter shall authorize the Organization to intervene in matters which are essentially within the domestic jurisdiction of the State concerned or shall require the members to submit such matters to settlement under this Charter; but this principle shall not prejudice the application of Chapter VIII, Section B. (Chapter VII)

The four sponsoring Governments made it plain that the purpose of their amendment was to alter the nature of the prohibition of intervention. Mr. Dulles, on behalf of the sponsoring powers, explained that by this amendment they intended to deal with domestic jurisdiction 'as a basic principle, and not, as had been the case in the original Dumbarton Oaks proposals and in Article 15 of the Covenant of the League of Nations, as a technical and legalistic formula designed to deal with the settlement of disputes by the Security Council'.⁴

By 'basic principle' Mr. Dulles must have meant that instead of governing only the functions of the United Nations in a restricted sphere, it was to regulate its entire working. This indeed was the interpretation placed on the shift in position

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1. See, UNCIO, Vol.3; and Doc. 207, III/2/A/3, UNCIO, Vol. 12, p.190-192.
 2. The United States, the Soviet Union, China and the United Kingdom.
 3. Doc. 2,G/29, (May 5, 1945), UNCIO, Vol.3, p.623. Chapter VIII, Section B became Chapter VII of the Charter.
 4. Summary Report of the 17th meeting of the Committee I/1, Doc.1019, I/1/42, UNCIO, Vol.6, pp.507-508.

of this provision by the United States delegation,¹ and appeared to have been accepted also by the Conference.² It must therefore be presumed that, irrespective of the inconsistencies which such an interpretation produces, it was the intention of the San Francisco Conference to subject the working of the entire Charter system to this limitation.

The Principles subject to which the entire Organization was to function were considered by Committee I/1. Little that was said in this committee sheds much light on the meaning the drafters attached to the word 'intervene' vis a vis the functions of the General Assembly.

1. American Report - Hearings, p.57:

"1. The proviso with reference to domestic jurisdiction becomes a limitation upon all of the activities of the Organization rather than merely a limitation upon the action of the Security Council under Chapter VI of the Charter....."

It will be noted, however, that this statement is not quite accurate. Under Chapter VIII, Section A, para. 2, any State, whether a member of the Organization or not, was entitled to bring a dispute or situation, which was likely to endanger the maintenance of international peace and security to the attention of the Security Council, or the General Assembly. While no specific powers were conferred upon the General Assembly with reference to such matters, by this Chapter, whatever power it had thereunder to deal with such matters was subject to the prohibition of intervention.

2. See, Report of Rapporteur of Subcommittee I/1/A to Committee I/1, Doc.739, I/1/A/19(a), UNCIO, Vol.6, p.717; and also, Supplement to Report of Rapporteur, Committee I/1, to Commission 1, Doc.1070, I/1/34(1)(d), UNCIO, Vol.6, 486:

" The Organization we are developing is assuming, under the present Charter, functions wider in their scope than those previously assumed by the League of Nations or other international bodies and even wider than those which were first contemplated at Dumbarton Oaks, especially in the economic, social, and cultural fields. The tendency to provide the United Nations with a broad jurisdiction is, therefore, relevant and founded. The necessity, on the other hand, to make sure that the United Nations under prevalent world conditions should not go beyond acceptable limits or exceed due limitation called for principle 8 as an instrument to determine the scope of the attributes of the Organization and to regulate its functioning in matters at issue." (Principle 8 became Article 2(7).)

The task of explaining the intentions of the four sponsoring Governments in putting forward this amendment was given to Mr. Dulles, of the United States.¹ He did not deal to any extent with the portée of the word 'intervene' in so far as that applied to the functions of the General Assembly, or for that matter, the Economic and Social Council. He noted that the question had been raised as to what would be the basic relation of the Organization to member states. Would the Organization deal with the governments of the member States or would it penetrate directly into the domestic life and social economy of the members? Mr. Dulles maintained that the sponsoring-Governments' amendment would require the Organization to deal with the governments. He noted that under the Economic and Social Council, the Organization had a mandate to raise standards of living and foster employment, etc. However, he maintained that no one in the 10-member Council would be able to go behind the governments of member States in order to impose the desires of the Council. The amendment recognised, he claimed, the distinct value of the individual social life of each state.

Rajan has noted that this statement hardly clarifies the nature and scope of the action permissible under the Charter to the organs of the United Nations.² This is certainly true, but it is not the whole story. Lauterpacht went even further. He claimed that this explanation showed that the drafters only intended to prohibit the United Nations from indulging in any "direct legislative intervention in matters normally reserved to the legislature of the State".³ To make

1. Summary Report of the 17th meeting of Committee I/1, Doc.1019, I/1/42, UNCIO, Vol.6, p.508.

2. Rajan, op.cit., p.67.

3. See, inter alia, Lauterpacht, H., The International Protection of Human Rights 70, H.R., p.22 (1947); in the same place he claimed that the following passage from the American Report also supported this view: viz., (American Report - Hearings, pp.102-103),

"Unlike the Security Council, the Economic and Social Council was not to have any coercive powers. The proposals recognised that in social and economic matters an international organization could aid in the solution of economic and social problems but could not interfere with the functions and

such claims is to ignore another important section of the San Francisco records, i.e., those which deal with the drafting of Article 10. It is this Article which gives the General Assembly blanket powers of discussion and recommendation, and therefore the intention of those who framed it is most important.⁴

Article 10, as it now stands in the Charter, was virtually absent from the Dumbarton Oaks Proposals. In those Proposals, the first paragraph conferring various wide powers on the General Assembly was phrased as follows:⁵

The General Assembly shall have the right to consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, to discuss any questions relating to the maintenance of international peace and security brought before it by any member or members of the Organization or by the Security Council; and to make recommendations with regard to any such principles or questions. Any such question on which action is necessary should be referred to the Security Council by the General Assembly either before or after discussion. The General Assembly should not on its own initiative make recommendations on any matter relating to the maintenance of international peace and security which is being dealt with by the Security Council.

In her comments on the Dumbarton Oaks Proposals, New Zealand proposed to amend this paragraph by conferring on the General Assembly power 'to consider any matter

3. contd. "powers of sovereign states. It could not command performance by individual member nations; it could not reach into the domestic affairs of Members. Its tools and procedures were those of study, discussion, report, and recommendation. These are the voluntary means of a free and voluntary association of nations."

With great respect to the opinions of the late Professor Lauterpacht, this does seem to be stretching the process of interpretation rather far. For a start, the Report here uses the word 'interfere' not 'intervene'. It is not appreciated how Professor Lauterpacht drew from this and other passages the conclusion that what the drafters intended to prohibit was direct legislative action by the United Nations.

4. Rajan, op.cit., p.68, fn.3, dismisses this part of the work of the Conference in a few lines. He claims that no conclusive and unambiguous inference can be drawn from the discussions on the precise effect of Article 2(7) on Article 10.

Ambiguity is certainly in the eye of the beholder. However, it is difficult to avoid the conclusion that Rajan was looking for contradictions, and not for evidence of agreement: see also, loc cit., fn.2.

5. UNCIO, Vol.3, p.3: Chapter V, Section B, para.1.

within the sphere of international relations'.¹ Australia proposed to allow the General Assembly to consider and make recommendations on 'matters affecting international relations'.²

The drafting of what is now Article 10 was discussed by Committee II/2. At its second meeting New Zealand proposed the insertion, in the paragraph quoted above, of a first sentence to the effect that the General Assembly should have the power to consider any matter within the sphere of international relations.³ Discussion on the Australian amendment which was roughly to the same effect⁴ was opened at the fourth meeting of the Committee. At this meeting, Mr. Evatt of Australia posed the question of principle thus:⁵

"Should the Assembly have general power to discuss and make recommendations in respect to any matter affecting international relations?"

Discussion on this question of principle⁶ was continued at the ninth meeting of the Committee⁷ and at this meeting the general consensus of opinion was that there should be no limitation whatsoever upon the right of the General Assembly to discuss any matter within the sphere of international relations at any time. It was generally felt that the only limitation on the Assembly's powers to make recommendations should be in respect of matters relating to the maintenance of international peace

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1. Doc. 2,G/14(f), May 2, 1945, UNCIO, Vol.3, p.487.
 2. Doc. 2,G/14(1), May 5, 1945, UNCIO, Vol.3, p.544.
 3. Doc.137,II/2/4, UNCIO, Vol.9, p.15.
 4. Supra, fn.2.
 5. Summary Report of the 4th meeting, Doc.229, II/2/11, UNCIO, Vol.9, p.29.
 6. See Report of Subcommittee A, Doc.235, II/2/A/1, UNCIO, Vol.9, p.336.
 7. Summary Report of the 9th meeting, Doc.443, II/2/19, UNCIO, Vol.9, p.60.

and security during the period when the Security Council was dealing with them and that the interpretation of the expression 'international relations' should be the widest possible.¹

The matter was referred to a drafting subcommittee but it was unable to agree on the wording of the proposed paragraph, one of the most important reasons for this disagreement being the protection which should be given to the reserve domain.² The subcommittee therefore elected to refer to the whole Committee the following draft, accompanied with the question: 'Should the words in brackets be included in the paragraph':³

The General Assembly should have the right to discuss any matter within the sphere of international relations [which affects the maintenance of international peace and security]; and, subject to the exception embodied in paragraph below, to make recommendations to the members of the Organization or to the Security Council or both on any such matters.

The Committee decided that the words in brackets should not be included,⁴ but this does not mean that there was a general understanding that the General Assembly was empowered to discuss and make recommendations on the domestic affairs of one state in particular just because these happened to affect international relations. Indeed all the evidence points to a contrary conclusion.

This provision was very much the work of the Australian delegation, and so it is natural that great weight should be attached to its opinion on the exact scope of the wording adopted. The United Kingdom, for example, considered that Article

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1. Some doubts on the score of intervention were expressed, but this was the general trend of the meeting. See Preuss, op.cit., p.580, fn.2.
 2. See, Summary Report of the 4th meeting of Subcommittee B of Committee II/2, Doc.617, II/2/B/5, UNCIO, Vol.9, p.392.
 3. Report of Subcommittee B to Committee II/2, Doc.601, II/2/B/4, UNCIO, Vol.9, p.407.
 4. Summary Report of 15th meeting of Committee II/2, Doc.686, II/2/34, UNCIO, Vol. 9, p.109.

2(7) was adequate to prohibit recommendations concerning matters which, though they affected international relations, nevertheless still remained within domestic jurisdiction. But she wished, by means of a restrictive phrasing of Article 10, to ensure that the Assembly would not even consider itself competent to discuss such questions. The Australian delegate, Dr. Evatt, agreed with this objective but was of the opinion that the formula, 'within the sphere of international relations' was sufficient to prohibit that also.¹ Dr. Evatt seemed to indicate that the phrase 'international relations' excluded domestic matters, an inference which is confirmed by later statements.

No reference to any disagreement with this Australian point of view has been found and it must therefore be presumed that no delegation questioned Dr. Evatt's understanding of the scope of the new Article.

It seems clear, even from the summary reports of these meetings, that delegations were intent on finding a formula which would give the United Nations the widest possible jurisdiction, and yet leave essentially domestic matters outwith its competence. They were concerned to confer on it wide functions to promote international co-operation, in the social and related fields, but wished to ensure that it had no powers to meddle with the domestic affairs of Members. They appeared, at one stage, to have believed that the formula, 'within the sphere of international relations' was the answer to their problems. It was suggested that perhaps this might allow the General Assembly to discuss the domestic matters of one State, but this was expressly negatived, and this by the delegation which had had a large hand in framing the provision.²

The matter appeared to have been definitively settled, but suddenly, just

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1. Verbatim Minutes of the 15th meeting of Committee II/2; quoted from Preuss, op.cit., p.581, fn.1, as the Verbatim minutes are not readily available in this country.
 2. See Verbatim Minutes of 15th meeting of Committee II/2; *supra*,fn.1.

before the end of the Conference, the entire question of the scope of the Assembly's powers under this provision was reopened by the Soviet Union. During the consideration of the provisional text of the report of the Rapporteur of Committee II/2, the Soviet delegate proposed that the powers of the General Assembly to discuss and make recommendations on any matters within the sphere of international relations be qualified by the addition at the end of the paragraph of the words 'which affect the maintenance of international peace and security'.¹ This was, of course, an attempt to reintroduce the qualification which had been struck out at a previous meeting of the Committee.²

The matter was of such a serious nature that it was referred to the Executive Committee.

Explaining Soviet objections to the paragraph in question, Mr. Gromyko maintained that³ in its attempt at liberalism, this paragraph concealed an element of danger to the effectiveness of the Organization as a whole in that it made it possible for any country to raise for discussion in the General Assembly any act of another which it did not like. For example, he pointed out that a country could object to the immigration policy or tariff system of another country and could raise these matters for discussion in the General Assembly on the grounds that they came 'within the sphere of international relations' despite the fact that they were clearly matters of domestic jurisdiction. The present form of this provision, Mr. Gromyko said, made possible direct infringement of the sovereignty of the member nations of the United Nations. Furthermore, he maintained that such discussions would strain the relations between States in contradiction to the co-operative

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1. Summary Report of 24th meeting of Committee II/2, Doc. 1038, II/2/55, Vol.9, p.221.
 2. *Supra*, p.150.
 3. Summary Report of the 9th meeting of the Executive Committee, Doc. 1063, EX/27, UNCIO, Vol.5, pp.522 et seq.

purposes of the Organization. The Soviet delegation, Mr. Gromyko said, considered the formula adopted by Committee II/2 undesirable. He agreed that the General Assembly should have the power to discuss any matter relating to the maintenance of international peace and security but this did not mean granting the broad authority given under this paragraph.

In reply Dr. Evatt pointed out that a long discussion had preceded the adoption by Committee II/2 of the text as it stood. He recalled that two points of view had been presented in those discussions: (1) that the Assembly should have the power to discuss any matters affecting international relations, and (2) that the Assembly should be authorised to discuss only matters affecting the maintenance of international peace and security. He disagreed with the view expressed by Mr. Gromyko that the language of the provision as it stood would permit members to raise matters of domestic jurisdiction for discussion in the General Assembly. He reminded Mr. Gromyko that the Conference had already approved a provision specifically banning the Organisation from intervening in matters of domestic jurisdiction and such questions as immigration or customs laws would clearly be excluded by that provision from consideration. This prohibition was, he claimed, also fully recognised in the provisions of the Charter concerning the Economic and Social Council.

However, it appeared that Mr. Gromyko was not to be shaken from his views. He replied that the Soviet Union attached great importance to this question and was not prepared to reconsider its views. He re-emphasised his belief that the present form of this provision opened up such a broad field of discussion as to interfere with the principle of sovereignty of nations which had been agreed as fundamental to the Organization.

Dr. Evatt replied that the prohibition against intervention in matters of domestic jurisdiction overrode all other powers granted to the General Assembly. In an effort to meet the Soviet objections he suggested that the prohibition against

intervention could be repeated specifically in connection with the Chapter under discussion. He expressed the hope that the Soviet delegation would agree to solving the problem by repeating, in connection with this provision, a specific prohibition against discussion of matters of domestic jurisdiction.

Lord Halifax and Mr. Wellington Koo both supported this suggestion.¹

Oddly enough this suggestion did not meet with the approval of the Soviet delegation. Mr. Gromyko said that he did not believe that it would be sufficient to refer, in this paragraph of the Charter, to the provision of the Charter prohibiting consideration of matters of domestic jurisdiction. The ideas contained in the two paragraphs were, he maintained, different and difficult to reconcile.

No agreement was reached at this meeting of the Executive Committee and the entire matter was referred to a subcommittee composed of Mr. Stettinius, of the United States, Mr. Evatt and Mr. Gromyko.

The subcommittee did not reach agreement immediately and at a further meeting of the Executive Committee Mr. Gromyko again requested that some mention be made in the proposed Article of the right of the General Assembly to discuss matters relating to the maintenance of international peace and security.² He did this despite the fact that Dr. Evatt repeated that the general prohibition of intervention in domestic affairs, contained in Article 2(7), was an overriding principle or limitation and controlled each and every organ and body of the United Nations, of which the General Assembly was one. He stressed that any powers given to any body or organ of the United Nations were subject to this overriding limitation.³

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1. It will be remembered that the United Kingdom herself had had fears that the present formula might allow the General Assembly to discuss domestic matters of particular States; see supra, pp. 150-151.
 2. Summary Report of the 10th meeting of the Executive Committee, Doc.1108, EX/28, UNCIO, Vol.5, pp.536-537.
 3. *ibid*, p.535.

The matter was referred back to Committee II/2 and thanks principally to the efforts of Dr. Evatt a formula was found which was acceptable to all the member of the subcommittee, i.e., the present wording of Article 10. This text was accepted by the Committee,¹ and it does not appear from the summary report of this meeting that anyone questioned the assimilation which Dr. Evatt had made at the meetings of the Executive Committee of 'intervention' to discussion and consideration.²

The history of the drafting of this Article clearly shows that there was an intention paramount in the minds of the drafters to prevent the General Assembly or, for that matter, any other organ of the United Nations, from exercising any function in connection with matters which were regarded as within the domestic jurisdiction of a particular State. The early discussions on the general question of the powers to be given to the General Assembly demonstrated a desire to bestow on that body wide powers of discussion.³ However, while there was general agreement on this question of principle, when it came to drafting a specific proposal, difficulties arose over the question of the exact scope of those powers. Australia was instrumental in working out the wording finally accepted by the Conference and her delegation made it quite clear that discussion of domestic affairs was not within the powers of the General Assembly under Article 10. No delegation took exception to this and it must therefore be presumed that this interpretation was accepted by the Conference. No doubt contradictory inferences can be found in other corners of the San Francisco records. However, this does

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1. Summary Report of the 25th meeting of Committee II/2, Doc.1121, II/2/59, UNCIO, Vol. 9, p.235.
 2. *ibid*, p.234 - The delegate of Egypt did deplore a certain ambiguity in the new wording, due partly to its definition by reference to the Assembly's power to discuss, but this was not taken up by the meeting at large.
 3. *Supra*, p. 147.

not alter the fact that there was present in the minds of those instrumental in framing this provision an intention to take the domestic matters of particular States out of the competence of the General Assembly.

The fear that the United Nations, through the General Assembly and the Economic and Social Council, might overstep the limits of the powers conferred upon it, was again evident in the drafting of the provisions of Chapter IX, International Economic and Social Co-operation. As in the debates on the drafting of Article 10, so in the drafting of these provisions there was evident the same assimilation of the idea of intervention with 'interference pure and simple' in the domestic affairs of particular nations. The idea that 'intervene' meant some kind of dictatorial interference nowhere reared its head. Thus, for example, the Report of the Rapporteur of Committee II/3 states:¹

There were some misgivings that the statement of purposes (of Chapter IX) now recommended implied that the Organization might interfere in the domestic affairs of member countries. To remove all possible doubt, the Committee agreed to include in its records the following statement:

'The members of Committee 3 of Commission II are in full agreement that nothing contained in Chapter IX can be construed as giving authority to the Organization to intervene in the domestic affairs of member States.'

This same assimilation of 'intervention' to the idea of 'interference pure and simple' is to be found in the Report of the American Delegation to the President on the Results of the San Francisco Conference.²

1. Report of Rapporteur of Committee II/3, Doc.861, II/3/55(1), UNCIO, Vol.10, p.271.

2. American Report - Hearings, pp.105-106; After reciting the text of Article 55, the Report continues:

"No corresponding provision occurs in the Dumbarton Oaks text. Early in the Conference the Delegation of Australia introduced a lengthy amendment which would have pledged all members of the Organization 'to take action both national and international for the purpose of securing to all peoples, including their own, improved labor standards, economic advancement, social security and employment for all who seek it,' and to report annually upon steps taken in fulfilment of the pledge.

The records of the San Francisco Conference on this point do not really admit of any reasonable charge of ambiguity. Yet some authors do make such a charge. In particular, it is contended that Dr. Evatt, in other debates, made statements which cast doubt on the import of his prior statements on the portee of Article 10 and the question of intervention.³

During the consideration of the Report of Committee II/2, i.e., the Committee in which Article 10 was drafted, Dr. Evatt said of this provision:⁴

As has been pointed out by a number of speakers this morning, the Assembly now has the right... to discuss any questions or any matters within the scope of the Charter and it may in connection with those matters ... make recommendations to members of the United Nations on any question. That, Mr. President, is the fundamental basis upon which the Assembly's power to discuss will rest

.....the text that is now before the Commission means, in our view, the clear right of the Assembly to discuss any question or any matter within the scope of the Charter. That scope will include every aspect of the Charter, everything contained in it and everything covered by it. It will include the Preamble of the Charter, the great purposes

2. contd. "These are objectives which have the full support of the Government and people of the United States.

On the other hand, the view was advanced that the further element in the Australian proposal calling for national action separate from the international organization went beyond the proper scope of the charter of an international organization and possibly even infringed on the domestic jurisdiction of member states in committing them to a particular philosophy of the relationship between the government and the individual.

The pledge as finally adopted was worded to eliminate such possible interpretation. It pledges the various countries to co-operate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.

To remove all possible doubt on this score the following statement was unanimously approved and included in the record of the Conference"

3. See, e.g., Rajan, op.cit., p.68, fn.2; and Higgins, op.cit., pp.68-69.
4. Verbatim Minutes of the 14th meeting of Commission II, Consideration of the Report of Committee II/2, Doc. 1151, II/17, UNCIO, Vol.8, p.208.

and principles embodied in it, the activities of all its organs; and the right of discussion will be free and untrammelled and will range over that tremendous area.

It is very satisfactory to note the spirit of unanimity here this morning, because for some time there was opposition to the definition of the power of discussion in terms which most members of the Committee, most of the United Nations, deemed desirable. Now we have agreed upon a formula. It is established, I think, that this right of discussion is so broad, that so long as the matter referred to comes within the scope of the Charter or any of its provisions, there will be no attempt on the part of any body to block discussion or free criticism at the meeting of the Assembly.

This statement is in no way contradictory of previous statements made by Dr. Evatt. All that is to be found here is an emphasis of the breadth of the power which the nations assembled at San Francisco had conferred on the General Assembly. Throughout his statement, Dr. Evatt stressed that the power of discussion was limited by the scope of the Charter, but he had made it perfectly clear at meetings of the Executive Committee that domestic matters were not within that scope. He had even gone to the length of offering to include in Article 10 a specific prohibition of discussion of any domestic matter.

This so-called ambiguous statement must be read subject to the views expressed on other occasions by Dr. Evatt. To do otherwise would be to distort the Conference records. Dr. Evatt had made his position perfectly plain. He was the central figure in this drama and it was principally as a result of his efforts that the Soviet Union came to accept the present wording of Article 10. To suggest that no sooner had he obtained Soviet consent to this wording than he somehow altered his views on the subject is to attribute to him either a lack of appreciation of what he was saying or a Machiavellian intention to thwart

the Soviet Union, for neither of which there is any warrant.¹

2. The Security Council

The wording of Article 2(7) was also intended to exclude all functions of the Security Council under Chapter VI with reference to domestic matters. There

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1. In view of the drafting history of this Article, it is well nigh impossible to appreciate how publicists like Bentwich and Martin could give the following interpretation to Article 10: (op.cit., p.35)

"For practical purposes, this phrase [matters within the scope of the Charter] covers the whole field of international relations. The Charter is applicable not only to the international action of Member States, but, in the field of security, also with the action of non-Members (Article 2(6)). It deals with the co-operation of Members not only within the Organization, but also outside it: 'regional arrangements' (Article 52) are not permissible unless they are consistent with the Purposes and Principles of the United Nations. Again, the Assembly is not debarred from discussing the domestic affairs of States. First, discussion and recommendation are not 'intervention' in the sense prohibited by Article 2(7): and secondly, the responsibilities assumed by the Organization for the promotion of respect for human rights have narrowed considerably the field of essentially domestic jurisdiction."

Messrs Bentwich and Martin, in making this assertion, chose to ignore the history of this Article. The phrase, 'within the sphere of international relations' had been expressly excluded from the wording of the Charter because of the fear that it opened the door too wide to possible ultra vires acts by the General Assembly. It had been pointed out, (and not only by the Soviet Union - see, for example, the statement of the British delegation on this point at the 9th meeting of Committee II/2, Verbatim Minutes, May 18, 1945, quoted in Preuss, op.cit., p.580, fn.2) that many matters could be within the sphere of international relations and yet remain within the domestic jurisdiction of States. It was to overcome these objections that the formula 'matters within the scope of the present Charter' was developed. It is therefore misleading to state, baldly, without any qualification as to the intention of the drafters, that for practical purposes, the phrase 'within the scope of the present Charter' covers the whole field of international relations. It is no doubt true, that in practice, it is difficult to draw the line of demarcation. But that some line of demarcation was intended is not in doubt. Therefore it is not helpful in a commentary on the Charter, particularly one written so early in the life of the Organization, before subsequent practice could have had any broadening effect thereon, to make an assimilation of the two.

was present an intention to prevent the Security Council, under that Chapter, from making any recommendations on, or even discussing, such matters. This conclusion is rendered not doubtful by the drafting history of Article 2(7) itself. Again, it was largely due to the efforts of Australia that this point stands out so clearly in the Conference records.

As originally worded, the prohibition of intervention suggested by the four sponsoring powers did not 'prejudice the application of Chapter VIII, Section B' of the Humbarton Oaks Proposals, (Chapter VIII, Section B becoming Chapter VII in the final form of the Charter).¹ To deal with threats to the peace, breaches of the peace or acts of aggression, the Security Council was authorised by this Chapter to make recommendations or decide upon what measures should be taken to maintain or restore peace and security. Australia objected to these provisions. In the opinion of her delegation there was a danger that by allowing the Security Council to make recommendations under this Chapter that body might thereby be authorised to intervene in matters outwith its competence.

The following is the substance of what Dr. Evatt said in introducing his own proposals. For quotation purposes, his statement is long, but because of its importance the relevant section is set out almost in its entirety. He said:²

6. Chapter VIII, Section B, therefore authorises two main and quite distinct, processes. The first is that of making recommendations. The second is that of enforcement. As the proposed new paragraph 8 [eventually paragraph 7] of Chapter II (Principles) is at present worded, it therefore allows the Security Council to employ both processes, if there has been a threat to or breach of the peace.

7. This analysis suggests the second question involved in the proposed new paragraph:

Should the Charter authorise the Security Council, in cases where a state is threatened or attacked by reason of some matter of domestic jurisdiction, to intervene in that matter by making recommendations to the state threatened or attacked?

1. Supra, p. 145.

2. Amendment by the Australian Delegation to Proposed Paragraph 8 of Chapter II (Principles), Doc.969, I/1/39, UNCIO, Vol.6, pp.436-440; emphasis in para.9 added.

8. The exception at the end of the proposed new paragraph implies the answer 'yes' to this second question. The Australian Delegation contends that the answer should be 'no'. One step more in the analysis will show the reasons why we think so.

9. What the general part of the proposed new paragraph does is, in substance, to exclude matters of domestic jurisdiction from the operation of Chapter VIII, Section A [now Chapter VI] - the procedure for peaceful settlement. From the point of view of the Organisation, the important thing that is thereby excluded is the Security Council's power, under paragraph 4 of Chapter VIII, Section A to recommend appropriate terms of settlement. That is an entirely proper exclusion. By definition, a state is free, within the limited sphere of domestic jurisdiction, to adopt whatever policy it thinks best. But the exception at the end of the proposed new paragraph brings back, under Chapter VIII, Section B [Chapter VII] the very thing that the general rule at the beginning excludes under Chapter VIII, Section A [Chapter VI] - the power of the Security Council to make recommendations to the parties. VIII, A, operates where the continuance of a dispute 'endangers the maintenance of peace'. VIII, B, can operate as soon as there is an actual 'threat to peace'. As soon therefore as a threat to peace is made, the Security Council can intervene and take cognizance of the whole matter.

10. Such a provision is almost 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 extract concessions from the state that is threatened. Broadly, the exception cancels out the rule, whenever an aggressor threatens to use force. The freedom of action which international law has always recognised in matters of domestic jurisdiction becomes subject in effect to the full jurisdiction of the Security Council.

11. The Australian delegation opposes the inclusion in the Charter of any provision which produces this result. Our grounds are in no way peculiar to Australia itself. Every country represented in this Conference has its own internal problems, its own vital spheres of domestic policy, in which it cannot without forfeiting its very existence as a state permit external intervention.

Because of these doubts Dr. Evatt proposed that the exception to the general principle of non-intervention should be amended to read:

.... but this principle shall not prejudice the application of enforcement measures under Chapter VIII, Section B.

It would have been difficult for Dr. Evatt to have made his point of view clearer. He assimilated all the functions of the Security Council under Chapter VI of the Charter to intervention. In his opinion the prohibition of intervention contained in Article 2(7) excluded domestic matters from the entire operation of this Chapter. Because of this, he was reluctant to see one of these functions - the power to make recommendations - reintroduced in Chapter VII. It is important to stress that the whole purpose of this Australian amendment was to assimilate any

Security Council dealings with a domestic matter other than the ordering of enforcement measures to intervention. This was the sole purpose of its introduction. By this amendment Australia hoped to prevent the Security Council dealing with any domestic matter whether by way of discussion, study or recommendation. The only thing which was to be permitted was enforcement measures, should the necessity for them arise.

The Australian amendment was accepted by the Committee by 31 votes to 3, with 5 abstentions.¹ There was thus general acceptance of the Australian fears and indeed some of the delegations wished to go even further in safeguarding domestic jurisdiction by suppressing altogether the final clause defining the exception in favour of action by the United Nations. Furthermore, such objections as there were to the Australian amendment,² were directed to practical consideration. Norway, in particular, objected to the entire provision as she felt that any limitation upon the power of the Security Council, even under Chapter VI, would impair the efficiency of the United Nations as a peace keeping and peace ensuring agency.³ But her delegation did not in any way seek to suggest that discussion and recommendation of domestic matters were not intervention. Rather her delegate tried to persuade the Conference to include domestic matters within the ambit of the powers of the Security Council under Chapter VI.⁴

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1. Summary Report of the 16th meeting of Committee I/1, Doc.976, I/1/40, UNCIO, Vol.6, pp.494-499.
 2. In partic. Norway; see Statement by the Norwegian Delegate to Committee I/1, Doc.929, I/1/37, UNCIO, Vol.6, pp.430-432.
 3. *ibid.*
 4. For further material confirming the intention of Committee I/1 to exclude domestic matters altogether from the purview of Chapter VI, and from the power of recommendation contained in Article 39 see, Supplement to Report of Rapporteur, Committee I/1, to Commission I, Doc.1070, I/1/34(1)(d), UNCIO, Vol.6, pp.486-489; Report of Rapporteur to Committee III/3, Doc.881, III/3/46, UNCIO, Vol.12, pp.502-514; Summary Report of 2nd meeting, Committee III/2, Doc.188, III/2/3, UNCIO, Vol.12, pp. 8-10; and Summary Report of the 16th meeting of Committee I/1, Doc. 976, I/1/40, UNCIO, Vol.6, pp.494-499.

3. Conclusions

The drafting history of Article 2(7) and Article 10, not to mention similar inferences which can be drawn from the history of Chapter IX, is conducive to no other reasonable conclusion than that it was the intention of those present at San Francisco to prevent any organ of the United Nations discussing or making recommendations concerning matters which were essentially within the domestic jurisdiction of States. These two Articles were the work of the Australian delegation in particular and hence great weight must be attached to the views expressed by it concerning the portée thereof. Dr. Evatt made it quite clear that in his opinion, discussion of and recommendation concerning the domestic affairs of particular States were not within the power of any organ of the United Nations. No delegation took exception to this.

The material in support of these conclusions is substantial and in comparison contrary inferences are reduced to mere sniping from the side lines. To hold that the San Francisco records are not conducive to this conclusion is to refuse to attach proper weight to the principal current of this part of the Conference and to concentrate not on the main speeches but on the minutiae of contradiction which can be found in the records of any international gathering.

Against these conclusions only one reasonable argument can be raised. It has been argued that as the word 'intervene' was first introduced into the Charter by the committee of jurists¹ which drafted the four power amendment to the original prohibition (the word 'intervene' not figuring in the original

1. The four sponsoring governments formed a sub-committee to consider all the amendments to the domestic jurisdiction provision. This Committee consisted of John Foster Dulles and Green H. Hackworth, of the United States; Sir William Malkin of the United Kingdom; S.A. Golunsky of the USSR; and Wang Chun-lui of China. It was this committee which prepared the four-power amendment to paragraph 7 of Chapter VIII, Section A and suggested moving the new clause to Chapter II.

text of paragraph 7 of Chapter VIII, Section A) it must be understood in its technical legal sense. It is argued that a committee of jurists must have used the word 'intervene' having in mind the sense which it had in classical International Law, i.e., dictatorial interference, and that they could not possibly have intended to include within that term, discussion of or recommendations concerning the domestic affairs of particular States. These arguments may well be true. However, whether they are or not must remain a matter of conjecture for the report of the committee of jurists is not available.¹

There is, however, a powerful reply to any such assertion. It is to be presumed that the legal advisors of each delegation kept a close watch on the developments which were taking place as a result of the discussions in the various Committees. They must have been aware that in the discussions leading up to the adoption of Articles 2(7) and 10, the word 'intervene' was being used to cover actions which were not usually, in classical International Law, regarded as intervention. Had they taken exception to this, they would surely have made this known to their respective delegations, at least one of which would have pointed out the error, for example, contained in Mr. Gromyko's fears of intervention by discussion. But no such comment is to be found. The Conference was not lacking in legal talent² and it must therefore be presumed, in the face of this silence, that the fears of the Soviet Union, among others, were justified and that the steps which were taken to overcome them were correct.

Rajan, in his work 'United Nations and Domestic Jurisdiction' has maintained that "there is an intriguing conspiracy of silence in the travaux preparatoires on the use of this critical term".³ If by this is meant that there was not

1. Rajan, op.cit., p.35, fn.3.

2. Rajan, op.cit., p.71, fn.4, notes that of the legal advisers present at the San Francisco Conference, seven have been, or are presently, judges of the International Court of Justice.

3. Rajan, op.cit., p.71, fn.1.

a lot of discussion concerning the meaning of the term 'intervene' in Committee I/1, this assertion is certainly true. However this statement is not, in itself, conducive to great conclusions. What is important is the fact that the point was raised and was the source of considerable amount of trouble to certain influential delegates. The fact that special sessions of the Executive Committee were held to clear up this point can hardly be called a conspiracy of silence. The fact that an important amendment to Article 2(7), the sole purpose of which was to ensure that the Security Council could not adopt any recommendations concerning a domestic matter either under Chapter VI or Chapter VII, is hardly conducive to the view that the matter was glossed over. The fact that the wording of Article 10, which had already been agreed on, was altered to take account of the fears of one delegation in particular that the General Assembly might intervene by discussion, is hardly a point that can be thrust into a corner.

Yet, it has been maintained that the San Francisco records are ambiguous. This ambiguity has not been found.

Chapter VII

The Status of Preliminary or Jurisdictional Discussion and the Question of Inclusion

Since the majority of States which have considered the question of the definition of intervention in United Nations law maintain that substantive discussion of or recommendations concerning the domestic affairs of any State in particular constitutes intervention, it becomes necessary to consider the status of preliminary or jurisdictional discussion. Can this be said to be prohibited by Article 2(7)?

1. Unilateral Decisions on Competence and Their Inherent Defects

In the cases in which objections to the inclusion of items on the definitive agenda of the General Assembly were made on the basis of Article 2(7), there is a certain striking similarity. All of them concerned either questions of the violation of human rights and fundamental freedoms or the maintenance of peace and security. In all of them there was a conflict as to whether or not the subject matter of the item was essentially domestic. Furthermore - and perhaps most important of all - in each case the claim that the subject matter was essentially domestic and hence outwith the competence of the General Assembly was made unreservedly. States made this claim under the apparent impression that the mere fact that they considered a certain item to fall within their own or someone else's domestic jurisdiction was enough to bar inscription of the item in question and any discussion thereon. Thus, for example, in case 7, the observance of human rights in the Union of Soviet Socialist Republics, we find the Soviet Union and Poland requesting the deletion of this item from the definitive agenda because it was, in their opinion, within the domestic jurisdiction of the Soviet Union. Again, in case 8, the observance of human rights in Bulgaria, Hungary and Romania, we find Czechoslovakia, Poland, Yugoslavia, Byelorussia and the USSR requesting the deletion of this item from the agenda for the same reason. In case 24, the question of

Cyprus, the United Kingdom and Turkey opposed the inscription of this item because it was claimed to be within Great Britain's domestic jurisdiction. In all the cases dealt with, no doubt was expressed by those States which adopted this view. With the exception of South Africa¹ we do not hear the argument: The Government of X is of the opinion that this item concerns a matter which is essentially domestic and therefore invites the General Assembly to debate and decide on its competence prior to discussing the substance of the case. Instead, the General Assembly was presented with the bland statement that as these matters were within the domestic jurisdiction of a certain State they had to be deleted from the agenda. Any other course would be intervention.

This contention, surprising enough in itself, is more so when the terms of the Charter are taken into account. In many respects, as already noted, it is a vague document. In particular, it covers such subjects as human rights and fundamental freedoms which heretofore had not been within the confines of international law, or at least only marginally so. Such subjects had in the main been considered to fall essentially within the domestic jurisdiction of the various members of the international community. Now, however, they have been subjected to a certain amount of international authority through their mention in the Charter, but from the Charter itself, the extent of that authority is not clear. It is not clear just how far international responsibility extends and where domestic jurisdiction begins.

Despite this uncertainty, however, states have not hesitated to make the claim that certain items which, in many respects, appear controversial are within domestic jurisdiction and on the strength of this to demand their exclusion from the Assembly's agenda.

If, in any process before an international tribunal, an objection to jurisdiction were lodged on the basis that the matter concerned was domestic, whether or not

1. See, *infra*, p. 201, et. seq.

the tribunal had jurisdiction would be decided by the tribunal itself, not by the contestant. The jurisdiction of international courts is not divested by the mere assertion of a party to a process that it lacks jurisdiction to hear the case. There appears to be no good reason why the same rule should not apply in the proceedings of the United Nations. The jurisdiction of the United Nations is in many respects controversial. In many instances a good case can be made for the proposition that it lacks the jurisdiction to entertain a particular matter. However, such assertions of lack of competence must themselves be subject to the scrutiny and decision of the United Nations. The United Nations, no more than any international tribunal, cannot be bound by the unilateral assertions of Members that it lacks competence. Nemo esse iudex in propria sua causa is a general principle of law applicable to all situations and it follows that if the rule of law is to have any application at all in international affairs no State can be allowed to interpret with binding force its obligations under the United Nations Charter or any other instrument.

In United Nations practice decisions on questions of competence have always been taken by the organ concerned. No resolution has ever been passed which expressly declares that the organs of the United Nations have this power and the Charter does not specifically confer it. However, it is generally accepted that the organs of the United Nations have this power¹ and all attempts to have questions of interpretation referred, as a matter of course, to the International Court of Justice have been resisted.

2. Decisions on Competence - What they involve

The difficulties inherent in an objection to the jurisdiction of any tribunal

1. See Vallat: The Competence of the United Nations

General Assembly, 97 H.R., pp.208-213, (1959) for a discussion of the drafting history of the Charter relating to the question of where the power to give "authoritative interpretations" of the Charter lies.

on the grounds that the matter falls within the domestic jurisdiction of the defendant State were well put by Sir Humphrey Waldock in his article "The Plea of Domestic Jurisdiction before International Legal Tribunals", where it was said:¹

The reserved domain of matters of domestic jurisdiction thus, in principle, comprises those activities which at any given moment are left by international law within the uncontrolled discretion of the State concerned. From one aspect, matters of domestic jurisdiction are those activities which, at any given moment, international law leaves to the exclusive jurisdiction of the State in question. From another aspect, matters of domestic jurisdiction are those activities in regard to which, at any given moment, international law does not subject the State in question to any international obligation vis a vis a State or international organisation. In its first aspect, the doctrine of the reserved domain appears as a constitutional doctrine distinguishing between matters within international jurisdiction and matters exclusively within State jurisdiction. In its second aspect, the doctrine is concerned with the substantive obligations of States under international law; in this aspect it simply affirms that the range of the State's obligations is prescribed by rules of international law applicable at the time and that outside that range a State is not answerable internationally for its conduct. It follows that a plea of domestic jurisdiction may either appear as an objection to the competence of a State, international organisation or international tribunal to examine into the matter at all or may appear as an objection to the validity of an international claim on the ground that the claim does not disclose any breach of an obligation owed to the claimant under international law.

Some of the difficulty which surrounds the doctrine of domestic jurisdiction is due to its dual character as a doctrine concerned both with the boundary between international and State jurisdiction and with the substantive rights and obligations of States under international law. ... even where there exists an independent tribunal, the jurisdiction of which is invoked by one of the parties to a dispute, the intimate connection between the question of jurisdiction and the question of substantive rights and obligations under international law is in no way diminished. Consequently, on the plea of domestic jurisdiction being lodged as an objection to its jurisdiction, the tribunal is necessarily confronted with a point which relates to the substantive rights of the parties under international law as well as to its own competence in the case. The problem for the tribunal is then how to reach a decision as to its own competence in the case without in fact examining into the rights of the parties on the merits and thus to some degree exercising the very jurisdiction which is disputed.

In making any decision on competence, any organ of the United Nations acts in a quasi-judicial capacity and the problems it faces in this respect are the exact

1. Waldock: The Plea of Domestic Jurisdiction Before International Legal Tribunals, 31 B.Y.I.L., p.97 (1954); hereinafter referred to as "Waldock, 1954".

parallel of those faced by any other international tribunal. The question of competence must be discussed by the United Nations, but in so doing there is a distinct danger that the organ concerned will become involved in an examination of the merits of the case, the exercise of this power being the very thing which is being challenged by the plea of domestic jurisdiction.

This problem was solved for international courts by the Permanent Court of International Justice which established the practice, in such cases, of examining only the grounds on which the particular claim was based and deciding on that whether or not it had jurisdiction to hear the case. This procedure was laid down in the advisory opinion on the Nationality Decrees in Tunis and Morocco. In 1923 the P.C.I.J., was asked by the Council of the League of Nations to give an advisory opinion on whether certain decrees, converting into French citizens certain classes of British subjects, were solely a matter of French domestic jurisdiction within the meaning of Article 15(8) of the Covenant of the League, and whether therefore, the Council was prohibited from making any recommendations with respect thereto.

The Court in this case "showed itself very much aware that the question of domestic jurisdiction in preliminary proceedings on jurisdiction is intimately related to the substantive rights of the parties on the merits. It recognised the delicacy of the task of deciding the validity of a plea of domestic jurisdiction as an objection to jurisdiction without a full investigation of the merits and yet without prejudicing the rights of the parties as they emerge from a full investigation of the merits".¹

In giving its opinion, the Court laid down the general principle that in considering the competence of the Council to make the recommendations in question, the criterion which had to be looked to was the general legal nature of the subject matter of the dispute, and not whether the defendant State had or had not in fact

1. Waldock 1954, p.108.

acted within its powers according to international law.¹ The Court came to the conclusion that to decide the preliminary question of jurisdiction, it was not necessary for it to examine in detail the contentions of the parties on the merits, but only to examine, in a superficial manner, the grounds on which the claim was based. The Court said:²

It is certain.... that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15.

It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds (titres) relied on are such as to justify the provisional conclusion that they are of judicial importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (titres), the provisions contained in paragraph 8 of Article 15 cease to apply.

The Court thus held that what is important in deciding jurisdiction is not the substantive rights of the parties, but rather the prima facie status of the subject matter of the dispute. If, on a provisional survey of the grounds adduced by the claimant for his case, it appears that the matter falls within the confines of international law, then the plea of domestic jurisdiction falls, for the purpose of denying jurisdiction to the tribunal.

There has been a certain amount of controversy over the validity of this 'provisional view' approach of the P.C.I.J. to the question of jurisdiction. Sir Hersch Lauterpacht, for example, pointed out that this 'provisional view' approach to the question of competence could lead to the anomalous situation where a Court could find that, on a prima facie survey of the case, a matter fell within international

1. (1923), P.C.I.J., Series B., No.4, pp.23-24.

2. *ibid*, pp.25-26.

law but that on the resultant examination of the merits it might find that in fact the matter was domestic. This would mean that the Court had been exercising a jurisdiction which it, in fact, did not possess, and that its provisional judgement had been based on a general impression which was not substantiated by the investigation of the merits.¹

Whatever the merits of this controversy, it need not detain us here. For, despite the objections of Professor Lauterpacht, the practice of making a provisional assessment of the case for the purpose of deciding the question of jurisdiction has become established. The International Court is frequently presented with objections to its jurisdiction based on the plea of domestic jurisdiction and it disposes of the matter by examining, not the merits of the case, but the legal grounds which are adduced as the basis of the claim.

However, while this 'provisional view' method of disposing of the question of jurisdiction has become established practice in the International Court, it has been found that it is not always possible to adhere to it. The chief difficulty inherent in this procedure is that by confining itself to a superficial examination of the legal grounds adduced for the claim, the Court may thereby fail to appreciate fully the plaintiff's cause of action and thus ignore the existence of international elements therein which would have become evident from an examination of the merits. This defect in the 'provisional view' procedure has led the Court, in some contentious cases, to join the preliminary objections to jurisdiction to the hearing on the merits and thus to defer its decision on jurisdiction until after it has had a full investigation of the merits of the case. This expedient was first adopted in 1933² and is now expressly provided for in the Rules of

1. See, Lauterpacht, H., in 10 Economica, p.137 (1930); quoted by Waldock, 1954. For a full discussion of these conflicting views, see Waldock, 1954.

2. The Fless Case, (1933). P.C.I.J., Series A/B No.52, p.16.

Court.¹ Since this change in the Rules of Court it has become the practice always to postpone until after the hearing on the merits the decision on a preliminary objection to jurisdiction which, because of its close connection therewith, cannot be satisfactorily answered without a full investigation of the merits.²

3. Application of the principles evolved by the International Courts to the procedure of the General Assembly.

In attempting to apply the procedures evolved by the Permanent Court of International Justice and its successor, the International Court of Justice, for dealing with preliminary objections to their jurisdiction, to a body like the General Assembly, it is essential to keep firmly in mind the exact nature of the objection which is made to the assumption of jurisdiction by that body. Some States, maintaining that a matter is domestic, claim that it cannot be discussed by the General Assembly, and hence cannot be included on the agenda of that body.

The plea of domestic jurisdiction is only a claim on the part of a State or group of States as to the nature of the subject matter in question and hence cannot be taken to deprive the General Assembly of all power to deal with the subject. It is imperative that some decision be taken on that claim in order to testify to its veracity or falsity. It will be evident however that before any decision can be taken by any international body, that body must be seized of the matter in issue.

The International Court of Justice becomes seized of a matter in one of two ways. It may become seized of a matter through the presentation of a special agreement between the parties.³ Alternatively, it may become seized of a matter

1. Article 62(5) of the Rules of Court states that: After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.

2. For a discussion of the subject see "Waldock, 1954", pp.111-116.

3. Article 40(1) of the Statute of the International Court of Justice.

when a written application stating the cause of complaint is addressed to the Registrar.¹

In such cases, the Court is then in a position to consider objections to its jurisdiction, and it will be obvious that until it is seized of a matter, no question of its competence can arise, for the Court does not have the power to consider hypothetical questions.

For the General Assembly of the United Nations to become seized of a certain matter, however, the procedure is rather more complicated. Unlike the International Court of Justice, a unilateral application by one state or group of states to the United Nations is not sufficient to make any of its organs seized of a particular matter. The procedure which must be followed to seize the General Assembly of a particular matter is two fold. The item has to be considered by the General Committee and approved by the General Assembly.

The provisional agenda for each session is drawn up by the Secretary General and communicated to the Members of the United Nations at least sixty days before the opening of the session.² This provisional agenda has to include, inter alia, all items the inclusion of which has been ordered by the General Assembly at previous sessions,³ and all items proposed by any Member of the United Nations.⁴

The provisional agenda is then considered by the General Committee, in terms of Rule 40, as follows:

The General Committee shall, at the beginning of each session, consider the provisional agenda, together with the supplementary list, and shall make recommendations to the General Assembly with regard to each item proposed concerning its inclusion in the agenda, the rejection of the request for inclusion, or the inclusion of the item

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1. Article 40(1).
 2. Rule 12 of the Rules of Procedure of the General Assembly.
 3. Rule 13(c).
 4. Rule 13(e).

in the provisional agenda for a future session.... In considering matters relating to the agenda of the General Assembly, the General Committee shall not discuss the substance of any item, except in so far as this bears upon the question whether the General Committee should recommend the inclusion of the item in the agenda, the rejection of the request for inclusion, or the inclusion of the item in the provisional agenda of a future session, and what priority should be accorded to an item the inclusion of which has been recommended.

The General Committee having examined the proposed item and made its recommendations thereon, the matter is then submitted, together with the other recommendations of that body, to the General Assembly for the latter's approval. The question therefore arises whether, at this stage of the proceedings, the Assembly can and should consider its competence to entertain the various items.

On an analogy with the procedure of the International Court of Justice, the answer to this question must be in the negative. As with the International Court, so too in the case of the General Assembly, before any question of competence can be discussed, the Assembly must be formally seized with a certain question. The General Assembly is not formally seized of any item until it is on the agenda.

Consideration of the provisional agenda by the General Committee does not formally seize the General Assembly of the various items thereon. The General Committee's consideration of the provisional agenda is entirely a preliminary proceeding and it is upon the General Assembly that rests the final decision on whether or not to include an item. It is not until this decision on inclusion has been taken that any debate can ensue on the competence of the Assembly to entertain the question. Therefore, it follows that the act of including an item on the agenda, the status of which is in doubt, can never amount to an act of intervention. The approval of the agenda should be, therefore, as far as the question of competence is concerned, a purely formal matter, with no attempt to pass upon the nature of the item in question.

On becoming formally seized of a particular matter, the General Assembly should immediately take up the question of competence, should any objection to it be raised.

Once the item is on the agenda the Assembly should, like the International Court of Justice, make a preliminary assessment of the objections to its jurisdiction on the basis of the criteria set out in the Nationality Decrees advisory opinion, i.e., the General Assembly should examine the legal grounds which are relied on by the petitioning State to see if they are such as to justify the provisional conclusion that they are of juridical importance for the dispute brought before it and also to ascertain whether the competence of a State to take the action complained of is subordinated to the formation of an opinion with regard to the validity and construction of those legal grounds. It should be emphasised, however, that what is required at this stage is not an extensive review of the whole merits of the case, but a 'provisional view' of the case presented by the State or States requesting inclusion.¹ Only after this preliminary examination and decision on the question of competence should the General Assembly proceed to examine the merits of the case, provided, that is, the preliminary decision on competence was favourable.

Such preliminary or jurisdictional discussion cannot possibly constitute intervention in the domestic affairs of any nation. Such discussion and decision on the status of a particular item is the sine qua non of the rule of law in international affairs.

As in the practice of the International Court, so too in that of the General Assembly, there will often be cases where it will not be possible, on a provisional view of the case, to come to any decision on the competence of the United Nations to deal with it. In such cases, there is no essential reason why the procedure of the International Court of Justice should not be adopted, and the decision on jurisdiction postponed until after the hearing on the merits. To maintain otherwise would be to stifle unnecessarily the operation of the United Nations.

1. In the Anglo-Iranian Oil Co. Case (1952 I.C.J. Reports, Pleadings, Arguments and Documents, Session of 11 June, 1952), the Court actually stopped the Iranian Counsel from going too much into the merits of the case and requested him to confine his arguments to the preliminary objection to the jurisdiction of the Court.

Therefore, such examination of the merits, preparatory to deciding on the question of competence cannot ~~either~~ be justly regarded as intervention in the domestic affairs of any State.

There is, indeed, one class of case where such substantive discussions are essential if the Assembly is to come to any decision on its competence. This is that class of cases which involve those Articles of the Charter which call upon the General Assembly to make certain value judgements prior to applying them.

In general, the interpretation and application of a treaty is a mixed matter of law and fact. In the case of the Charter, however, it is also, in very many cases, a question of opinion or value judgement.

The interpretation and application of the Charter is a matter of law because it depends on the meaning to be ascribed to the various provisions of that instrument. It is a question of fact because whether or not a particular provision has been violated depends on the actions which have been carried out by the parties concerned. It is also a question of opinion, because so many of the Articles of the Charter entail that a value judgement be passed on those facts before the law of the Charter can be applied to them.

This three fold process of interpretation and application is especially true in the case of Article 2(7). Whether or not a matter falls essentially within the domestic jurisdiction of a particular State depends, in the first analysis, on the legal meaning if any to be attached to the phrase, 'essentially within the domestic jurisdiction of a State'. Secondly, it depends on a simple question of fact: Has State X done a certain thing? Thirdly, it may depend on opinion, for the one important way in which facts, which by the other two criteria fall within the domestic jurisdiction of a State, can be considered as non-domestic is to regard them as constituting a threat to the peace of the world or as likely to impair the friendly relations among nations, which is necessarily, in many cases, a question of opinion.

The powers of the General Assembly with regard to international peace and security are as follows: It may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.¹ It may discuss any question relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations and may make recommendations with regard to any such questions to the State or States concerned or to the Security Council.² The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security. It may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare, or friendly relations among nations.³

Each one of these provisions entails that a value judgement be taken on certain facts. Thus, while it may be true that, for example, the subject matter dealt with in Chapter IX of the Charter does not come within the sphere of international law, and hence, under normal circumstances would be considered to fall within the domestic jurisdiction of the Members, should measures taken with respect to those subjects constitute a threat to the peace, or be deemed likely to constitute such a threat then obviously the subject concerned would thereby cease to be domestic. However, it will be evident that in such cases as these, before the General Assembly can make the value judgements which it is called upon to make, it must be in full possession of the facts. For, after all, whether or

1. Art.11(1).

2. Art.11(2).

3. Art.14.

not a situation is likely to impair the general welfare or friendly relations among nations is not necessarily a self-evident fact.

In such cases as those, and in all others where, for one reason or another, the General Assembly, acting in a quasi-judicial capacity, is unable to come to a provisional view of its own competence, full substantive discussion of the merits must be allowed. Therefore, substantive discussion under such circumstances does not constitute intervention, even if the matter were ultimately decided to be within the domestic jurisdiction of a certain state, for otherwise the General Assembly, like any other international body in such circumstances, would be unable to function. The alternative to this conclusion is to leave each State as the judge of its own competence, and hence, of that of the United Nations. The results of such a 'universal Connally Reservation' would be the antithesis of the rule of law.

In the light of these procedural necessities, therefore, the conclusion that substantive discussion constitutes intervention within the meaning of Article 2(7) requires to be modified somewhat. The exigencies of procedure and the correct administration of justice will frequently predicate that there be a full presentation of the facts of a case and discussion on the merits thereof. Because of this fact, the conclusion that substantive discussion constitutes intervention has more a contingent than an immediate value. It serves to draw attention to the fact that once it has been decided that a matter is essentially domestic, no further United Nations action can be taken. No further discussions can be carried on, under the present law, nor any recommendation adopted. The prohibition of substantive discussion is particularly important if, on a provisional view of the case, it is decided that the matter is essentially domestic. Then the matter must be removed from the agenda immediately. However, these facts should not blind States to the need, in many cases, for full and frank discussions on a subject in order to come to a reasoned conclusion on the question of competence.

In these circumstances - but only in these circumstances - substantive discussion must be allowed.

In view of the exigencies of procedure, therefore, objections to the competence of the United Nations should not be phrased thus: This matter is domestic; the United Nations cannot discuss domestic matters; therefore, this matter cannot be included in the agenda of the General Assembly. Rather it should be: In the opinion of State X, this matter is domestic; the United Nations is debarred, by Article 2(7), from discussing such matters; therefore, the United Nations must establish its competence to deal with this item, either by taking a preliminary decision thereon or by joining the issue of competence to the merits of the case. If the matter was looked at in this fashion, all those protracted debates on the inclusion of items on the agenda would cease.

4. The Actual Practice and Procedure of the General Assembly

In practice the General Assembly has not approached the question of its own competence with any degree of method or, apparently, with any clear understanding of what it is doing, a fact which has led to prolonged and confused debates on the adoption of the agenda. In the vast majority of cases, no actual decision on competence has been expressly taken, either immediately after the inclusion of an item on the agenda or after a discussion on the merits. The General Assembly has neither expressly made a provisional estimate of its own competence nor joined that issue clearly to the discussion of the merits of the case. Its competence has, usually, to be inferred from the action which it has taken. Moreover the Assembly has tended frequently to stress the political aspects of a question and to denigrate the legal, a practice which is hardly conducive to trust in the world organization.

If a generalisation had to be made about the Assembly's attitude towards the question of its own competence, it could with justification be said that in general it has manifested a singular disregard for the doubts which have been

expressed, in all honesty, thereon. There has been evident a tendency to treat those who challenge the jurisdiction of the Assembly with a certain amount of disdain.

Nevertheless, despite this general apathy towards the legal aspects of the matter, four fairly well-defined attitudes are discernable towards the question of inclusion. (a): The predominant group of States have adopted an a priori approach to the question of the Assembly's competence. They have maintained that where a matter falls essentially within the domestic jurisdiction of a particular State, it cannot be discussed by any of the United Nations organs and hence may not even be included in an agenda. Such assertions indicate an a priori approach to the question. They indicate that in the opinion of those States the question of competence can be decided by each Member of the United Nations, individually, without the necessity of any discussion or examination by the appropriate organ. (b): The contrary view has also been expressed, though by a smaller number of States. Several States have maintained that no a priori opinions on the nature of the subject matter of an item can be controlling in the question of inclusion. It is the opinion of those States that whenever a question of competence is raised, the item concerned must be included on the agenda before a decision can be taken thereon. (c): Some States have carried the arguments of the second group of countries a stage further. They have expressed the view that any matter which is brought to the attention of the United Nations must be included on the agenda, or at least, *cannot* be excluded on jurisdictional grounds. Some have asserted that each State has the right to have any matter which it chooses to bring to the attention of the United Nations discussed in the General Assembly. Others have not gone so far, but have qualified the existence of such a right by postulating the need to present a prima facie case, justifying the inclusion of the item. (d): There is also the opinion, once expressed by the United States, that the question of competence

can be decided by States, individually, prior to inclusion, from the nature of the action which the State seeking inclusion proposes.

- (a) The a priori approach. Where a matter is outwith the competence of the United Nations, it cannot be discussed and hence cannot be included on the agenda of the General Assembly.

The many instances of this argument have already been examined in Chapter V and it is not necessary to re-examine them here at length. As put forward in the agenda debates, this argument was all inclusive. It covered not only substantive discussion, but preliminary or jurisdictional discussion as well. As far as the protagonists of this theory were concerned, no discussion on a matter which they considered to be domestic was permissible.

This approach has one fundamental weakness. It classes not only substantive discussion as intervention, for which there is a very strong case, but also discussions designed to elucidate the question of competence, for which no sound justification can be made. Were preliminary or jurisdictional discussion to constitute intervention, that would mean that some a priori judgment would have to be made on the nature of the subject matter of the item, by States individually, entirely outside the framework of the United Nations and prior to its inscription on the agenda of any organ thereof. As such, the resultant decision on competence would not be a decision of the organ of the United Nations concerned. Such procedure is incorrect. No decision on competence is possible until the General Assembly is seized of a matter and the decision whereby it does become seized of that matter cannot in itself be interpreted as a decision on competence.

Despite the obvious weakness in the a priori approach, it is the one which, in the agenda debates, has found the largest measure of support. The fact that no item has ever been deleted from the provisional agenda of the General Assembly on jurisdictional grounds is, moreover, not indicative of a mass rejection of this opinion. Rather it confirms the conclusion that the majority of State have approached this question in an a priori manner. No matter has been deleted from

the provisional agenda because in each case the majority has been of the opinion that the matter was not domestic in any case. States which have asserted that a matter was not domestic and hence could be included on the agenda have, in fact, been as guilty of utilizing the a priori approach as those which have asserted the converse. For, with one exception, dealt with below, States which maintained that the matter was not domestic have not adopted the line of reasoning: "There is obviously some doubt concerning the status of this item. Therefore it must be included on the agenda before we can decide this question." On the contrary, they too have been quick to assert that the status of the matter was not in doubt.

Both these positions are unsatisfactory. One assumes that the matter is domestic and that any discussion, even of the question of competence, is intervention. The other assumes that the matter is not domestic and that no discussion of the question of competence is necessary.

- (b) No a priori judgement on competence is possible. Whenever a question of competence arises, the item concerned must be included on the agenda before even that question can be discussed.

In one instance, the General Assembly turned its back on its disorderly approach to this question and adopted a sensible procedure. At the seventh session, during a debate on whether or not to include on the agenda the subject, the Race Conflict in South Africa, the General Assembly decided by a large majority that no decision on the question of competence was possible prior to the inclusion of this question on the agenda. Unfortunately, however, this is a lone instance. It has not led, for example, to the disappearance, in debates on the adoption of the agenda, of objections to inclusion of certain items. States, despite this clear decision, have still made the same objections, in these debates, on the basis of Article 2(7) and contended that the United Nations was not competent to deal with a particular matter. They have not, in general, adopted the line: "There is obviously some doubt about the question of

competence. Let us therefore discuss it and take a decision thereon".

The decision which was taken at the seventh session was the culmination of the efforts of South Africa to have matters which she considered to be within her domestic jurisdiction, excluded from the agenda.

At the first, second, third and fifth sessions of the General Assembly, the item, The Treatment of People of Indian Origin in the Union of South Africa, was included on the agenda without vote, there being no formal objection to its inclusion. However, at the sixth session, the South African delegation proposed the deletion of the item from the definitive agenda on the now familiar ground that the matter was internal.¹ This proposal was rejected by the General Assembly,² as it was in all the other cases examined in Chapter IV. At the seventh session, the South African Government again proposed the deletion of this item, again without success. Upon this defeat, however, the South African Government changed its tactics. At the subsequent meeting,³ the South African Government, during a discussion of the inclusion on the agenda of the item, The Racial Conflict in South Africa, proposed that prior to inclusion, the General Assembly take a vote on its competence to deal with the matter. Mr. Jooste said:⁴

.....the question of competence, which must necessarily also govern inclusion, is one which can be dealt with only by the Assembly and not by the General Committee.

I am therefore raising the matter here and I am doing so under rule 80 of our rules of procedure. The proposal which is before the General Assembly is the recommendation of the General Committee that the item in question should be placed on the agenda. There is a prior question to be decided, and that is whether the Assembly under the Charter has the jurisdiction to consider the item at all.

It has been our invariable experience that when a matter of competence is discussed in any of the Main Committees of the General

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1. G.A., (VI), Plen., 341st mtg., para.32 et seq.
 2. *ibid*, para.41.
 3. G.A., (VII), Plen., 381st mtg., para.1 et seq.
 4. *ibid*, paras.1-5.

Assembly, the debates which ensue are confused by the introduction of emotional, sometimes acrimonious, and often hostile, elements which, we submit, render a clear-cut decision on competence well nigh impossible. It has also been our experience that once a decision is taken in a committee on the question of competence, whether that decision is legally sound or not, reversal thereof usually proves to be impossible. We have on occasions, as will be recalled, endeavoured to seek redress in the Assembly, but have invariably been prevented from doing so by technicalities. It has been our experience that once a matter has been thrown open for discussion in a committee, attempts to secure a decision by the General Assembly in regard to the competence of the Organization, are, to say the least, usually fruitless.

The question of whether this Organization has the right, under the terms of the Charter, to interfere in the matter before us, is one of great importance to my country. I feel, therefore, that the matter of competence is one which should be dealt with in this Assembly at this stage, before it is thrown open for a debate which, if our experience serves as an indication, will inevitably be acrimonious and will only confuse the issue which I am raising.

Therefore, under the terms of rule 80 of our rules of procedure, I ask that the question of competence should be decided upon by the General Assembly before voting on the recommendation of the General Committee that the item should be placed on the agenda of this session.¹

The President of the Assembly, Mr. Lester Pearson of Canada, allowed the South African delegation to proceed on this basis.

Mr. Jooste then proceeded to state his reasons for contending that the subject matter of the item was outwith the competence of the General Assembly, and was supported in his assertions by the representatives of the United Kingdom and Australia, those opposing him being, India, Chile, and Iraq. Discussion of this item had been limited to three speakers from each side under rule 23 of the Rules of Procedure.² However, when the President of the Assembly attempted to put to the vote the South African motion denying the competence of the Assembly to deal

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1. Rule 80, now rule 81, states that subject to rule 79, any motion calling for a decision on the competence of the General Assembly to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question.
 2. *ibid*, para.68; Rule 23 states that debate on the inclusion of an item when that item has been recommended for inclusion by the General Committee, shall be limited to three speakers in favour and three against the inclusion. The President may limit the time to be allowed to speakers under this rule.

with the matter, objections were made to this manner of procedure. Mr.

Santa Cruz of Chile said:¹

I seriously doubt whether the proposal of the representative of the Union of South Africa can be put to the vote. It is correct that rule 80 of the rules of procedure states that "any motion calling for a decision on the competence of the General Assembly to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question." But rule 80 refers to proposals submitted concerning an item which is already on the agenda. Before the question of competence can be discussed, the matter must be on the agenda; otherwise how can the Assembly discuss it? The discussion of competence is part of the discussion of the item. I believe that we cannot now discuss competence, but that we must first decide whether to include this item in the agenda, and then the matter of competence can be raised in committee before any other. Moreover, I believe this has been the general practice in all United Nations organs.

In supporting the representative of Chile, Mr. Padilla Nervo of Mexico said:²

.....I believe that the question which the President put to the Assembly a moment ago was not that of competence, but whether or not the item to which we are referring should be placed on the agenda. The rule invoked by the President was rule 23, which provides that "debate on the inclusion of an item in the agenda, when that item has been recommended for inclusion by the General Committee, shall be limited to three speakers in favour of and three against the inclusion." Accordingly, the President limited the debate to three speakers; but surely, if what we are discussing is the question of competence, all the representatives here in the Assembly at this moment have the right to speak on that point. If we have that right, then why was the debate limited to three speakers in favour and three against? It was in fact limited, obviously, because we are not discussing competence but the inclusion of the item. Therefore I do not consider that it would be appropriate for this question to be decided by a ruling of the President. I think that we should vote on the inclusion of this item in the agenda. The proposal made by the representative of the Union of South Africa is actually a proposal against the inclusion of this item; and it is on that question that we should vote.

Giving the views of Iraq, Mr. Khaledy said:³

The item before the Assembly is the question of inclusion. What we must decide now is whether or not to include the item in the agenda. The question of competence should come up when the

1. *ibid.*, para.131; emphasis added.

2. *ibid.*, para.136.

3. *ibid.*, para.156.

discussion is started in committee or in the Assembly. However, as the delegation of Chile has explained, we cannot decide on competence if we have not decided to discuss the question.

The views expressed by the Chilean, Mexican and Iraqi representatives found a fourth supporter at this point in, of all countries, the Soviet Union.

Objecting to this method of procedure, Mr. Vyshinsky said:¹

Indeed, it is absolutely unprecedented to consider the question of whether an item should be included in the agenda or not from the point of view of the Assembly's competence. Legally, this is simply nonsense.

We are quite well able to distinguish between the question of the General Assembly's competence and the question of including an item in the agenda on the General Committee's recommendation.

I would point out that we are now discussing the General Committee's proposals and nothing else. Only when the time comes to discuss the substance of any given item can the question of the General Assembly's competence be raised.

The President's ruling that the South African motion denying the competence of the General Assembly should be put to the vote first, was reversed by 41 votes to 10 with 8 abstentions.²

The procedure adopted by the General Assembly in this case was correct.

The competence of the United Nations to deal with a certain item had been challenged and it was decided that in order to elucidate and decide upon even this question, the General Assembly had first to include it upon the agenda.

Unfortunately, the fruits of this decision have not been adopted into the

1. *ibid*, paras.141-143; emphasis added.

2. G.A., (VII), Plen., 381st mtg., para.150. The details of voting were as follows:

In favour: South Africa, UK., USA., Australia, Belgium, Canada, France
Luxembourg, Netherlands, New Zealand.

Against: USSR., Uruguay, Yemen, Yugoslavia, Afghanistan, Argentina,
Bolivia, Burma, Byelorussian SSR., Chile, China, Costa Rica,
Czechoslovakia, Denmark, Ecuador, Egypt, El Salvador, Ethiopia,
Guatemala, Haiti, Honduras, India, Indonesia, Iran, Iraq,
Lebanon, Liberia, Mexico, Norway, Pakistan, Panama, Paraguay,
Peru, Philippines, Poland, Saudi-Arabia, Sweden, Syria,
Thailand, Ukrainian SSR.

Abstaining: Brazil, Cuba, Dominican Republic, Greece, Iceland, Israel,
Nicaragua, Turkey.

general procedure of the Assembly. Still we hear the plaintiff cry that the United Nations has no business to include certain items in its agenda because to do so constitutes intervention. These claims as to the lack of competence even to include an item have not been categorically denied each time by the General Assembly, which has chosen in almost all cases to rely on the argument that the matter is not domestic. Hence, these appeals to this quite unjustified charge of intervention are continued, time without number.

While this vote at the seventh session has proved to be an isolated instance in the practice of the General Assembly, there are, in the debates, other single examples of States which have supported the view that the inclusion of an item is without prejudice to the question of competence. The practice on this point is not of the same massive variety as that which supports the view that where a matter is domestic it cannot even be included. Nevertheless, it does show that while the procedure adopted in this respect at the seventh session has not found a place in standard United Nations procedure, some Members are alive to the problem and have approached it with some semblance of order.¹

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1. See Belgium: Case 8: G.A. (III/2), Plen., 190th mtg., p.22.
China: Case 11: G.A., (VII), Plen., 381st mtg., para.159.
Egypt: Case 27: G.A., (X), Gen.Com., 103rd mtg., para.17.
El Salvador: Case 24: G.A., (IX), Plen., 477th mtg., para. 226.
Greece: Case 11: G.A., (VIII), Plen., 435th mtg., para.57.
India: See *infra*, p.189.

See also Repertory, Vol.I, p.132, para.352; and Supplement, No.1, Vol.I, p.57, fn.134. The references in Vol.I of Supplement I should, however, be used with care as there is a certain inaccuracy in the presentation of the material. Most of the references there cited refer not to the question of whether or not inclusion is without prejudice to the question of competence, but to when a vote on competence should be taken once an item has been included on the agenda.

For further statements on whether or not the inclusion of an item on the agenda prejudices the question of competence see the statements of the Presidents of the General Assembly: G.A., (III/1), Plen., 146th mtg., p.225; G.A., (VIII), Ad Hoc Pol. Com., 34th mtg., para.55.

(c) Inclusion of Items as a matter of right - when does a question of competence arise?

At the seventh session, there was a clear consensus in favour of including in the agenda items the status of which was in doubt. Only after they had been included, it was argued, could they be examined with reference to the question of competence. However, the question arises: What constitutes uncertainty as to the status of an item? When is competence in doubt? For example, in the minds of those States noted in Chapter IV which opposed the inclusion of items on the agenda on the basis of Article 2(7), there was no doubt at all. In order that a certain doubt as to the status of an item can be said to exist is it, for example, necessary for the State requesting inclusion, to make out a prima facie case for its complaint, by presenting documents and by making statements both in the General Assembly and in the General Committee? Alternatively is it sufficient to raise the matter under the appropriate Article of the Charter?

Such opinion as there is on this point supports the view that in order to merit inclusion on the agenda, it is sufficient to raise an item before the United Nations. Statements on this point frequently contain a dual line of attack. They assert, on the one hand, that each State has the right to have any matter which it raises discussed in the General Assembly. On the other, they point out that the mere fact that a matter is raised before the General Assembly is in itself sufficient to raise a doubt concerning its status, a doubt which can only be settled by including the item and discussing it.

States which have taken this stand include, in particular, Brazil, Costa Rica, Ghana, Guatemala, India, Iraq, Lebanon and Thailand.

Ghana and Guatemala have both, on at least one occasion, lent their support to the view that each State has the right to have any matter which it proposes, discussed, or at least not excluded on jurisdictional grounds.¹

1. Ghana: G.A., (XIII), Plen., 752nd mtg., paras.33-34.
Guatemala:G.A., (XII), Gen. Com., 111th mtg., para.32.

The Indian delegation has consistently¹ taken the view that the inscription of an item on the agenda does not prejudice the question of competence which can, in her opinion, only be dealt with once the item in question has been included on the agenda.

At the seventh session, during a discussion of whether or not to include the question, The Treatment of People of Indian Origin in the Union of South Africa, Mr. Pathak said² that it was now too late to raise the question of competence. He recalled that this item had been dealt with before and no good reason had been advanced why it should not be so again. It was also, he said, against Assembly practice to delete an item from the provisional agenda on the grounds that it involved a question of domestic jurisdiction. He continued:³

....The very fact that the question is raised makes it necessary that it should be discussed and that can be done only by putting the item on the agenda. The item cannot be excluded without a discussion of the question which is adduced as a ground for exclusion.

The question of jurisdiction is inseparable from the facts. When the facts are presented, it will be clear that the policy of apartheid is nothing but racial discrimination, and racial discrimination being a violation of the Charter, the General Assembly is competent to consider the question. When the facts are presented before the General Assembly, the question of jurisdiction will answer itself.

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1. But compare this with the Indian stand on the inclusion of the Hyderabad Question on the agenda of the Security Council; see *infra*, Vol.III, Ch. 1V, p.88.
 2. G.A., (VII), Plen., 380th mtg., paras.135-137; for other Indian statements on this point, see *inter alia*; *ibid*, 381st mtg., para.74; G.A., (VIII), Plen., 435th mtg., paras.14, 52, 57; G.A., (XI), Vol.I, 576th mtg., para.197.

While India has, in general, adopted the attitude of not excluding items from the agenda on jurisdictional grounds not all her pronouncements are to the exact same effect. For example, at the 10th session of the General Assembly, during a discussion of whether or not to include the Algerian Question on the agenda, Mr. Menon said: [G.A., (X), Plen., 530th mtg., para.158]

"Great attention has been paid to the domestic aspects of this question. I would not argue the matter any further. I submit that on this matter it is not necessary for those of us who are requesting inscription to establish a case in its finality. I will not try to do so. All we have to do is to invite the attention of the General Assembly to a set of circumstances that prima facie call for examination."

On the one hand, India has claimed that any subject which is raised must be included. Then, on the other, on this occasion she supported, or seemed to support, the presentation of a prima facie case before an item would merit inclusion. These two points of view are not really compatible, unless it is maintained that the very fact that an item is raised is itself prima facie evidence of the need to examine a matter.

3. *loc. cit.*, See also the statement of the Iraqi delegate in the 15th Session during a discussion of whether or not to include the question of Oman on the agenda: G.A. (XV), Gen. Com., 131st mtg., para.8.

The theme of this statement was taken up and elaborated by the Brazilian delegate during the same session, though during the discussion of whether or not to include on the agenda the question, The Racial Conflict in South Africa. The Brazilian delegate, Mr. de Souza Gomes, said:¹

The paramount consideration in the mind of my delegation is that certain Member States have requested the inclusion of the item, and, in an explanatory memorandum, have presented the problem as one whose aggravation may present a tangible danger to international peace and security. We cannot, therefore, escape the conclusion that we should not dismiss the matter altogether by simply rejecting the inclusion of the item. The very fact that thirteen Member States had their attention called to the problem and that they maintain, rightly or wrongly,² that it is related to international peace and security, is in itself a circumstance of such an important nature as to deserve the close attention and consideration of the General Assembly.

I wish to make it quite clear that my vote in favour of the inclusion of this item is not to be construed as in any way prejudging the question of the competence of the General Assembly to make recommendations on certain aspects of the matter which might well fall under the limitation of Article 2, paragraph 7, of the United Nations Charter, which precludes action by the Organization on matters relating to the domestic jurisdiction of Member States.

Our position on this matter is that, since the question of competence is not entirely clear to us from a prima facie consideration, we should keep an open mind, and should not deny thirteen Member States the opportunity to present their case and their views. With all due reservation on this matter of competence and on the merits of the question, we feel that in this case, as in some others having similar characteristics, the General Assembly, as the most representative body of the United Nations and as a forum for the free exchange of views of Member States, should not assume a negative role from the start.

We may eventually feel that some matters do really fall outside our competence.... The necessity of clearing up this point of competence and certain aspects of the merits of the question is precisely the reason which prompts us to vote in favour of inclusion. It also explains why we do not favour a prima facie decision on competence at this early stage of our proceedings. Only after it has heard the parties concerned will the Ad Hoc Political Committee be in a position to take a decision on competence, a question which is not yet entirely clear to the majority of delegations.

At the ninth session, during a discussion of whether or not to include the question of Cyprus on the agenda, the representative of Thailand expressed the

1. G.A., (VII), Plen., 381st mtg., paras.162-165, See also, G.A. (XI), Sp. Pol.Com., 16th mtg., para.8.

2. Emphasis added.

view that all Members of the United Nations had the right to bring before that body, any questions which affected it or international peace and security. He said:¹

Our representative in the General Committee voted in favour of the inscription of this item because my delegation strongly feels that it is the undeniable right of any Member of this Organization to bring before the United Nations a problem affecting it or the peace and security of the world or a region of it, and that the United Nations is at least obliged to give to that Member a just and fair hearing.....

In doing so my delegation has in no way entertained, far less accepted - cannot possibly do so - the merits and principles involved in this case. This will be the task which will be incumbent upon the Assembly if the item is adopted. Then and only then will my delegation take a position on the substance of the matter.

At the tenth session, both Costa Rica and Lebanon expressed similar sentiments during a discussion of whether or not to include the question of Algeria on the agenda, which some states contended was a matter falling within the domestic jurisdiction of France. The representative of Costa Rica said:²

....If we dismiss the petition without a hearing, we would be prejudicing to the detriment of the petitioners, the merits of a question, about which we are insufficiently informed.

The Lebanese delegate expressed his country's views thus:³

The 14 States which have requested inscription, supported by 1,500 million people, hold an opposing point of view. Is that not a sufficient reason to grant them the right to be heard, so that they could fully develop the arguments which have only been broached in this procedural debate?

These various statements all raise substantially the same questions, though

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1. G.A., (IX), Plen., 477th mtg., paras.192-193.
 2. G.A., (X), Plen., 529th mtg., para.141.
 3. *ibid*, para.171.

they are not entirely free from contradictions.¹ Is the fact that one State feels it has a problem concerning principally itself or international peace and security, sufficient to compel the General Assembly, or for that matter, where appropriate, the Security Council, to look into it? Is it indeed true that the very fact that a matter is raised makes it necessary to at least examine

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1. The Brazilian delegate, for example, supra, p.190, does not appear to be too sure what procedure he would adopt. To begin with he uses words which suggest that he supports the view that the very fact that a matter is raised makes it necessary that it be discussed, at least from a jurisdictional point of view. Later on in his statement, however, he seems to show some attachment to the idea of an a priori determination of the nature of the matter by the members, individually, prior to the inscription of the item on the agenda. He seems to suggest that if he were satisfied, prior to inscription, that an item did fall within the domestic jurisdiction of a particular State, he would not vote in favour of its inclusion. If this is what he is saying, then it directly contradicts what he said earlier in the same statement.

Indian statements on the subject show a similar tendency to inconsistency, though this time, what India seems to favour is not so much the taking of an a priori decision on competence by the members, individually, prior to the inclusion of the item on the agenda, but rather the necessity of presenting a prima facie case in order to merit inscription. See supra, p. 189 fn.2.

Elsewhere, Lebanon has also supported the view that some prima facie case has to be presented in order to justify inclusion, whereas in the statement quoted above, she seems to view the doubts surrounding the question of jurisdiction as sufficient reason for inclusion. For example, during the debate on whether or not to include the Question of West Irian on the Assembly's agenda for the ninth session, the Lebanese delegate said: [G.A., (IX), Plen., 477th mtg., para.64]

"In the first place, the delegation of Lebanon, as a matter of principle . . . has supported in United Nations organs, and will continue to support, the inclusion of an item in the agenda of one of those organs if the party presenting the item can show a prima facie case for consideration of the item. Far be it from me to imply that my delegation will vote in favour of the inclusion in the agenda of any item, even extravagant claims or wild complaints. If, however, the plaintiff can show reasonable grounds for his case, my delegation believes that he is fully entitled to a hearing."

For other statements supporting this view that the presentation of prima facie case justifies inclusion, see the statement of Ceylon G.A. (XV), Gen. Com., 131st mtg., para.28: and Yugoslavia, ibid, para.26.

it from a jurisdictional angle?

From a procedural point of view and, in common sense, the general trend of the views noted in this section must be recognised as sound. The majority of States may feel, in advance of any discussion, and with justification, that a certain matter falls essentially within the domestic jurisdiction of a particular State and that therefore it ought not to be the subject of any United Nations action. But the mere fact that this is disputed by one State, or, more important, by a group of States, does raise a bona fide doubt as to the nature of the subject matter in question, a doubt which can only be settled by a jurisdictional debate and decision on the competence of the General Assembly. To do this, the item must be included.

To adopt any other procedure would be to deprive Members of the rights under the Charter. Nor is this conclusion in any way inconsistent with the dictum of the Permanent Court of International Justice, in the Nationality Decrees advisory opinion that:¹

... the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15.

It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable.

The mere fact that a matter is raised before the General Assembly does not confer on that body substantive competence. But it does, at least, confer on that organ the right to examine the matter in order to ascertain whether or not it is competent. To this extent therefore, the General Assembly is competent to discuss any subject.

Unfortunately, this is not the approach which has prevailed in the debates of the General Assembly. Despite the outcome of the debate on the inclusion in

1. (1923), P.C.I.J. Series B, No.4, pp.25-26.

the Assembly's agenda for the seventh session of the apartheid question, and despite the considerable amount of support for this procedure which has been voiced, here and there in other debates, no move has ever been made to rid the Assembly, or for that matter the General Committee, of these tedious repetitions of challenges to competence. Debates on the adoption are not the time to press challenges to competence, but this fact does not seem to have been fully recognised by the Assembly as a body.

- (d) The Question of Competence can be decided prior to inclusion from the nature of the action proposed by the state seeking inclusion of the item.

The United States has taken a rather equivocal stand in these matters. It has in general opposed the view that the inclusion of a so-called domestic matter and a discussion thereof by the General Assembly, constitute intervention. But in the case of the Algerian War, the American delegation voted against inclusion, not because the United States had changed her mind about the nature of intervention, but because of the nature of the action sought by the sponsors of this item. Mr. Cabot Lodge said, inter alia:¹

This memorandum indicates clearly that what is sought by the sponsors of the item is the sanction of the General Assembly to a course of action intended to bring about fundamental changes in the composition of one of the United Nations' own Members - that is the French Republic. If it does not mean that it does not mean anything.

The United States believes that the proposed item, viewed in the context of this action which it is suggested should be sought in the General Assembly, falls within the provisions of Article 2, paragraph 7 of the United Nations Charter.

It is submitted that this position is essentially unsound. Mr. Lodge had earlier, in the same speech, recalled that inscription of an item on the agenda was without prejudice to the ultimate question of the Assembly's competence. It may justifiably be asked why this view was not extended to the ultimate action taken by the General Assembly on the item in question.

1. G.A. (X), Plen., 530th mtg., paras.111-112.

Rule 20 of the General Assembly's rules of procedure enjoins States requesting the inclusion of a particular item to accompany their requests with an explanatory memorandum, and if possible with basic documents and a draft resolution. But the General Assembly, if it decides to accept this request for inclusion, does not bind itself to accept the accompanying draft resolution and approve the action proposed to it by the requesting State. It may well feel that while certain aspects of the subject are within its jurisdiction, adoption of the draft resolution would force upon it a course of action for which it has no authority. Competence is, after all, a question of degree. The United Nations can be competent to deal with a certain matter up to a point, but no further. The United States stand in this particular issue is therefore submitted to be wrong. Her course of action here should have been to vote for inclusion of the item, but to move a resolution denying the competence of the General Assembly to entertain a certain course of action.

5. Suggested reasons for the obstructive attitude of some States towards the question of inclusion and discussion.

The analogy between the procedure of the International Court of Justice and the General Assembly results in relatively clear conclusions. For an item to be discussed at all, even from the point of view of the competence of any organ of the United Nations to entertain it, it has to be included in the agenda. Why, therefore, have so many prominent States taken up the position that inscription of an item on the agenda and the discussion thereof constitute intervention in their domestic affairs? It is reasonable to assume, for example, that where States have agreed to confer on the International Court of Justice the power to decide disputes as to its own competence they appreciate the need to prevent such disputes being decided by anyone other than an independent tribunal. Why then have so many nations adopted a contrary view in the United Nations?

Their reasons are, it is submitted, two. (a): The rules of procedure of the General Assembly itself do suggest that a prima facie decision on competence

is called for, prior to the inclusion of any item on the agenda. (b): There has never been any serious attempt to establish a definite procedure for dealing with questions of competence. Questions of competence have continually been confused with those of inclusion. No attempt has been made to establish a formal procedure for taking a preliminary decision on competence, immediately after inclusion, or for joining the issue of competence formally to the hearing on the merits, in appropriate cases. Such procedure as there has been has been very pragmatic.

(a) The Rules of Procedure of the General Assembly

To a considerable extent, certain of the rules of procedure of the General Assembly do lend support to the view that before any item can be included on the agenda, some prima facie assessment of its status has to be made. In particular, Rules, 40, 20, 21 and 43, do suggest that matters which are, on this prima facie assessment, outwith the competence of the General Assembly or, to put it another way, are ostensibly within the domestic jurisdiction of member States, cannot be included in the agenda and discussed.

Rule 40 states that:

The General Committee shall, at the beginning of each session, consider the provisional agenda, together with the supplementary list, and shall make recommendations to the General Assembly with regard to each item proposed, concerning its inclusion in the agenda, the rejection of the request for inclusion, or the inclusion of the item in the provisional agenda of a future session. In considering matters relating to the agenda of the General Assembly, the General Committee shall not discuss the substance of any item, except in so far as this bears upon the question of whether the General Committee should recommend the inclusion of the item in the agenda, the rejection of the request for inclusion, or the inclusion of the item in the provisional agenda of a future session, and what priority should be accorded to an item the inclusion of which has been recommended.

The inference to be drawn from the terms of this rule of procedure, particularly from its words directing a non-involvement with the merits of the case, is that the General Committee has itself to form an opinion as to the status of the matter and to base its recommendation to the General Assembly on this, among other factors.

Rules 20, 43 and 21 support this inference.

Rule 20 states that:

All items proposed for inclusion in the agenda shall be accompanied by an explanatory memorandum and, if possible, by basic documents or by a draft resolution.

Rule 43 states that:

A member of the General Assembly which has no representative on the General Committee, and which has requested the inclusion of an item in the agenda, shall be entitled to attend any meeting of the General Committee at which its request is discussed, and may participate, without vote, in the discussion of that item.

The terms of rule 20 seem to direct States requesting the inclusion of items to substantiate their claim in some way. In other words, there seems to be a demand here that a prima facie case be made out before an item will be admitted to the agenda. This inference is heightened by the terms of Rule 43, enabling a requesting State to come before the General Committee to support and elaborate upon its request, and also by the practice of the General Committee, not provided for in the rules of procedure, of allowing a 'defendant' State to appear before it also to oppose inclusion. All this suggests that a decision is here being taken on the status of the item, and this before inclusion of the item on the agenda.

Once the General Committee has made its recommendations, these, together with the provisional agenda, are sent to the General Assembly for 'approval'.¹ If the view that the General Committee was indeed making an assessment of the nature of the item were correct, then the subsequent approval of that recommendation by the General Assembly could be held to mean that this body had accepted the findings of the General Committee on competence. The result of such an interpretation of the rules of procedure would be that once an item had been examined by the General Committee, and included on the agenda by the General Assembly, the matter of competence could no longer be considered. This has indeed been argued on

1. Rule 21.

several occasions.¹ It is therefore hardly surprising that some States have looked upon a decision to include an item as a decision that the General Assembly was competent to entertain the question, and have tried on that account to have the item deleted from the agenda.

These inferences are strong. However, they cannot justify the course of action, relative to the question of inclusion and discussion, upon which so many States have embarked. First, the rules of procedure are not part of the Charter, and therefore no theory of intervention can be based entirely thereon. If inclusion and discussion of domestic items were to constitute intervention, there would have to be more cogent reasons for so considering them than the rules of procedure. Second, the inferences drawn from the rules of procedure just considered are, to a considerable extent, contradicted by others. (i) The General Committee is hardly a fit body to make an assessment of the competence of the General Assembly to entertain an item. Not all member States of the United Nations are represented on the General Committee,² and competence is a subject on which all States are entitled to be heard. (ii) Rule 23 of the rules of procedure states that:

Debate on the inclusion of an item, when that item has been recommended for inclusion by the General Committee, shall be limited to three speakers in favour of and three against inclusion. The President may limit the time to be allowed to speakers under this rule.

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1. See *infra*, pp. 212, 215-216, 220.
 2. Rule 38 states: The General Committee shall comprise the President of the General Assembly, who shall preside, the seven Vice-Presidents, the Chairmen of the six Main Committees and the Chairman of the Ad Hoc Political Committee when one is established. No two members of the General Committee shall be members of the same delegation, and it shall be so constituted as to ensure its representative character. Chairmen of other committees upon which all Members have the right to be represented and which are established by the General Assembly to meet during the session, shall be entitled to attend the meetings of the General Committee and may participate without vote in the discussions.

It has been cogently pointed out,¹ that if competence is discussed prior to inclusion, this rule of procedure would apply. But competence is a question on which all States are entitled to speak.

(iii) Rule 81 of the rules of procedure states that:

Subject to rule 79, any motion calling for a decision on the competence of the General Assembly to adopt a proposal submitted to it shall be put to the vote before a vote is taken on the proposal in question.

It is contended by some States that this rule of procedure shows that the inclusion of a subject on the agenda and the substantive discussion thereof by the Assembly and its committees cannot constitute intervention because it indicates that the question of competence is to be decided just before the vote on the substance of the matter, i.e., after the debate on substance.²

Third, the strongest reason why it is not possible to postulate the need for a prima facie case before an item will be included on the agenda, or, to look at the subject from a different point of view, why no decision on competence is possible prior to inclusion of the item on the agenda, is that prior to inclusion of an item on the agenda, no decision on the nature of that item is possible.³

The rules of procedure are, in this respect, a source of confusion rather than of help.

One result of the confusion which has surrounded this subject, both in the Charter and in the rules of procedure, is that there is now a body, whose apparent function is to make some decision on the nature of a provisional item,

1. G.A., (VII), Plen., 381st mtg., para.136, per Mexico.

2. See the statement of, inter alia, El Salvador, G.A., (IX), Plen., 477th mtg., paras.226-227; ibid, 1st Com., 751st mtg., para.32.

3. Nor need it be argued that the decision to include is itself a decision concerning the item. 'Inclusion' is certainly a decision but it is not a decision on the nature of the item.

but which in reality is in no position to do so, i.e., the General Committee. The General Committee has no useful function to perform in so far as the nature of the items is concerned. Were its recommendations concerning the nature of the various items to have any value, this would mean that some assessment of the nature of the item was being made prior to inclusion. This is neither possible nor desirable. Therefore, in this respect, the General Committee is redundant.

(b) The Timing of the Vote on Competence

It is the practice of the International Court of Justice to attempt, when its competence is challenged, to make some preliminary assessment of its power to entertain the claim. If, after having done so, it finds that it is, on this preliminary view, competent, it proceeds to hear the merits. But this does not prejudice the right of the defendant State to plead the defence of domestic jurisdiction in answer to the case on the merits. Where, however, it is not possible to come to any preliminary view on competence, that question is joined to the hearing on the merits and decided after a full hearing of the merits, but before a decision thereon.

This procedure has not been clearly adopted by the General Assembly. While, in the final analysis, the General Assembly can be said in fact to have joined the issue of competence to the hearing on the merits in almost every case, it has never done this clearly, stating why and what it was doing. It has never, for example, tried to come to some preliminary decision on competence, and only on the failure to do this, joined the question of competence to the hearing on the merits. In general it has by-passed this step altogether. This has been responsible for a considerable degree of confusion in the agenda debates and in those of the Committees to which the various items have been referred and also for the attempts of several States to have items deleted from the agenda without any debate at all.

The effect of the lack of a definite procedure for dealing with objections to the competence of the General Assembly is shown clearly by the experiences of South Africa.

(i) Proposals to Refer the Interpretation of Article 2(7) to the International Court.

A great deal of the practice of the United Nations on the subject under discussion has evolved from the discussions of matters which affected South Africa. Indeed, had it not been for South Africa's racial policies it is doubtful if the General Assembly would have become involved to the extent that it has in this technical legal question. But that it has done so is not entirely due to the obstinacy of the South African Government, but also to the procedure and tactics adopted by the General Assembly itself.

The General Assembly, at its first session, declined to have an impartial interpretation of Article 2(7) by the International Court relative to the question of the treatment of people of Indian origin in South Africa. The question of the best or most appropriate method of interpreting controversial articles of the Charter is essentially outwith the scope of this study. However, as it forms the starting point in South Africa's attitude, it is necessary to take account of it.

At the first session of the General Assembly, the agenda, including the item, Treatment of People of Indian Origin in South Africa, was approved without objection and thereupon that item was referred to a Joint First and Sixth Committee because of the mixture of political and legal problems involved.

This first meeting of the Committee is a good example of opportunities missed. The meeting opened with a short statement by the Indian delegate, Mrs. Pandit, in which she briefly gave her reasons for contending that the matter fell within the competence of the United Nations. Field Marshal Smuts made a statement in rebuttal. Thereupon the Chairman remarked that it would be difficult to settle the question without first referring it to a sub-committee,

which he suggested, should therefore be set up. It appears from a subsequent statement by the Chairman,¹ that what he intended was that this sub-committee should examine the factual situation in order that the competence of the United Nations should be clarified. He was of the opinion that the Committee had not yet sufficient information to enable it to take a decision.² The proposal of the Chairman was taken up and elaborated by the Argentinian delegate, who proposed that a sub-committee be set up to study the question of whether the Indian proposal was within the terms of the Charter. However neither of these proposals to set up sub-committees met with general approval, the delegates who spoke favouring instead that the subject should be opened to general debate before any reference to a sub-committee. The Ukrainian delegate was of the opinion that the legal position was clear and that the Committee should proceed to a free discussion of the substance of the question.³ In this he was supported by the Byelorussian and the Chinese delegations.⁴ The Soviet delegate, oddly enough, was not so articulate at this stage, and stated that in view of the serious nature of the question, it should be given serious consideration. However, he thought that no decision could be taken at the moment, even on the formation of a sub-committee. The Soviet delegation, he said, would like to study the problem more closely before defining its attitude.⁵ In this he was supported by the United Kingdom whose delegate, Sir Hartley Shawcross, pointed out that a full,

1. G.A., (I/2), Joint 1st and 6th Com., p.8.

2. *ibid.*

3. *ibid.*, p.4.

4. *ibid.*, p.5.

5. *ibid.*, p.8.

free and public debate on the question might obviate the need to refer the question to a sub-committee.¹

It is clear from those short statements that the Committee did not feel itself in a position to take any decision on either its competence or the substance of the matter. But it is not clear whether the debates which followed were primarily intended to serve the function of elucidating competence or were directed mainly at the merits of the question. Some delegates spoke mainly to the question of competence, others took up the merits of the case. This confusion could have been obviated in the very first instance by examining the legal aspect of the question, for surely that must take precedence over everything else, though many delegates do not seem to share this view. Had the Argentinian proposal been formalized and been voted on, it might have served as a useful precedent for the future. As it was, a great opportunity was lost.

The second opportunity which was lost was that of referring the legal aspect of the matter to the International Court for an advisory opinion. At the opening of the discussion in Committee, Field Marshal Smuts said that "he had no objection to the case being freely discussed". However, "in view of the fact that the present case would form a precedent for the future, he would formally propose that, at the conclusion of the debate, the Joint Committee should recommend to the General Assembly that an advisory opinion be sought from the International Court of Justice upon the question whether the matters set forth by the Government of India and replied to by the Government of the Union of South Africa were, under Article 2, paragraph 7, of the Charter, essentially within the domestic jurisdiction of the Union of South Africa".² Later in the debate,³ Field Marshal Smuts stated

1. *ibid.*

2. *ibid.*, p.4.

3. *ibid.*, p.48.

that his government had no desire to prevent an enquiry or study of the position of Indians in his country. To that end he said he would consent to the proposed reference to the Court being enlarged to include the facts as well as the law and the Court, if it wished, could send a commission of inquiry to South Africa so as to establish the facts. But he said, after an attack which had included suggestions that the Government of South Africa occupied a position comparable to that of Nazi war criminals, it could not agree to an enquiry by any political body.

It is difficult not to sympathise with the South African position here. She went a long way to meeting any demands which could have reasonably have been made on her. But no request for an advisory opinion was ever recommended by the Committee, despite the fact that there was a considerable body of support for the proposition. This resulted from the procedure adopted by the Chairman, which was not challenged and overruled.

The South African proposal to refer the matter to the International Court was not formalized right at the start, as Smuts had indicated his intention to submit a motion to that effect at the end of the debate. However before any motion to that effect was introduced¹ a resolution was introduced by France,² subsequently amended by Mexico,³ to the effect that:

The General Assembly, having taken notice of the application made by the Government of India regarding the treatment of Indians in the Union of South Africa, and having considered the matter:

States that, because of that treatment, friendly relations between the two Member States have been impaired, and unless a satisfactory settlement is reached, these relations are likely to be further impaired;

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1. Motions requesting advisory opinions were introduced by Sweden, *ibid*, p.27, Colombia, *ibid*, p.33, and jointly by Sweden, the United States and the United Kingdom, *ibid*, p.43, which later was supported by South Africa, *ibid*.
 2. *ibid*, p.17.
 3. *ibid*, p.24.

Is of the opinion that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements concluded between the two Governments and the provisions of the Charter;

Therefore requests the two Governments to report at the next session of the General Assembly the measures adopted to this effect.

This resolution obviously prejudged the issue, for it assumed that South Africa had international obligations towards India on this subject, the very point which the Government of South Africa denied. However, it might have been thought that as there were resolutions before the Committee questioning the authority of the United Nations to deal with the matter, these would have been dealt with first. Such was not the case, and the Chairman ruled that the Committee would vote on the resolutions in the order in which they had been presented. The French resolution having been presented first, it was put to the vote first, and having been carried, no vote was ever taken on the proposal to ask for an advisory opinion.

This vote established what was to become a conspicuous practice of the United Nations General Assembly; i.e., taking decisions, without first ascertaining formally its competence to do so. The situation has thus arisen that in most cases where competence is disputed, the competence of the General Assembly can only be inferred from the action taken, not from any pronouncement on the subject.

South Africa however raised the question of an advisory opinion during the plenary session, and submitted a formal amendment to the resolution recommended by the Joint First and Sixth Committee, under which the General Assembly would have requested the International Court to give an advisory opinion on the question whether the matters referred to in the Indian application were, under Article 2, paragraph 7 of the Charter, essentially within the domestic jurisdiction of the Union.¹ This amendment was formally rejected and the draft Franco-Mexican

1. G.A., (I/2), Plen., 50th mtg., p.1010.

resolution was adopted instead.¹

It is very difficult to understand why this South African amendment was rejected, particularly in view of the co-operative attitude shown by the Government of South Africa in regard to allowing a commission of inquiry to be sent to South Africa by the International Court to ascertain the facts.

Two points of view were put forward. One group of States were of the opinion that the central issue was a legal one; namely, was there or was there not some legal obligation on South Africa towards India, contracted under certain international "treaties"? It was on this point that these States contended the whole case rested, and indeed it is difficult not to agree with them. The resolution before the General Assembly exhorted the Union government to abide by its "international obligations under the agreements concluded between the two Governments and the provisions of the Charter". Thus, before any resolution was passed exhorting the Union Government to abide by its international obligations, it would have been wise, one would have thought, to have ascertained just exactly what were the international obligations of South Africa. This would have entailed three questions. One, were there in existence any obligations arising out of the Cape Town Agreements? Two, what were the obligations of South Africa under the Charter? Three, what is the correct interpretation of Article 2(7) of the Charter, a question which, as the representative of the Netherlands, Mr. van Kleffens, noted, was most important, not only from the point of view of the question before them but for the whole future of the Organization.²

The other point of view was that as the matter was essentially political and that as in any case any matter of human rights fell within the scope of the

1. *ibid*, 52nd mtg., p.1061.

2. *ibid*, 51st mtg., p.1032.

Charter there was no need to refer it to the International Court. This last assertion was to a certain extent begging the question, for whether or not the human rights problems which were here concerned did fall within the scope of the Charter was exactly what the Court in question two, above, would have had to answer. By stating that the question here involved did concern human rights in such a way as to fall within the terms of the Charter, the General Assembly was taking upon itself the task of interpreting the legal obligations of South Africa, the one thing the advisory opinion was designed to avoid.

As to the first part of this assertion, that the matter was essentially political and hence there was no need to refer it to the International Court of Justice, it was true that to a considerable extent, the policy of the South African Government had resulted in an impairment of friendly relations between the two countries.¹ As Mr. Wellington Koo of China pointed out, relations between the two countries had not only been impaired, they had been suspended altogether.

Under such circumstances, it is true that whatever was the cause of the impairment of friendly relations between these two nations, it could not be something essentially within the domestic jurisdiction of South Africa, for something which does cause an impairment of friendly relations between nations, or even worse, a threat to the peace, cannot be domestic to any one country. But the fact that a considerable part of the problem had become political would not in any way have detracted from the usefulness of a clear exposition of the obligations of the parties involved. For, with a clear knowledge of the legal obligations of the parties, the General Assembly would surely have been in a much stronger position to find a solution to the situation.

It must be a matter of great regret that the United Nations did not seize

1. See the statement by Mr. Wellington Koo, of China, *ibid*, 50th mtg., p.1020.

this opportunity to have an authoritative opinion on the extent of South Africa's obligations, for in so doing some indication would have been given of the scope not only of the human rights provisions of the Charter but of Article 2(7) as well. Furthermore, when some of the subsidiary reasons for not applying to the International Court for an advisory opinion are examined, one wonders just what part the rule of law can play in a body such as the United Nations. The following passage from the speech of Mr. Wellington Koo, though long, is set out because it demonstrates how even international lawyers of repute can give expression to rather curious views on the place of law in the United Nations. He said:¹

What are the advantages and disadvantages of referring the matter to the International Court of Justice? In the first place, it is clear that the Court can only give a decision in one way or the other; it can decide that this matter is within the competence of the United Nations, in which case the situation remains the same, and the Assembly will have to take it up and deal with it. That means a delay of several months, and in the present situation, in the present unsettled conditions of the world, is it wise for us to let the strained situation remain as it is? Are we sure that it will not be aggravated in the interval?

There is the other alternative: the Court may decide that the matter is not within the competence of the United Nations, namely, that it is essentially within the domestic jurisdiction of the Union of South Africa. Would such a decision help South Africa to settle this case, or make it easier to deal with, and afford the necessary relief to the Indians? That is the question also for us to consider.

There is another aspect to consider. In view of the important issues involved in this case, issues which affect... the honour of a whole continent, the pride of half the human family, the dignity of man himself, are we sure that the Court will be able to reach a unanimous decision? I hope it will. But none of us can be sure, and we know that the world tribunal is composed of representatives from all races, at least the principal races.

Suppose we get a divided opinion. Would that help us very much? Would that help the prestige and authority of the Court itself. If it is a divided opinion, maybe the majority opinion will be on one side, the minority opinion on the other.² That opinion will expose the Court to praise in some quarters, and to criticism in others.

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1. *ibid.*, p.1021. Mr. Wellington Koo is now a judge in the International Court and it might be reasonable to ask if he still holds the same peculiar views on the judicial process.
 2. Emphasis added.

Are we justified, in the early stage of the existence of the Court, in putting such a heavy strain on that tribunal, whose authority and prestige we have every reason to uphold in the interest of the whole world? Therefore, we are decidedly of the opinion that the best course for the General Assembly to pursue now is to make a friendly offer of good offices, to make an effort to facilitate a settlement of the case by the parties, either separately or together. That is precisely what the resolution before us proposes to do.

The extraordinary thing about this pronouncement of Mr. Koo is that he seems actually to fear that the Court might find the subject to be within the domestic jurisdiction of South Africa. During the discussion of the subject in Committee¹ he had pursued the same line of reasoning and wondered what influence an opinion finding that the subject was within the domestic jurisdiction of South Africa, would have on that country to make it relax its discriminatory attitude towards the Asian population. Moreover, he said, once the Court had declared that the matter was within the domestic jurisdiction of South Africa, no further intervention on the part of the United Nations would be possible until the situation had reached such a critical stage that the terms of Chapter VII of the Charter could be invoked. This last statement is of doubtful validity. In any case it is rather curious to argue that a matter must not be sent to court in case the court finds against you. In the minds of many people that would suggest that you are not too sure of your grounds.

The case for the opposition was eloquently put by Sir Hartley Shawcross who said:²

...If we are going to ignore, in this matter, the appeal which has been made here by one of our Member States for an authoritative decision that this Assembly has jurisdiction to try that State before we condemn it, we shall be leading our Organization into the gravest danger for the future. It is not merely that no other tribunal in the world would dream of acting this way. It is that a denial of this appeal for an authoritative legal decision would do far more harm to our Organization than it will ever do good to the Indians in South Africa.

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1. G.A., (I/2), Joint 1st and 6th Com., 5th mtg., p.38.
 2. G.A., (I/2), Plen., 51st mtg., p.1033.

Mr. Wellington Koo... said yesterday that if this matter were referred to the Court, it might be that the Court would be divided. Well, if that is so, it is, of course, all the more reason why we should hesitate to take rash and political decisions and to put rash and political interpretations upon the meaning of the Charter, according to the way our emotions are swayed by the last speech we happen to have heard. For my own part, I see no reason why the Court should be divided on this perfectly straight forward constitutional question, nor do I think it would be a great disaster if the Court were divided.

We cannot preserve the International Court of Justice, in cotton wool under a glass case, only to be taken out and allowed to act when we know that we can put something before it upon which it is obviously certain to agree. Is that the way in which the rule of law is administered and enforced in our own countries? Is that how we are going to administer it and enforce it and enhance it in international affairs?.... What is important is not the risk that the Court might possibly disagree, but that we ourselves here are hopelessly divided on this matter.

By this refusal to have an advisory opinion, a great opportunity was missed to establish a sound precedent for the way in which the legal aspects of a dispute should be dealt with. Many cases, such as the one at hand, do, of course, involve a plethora of factors, the legal only being one of them. It is certainly true that in so far as the competence of the General Assembly is a function of political factors, e.g., when does a threat to the peace arise? etc., it must be decided by a political body. But surely, when there are complicated legal matters involved, these should be referred to the judicial arm of the United Nations, i.e., the International Court of Justice. That they tend not to be shows scant regard for the rule of law, to which every one pays, at least, lip service.

(ii) Subsequent South African Procedure

The South African Government had not objected either to the inclusion of the item, The Treatment of Indians in the Union of South Africa, in the agenda of the first session of the General Assembly, nor to its free discussion in Committee. She had not objected to discussion because she obviously thought that the Assembly would agree to have an advisory opinion on the subject, and being sure of her own grounds, she must have been under the impression that the matter would go no further. The proposal to ask for advisory opinion having been rejected, the obvious procedure was to seek a way of preventing the Assembly from dealing with

something on which its competence was contested, and the first mode of operation adopted by South Africa was to try to have the General Assembly take a decision on its own competence, after inclusion, (for no objection was lodged to inclusion per se till after the failure of this present modus operandi) but before any discussion on the substance of the matter.

It will be remembered that during the debate on the adoption of the agenda for the third session, Mr. Louw, the South African representative, had indicated his country's objections to the inclusion of the item dealing with the Indian population in South Africa. He had said¹ that in the view of South Africa, a decision to include a matter on the agenda was tantamount to a decision that consideration of the item was within the competence of the General Assembly. The reason why South Africa took this attitude, though not specifically stated, is not hard to find. Having been denied a legal interpretation of their obligations in this respect she, not without some justice, felt that the General Assembly was assuming a competence which it did not have.

The South African representative received an assurance that the question of competence could be dealt with in Committee, and for this reason, he did not press the matter to a vote at this early stage.²

However, when the matter came up in the First Committee, a South African motion to have the question of competence discussed and decided upon before that of substance was rejected.³

Discussion on this topic was confused, for there was before the committee not only the question of what should be discussed first, competence, or substance, but also who should speak first.⁴

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1. Supra, Ch.IV, 74; G.A., (III/1), Plen., 146th mtg., p.224.
 2. See supra, Ch.IV, 75; It will be remembered that the terms of Mr. Louw's request and those of the President's assurance did not exactly correspond.
 3. G.A., (III/2), 1st Com., 263rd mtg., p.253.
 4. But see statement of the Chairman, *ibid*, p.247, that the latter question had ceased to obtain.

The resultant discussion is a good example of the confusion which surrounds the whole subject of when and why matters of competence should be discussed and decided. For example, despite the statement of the President of the General Assembly during the debate on the adoption of the agenda that inclusion of an item did not settle the question of competence,¹ we find the delegations of Mexico and the Philippines saying that the General Assembly had declared itself competent by deciding to include the present subject on the agenda of the third session.²

The South African delegate, Mr. Louw, recalling the ruling of the President of the Assembly during the adoption of the agenda that he could raise the question of competence in Committee, asked the Chairman of the Committee to rule that the question of competence had to be discussed and decided first. Such a procedure would, he said, be in conformity not only with common sense but also with common legal procedure according to which, when the jurisdiction of a court is challenged, the challenger is permitted to state his argument before the substance of the case is discussed.³

India, on the other hand, opposed giving priority to any discussion to the question of competence. In her opinion it was only necessary to give priority in voting to any motion denying the competence. It was not, however, she claimed, necessary to give such priority to the discussion of this question over that of substance.⁴

The Committee decided not to consider the question of competence before that of substance.⁵

1. G.A., (III/1), Plen., 146th mtg., p.225.

2. *ibid.*, (III/2), 1st Com., 263rd mtg., p.251; *ibid.*, 268th mtg., p.312.

3. *ibid.*, 263rd mtg., pp.246-247.

4. *ibid.*, pp.247-248.

5. *ibid.*, p.253; voting - 33:7:10.

During the discussion leading up to this decision, one interesting proposal in particular was made. The representative of Haiti suggested that to avoid wasting time the two questions of competence and substance should be joined.¹ Unfortunately, this proposal was not further elaborated and if it was in the minds of the delegates that it was really necessary to do so in order to come to any valid decision on the question of competence, few of them gave any indication that they thought so. In fact, only Poland indicated the need for more information before coming to any decision on competence.²

The correct procedure in this case would have been that the matter having been placed before the General Assembly and included on the agenda, the question of competence should have been considered first and at least a preliminary decision clearly taken thereon. That decision could have been one of three things. One, the Committee could have decided that it was not competent. Two, it could have decided, provisionally, that it was competent, which of course would not prejudice the eventual outcome of a discussion on the merits. Three, it could have decided that the question of competence could not be decided on a preliminary view of the matter and joined the question of competence to that of substance. In fact, the committee did number three, but unfortunately it did it in such a way as to give the impression that it did not think it was necessary to have any preliminary decision on the question of competence.

When the discussion of this matter was resumed in committee, South Africa submitted a resolution to the effect that the matter "was essentially within the domestic jurisdiction of the Union of South Africa and that it did not fall within the competence of the Assembly".³ Thereafter, the matter was

1. *ibid*, p.251.

2. *ibid*, p.249.

3. G.A., (III/2), 1st Com., 265th mtg., p.280; A/C.1/460.

discussed from both the point of view of competence and substance, and it was not till the voting stage that the two were again separated. The South African motion denying the competence of the General Assembly was defeated by 33 votes to 5 with 12 abstentions¹. In the Plenary Session, though South African raised the question of competence, no formal motion challenging it was tabled.

Fifth Session

At the fifth session, the item was again included in the agenda without formal objection on the part of South Africa. Again, as soon as the subject was brought up in committee, South Africa raised the question of competence.² In this case, however, there was no formal vote on which aspect of the subject, competence or substance, should be discussed first, and when in the early stages of the debate the Chairman, in reply to a question to the Chair, said that they were discussing both aspects of the matter, no one challenged his statement.³ It is indeed clear from the consensus of views expressed in this debate that many delegates felt that the question of competence could not be decided until the factual side of the question had been more fully elaborated. No objection can be taken to this, but it is a pity that the procedure of joining the aspect of competence to substance was not formalised and made clear. Then it would perhaps be possible to avoid the endless wrangling over what is to be discussed when and by whom and who is to speak first.

At the forty sixth meeting of the Ad Hoc Political Committee, it was decided by 35 votes to 3, with 17 abstentions, that the Ad Hoc Political Committee was competent to consider and vote on such proposals as had been submitted to it.⁴

1. G.A. (III/2), 1st Com., 268th mtg., p.321.

2. G.A., (V), Ad Hoc Pol.Com., 41st mtg., para.1 et seq.

3. *ibid*, 42nd mtg., para.75.

4. *ibid*, 46th mtg., para.112.

Although the procedure adopted during the third and fifth sessions of the General Assembly and its committees on this matter was far from well established and clear, it is possible to say that in general the delegates wished to join the matter of competence to that of substance, for otherwise they would not have been able to come to any clear decision. This procedure is well established in the practice of the International Court and it might well be asked why at the following session South Africa, instead of waiting to raise her objections to competence in committee, tried, unsuccessfully, to have the item deleted altogether from the provisional agenda, and then at the seventh session, tried to have a vote taken on the competence of the General Assembly to discuss the Racial Conflict in South Africa, even before that item was included on the agenda. The answer to these questions lies, it is submitted, in the confused state in which the vote in the fifth session was taken.

It will be recalled that during the discussion of the question of the treatment of Indians in South Africa in the third session, the delegates of Mexico and the Philippines, during the debate in the First Committee, evinced the opinion that once the General Assembly had included an item on the agenda, the question of competence was closed. This line of argument was taken up and amplified in the later stages of the debate in committee at the fifth session.

The delegation of Cuba put forward the argument that the Committee was not competent to consider the general question of its competence to entertain the question, but could only decide on its competence with regard to specific proposals. This, he maintained, was the correct position, because the general question of competence to consider the matter had been settled by the General Committee and by the General Assembly when it approved the report of the latter body. If there were any doubts as to this general question of competence, as opposed to the competence to adopt specific proposals, these would have to be decided, he

claimed, by the General Assembly itself.¹ In this he was supported by Chile and Iraq.² Elaborating his views,³ the Cuban delegate said that the approval of the General Assembly of the inclusion of the item in the agenda had not been given heedlessly on the mere basis of the title of the item. An explanatory memorandum had been submitted by the proposer of the item and had been considered and the General Assembly was well aware of what it was approving. Moreover, he pointed out that ample provision was made under the rules of procedure of the General Assembly to enable Members to present their objections to inclusion. Indeed, he added, were the question of the general competence of the United Nations to be reopened now, it would make the General Committee into a useless and superfluous organ.

Replying to the points raised by the Cuban delegation, Mr. Donges, the South African representative, recalled⁴ the ruling given in 1948 by the then President of the General Assembly⁵ that if the item raised by India were placed on the agenda, the question of the competence of the General Assembly could be raised in committee. He further pointed out that he had expressly reserved his country's position on this item during the debate on the adoption of the agenda of the fifth session.⁶ The South African point of view found general support from the Chairman, Mr. Belaunde of Peru, and from Bolivia, Greece, Syria, Belgium, Argentina and the Dominican Republic. The Greek delegation quoted the report of the Sub-Committee on International Co-operation in the Political Field, appointed by the Interim

1. *ibid*, para.63-66.

2. Chile: *ibid*, paras.78-80; Iraq: *ibid*, para.94.

3. *ibid*, paras.96, 69.

4. *ibid*, para.67, 74.

5. See *supra*, p. 211, and see also *supra*, Ch.IV, 74.

6. G.A., (V), Plen., 285th mtg., paras. 24-26.

Committee¹ which also stated that the inclusion of an item on the agenda did not amount to a decision that the Assembly was competent to discuss or make recommendations thereon.

The delegation of the Philippines, however, said that the question of whether or not the Committee was competent to discuss the matter was of academic significance only, for in fact they had discussed it, and the only thing left to be done was to decide whether or not the Committee was competent to act on the specific proposals.²

Summing up his government's position Mr. Donges said³ that he had asked that the Committee refrain from discussing the item because, from its wording and from the explanatory memorandum of the proposer, it was clear that any consideration of it would infringe on the domestic jurisdiction of the Union of South Africa. However, in spite of his country's views on the subject he had acceded to a request that he should not press for a decision on competence until he had heard the Indian delegation's presentation of the case. The facts presented by India had been heard and the entire question discussed. But that did not render the question of competence academic.

However, despite these opposing views on the subject, no real decision was taken here as to whether the Committee was competent to decide the general question of competence. The Cuban delegation had requested a specific vote on this subject, but none was taken.⁴ The resolution which was finally adopted and which asserted the competence of the Committee to consider and vote on such proposals as had been submitted did not really solve the basic question. The terms of this resolution,

1. A/1388, Annex A, para.21.

2. G.A., (V), Ad Hoc Pol.Com., 46th mtg., para.100.

3. *ibid*, para.105.

4. *ibid*, para.70.

submitted by Syria, were as follows:¹

The Ad Hoc Political Committee,

In view of the fact that the question of competence regarding the item on the agenda relative to the treatment of people of Indian origin in the Union of South Africa had been considered,

In view of the discussion on this subject and the proposals submitted,

Decides that it is competent to consider and vote on such proposals as have been submitted.

While the South African delegation, in this case, expressed itself as satisfied with the wording of this resolution, it really did not settle the question which had been raised of whether or not the Committee could take a general decision on the competence of the Organization to entertain an item, as opposed to the specific decision of whether or not it was competent to take a certain action.

The need to clarify and codify procedure on these questions of competence will be manifest from the above confusion, and it is submitted that the proposal laid out above would substantially contribute to this end.²

Sixth Session

The next step of the South African Government, to try to have the item deleted from the agenda, and thus bar any discussion at all, has already been dealt with.³

Seventh Session

The deletion of the item dealing with the population of Indian origin in South Africa, having been denied at both the sixth and seventh sessions, at the

1. See *ibid*, para.110.

2. Due to certain technicalities and misunderstandings, the item was not discussed in Plenary session, and the Assembly proceeded directly to the vote. Therefore, in this case, South Africa was unable to raise the question of competence in the General Assembly. See G.A., (V), Plen., 315th mtg., paras.3-6.

3. *Supra*, Ch. IV, p. 76.

seventh session the South African Government tried to get a vote on competence taken during the debate on whether or not to include the question of the Racial Conflict in South Africa on the Agenda. This too was denied.¹

When, in the seventh session, the matter was referred to the Ad Hoc Political Committee, the South African delegate tabled a resolution denying the competence of the Committee to consider the matter.² However, the procedure adopted in previous cases of this nature was adopted and no decision or vote was taken on the South African motion till the end of the debate, when it was rejected.³

Eighth Session

Substantially the same procedure was adopted at the eighth session. The South African delegate proposed the deletion of the items dealing with the treatment of the people of Indian origin in the Union and with her apartheid policies, but both requests were denied.

When the subject of South Africa's racial policies came up in the Ad Hoc Political Committee South Africa again, immediately, introduced a resolution to the effect that the Committee had no competence to intervene therein.⁴ Again, however, the question of competence was not settled till after there had been a debate on the substance of the matter. But again, as in previous sessions, this procedure was not adopted without a degree of wrangling over what should be discussed and decided first.

Shortly after the South African delegate submitted his draft resolution challenging the competence of the Committee to deal with the matter, the Chairman ruled that the debate would continue as a general discussion and that the question

1. See supra, Ch. IV, pp. 77-80, and pp. 182-186.

2. G.A., (VII) Ad Hoc Pol.Com., 13th mtg., para.14.

3. *ibid*, 21st mtg., para.35. Voting: 45:6:8.

4. G.A., (VIII), Ad Hoc Pol.Com., 32nd mtg., para.2; Doc. A/AC.72/L.13.

of competence would be settled, in accordance with Rule 120(now 122) of the rules of procedure, before a vote was taken on the substantive proposals. He accordingly invited delegates to speak on both the matter of substance and competence.¹ This ruling was not challenged.

However, during the course of the debate, the now familiar wrangle started again. The Colombian representative inquired during the 34th meeting what motion was under discussion.² Upon the Chairman replying that no particular motion was under discussion, but that the committee was engaged in a general discussion, the Colombian representative stated it was his opinion that the Committee could not discuss the joint draft resolution, submitted by India on behalf of 17 Member States, until the question of competence had been settled.³ The Chairman then ruled again that the South African resolution would be put to the vote before any other, but that it was not necessary to give it priority of discussion.⁴ Later he reiterated former rulings that the inclusion of an item on the agenda by the General Assembly does not prejudice the question of its competence,⁵ for the Committee had again been treated to the view that as the Assembly had included the matter in the agenda, the question of competence had been settled.⁶

(c) Conclusion

Rules of procedure can frequently be used to great advantage. Particularly where they are complicated, it is possible in litigious matters to prolong cases

1. *ibid*, para.54.

2. *ibid*, 34th mtg., para.30.

3. *ibid*, para.32.

4. *ibid*, para.33.

5. *ibid*, para.55.

6. G.A., (VIII), Ad Hoc Pol.Com., para.35, per Pakistan; para.40, per Syria.

for years, even decades. However, the procedure developed by the International Court of Justice for dealing with preliminary objections to jurisdiction is relatively simple and clear. Had it been clearly adopted by the General Assembly in like circumstances, the difficulties discussed above need never have arisen.

It is submitted that had the General Assembly adopted a more legalistic attitude towards challenges to its competence, the business of the Assembly would have been expedited. Internally, the adoption of such procedures would have ensured a smoother passage of certain items through the Assembly and its committees, not least by making the issues more understandable to the delegations. It is not uncommon, for example, in Committee for the Chair to be asked several times in the course of one debate, just what motion is being spoken to. Externally, the adoption of a more rigorous approach to these questions would have ensured a greater respect for the recommendations of the General Assembly. Where resolutions are adopted and recommendations made in circumstances where certain of the delegations most affected deny the competence of the General Assembly, it is hardly surprising that these resolutions and recommendations are often ignored, pointedly. Had greater attention been paid to the legal requirements of a decision on competence, this situation would not have arisen or if it had, those who ignore such recommendations would not have had such good grounds for doing so.

It may be argued that rule 122 of the rules of procedure amply takes care of the objections which have been made in this Chapter. That it does not, however, should be evident from the continuous wrangling that goes on over the adoption of the agenda. Every time a question arises which in any way involves a question of domestic jurisdiction, someone tries to block its inscription on the agenda. This is so, it is suggested, because rule 122 does not really fill the bill. This rule of procedure does seem to be designed more to deal with

specific proposals than with the general question of the competence of the United Nations even to entertain a particular question. It is submitted that what is required is a definite procedure to take care, immediately after inclusion of an item on the agenda, of the general question of competence. If this were established it would be possible to rid the organs of the United Nations of these tedious repetitions of the old argument "This is a domestic matter, and you can't include it on the agenda".

6. Contradictions in the General Assembly Practice

Contradictions abound in the practice of the General Assembly, particularly in that relating to this subject. Most of them relate to what is considered a domestic issue and what is not. Why, for example, did Great Britain consider South Africa's racial problems to be internal, but not the legislation concerning the freedom of Russian women to leave the Soviet Union? However, such contradictions are not part of this study.

There are, however, certain contradictions in relation both to what delegations consider as intervention, and also in their attitude towards the procedure for deciding questions of competence. These contradictions are unconnected, and do not present a coherent picture. However, they do demonstrate still further the need to establish a definite procedure for dealing with questions of this kind.

The United States

The United States is on record as being of the opinion that inclusion of an item and its discussion by the General Assembly does not constitute intervention in the affairs of members.¹ Further, the United States believes that the inclusion of an item is without prejudice to the question of competence.² Yet, at the tenth session the United States voted against the inclusion of the Algerian question

1. *Supra*, Ch. IV, p. 107; G.A., (III/2), Plen., 189th mtg., p. 12.

2. G.A., (X), Plen., 530th mtg., paras. 111-112.

because of the type of action which the sponsors sought.¹ These statements are not compatible. The view that discussion did not constitute intervention was not limited in any way to items which on some prima facie judgement by the Members, prior to inclusion, fell within the jurisdiction of the United Nations. Indeed the whole point of the argument that discussion is not intervention is that the domestic status of an item is of no account.

For the same reason, it is not understood why, at the seventh session, the United States voted in favour of deciding on the competence of the General Assembly to entertain the item, The Racial Conflict in South Africa, prior to the inclusion of that matter on the agenda.²

Czechoslovakia

During the third session, Czechoslovakia, together with the other members of the Soviet bloc, opposed the inscription on the agenda of the item, The Observance of Human Rights in Bulgaria, Hungary [and Romania]. In keeping with the opinions of the other communist states, the Czech delegate, Mr. Houdek, maintained that as the matter was domestic it could not be included on the agenda and discussed by the Assembly.

Mr. Houdek gave a clear explanation of why this item could not be included on the agenda. In the same breath however, he voiced the opinion that the Indonesian question³ could be included because it was not internal. This last point may well have been true, but it is the fashion in which he compares the two which is of interest.

Dealing with the general competence of the United Nations Mr. Houdek said⁴

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1. Supra, Ch. IV, p. 99; G.A., (X), Plen., 530th mtg., paras. 111-112.
 2. Supra, p. 186.
 3. See infra, Vol. II, Ch. X.
 4. G.A., (III/2), Plen., 189th mtg., p. 7 et seq.

that the wide variety of questions defined by the Charter was prescribed and limited by Chapter I, which outlined the purposes and principles by which the activity of the Organization was to be guided. He drew attention to Article 2(7) and emphasised that the final clause of that paragraph did not apply to the case under discussion, inasmuch as that case did not present any threat to the peace, breach of the peace or act of aggression.

However, his attitude towards the Indonesian question was somewhat different. Czechoslovakia would vote, he said,¹ for a thorough discussion of the Indonesian problem. According to Czechoslovakia's information, in Indonesia there was taking place a gross violation of human rights by a not unimportant member of the international community. He maintained that only a thorough debate before the Assembly, in which the indigenous people would have the opportunity to participate, would show whether or not that information was correct and whether the events in Indonesia did or did not jeopardize international peace and security.

Mr. Houdek went on to explain why he considered the debate on the Indonesian situation was necessary and why it would not violate the terms of Article 2(7). It was the opinion of Czechoslovakia, he claimed, that the meaning of Article 2(7) was closely related to the question of whether a fact considered by some to fall exclusively within their competence, did not at the same time present a threat to international peace and security. It was hardly conceivable, he claimed, that events resulting in the liquidation by brute force of a State of several million inhabitants would not result in endangering peace and security. Therefore, a debate was necessary in order to clarify this point.

However, in his opinion, the case of Cardinal Mindszenty and the Bulgarian church leaders had nothing to do with a threat to international peace and security.

1. *ibid*, p.8.

The two propositions are not compatible, though Mr. Houdek claimed that they were.¹ What he is saying is this: There is a certain situation in Indonesia which in our opinion poses a threat to international peace and security. If such a situation does exist, then it ceases to be domestic and hence is not covered by the terms of Article 2(7). In order to determine whether this situation is as bad as we have reasons to believe it is, a full debate in the General Assembly is necessary.

No exception can be taken to this line of reasoning. But it is not understood why he did not apply it to the case of Bulgaria and Hungary. Whereas, in the Indonesian case, Mr. Houdek favoured a full debate to clear up any uncertainty about the domestic nature of the item, in the case of Bulgaria and Hungary he did not. Of course, no doubt he would argue that in the case of Bulgaria and Hungary, there was no doubt at all about the domestic nature of the subject matter. Yet many nations thought that there was. If a debate is the correct way in which to clear up an uncertainty in one case, then there is no reason why it should not be so in every case. However, apparently Czechoslovakia preferred to rely on prima facie judgements as to the domestic nature of the Bulgarian and Hungarian matter taken prior to the inscription of that item on the agenda.

The Soviet Union

In both the case of the observance of human rights and fundamental freedoms in the Soviet Union and in the case of Bulgaria, Hungary and Romania, the Soviet delegate also preferred to rely on judgements as to the domestic nature of these items, taken prior to inclusion. In neither of those cases did the Soviet Union have any doubt as to the domestic nature of the matter. But of course, others did.

Yet, in the seventh session, opposing the attempt to have the question of

1. *ibid*, p.8.

competence decided prior to the inclusion of the item dealing with the racial conflict in South Africa, Mr. Vyshinsky stated that "only when the time comes to discuss the substance of any given item can the question of the General Assembly's competence be raised".¹

Wherein lies the difference between the two cases? The only possible way for the Soviet Union to reconcile the two views would be for her to deny that there was any question of competence in the case of human rights in the Soviet Union or in Bulgaria and Hungary. However, a bland denial is hardly an answer to the doubts of others.²

7. Procedural Inconsistencies

There has been some controversy over whether the inclusion of an item on the agenda amounts to a decision on the part of the Assembly that it is competent to entertain it, with the corresponding result that the matter of competence may not be reopened, except with regard to specific proposals. Despite the weakness of such an argument and several rulings from the Chair that this is not so, the argument has frequently been heard. This in itself is unfortunate, for it adds to the confusion. Even worse, however, is the fact that this argument has been put forward by States which themselves have maintained the very opposite.

During the debate in the seventh session on when the vote on the competence of the General Assembly to deal with the racial conflict in South Africa should be taken - before or after inclusion of that item on the agenda - the delegations of Chile, Mexico and Iraq all supported the view that no vote could be taken till after inclusion.³

Yet the same delegations have in other debates supported the opposing point of view, namely, that once the item is included, the general question of

1. G.A., (VII), Plen., 381st mtg., paras. 141-143.

2. Czechoslovakia and the rest of the communist bloc also voted against this attempt to have a decision on competence taken prior to inclusion. See supra, p.186.

3. Supra, p.185.

competence is closed.¹

Contradictions of this kind are not conducive to the smooth working of the General Assembly. Furthermore, in the face of such equivocal attitudes it is difficult to blame other States from seeking to prevent the inscription of items on the agenda altogether. Where those who are to be the judges are unable to maintain a consistent attitude towards the same problem, then they had better not be trusted with the decision.

8. General Conclusions

The exigencies of procedure demand that preliminary or jurisdictional discussion, even though this entails a full discussion of the merits of a case, not be considered as intervention. Unfortunately, as the above survey indicates, this has not been accepted to any great extent in the General Assembly. The majority of States which have considered the problem appear to be of the opinion^{that} any discussion of an item, which they consider as domestic, constitutes intervention. For these States there appears to be no difference between substantive and jurisdictional debate. This is unfortunate for it has led to confused procedure and to tedious repetitious debates in the General Assembly all of which could have been avoided had the procedure outlined at the beginning of this Chapter been followed.

1. Mexico, supra, p.212; Chile, supra, p.216; Iraq, *ibid*, p.216.