REGIONAL TREATIES AND THE UN CHARTER: A STUDY IN COMPARATIVE LAW OF INTERNATIONAL INSTITUTIONS

Regional organizations have become conspicuous features of the political landscape of the international system.[1] The proliferation of these regional systems of public order and the noticeable tendency towards "the empire-building of rival international organizations"[2] have inspired debate on the practicability, if not the desirability, of the idea of universality in international law and organization.[3] In this article, we examine and analyze the international constitutional law of some of the most important regional organizations with a view to assessing both the extent to which similarity does exist between regional constitutional law and the law of the United Nations, and the contribution made by regional international constitutional law to the development of general international law. Believing that the United Nation's Charter was in 1945 intended to and has since become the universal law of the organized world community, we address ourselves to the legal front of the battle for welding the principal regional systems of public order into the global chain of the United Nations.

The constitutional law of the following regional organizations will be examined: the League of Arab States, the Organization of American States (OAS), the North Atlantic Treaty Organization (NATO), the Council of Europe, the ANZUS Treaty Alliance, the Southeast Asia Treaty Organization (SEATO), the Warsaw Pact, the Organization of African Unity (OAU), and the Association of Southeast Asian Nations (ASEAN). The particular aspects of their constitutional law[4] analyzed deal with (a) relations with and deferential references to the UN

1. R.A. Akindele, *Regional Organizations and World Order,* (Unpublished Ph.D Thesis, The University of Alberta, Edmonton, Canada, 1970); Ronald Yalem, *Regionalism and World Order,* (Washington: 1965); Ruth Lawson (ed.), *International Regional Organizations: Constitutional Foundation,* (New York: 1962); Amos J. Peaslee, *International Governmental Organizations: Constitutional Documents, 2* Vols, (The Hague: 1964).

2. Geoffrey L. Goodwin and Susan Strange, *Research on International Organization,* (London: 1968), p. 39.

3. C.W. Jenks, *The Common Law of Mankind,* (London: 1958) Ch. 2; Lasswell and McDougal, "The Identification and Appraisal of Diverse Systems of Public Order", *American Journal of International Law* (A.J.I.L.), Vol. 53, 1959, p. 1 *et seq.*; H.A. Smith, *The Crisis in the Law of Nations,* (London: 1947); Oliver Lissitzyn, "International Law in a Divided World", *International Conciliation,* No. 542, March 1963; Rosalyn Higgins, *Conflict of Interest: International Law in a Divided World,* (London: 1962), Ch.7; Thomas, *Communism Versus International Law,* (Dallas: 1953).

4. See Ruth Lawson (ed.), *op. cit.*, (Note 1 above); Peaslee, *op. cit.*, (Note 1 above). *International Legal Materials* (I.L.M.) Vol. 2, 1963, p. 766; *I.L.M.,* Vol. 6, 1967, p. 1253.

Charter, (b) requirements of membership, (c) principles of international law, (d) modes of decision-making, and (e) pacific settlement of disputes and legal regulation of the use of force.

Our approach to this inquiry is comparative in a double sense. Selected provisions of regional treaties are not only compared *inter se,* but also with similar provisions of the UN Charter. It is firmly believed that "comparative law serves a triple purpose for the international lawyer. In the first place, it enables him to seek those common rules of local law which might form the basis of a uniform international code. Further, by seeking the universal concept of justice, it permits a court to avoid lacunae when called upon to decide international juridical disputes. From the developmental point of view, it makes possible the supplementation of established law through the medium of the general principles of law recognized by civilized nations, either with the aim of clarifying existing law or in order to allow the existing law to adjust itself to the new social conditions."[5]

II

Relationship between General International Law and the Law of International Institutions.

As this study deals broadly with the constitutional law of international organizations, it is proper to begin by commenting briefly on the relationship between this international constitutional law and general (customary) international law.

It is not surprising that before the twentieth century international legal scholars did not differentiate between international law at large and the constitutional law of international organizations. Apart from the existence of specialized international Unions performing non-political (technical) functions,[6] international life, until the founding of the League of Nations in 1919, lacked permanent global institutions dedicated primarily to the maintenance of international peace and security.[7] Europe in the nineteenth century was "governed" by a system of *ad hoc* conferences[8] aptly described as "a system of Rights without Duties, and Responsibilities without Organizations."[9] It is, however, remarkable

5. L.C. Green, "An International Lawyer Looks at Comparative Law," *Israel Law Review*, Vol. 1, 1966, p. 592; also "Comparative Law as a source of International Law," *Tulane Law Review*, Vol. 42, 1967-1968, p. 66.

6. Paul S. Reinsch, *Public International Unions*, (Boston: 1911); L.S. Woolf, *International Government,* (London: 1916); F.B. Sayre, *Experiments in International Administration,* (New York: 1919); Norman Hill, *International Administration,* (New York: 1931).

7. C.W. Jenks, *The World Beyond the Charter*, (London: 1969), Ch.1.

8. R.B. Mowat, *The Concert of Europe*, (London: 1930); Norman Hill, *The Public International Conferences,* (Stanford: 1929); F.S. Dunn, *The Practice and Procedure of International Conference,* (Baltimore: 1929).

9. Sir Alfred Zimmern, *The League of Nations and the Rule of Law, 1918-1935,* (London: 1936), p. 75.

that international society has since been transformed into an *organized* though *decentralized* and somewhat *primitive* political system.[10] The rise of *permanent* public international institutions has left its impact on thinking about international law. It is now generally accepted that international law is so closely related to international organizations that the former cannot be fully treated independently of the latter. The development of international organizations has called for a reexamination not only of the question of the *sources* but also of the *subjects* and *subject-matter* of international law.[11] Besides, it has, perhaps paradoxically, induced the tendency to differentiate the law of international institutions from general international law.

The relationship between the constitutional law of international organizations and general (customary) law is much discussed among international legal scholars. Some scholars, particularly those from the Soviet bloc, hold the view that it is unnecessary to distinguish between classical international law and the international law of the United Nations in so far as both are regarded as being based upon the positive consent and agreement of states. The eminent Soviet scholar and one-time judge of the International Court of Justice, Krylov, stated this view provocatively in the following words more than a decade ago:

> I am opposed to making any distinction between general international law and the international law of the United Nations... The law of the United Nations is only the part of international law which must unite us all. The distinction between so-called classical international law and the international law of the United Nations, is not necessary. We have no classical law now, we have the law of the 81 States belonging to the United Nations [12]

Underlying such view is the assumption by Soviet scholars of the primordial position of international treaty as the source of international law.[13] Generally speaking, Western legal scholars repudiate this theory of substitution or amalgamation, and contend that the law of international institutions is no more and no less than a specialized and largely auto-

10. A recent count reveals that there are now in existence 3510 active international organizations. See *Year Book of International Organizations 1968-1969,* (Brussels: 1969).

11. Jenks, *The Common Law of Mankind,* (London: 1958); Wolfgang Friedmann, *The Changing Structure of International Law, (*New York: 1964); Georg Schwarzenberger, *The Frontiers of International Law,* (London: 1962); also *The Inductive Approach to International Law,* (London: 1965); Clive Parry, *The Sources and Evidences of International Law,* (Manchester: 1965); Torsten Gihl, "The Legal Character and Sources of International," *Scandinavian Studies in Law*, 1957, pp. 53-92; Chris Osakwe, "Contemporary Soviet Doctrine on the Juridical Nature of Universal International Organizations," *A.J.I.L.,* Vol. 65, No. 3, July 1971.

12. International Law Association (I.L.A.), *Report of the 48th Conference,* (New York: 1958), p. 512. See also Lukashuk (U.S.S.R.), I.L.A., *Report of the 52nd Conference,* (Helsinki: 1966), p. 563; G.I. Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law, *California Law Review,* Vol. 49, 1961 pp. 419-430; also "Co-existence and International Law", *Hague Recueil,* Vol. 95, 1958, (II), pp. 5-78.

13. T. Taracouzio, *The Soviet Union and International Law,* (New York: 1935), pp. 13-14; Triska and Slusser, *The Theory, Law, and Policy of Soviet Treaties,* (Stanford: 1962), Ch. 1; Tunkin in *Hague Recueil,* Vol. 59, 1958, (II), pp. 5-78.

nomous branch of general international law. These scholars hold the view that the constitutional law of international institutions presupposes and indeed stands under the impact of general international law.[14]

It is beyond the scope of this article to examine arguments marshalled in support of both the theories of amalgamation and of differentiation. It is sufficient to indicate that the theory of differentiation is the more plausible of the two. However, to reject the contention that the conventional law of the United Nations should be substituted for general (customary) international law is not to be oblivious of the dual relationship between the two, and, in particular, the extent to which the former has rendered obsolete or modified some of the assumptions of the latter. Indeed, it has been rightly urged by the International Law Commission in its 1950 Report on Ways and Means of making the evidence of customary international law more readily available that

> The differentiation between conventional international law and customary international law ought not to be too rigidly insisted upon... A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought into force are frequently regarded as having value as evidence of customary international law.[15]

On the question of the impact of international institutions on general international law, legal scholars agree that the law, practices and procedures of international institutions have made positive contributions to the progressive development of international law.[16]

14. Oppenheim, *International Law,* Vol. 1, (1955), p. 25; Hans Kelsen, *Principles of International Law,* (2nd Ed., 1966), p. 438; Josef Kunz, *The Changing Law of Nations,* (1968), p. 335 *et seq.;* Alfred Verdross, "The Charter of the United Nations and General International Law," in Lipsky (ed.), *Law and Politics in the World Community,* (1953), pp. 153-161; Clive Parry, *op. cit.,* (Note 10 above), p. 28 *et seq.;* Georg Schwarzenberger, "Reflections on the Law of International Institutions," *Current Legal Problems,* (C.L.P.), Vol. 13, 1960, pp. 276-292; Torsten Gihl, *op. cit.,* (Note 11 above), p. 75; D.W. Bowett, *The Law of International Institutions,* (New York: 1963).

15. U.N. Doc. A/1316. Report of the International Law Commission to the General Assembly, *Yearbook of International Law Commission 1950,* Vol. 2, p. 368.

16. Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations,* (London: 1963); H. Lauterpacht, *The Development of International Law by the International Court,* (London: 1958); Jenks, *op. cit.,* (Note 11 above), pp. 173-204; A.J. Tammes, "Decisions of International Organs as a Source of International Law", *Hague Recueil,* Vol. 94, 1958, pp. 265-363; Oscar Schachter, "The Development of International Law Through the Legal Opinions of the Secretariat," *British Year Book of International Law* (B.Y.B.I.L.), Vol. 25, 1948, pp. 91-132; J.G. Starke, "The Contribution of the League of Nations to International Law," *Indian Yearbook of International Affairs,* (I.Y.I.A.), Vol. 13, 1964, pp. 207-226; Louis Henkin, *"International Organization and the Rule of Law," International Organization,* Vol. 23, 1969, pp. 656-682; "Development of International Law by International Organizations," *Proceedings, American Society of International Law,* 1965, pp. 1-212.

III

The UN Charter as the Higher Law vis-a-vis the law of international regional organizations.

The presumed theoretical superiority of the idea of universality in international law and organization underlies the conception of the law of the United Nations as the higher law *vis-a-vis* the law of international regional organizations. The rule declaring the paramountcy of the obligations of UN membership over those of other treaties contracted by members of the world organization where the two sets of obligations lead to inconsistent duties is formulated in Article 103 of the Charter of the United Nations.[17] The formulation differs in important respects from Article 20 of the League Covenant.[18] It may be noted that Article 103 of the Charter uses the word "supersede" instead of "abrogate" which was employed in the formulation of the principle of paramountcy in the League Covenant. The Report of the Rapporteur of Committee IV/2 explains why the authors of the Charter considered the idea of automatic abrogation "inadvisable": "A few delegations have observed that the adoption of the terms of Article 20 of the Covenant of the League of Nations would be likely to produce uncertainty regarding the meaning of a great many treaties and to create practical difficulties concerning the designation of the organ or organs which would be competent to determine a question of inconsistency."[19] The authors of the Charter rejected the judging of inconsistency of obligations *a priori.* The Report cited above declares *inter alia:* "It has been deemed preferable to have the rule depend upon and linked with the case of conflict between two categories of obligations. In such a case, the obligations of the Charter would be pre-eminent and would exclude any others."[20] It is for this reason that the compatibility of a regional treaty with the UN Charter depends not so much on the mutual consistency of obligations assumed as on the compatibility of duties deriving from the two categories of obligations.[21]

It is in the light of the presumed theoretical superiority of the principle of universality and, hence, the paramountcy of the duties of UN membership that the deferential references made by regional treaties to the UN Charter should be examined. It is common practice to include in the constitutional law of regional organizations statements in the

17. See Charles Cadoux, "La Superiorite du Droit des Nations Unies sur le droit des stats membres," *Revue Generale de Droit International Public* (R.G.D.I.P.), Vol. 65, 1959, pp. 649-680.

18. For an illuminating interpretation of this Article, See H. Lauterpacht, "The Covenant as the Higher Law," *B.Y.I.L.,* Vol. 17, 1936, pp. 54-65.

19. Doc. 933, IV/2/42 (2); *United Nations Conference on International Organization, Documents* (U.N.C.I.O. Doc.), Vol. 13, p. 707.

20. *Ibid.*

21. Hans Kelsen, *The Law of the United Nations,* (London: 1964), pp. 323-324; Goodrich and Hambro, *Charter of the United Nations: Commentary and Documents,* (Boston: 1949), pp. 518, 519, Bentwich and Martin, *A Commentary on the Charter of the United Nations,* (London: 1969), p. 180.

preamble or in the operative part declaring that none of the provisions in the particular treaty are to be so construed as to impair the rights and obligations of the signatories as members of the United Nations, and reaffirming expressly the faith of the signatories in the purposes and principles of the UN Charter.[22]

It may be said with justification that the deferential references which regional treaties make to the UN Charter are unnecessary and superfluous in so far as these references do not add one iota to the legal validity of the principle of paramountcy of UN obligations already accepted by signatories to regional treaties as members of the United Nations. Yet, there is some *symbolic* value in having the superiority of the idea of universality *expressly* declared in regional treaties established subsequent to the UN Charter. Whether or not the deferential references have proved to be nothing but a mere lip-service to the superiority of the obligations of UN membership is an important consideration which is a matter of empirical determination. A case-study analysis of the operation of the Charter law of universal-regional relationship leads one to the conclusion that the obligations of UN membership have been placed in an *inferior* position in relation to those of regional organizations.[23]

Apart from the generalities of these deferential references expressly acknowledging the UN Charter as the "higher law", some regional treaties define their relationship to the UN Charter in specific terms. NATO, SEATO, ANZUS Treaty, and the Warsaw Pact are primarily collective self-defence organizations justifying their existence expressly

22. Statute of the Council of Europe, Art. 1(c); Manila SEATO Treaty, Art. 6; North Atlantic Treaty, Preamable and Art. 7; OAS Charter, Art. 137; OAU Charter, Art. 2(1) (e); Warsaw Pact, Preamble and Art. 1; ANZUS Treaty, Art. 6; CENTO, Art. 4; ASEAN Declaration, Paragraph 2(2). As the Pact of the Arab League antedated on the UN Charter, it contains no specific deferential references to the Charter of the United Nations, but imposes on the League Council the duty "to decide upon the means by which the League is to co-operate with international bodies to be created in the future in order to guarantee the security and peace and regulate economic and social relations." See Art. 3.

23. L.C. Green, "New States, Regionalism and International Law," *Canadian Yearbook of International Law,* Vol. 5, 1967, pp. 118-141; J.W. Halderman, "Regional Enforcement Measures and the United Nations," *Georgetown Law Journal,* Vol. 52, 1963, pp. 89-119; also *The United Nations and the Rule of Law,* (New York: 1965), p. 37 *et seq.;* Inis Claude, Jr., "The OAS, the UN, and the United States," *International Conciliation,* No. 547, March 1964; G.I.A. Draper, "Regional Arrangements and Enforcement Action," *Revue Egyptienne de Droit International,* Vol. 20, 1964, p. 1 *et seq.;* R. St. J. Macdonald, "The Developing Relationship between Superior and Subordinate Political Bodies at the International Level: A Note on the Experience of the United Nations and the Organization of American States," *Canadian Yearbook of International Law,* Vol. 2, 1964, pp. 21-54; M.E.J. de Arechaga, "La Coordination des Systems de L'O.N.U. et. de L'Organisation des Stats Americans Pour le Reglement Pacifique des Differends et la Securite," *Hague Recueil,* Vol. III, 1964 (1), pp. 423-520; Michael Akehurst, "Enforcement Action by Regional Agencies with Special Reference to the Organization of American States," *B.Y.B.I.L.,* Vol. 42, 1967, pp. 175-227; C.J.R. Dugard, "The Organization of African Unity and Colonialism," *International and Comparative Law Quarterly,* 4th Series, Vol. 16, 1967, pp. 157-190.

or implicitly under Article 51 of the law of the United Nations,[24] and, thus, accepting to be bound by the rules of behaviour postulated for any regional organization exercising the right of collective self-defence. The law of the OAS and of the Arab League defines the regional organization as both a collective self-defence system under Article 51 and a regional organization under Articles 52-54.[25]

There is much to be said in favour of the view that the definition of the relations of a regional organization to the United Nations in terms of specific articles of the UN Charter is hardly necessary. In accordance with a functional analysis of the provisions of the Charter dealing with regional organizations, the relations of a regional organization to the United Nations are determined and defined not by the *character* of the regional organization, but by the *function* it is performing in particular situations.[26] A functional interpretation of Articles 51-54 of the UN Charter enables us to avoid the Beckett-Kelsen argument concerning whether a collective self-defence organization like NATO can also be a regional organization within the meaning of Chapter VIII of the UN Charter.[27] As a "higher law," the UN Charter posits some behavioural rules which are intended to guide the activities of regional organizations in whatever functional capacity they find themselves. It is only to the extent that regional organizations conform to these behavioural rules in the performance of specific functions that they can be said to be operating compatibly with the law of the United Nations.

IV

Membership: The Definition of "State" for the purposes of Membership in International Organizations.

The 1933 Montevideo Convention on the Rights and Duties of States posited four criteria of statehood: (i) a permanent population, (ii) a defined territory, (iii) stable and effective government, and (iv) capacity to enter into relations with other states, that is, independence and sovereignty.[28] It is by no means easy to determine these criteria with

24. Sir Eric Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations,* (London: 1950); J.G. Starke, *The ANZUS Treaty Alliance,* (Melbourne: 1965); Royal Institute of International Affairs (R.I.I.A.), *Collective Defence in South East Asia: The Manila Treaty and its implications,* (London: 1956); K. Grzybowski, *The Socialist Commonwealth of Nations,* (New Haven: 1964).

25. Thomas and Thomas, *The Organization of American States,* (Dallas: 1963), p. 48 *et seq.;* M.F. Anabtawi, *Arab Unity in Terms of Law,* (The Hague: 1963).

26. D.W. Bowett, *Self-Defence in International Law,* (Manchester: 1958), pp. 215-223.

27. Beckett, *op. cit.,* (Note 24 above); Starke, *op. cit.,* (Note 24 above) p. 76 *et seq.;* Julius Stone, *Legal Control of International Conflicts,* (1959), p. 247, *et seq.;* Hans Kelsen, "Is the North Atlantic Treaty a Regional Arrangement?", *A.J.I.L.,* Vol. 45, 1951, p. 160 *et seq.;* also *The Law of the United Nations,* (1964); Bowett, *op. cit.,* (Note 26 above), p. 215 *et seq.*

28. M. Hudson, *International Legislation,* Vol. 6, p. 620.

objectivity. It is too well known that recognition of states in international law and the admission policy of international organizations are always based on political calculations and interests of the recognizing state or the admitting organization.[29] Thus, for example, Article 4(1) of the UN Charter, laying down the conditions of UN membership, states as follows: "Membership in the United Nations is open to all other *peace-loving* states which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations."[30] As interpreted in the *Conditions of Admission* case, "the requisite conditions are five in number: to be admitted to membership in the United Nations, an applicant must (1) be a state: (2) be peace-loving: (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so."[31] These five conditions constitute an exhaustive enumeration. As to the respective competences of the Security Council and the General Assembly in the processes of admitting new members, the International Court of Justice asserted authoritatively that admission of an applicant state requires the positive consent of both organs.[32] Whether one agrees or not with the reasoning of the majority opinion in the *Conditions of Admission* case to the effect that political considerations should not enter into a state's pre-voting calculations,[33] one cannot ignore the fact that in practice admission of new members to the United Nations has always been a contentious political problem enmeshed in cold war ideological confrontation.[34] It has, however, been said that, in spite of the existence of non-legal factors in the voting behaviour of members of the United Nations on admission of new members, "variations in the United Nations practice concerning claims of statehood are a result not of an abandonment of traditional legal criteria of statehood but of the proper use of flexibility in interpreting these criteria in relation to the claim in which they are presented."[35]

29. Hans Aufricht, "Principles and Practices of Recognition by International Organizations," *A.J.I.L.,* Vol. 43, 1949, pp. 679-704.

30. Emphasis added.

31. *Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter), Advisory Opinion of May 28th, 1948, I.C.J. Reports 1947-1948,* p. 57 at p. 62.

32. *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of March 3, 1950, I.C.J. Reports 1950,* p. 4 at p. 9. It may be noted that Trygve Lie's term of office as Secretary-General was extended by the General Assembly without a positive recommendation from the Security Council. See Lie, *In the Cause of Peace,* (1954), p. 367 *et seq.;* UN *Bulletin,* Vol. 9, No. 10, 1950, p. 516.

33. See the Dissenting Opinion of Judges Basdevant, Winiarski, McNair and Read, *I.C.J. Reports, 1947-1948,* p. 57 at p. 82.

34. See generally, L.C. Green, "Membership in the United Nations," *Current Legal Problems,* Vol. 2, 1949, pp. 258-282; Rudzinski, "Admission of New Members: The United Nations and the League of Nations," *International Conciliation,* No. 480, April 1952; Higgins, *The Development of International Law Through the Political Organs of the United Nations,* p. 11 *et seq.;* Leo Gross, "Progress Towards Universality of Membership in the United Nations," *A.J.I.L.,* Vol. 50, 1956, pp. 791-827; Nathan Feinberg, "La Admission de Nouveaux Members a la Societe des Nations et a 1'Organisation des Nations Unies," *Hague Recueil,* Vol. 80, 1952, (I), pp. 297-389.

35. Higgins, *op. cit.,* (Note 16 above), p. 54.

Like the law of the United Nations, constitutional provisions dealing with the admission of new members to the regional organizations considered here reflect the principle of functional essentiality which denies an automatic right of membership to applicant states. The OAS Charter posits the following conditions: (a) an applicant member must be an independent American state, and (b) must be willing to sign and ratify the Charter of the Organization and the obligations inherent in membership, especially those relating to collective security.[36] The decision to admit an applicant state requires an affirmative vote of two thirds of the members of the General Assembly, upon the recommendation of the Permanent Council of the Organization.[37] In view of the series of anti-communist declarations dating from 1954,[38] it seems obvious that an independent *communist* American state cannot become a member of the OAS. The Punta del Este declaration of 1962 which excluded the Castro Government of Cuba from participating in the Inter-American System because it has officially identified itself as a Marxist-Leninist government demonstrates that there is an underlying ideological foundation for the OAS.[39] It is difficult to accept the view advanced during the Security Council debate on Cuba's protest against the "enforcement measures" adopted by the OAS at Punta del Este that the Government of Cuba was excluded from the regional organization not because of her social and economic system, but because of her violation of the Charter of the OAS.[40] In any case, it should be noted that the Punta del Este action against Cuba has been officially defended as "implicit in the essential purposes of the Organization."[41] The conclusion seems inescapable that the concept of statehood in the practice of the OAS is one based upon a democratic *capitalist* ideology.

A similar conclusion can be drawn in respect of the Council of Europe.[42] Membership is open to any European state which is not only able but also willing to "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights

36. L.R. Scheman, "Admission of States to the Organization of American States," *A.J.I.L.,* Vol. 58, 1964, pp. 968-974.

37. See the Act of Washington (Admission of New Members to OAS). Text in *International Legal Materials,* Vol. 4, 1965, p. 194; Charter of Bogota (as amended by the Protocol of Buenos Aires in 1967). Text in *International Legal Materials,* Vol. 6, 1967, p. 310.

38. See US Dept. of State, *Bulletin,* Vol. 30, 1954, p. 638; OAS Official Records OEA/Serv.C/II.5 (English), *Fifth Meeting of Consultation of Ministers of Foreign Affairs,* 1959, p. 4 *et seq.;* OAS Official Records OEA/Serv.C/II.8 (English), *Eighth Meeting of Consultation of Ministers of Foreign Affairs,* 1962, p. 6.

39. Thomas and Thomas, "Democracy and the Organization of American States," *Minnesota Law Review,* Vol. 46, 1961-62, pp. 337-383. The writers further added that "no firm legal obligations backed by adequate sanctions have been agreed upon to assure the growth of democracy throughout the region" (p. 374).

40. UN Doc. S/PV. 992-998.

41. OAS Official Records OEA/Ser.D/III.14 (English), *Annual Report of the Secretary General,* 1962, p. ii.

42. A.H. Robertson, *The Council of Europe,* (London: 1961), pp.12, 15-21; Cmd. 7720, *Explanatory Note on the Provisions of the Statute of the Council of Europe,* (1949), p. 3.

and fundamental freedoms."[43] Faithful to this ideological requirement of membership, it has been necessary to exclude Spain and Portugal from the continental organization by simply not inviting them to accept the obligations of membership. More recently, the Council of Europe served notice on Greece presently ruled by a military oligarchy that it must return to democracy or consider withdrawal from the regional organization in violation of one of the major conditions of membership, namely, the undertaking to uphold human rights and fundamental freedoms.[44] Faced with a possible expulsion, Greece "voluntarily" withdraw from the Council in December 1969.[45] Under the Statute of the Council of Europe, a prospective member must wait until invited to accept the obligations of membership. Moreover, the decision of the Committee of Ministers to invite any such state requires a two-thirds majority of all the representatives entitled to sit on that Committee.

The OAU Charter hides the fact that membership in the Organization is *not* open to *all* African states. According to Article 5, "[e]ach independent sovereign African State shall be *entitled* to become a Member of the Organization."[46] The article conveys the impression that membership is a matter of *right.* This impression is, however, discouraged by Article 28(3) which stipulates, *inter alia:* "Admission shall be decided by a simple majority of the Member States." The proper interpretation to be placed on the admission provisions is that an independent African State may apply for membership; whether the applicant state eventually becomes a member depends upon the judgement of the Conference of Heads of State and Government — the supreme organ of the OAU. What is an independent *African* state ? Dr. Elias, a Nigerian member of the Committee which drafted the OAU Charter at Addis Ababa, recalls that the question whether an independent state not under an African rule should qualify for membership in the Organization was much debated in the drafting Committee: "Some members contended that there would be nothing wrong in an independent state in Africa, with a non-African, possibly European Prime Minister, becoming a member of the Organization. Most members, however, preferred an independent state under an African Prime Minister as a candidate for membership."[47] In this connection, it has been well said that "[a] ll

43. Statute of the Council of Europe, Art. 3 and 4. See Kiss, "L'Admission des Etats Comme Members du Conseil de L'Europe," *Annuaire Francais de Droit International* (A.F.D.I.), 1963, pp. 695-708.

44. See *International Legal Materials,* Vol. 7, 1968, p. 706; Vol. 8, 1969, pp.890, 892; J.E.S. Fawcett, "Council of Europe Action on Greece," *World Today,* November, 1969, pp. 464-465.

45. *The Times* (London), December 13, 1969, p. 1; *International Legal Materials,* Vol. 9, 1970, pp. 408-409.

46. Emphasis added. For a literal interpretation of Art. 5, see Diallo Telli, "The Organization of African Unity in Historical Perspective," *African Forum,* Vol. 1, No. 2, 1965, p. 23.

47. T.O. Elias, "The Charter of the Organization of African Unity", *A.J.I.L.,* Vol. 59, 1965, p. 251.

African governments do not … have an equal right to adhere to the Organization … The African concept of legitimacy must be borne in mind: the government of a state that wishes to join the Organization must not only be in effective control of an African territory, but must also meet the ideological requirements laid down by the OAU — the requirements of African ethics, which recognize the right of all peoples of self-determination and call for the complete eradication of colonialism,"[48] It may be concluded that the law of the OAU defines the concept of statehood in a way intended to meet the *ideological* purposes of this particular regional organization.

The 1945 Pact of the League of Arab States declares that any independent Arab state[49] has unqualified *right* of membership of the League.[50] Admission procedure appears simple. An applicant independent Arab state only has to notify, in writing, the Secretary-General who, in turn, submits the request to the Arab League Council. It is not clear why the Pact should speak of the right to membership when the application of a prospective member has to be, and has always been, submitted to the League Council for final decision.[51] It should be noted that, although the Pact emphasizes the requirement of independence as a condition of membership, it accepted Trans-Jordan as a founding member at a time when the latter was still a mandated territory.[52] Just as the admission of India into the United Nations before achieving sovereign status was not considered as implying the abandonment of the criterion of statehood as a condition of admission,[53] it may be similarly contended that the original membership of Trans-Jordan, then a mandated territory, is not sufficient to cast doubt on the integrity of the requirement of independence as a condition of full membership in the League of Arab States. It should be further noted that, in order to emphasize the principle of national independence, but desirous of involving the Palestine Arabs in the work of the League, provision was made for a representative of Palestine selected by the League itself to participate in the work of the League "until that country can effectively exercise its independence."[54]

48. Boutros-Ghali, "The Addis Ababa Charter," *International Conciliation* No. 546, January 1964, pp. 38-39; also *L'Organization de L'Unite Africaina,* (Paris: 1969), pp. 98-101.

49. On the problem of defining the term "Arab State," see Boutros-Ghali, "La crise de la Ligue Arabe," *A.F.D.I.,* Vol. 14, 1968, pp. 89-90.

50. The Pact of the League of Arab States, Art. 1, (Emphasis added). Text in *A.J.I.L.,* Supp. Vol. 39, 1945, p. 266.

51. Bowett, *The Law of International Institutions,* (New York: 1963), p. 193; Anabtawi, *Arab Unity in Terms of Law,* (The Hague: 1963), p. 73.

52. Anabtawi, *Arab Unity in Terms of Law,* p. 72 *et seq.;* Majid Khadduri, "The Arab League as a Regional Arrangement," *A.J.I.L.,* Vol. 40, 1946, p. 767.

53. Higgins, *op. cit.,* (Note 16 above), pp. 16-17.

54. Annex Regarding Palestine. Macdonald, *The League of Arab States: A Study in the Dynamics of Regional Organization,* (Princeton: 1965), p. 325.

Restrictive and selective, the admission policy of the North Atlantic Treaty Organization states that the parties to the Treaty, acting unanimously, may "invite any other European state in a position to further the principles of this Treaty and contribute to the security of North Atlantic area." Admission is completed when any European state so invited has deposited its instrument of accession with the United States Government. It should be noted that, while the Preamble expresses the determination of members "to safe-guard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law," the Treaty, in contrast to the Statute of the Council of Europe, refrains from making respect for human rights and fundamental freedoms an ideological requirement of membership. This is probably because the North Atlantic Treaty, a collective self-defence organization, needs members which, due to their geographical position or material resources, can contribute to the defence of the North Atlantic Area.[55] The Council of Europe which expressly excludes defence matters from its concern can afford not to invite Spain and Portugal to accept the obligation of membership; but geography makes Portugal an important member of NATO. The geographical position of Spain is also equally of strategic importance but at the time NATO was founded the political regime in Spain was an international leper ostracized by a large number of the UN members. This was enough at that time to exclude Spain from NATO. The question of Spanish membership of NATO has since not become urgent probably because the US-Spanish defence agreement of 1953 makes Spain *indirectly* a key state in the Western defence.[56]

The constitutional law of admission of new members to the SEATO is substantially the same as that of NATO. Article 7 states: "Any other State in a position to further the objectives of this Treaty and to contribute to the security of the area may, by unanimous agreement, of the parties, be invited to accede to this treaty."[57]

The Warsaw Pact describes the foundation members of the regional organization as "peace-loving States of Europe," and affirms the desire

55. R.I.I.A., *Atlantic Alliance: NATO's Role in the Free World,* (London: 1952), p. 32; Marina Salvin, "The North Atlantic Pact," *International Conciliation,* 1949, p. 397.

56. A.P. Whitaker, *Spain and Defence of the West,* (New York: Harper & Brothers, 1961), Ch. 8; also "Spain and the Atlantic Alliance," *Orbis,* Vol. 10, 1966, pp. 42-78.

57. The Manila Protocol created rights without duties for Laos, Cambodia and South Vietnam. The SEATO members agreed that they would come to the aid of these states if the latter were to request assistance in the event of an armed attack. See R.I.I.A., *Collective Defence in South East Asia,* (1956), p. 171. The neutralization of Laos has removed that country from the SEATO protective umbrella. See Cmnd. 1828 (1962); George Modelski, *International Conference on the Settlement of the Laotian Question 1961-2,* (Canberra: 1962), p. 144 *et seq,* Cambodia has taken herself out of the SEATO shield. See Michael Leifer, *Cambodia: The Search for Security,* (New York: 1967), Ch. 3; R.M. Smith, *Cambodia's Foreign Policy,* (Ithaca: 1965), p. 73 *et seq.*

of the original members "to create a system of collective security in Europe based on the participation of *all* European States, irrespective of their social and political structure." The operative part of the Pact dealing with admission states: "The present Treaty shall be open for accession by other States, irrespective of their social and political structure, which express their readiness … to help in combining the effort of peace-loving States to ensure the peace and security of the peoples."[58] Accession to the Treaty does not become effective by merely depositing the instrument of ratification, but, more important, by the consent of the members of the organization. In so far as it is claimed by the Soviet leaders and scholars that relations among socialist states are qualitatively different from and superior to those among capitalist states or between socialist and capitalist states,[59] it is difficult to imagine membership of a non-socialist state in the regional organization of Eastern Europe. To adopt such membership policy is, in effect, to substitute the principle of "peaceful co-existence" for "proletarian internationalism" as the basis of the Soviet regional system of public order. Admission of a non-socialist state into the Warsaw Treaty Organization will certainly transform radically the fundamental ideological character of the organization. The Soviet authorities have shown no sign of contemplating such transformation.

The Declaration of the Association of Southeast Asian Nations[60] opens participation in the new regional organization to "all states in the Southeast Asian region subscribing to… [its] aims, principles and purposes." This Declaration is silent on the procedures for admission of new members. Although members of this organization (with the possible exception of Indonesia) are pro-West, there is yet no conclusive evidence that ASEAN is a militant anti-communist organization in the sense that the SEATO and the ANZUS Treaty Alliance are defensive arrangements against possible communist aggresive expansion in Southeast Asia.

No international organization need be obliged to admit to its membership states which do not share its sense of common purpose, or retain members which persistently violate the obligations of membership.[61] It will, however, be a breach of the Law of Treaties if a regional law were to impose obligations on non-members and compel third parties against their will.[62]

58. Warsaw Pact, Art. 9.

59. V. G. Korionov, "Proletarian Internationalism — Our Victorious Weapon," *International Affairs,* (Moscow), No. 8, August, 1963, p. 13; Grzybowski, *The Socialist Commonwealth of Nations,* (1964), p. 256 *et seq.;* Hazard, "Soviet Socialism as a Public Order System," *Proceedings, A.S.I.L.,* 1959, pp. 30-41; Tunkin, *Droit International Public,* (Paris: 1965), Ch. 12.

60. Text in *International Legal Materials,* Vol. 6, 1967, p. 1233.

61. See L.B. Sohn, "Expulsion or Forced Withdrawal from an International Organization," *Harvard Law Review,* Vol. 77, No. 8, 1964, pp. 1381-1425.

62. Lord McNair, *The Law of Treaties,* (Oxford: 1961), p. 309.

V

Regional Treaty Principles of International Law

The United Nations Charter expresses and declares the following generally recognized principles of international law,[63] namely, sovereign equality, good faith, pacific settlement of disputes, self-defence and non-interference in the domestic affairs of any state.[64] Members of the United Nations solemnly undertook to respect these principles in the conduct of their international relations.

The international constitutional law of regional organizations studied here emphasizes in varying degrees the same or similar principles. But to say that these regional organizations constitutionalize these principles as guiding norms is not to vouch that they actually always conduct their external relations in conformity with them. As states generally tend to behave in an opportunistic fashion one must not assume that what is desirable *de lege ferenda* in fact exists *de lege lata.* Since these principles and the obligations to respect them are either implied or generally expressly stated in the law of regional organizations,[65] it suffices to examine closely only those obligations and principles of regional constitutional law which appear to be potentially incompatible with or alter substantially the generally accepted forms of international law. In this connection, our discussion will focus on the OAU and the Warsaw Pact.

The Warsaw Pact members declare their readiness and willingness to "act in the spirit of friendship and cooperation... in accordance with the principles of respect for each other's independence and sovereignty

63. See generally, Schwarzenberger, "The Fundamental Principles of International Law," *Hague Recueil,* Vol. 87, 1955 (I), pp. 195-385.

64. UN Charter, Arts. 2, 51. It should be noted that consensus on the meaning and implication of some of these principles is still to be achieved. In 1963, a General Assembly Resolution 1966 (XVIII) constituted a Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States. Meeting in Mexico (1964) and New York (1966), the Special Committee examined seven principles of international law, namely, (1) prohibition of the threat or use of force, (2) peaceful settlement of disputes, (3) non-intervention, (4) sovereign equality, (5) duty of state to co-operate, (6) principle of equal rights and self-determination, and (7) principle of good faith. On the Mexican session, see UN Doc. A/5746 (November 16 1964); Text in *International Legal Materials,* Vol. 4, 1965, pp. 28-50. Consult also McWhinney, "The 'New' Countries and the 'New' International Law: The United Nations Special Conference on Friendly Relations and Cooperation Among States," *A.J.I.L.,* Vol. 60, 1966, pp. 1-34. On the New York session, see UN Doc. A/6230 (June 27, 1966). For a critical analysis, see Piet-Hein Houben, "Principles of International Law Converning Friendly Relations and Cooperation Among States," *A.J.I.L.,* Vol. 61, 1967, pp. 703-736. See also L.C. Green "New States, Regionalism and International Law," *C.Y.B.I.L.,* 1967 pp. 118-141; "The Impact of the New States on International Law, *Israel Law Review,* Vol. 4, 1969, pp. 27-60.

65. Arab League Pact (1945), Art. 2, 5, 8; Statute of the Council of Europe, Art. 1(c); North Atlantic Treaty, Preamble; OAU Charter, Art. 3; OAS Charter, Arts. 3, 9, 18, 21, 23-26.

and of non-intervention in each other's domestic affairs."[66] The pledge contained in Article 8 of the Warsaw Pact has been reiterated in many Declarations of the communist bloc conferences.[67] But the "Brezhnev Doctrine,"[68] first explicitly formulated in the wake of the Soviet-led Warsaw Pact invasion of Czechoslovakia, amounts to an express denial of the principle of sovereignty of any socialist country accessible to the Soviet Union. This Doctrine, addressing itself to "the question of the correlation and interdependence of the national interests of the socialist countries and their international duties,"[69] establishes two basic propositions: (1) "each Communist party is responsible not only to its own people, but also to all the socialist countries, to the entire Communist movement. Whoever forgets this, in stressing only the independence of the Communist party, becomes onesided. He deviates from his international duty,"[70] and (2) in so far as "one or another socialist state, staying in a system of other states composing the socialist community, cannot be free from the common interests of that community,"[71] "[t]he sovereignty of each socialist country cannot be opposed to the interests of world socialism."[72] In view of the fact that the "common interest" of the "socialist commonwealth" of Eastern Europe is usually defined by the Soviet Union,[73] the Brezhnev Doctrine amounts to the claim by the Kremlin of the right of intervention in the domestic affairs of socialist states of Eastern Europe.[74] The conclusion is inescapable that norms of international law postulating sovereign equality of states and prohibiting forceful intervention in the domestic affairs of other states are seen as being superseded by "the laws of class struggle" whenever the Kremlin alleges that socialism is endangered in socialist countries of Eastern Europe. Thus, as one scholar, commenting on the legal structure of the Communist bloc, correctly noted:

> [I]n the final analysis the question of the legal nature of the communist bloc is reduced to the relationship of those powers that claim to watch over the purity of communist ideology and the observance of party discipline. This peculiar union of communist-bloc countries does not lend itself to analysis in terms of general international law, which traditionally regulates only

66. Warsaw Pact, Art. 8. For a recent restatement of these principles, see Evgeny Nasinovsky, "The Impact of Fifty Years of Soviet Theory and Practice of International Law," *Proceedings, A.S.I.L.,* 1968, p. 189, *et. seq.*

67. For a partial list of such Declarations, see *Problems of Communism,* November-December 1968, p. 31; Grzybowski, *The Socialist Commonwealth of Nations,* (1964), Ch. 7.

68. Text in *International Legal Materials,* Vol. 7, 1968, p. 1323.

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*

72. *Ibid.*

73. Crzybowski, *op. cit.,* p. 268; Brzenzinski, *op. cit.*

74. The doctrine of limited sovereignty of socialist states has, of course, been rejected by Albania, Yugoslavia and Rumania, all of which are socialist states of Eastern Europe. See A.G. Mezerik (ed.), "Invasion and Occupation of Czechoslovakia and the UN," *International Review Service,* Vol. 14, No. 100, 1968, pp. 67-68; *Yugoslav Survey,* Vol. 9, No. 4, November 1968, p. 131 *et. seq.*

> relations between states and not relations between (political) parties. And the rules governing inter-party relations leave no room for application of the principles of co-existence between states — sovereignty, equality, and non-intervention.[75]

Article 3 of the OAU Charter combines generally accepted principles of international law with the following additional formulations: **(1)** "absolute dedication to the total emancipation of the African territories which are still dependent", and (2) "affirmation of a policy of non-alignment with regard to all blocs." Commentators have drawn attention to the implication of the first principle for the development of harmonious relations with certain members of the United Nations, and in particular, to the probability that the obligation to eradicate colonialism by all means might prevent members of the OAU from cooperating with those members of the United Nations which deny the right of self-determination to the black majorities in Southern Africa.[76] At this point, it is sufficient merely to indicate that some obligations undertaken by the OAU members put the signatories to the regional treaty on a collision course with some obligations of UN membership. It may, however, be true that when such Addis Ababa obligations are examined in the light of the various UN resolutions on apartheid and colonialism sponsored by the "new" states,[77] their compatibility to the UN Charter obligations may appear in a different light.

It may be noted that the new states of Africa are merely following the example set by the Arab states. In the well-known Arab League Resolution of 1951, members of the regional organization indicated that they would not undertake fully their obligations of UN membership "while some of them have not attained their complete national sovereignty."[78] While one should not condone this conditional acceptance of and devotion to the obligations of UN membership, one should perhaps try to understand the peculiar position of the new states in an international legal order which to them has for a long time existed in the service of the European colonial powers. Granted that certain obligations assumed by African states under the OAU Charter create duties potentially inconsistent with certain obligations of the Charter of the

75. Dietrich Andre Loeber, "The Legal Structure of the Communist Bloc," *Social Research,* Vol. 27, No. 2, 1960, pp. 200-201. See also Grzybowski, *op. cit.,* pp. 269-272.

76. See Boutros-Ghali, "The Addis Ababa Charter," *International Conciliation,* No. 546, 1964, pp. 36-37; Green, "The Impact of the New States on International Law," *Israel Law Review,* Vol. 4, 1969, pp. 46-47; also "New States, Regionalism and International Law," *C.Y.B.I.L.,* 1967, p. 130; Elias, "The Charter of the Organization of African Unity," *A.J.I.L.,* Vol. 59, 1965, p. 250; Krishnan, "African State Practice Relating to Certain Issues of International Law," *I.Y.I.A.,* Vol. 14, 1965, pp. 211-212; Duggard, "The Organization of African Unity and Colonialism", *I.C.L.Q.,* Vol. 16, 1967.

77. See, in particular, the UN Declaration on Colonialism: G.A. Res. 1514 (XV), 14 December, 1960, Text in Brownlie, Basic *Documents in International Law,* (Oxford: 1967), pp. 176-177.

78. Egyptian Society of International Law, *Egypt and the United Nations,* (1957), p. 128. Muhammad Khalil, *The Arab States and the Arab League,* Vol. 2, (Beirut: 1962), Doc. 59, pp. 147-148.

United Nations, it should be borne in mind that, generally speaking, the new Afro-Asian states have neither arbitrarily rejected classical international law nor indicated any desire to retreat into an exclusive system of regional international law.[79]

VI

Rules Governing Decision-Making

The question of decision-making in international organizations of independent sovereign states is integrally bound up with the doctrine of the juridical equality of states. Sovereign equality of states has traditionally been interpreted as implying the principle of unanimity in decision-making.[80] For this reason, public international conferences of diplomats in the pre-twentieth century period operated, generally speaking, on the basis of unanimity.[81] Although the commissions of public international unions adopted the majority principle as a decisional rule, decision-making in the conferences of public international unions was based on the unanimity principle.[82] The League Covenant carried forward the traditions of public international conferences by making unanimity the rule of decision,[83] although it permitted exceptions to the unanimity principle.[84] In any case, the rule of unanimity was

79. See generally, Syatauw, *Some Newly Established Asian States and the Development of International Law,* (The Hague: 1961); Sinha, *New Nations and the Law of Nations,* (Leyden: 1967); Higgins, *Conflict of Interest,* (London: 1965); Friedmann, *The Changing Structure of International Law,* (New York: 1964); Lissitzyn, *International Law Today and Tomorrow,* (New York: 1965); *Reports of Asian African Legal Consultative Committee;* Jenks, *The Common Law of Mankind,* (London: 1958); Falk, "The New Nations and International Legal Order," *Hague Recueil,* Vol. 118, 1966 (II), pp. 7-103; Anand, "Attitude of the Asian-African States Toward Certain Problems of International Law," *I.C.L.Q.,* Vol. 15, 1966, pp. 55-75; Fatouros, "International Law and the Third World," *Virginia Law Review,* Vol. 50, No. 5, 1964, pp. 783-823.

80. See generally, Bengt Broms, *The Doctrine of Equality of States as Applied in International Organizations,* (Helsinki; 1959).

81. F.S. Dunn, *The Practice and Procedure of International Conferences,* (Baltimore: 1929); Normal Hill, *The Public International Conferences* (Sanford: 1929).

82. P.S. Reinsch, *Public International Unions,* (Boston: 1911), p. 152; C.A. Riches, *Majority Rule in International Organization,* (Baltimore: 1940), Ch. 2; Normal Hill, "Unanimous Consent in International Organizations," *A.J.I.L.,* Vol. 22, 1928, pp. 319-329.

83. League Covenant, Art. 5. In the *Mosul* Case (1925), the Permanent Court of International Justice justified the rule of unanimity in the League Council as follows: "In a body constituted in this way, whose mission is to deal with any matter "within the sphere of action of the League or affecting the peace of the world," observance of the rule of unanimity is naturally and even indicated. Only if the decisions of the Council have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have: the very prestige of the League might be imperilled if it were admitted, in the absence of an express provision to that effect, that decisions on important questions could be taken by a majority." Hudson, *World Court Reports,* Vol. 1, (1934), p. 740.

84. League Covenant, Arts. 1(2), 4(2), 5(2), 6(2), 15(10), 26(1).

interpreted liberally with the result that, in practice, decision-making in the League was governed largely by the majority principle.[85] The voting provisions of the United Nations Charter[86] reflect the triumph of the principle of majority over that of unanimity.[87] The remnant of the unanimity principle is found in a special form in Article 27(3). According to this Article, decisions of the Security Council on substantive matters require the "concurring votes of the permanent members." The practice of the Security Council has, however, been to interpret intentional *abstention* and absence of a veto-wielding power as compatible with the requirement of unanimity of the five major powers.[88] Thus, today, the battle for the majority principle as a decisional rule in international organizations has been largely won.[89]

The constitutional law of regional organizations examined in this article reflects, in varying degrees, the transformation of the international decision-making rule of unanimity to that of majority. The Pact of the Arab League prescribes different voting rules for various situations.[90] This pattern has been emulated by many European regional organizations. When the supreme policy organ, the League Council, is called upon to decide on measures to repel aggression, voting must be unanimous. If a member state has been the aggressor, its vote does not count.[91] Majority rule governs decisions relating to the process

85. Riches, *The Unanimity Rule and the League of Nations,* (Baltimore: 1933); Sir John Rischer Williams, "The League of Nations and Unanimity," *A.J.I.L.,* Vol. 19, 1925, pp. 475-488; Julius Stone, "The Rule of Unanimity: The Practice of the Council and Assembly of the League of Nations," *B.Y.B.I.L.,* Vol. 14, 1933, pp. 18-42.

86. UN Charter, Arts. 18, 27, 67, and 89.

87. See Willington Koo, *Voting Procedures in International Political Organizations,* (1947), Ch. 4, 5; Inis Claude, Jr., *Swords into Plowshare: The Problems and Progress of International Organization,* (3rd Ed., Revised, New York: Random House, 1967), Ch. 7; F.A. Vallat, "Voting in the General Assembly of the United Nations," *B.Y.B.I.L.,* Vol. 32, 1954, pp. 273-298; C.W. Jenks, "Some Constitutional Problems of International Organizations," *B.Y.B.I.L.,* Vol. 22, 1945, pp. 34-42.

88. See T.J. Kahng, *Law Politics and the Security Council,* (The Hague: Martinus Nijhoff, 1964), p. 124 *et seq.;* Leo Gross, "Voting in the Security Council; Abstention from Voting and Absence from Meeting," *Yale Law Journal,* Vol. 60, 1951, pp. 209-257; also "Voting in the Security Council: Abstention in the Post-1965 Amendment Phase and Its Impact on Article 25 of the Charter," *A.J.I.L.,* Vol. 62, 1968, pp. 315-334; Yuen-li Liang, "Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council," *A.J.I.L.,* Vol. 44, 1950, pp. 694-700; C.A. Stavropoulos, "The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, Paragraph 3, of the Charter of the United Nations," *A.J.I.L.,* Vol. 61, 1967, pp. 737-755.

89. C.W. Jenks, "Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus as Modes of Decision in International Organizations," in R.Y. Jennings (ed.), *Cambridge Essays in International Law: Essays in Honour of Lord McNair,* (London: Stevens & Sons, 1965), pp. 48-63; D.W. Bowett, *The Law of International Institutions,* (London: *Praeger,* VTFCQ, p. 342, *et. seq.*

90. Macdonald, *op. cit.,* p. 56 *et seq.*

91. League of Arab States Pact (1945), Art, 6.

of arbitration and mediation by the League Council.[92] It is also the decisional rule for administrative and procedural matters.[93] Of special importance is Article 7 according to which unanimous decisions are deemed binding on all members, but decisions reached by a majority are considered binding upon those states which accept them. This simply means that while a state has the right to veto the application of a majority decision to itself it does not possess the right to veto the adoption of any decision. When the Joint Defence and Economic Co-operation Treaty Between the States of the Arab League was being drawn up in 1950, it was realised that Article 7 of the 1954 Pact could not be made applicable to decision-making in the newly created Joint Defence Council, an organ under the supervision of the League Council. Thus, according to the 1950 Treaty of Collective Self-Defence, decisions taken by a two-thirds majority are deemed binding on all the contracting states.[94] The Arab League seemed to have been influenced by Article 20 of the Inter-American Treaty of Reciprocal Assistance.[95]

The pattern of providing and prescribing different voting rules for various situations is followed by the Statute of the Council of Europe.[96] The Committee of Ministers, "an organ which acts on behalf of the Council of Europe,"[97] and in which "each Member shall be entitled to one representative,"[98] has only the power of recommendation.[99] Major recommendations of the types enumerated in Article 20 require "the unanimous vote of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee." Certain recommendations, for example, invitation of admission to new members, can only be made by a two-thirds majority of members of the Committee of Ministers. Resolutions relating to rules of procedures, financial and administrative matters require also a two-thirds majority of representatives casting a vote and of a majority of the representatives entitled to sit on the Committee. The Consultative Assembly in which member states are represented proportionally on the basis of population can make recommendations by a two-thirds majority.[1] In matters relating to internal procedures, the Consultative Assembly is free to determine whether its resolutions are to be governed by a simple or a special majority rule.[2]

92. Art. 5.
93. Art. 16.
94. Art. 6.
95. See below.
96. Cmd. 7720 (1949), pp. 4-5; Robertson, *The Council of Europe,* p. 35 *et seq.*
97. Art. 13.
98. Art. 14.
99. Art. 15 (b).
1. Art. 29.
2. Art. 30.

The constitutional law of the OAU breaks completely with the tradition of unanimity. Resolutions of the supreme organ of the African regional organization requires only a two-thirds majority of votes. On non-substantive questions, a simple majority is sufficient.[3] The Resolutions of the Council of Ministers are adopted by a simple majority.[4]

The Manila Treaty, the North Atlantic Treaty, the Warsaw Pact, the ANZUS Treaty Alliance and the Association of Southeast Asian Nations are all silent on the rule governing decision-making. In some cases, the treaty merely stipulates that each member state shall be represented on the supreme decision-making body and shall have one vote.[5] It was actually decided during the first meeting of the SEATO Council that decisions of the Council be made by a unanimous vote of member states.[6] It has been said that in the ANZUS Council unanimity evolves and is not registered.[7] Similarly, the practice in the NATO Council of Ministers, the Political Consultative Committee of the Warsaw Treaty Organization and the General Assembly of the OAS[8] has been to seek consensus for decisions made.[9] Where resolutions are passed without unanimous consent, such resolutions are meaningful only to those states which voted for them. But whereas under the Rio Treaty, a resolution of the Organ of Consultation imposing sanctions on any member state requires only a two-thirds majority, such resolution is considered binding upon all those states which have ratified the Treaty, except that no state can be compelled to use force without its express consent,[10]

In conclusion, it may be asked whether the majority principle as a decisional rule in international organizations derogates from the principle of the sovereign equality of states. The answer must be in the negative for these two reasons. First, when a state, by an act of free will, accepts membership in an international organization where unanimity is not the basis of decision-making, that state consents to some limitations on its sovereignty. There is nothing incompatible with sovereignty in agreeing to some limitations upon its exercise.[11] Second, what is

3. OAU Charter, Art. 10(a) and (3).
4. Art. 14.
5. Manila Treaty, Art. 5; Warsaw Pact, Art. 6; North Atlantic Treaty, Art. 9.
6. U.S. Dept. of State, *Bulletin,* Vol. 32, No. 819, 1955, pp. 371-375; R.I.I.A., *Collective Defence of South East Asia,* (1956), pp.119, 191.
7. Starke, *The ANZUS Treaty Alliance,* p. 168.
8. For recent organizational changes, see *International Legal Materials,* Vol. 6, 1967, p. 310, *et. seq.;* A.H. Robertson, "Revision of the Charter of the Organization of American States," *I.C.L.Q.,* Vol. 17, 1968, pp. 346-367.
9. R.I.I.A., *Atlantic Alliance,* (London: 1952), p. 42.
10. Rio Treaty, Art. 20; C.G. Fenwick, "The Unanimity Rule in Inter-American Conferences," *A.J.I.L.,* Vol. 42, 1948, pp. 399-401.
11. See Hans Kelsen, "The Principle of Sovereign Equality of States as a basis for International Organization," *Yale Law Journal,* Vol. 53, No. 2, 1944, pp. 207-220; Potter, *An Introduction to the Study of International Organization,* (5th Ed., New York: Appleton-Century-Crofts, Inc., 1948), pp.183, 192; M.S. Korowicz, "Some Recent Aspects of Sovereignty in International Law," *Hague Recueil,* Vol. 102, 1961 (I), pp. 5-113; Bourtos-Ghali, "Le Principle d'Egalite des Etats et les Organisations Internationales," *Hague Recueil,* Vol. 100, 1960 (II), pp. 1-73.

of utmost importance in international decision-making is not so much whether resolutions are passed (important as these are gradually becoming in terms of the collective political legitimization they provide for particular points of view)[12] as whether such resolutions constitute binding obligations, which are likely to be enforced against a state that wants no part of them. As a general rule, resolutions of most international organizations are recommendations which do not create legal obligations, but which, nevertheless, cannot be regarded as having no consequence at all.

VII

Pacific Settlement of Disputes and Legal Regulation of the Use of Force

It is well known that traditional international law of the pre-twentieth century neither prohibited nor authorized resort to armed violence. It sought not to define limits and conditions to the use of force in international relations, but to restrict war in time, place and method, and in particular, to regulate conduct of hostilities when a state of armed conflict existed with a view to mitigating its evils.[13] The constitutional law of international organizations adopts a different attitude; it seeks to restrict international coercion as a modality of political change. For instance, the Covenant of the League of Nations attempted to regulate resort to war on the basis of a distinction between permissible and impermissible use of force.

It was silent on the right of self-defence, but it must be assumed that members regarded this right as part of the customary rule of international law, and, hence, that it was considered superfluous to declare it in the Covenant.[14] While neither the Kellogg-Briand Pact[15] nor the United Nations Charter prohibited the use of force in *all* situations, both of them contain restrictions on the use of force by states. Under both treaties, the principle of self-defence has come to mark the dividing line between legal and illegal resort to war. In 1928, there seemed to be a consensus behind the view that each state "alone is competent to decide whether circumstances require recourse to war in self-defence.:"[16] In 1945, the use of the word "inherent" in the UN

12. On the concept of collective political legitimization, see Inis Claude, Jr., *The Changing United Nations,* (New York: Random House, 1967), Ch. 4.

13. Schwarzenberger, *International Law,* Vol. 2, (1968), p. 38 *et seq.;* Stone, *Legal Controls of International Conflict,* (1959), p. 297 *et seq.;* Green "Armed Conflict, War, and Self-Defence," *Archiv des Volkerrechts,* Vol. 6, 1956-1957, pp. 387-438; Brownlie, *International Law and the Use of Force by States,* (Oxford: 1963); Bowett, *Self-Defence in International Law,* (1958), p. 122.

14. F.B. Schick, "Peace on Trial — A Study of Defense in International Organization," *W.P.Q.,* Vol. 2, No. 1, March 1949, p. 4; Bowett, *Self-Defence in International Law,* (1958), p. 124.

15. J.T. Shotwell, *War as an Instrument of National Policy,* (New York: 1929).

16. See Reservations to the Kellogg-Briand Pact of 1928. Cmd. 3109, p. 25; Cmd. 3153, p. 10. Cited also in Green, "Armed Conflict War and Self-Defence," *Archiv des Volkerrechts,* Vol. 6, 1956-1957, p. 410.

Charter is evidence of the customary nature of that right. In view of the fact that the individual state is left to decide whether circumstances have arisen which call for the exercise of the right of self-defence, it would appear that the liberty of states to resort to war is still substantial. It should, however, be understood that the propriety of the initial act of self-defence can be subsequently reviewed by the Security Council if the voting problem of great power unanimity demanded under Article 27(3) is overcome.[17] The UN Charter makes provision for collective sanctions directed by the Security Council against "any threat to the peace, breach of the peace or act of aggression." Equally important is that, unlike the Covenant, the Charter, subject to Article 51, leaves the determination of what constitutes a threat to peace or a breach of the peace to the Security Council rather than to the individual state.[18] In accordance with Article 25, members are obligated to "accept and carry out the decision of the Security Council in accordance with the Charter." While it is certainly true that the Charter system of collective security has broken down because of the East-West ideological rift, the fact still remains that the constitutional law of the United Nations envisages a form of collective enforcement action against any aggressor state through the establishment of a central organization as a guardian of international peace and security.[19]

At the regional level attempts have been made to constitutionalize obligations forbidding resort to armed violence except in self-defence and requiring pacific settlement of international disputes.[20] We may now consider whether the constitutional law of regional organizations represents any marked advance, a retrogression or merely a restatement of the position in the UN Charter.

The 1945 Pact of the Arab League prohibits "[a]ny resort to force in order to resolve disputes arising between two or more member states of the League."[21] While the Arab League members which resorted freely to force against a non-member state, Israel, in 1947 were in breach of the UN Charter, it cannot be said that they were in breach of the law of their regional organization which permits the interpretation that in relation to non-Arab members, the Arab League members assumed no formal obligation of peaceful settlement of disputes. However, as the obligations of UN membership prevail over those of the League membership when both lead to inconsistent duties, the Arab

17. See Judgement of the International Military Tribunal (Nuremberg), Cmd. 6964, (London: 1946), p. 32; Waldock, "The Regulation of the Use of Force by Individual States in International Law," *Hague Recueil,* Vol. 81, 1952 (II), p. 495; Briefly, *The Law of Nations,* (1955), p. 315 *et seq.*

18. F.B, Schick, *loc. cit;* Briefly, "The Covenant and the Charter" *B.Y.B.I.L.,* 1946, pp. 83-94 at p. 87.

19. See generally, L.M. Goodrich and P. Simons, *The United Nations and the Maintenance of International Peace and Security,* (Washington: 1955).

20. See generally, United Nations, *A Survey of Treaty Provisions for the Pacific Settlement of International Disputes, 1949-1962,* (New York: 1966); *Report of A Study Group on the Peaceful Settlement of International Disputes,* (London: 1966).

21. Art. 5.

League members cannot justify their actions *vis-a-vis* Israel on the ground that it is not prohibited by the constitutional law for their regional organization. In any case, Article 5 of the Arab Pact should be interpreted in the light of Article 1 of the 1950 Collective Self-Defence Pact[22] under which the contracting parties "confirm their desire to settle their international disputes by peaceful means, whether such disputes concern relations among themselves or with other Powers." The post 1950 history of Arab-Israeli relations suggests however, that this provision is in practice little more than a mere declaration of intention.

The 1945 Pact authorizes the League Council to "mediate in *all* differences which threaten to lead to war between two member states, or between a member state and a third state, with a view to bringing about their reconciliation."[23] For the League Council to mediate in a dispute between a member state and a third party, the latter must accept the League's jurisdiction.[24] Perhaps inconsistently, the Pact excludes from the League's competence disputes concerning a state's independence, sovereignty or territorial integrity unless both parties to such disputes accept the Council's arbitration. This is not unusual as it is customary in treaties of arbitration to exclude matters of vital state interest from the scope of arbitration.[25] Thus, if a state declares that a certain dispute involves its independence and sovereignty it can refuse settlement through arbitration by the Council. In any case, the claim that the decision of the Council made by a majority vote shall be enforceable and obligatory is an empty boast. The worst the Council can do if a party rejects the Council's arbitral award or mediatory decision is to threaten such state with expulsion from the League.[26]

In connection with the pacific settlement system of the Arab Pact, two further comments may be made. First, while voluntary arbitration was accepted with reservation, the Pact designates the League Council, a political organ, as the arbitral "court." It is true that Article 19 leaves room for the possibility of constitutional changes intended to accommodate the establishment of an Arab Tribunal of Arbitration, but this has yet to come about.[27] Second, the Arab League members deliberately rejected judicial settlement as a proper method of peaceful

22. Text in Khalil, *op. cit.,* Vol. 2, Doc. 43, p. 101.

23. Art. 5. (Emphasis added).

24. See Status of Eastern Carelia, Advisory Opinion of July 23, 1923. Hudson, *World Court Reports,* Vol. 1, p. 190, at p. 204.

25. See J.L. Simpson and H. Fox, *International Arbitration,* (London: Stevens, 1959), p. 15 *et seq.;* Hudson, *International Tribunals,* (Washington: 1944), Ch. 6; L.B. Sohn, "The Function of International Arbitration Today," *Hague Recueil,* Vol. 108, 1963, (I), pp. 9-113.

26. League of Arab States Pact (1945), Art. 18. Compare Art. 94(2) of the UN Charter: "If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement," See Oscar Schachter, "Enforcement of International Judicial and Arbitral Decisions," *A.J.I.L.,* Vol. 54, 1960, pp. 1-24.

27. E. Foda, *The Projected Arab Court of Justice,* (The Hague: 1957).

adjustment of intra-Arab disputes, an example which African statesmen at Addis Ababa were to follow almost two decades later. Thus, right from the beginning the Arab League has lacked the method of judicial settlement of disputes based on the rules of positive international law.[28]

Under the 1950 Collective Self-Defence Pact, the obligation undertaken by signatories "to go without delay to the aid of the State or States against which... an act of aggression is made" follows from the acceptance of the view that "any [act of] armed aggression made against any one or more of them, or their armed forces. .. [is] ... directed against them all".[29] The Pact makes assistance in aid of a member which has become a victim of attack a *legal* duty, but leaves it to each of the signatories to decide for itself what action it deems necessary. In view of the fact that self-defence under the UN Charter is an inherent *right* and not a legal *duty*,[30] there is much to be said in favour of the view that any treaty which makes self-defence a legal duty creates obligations beyond the scope declared under Article 51 of the UN Charter without, of course, in any way infringing the Charter which nowhere forbids self-defence being made a legal duty.

The Council of Europe is not a collective security system. Its Statute expressly excludes matters relating to defence from its constitutional competence.[31] Until 1957, the Council of Europe had no machinery for the pacific settlement of disputes between its members. The European Convention for the Pacific Settlement of Disputes drawn up in 1957 [32] lists methods of pacific settlement of disputes in this order; judicial settlement, conciliation and arbitration. The order is not hierarchic.[33] The High Contracting Parties undertake to submit to the judgment of the International Court of Justice all international disputes which may arise between them,[34] and to comply with the decision of the International Court of Justice or the award of the Arbitral Tribunal in any dispute.[35] In Article 39(2), the Convention, like the UN Charter, stipulates: "If one of the parties to a dispute

28. M.F. Anabtai, *Arab Unity in Terms of Law,* (1963), p. 82 *et seq.;* Foda *op. cit.,* Ch. 2.

29. Art. 2. Compare Rio Treaty, Art. 3; North Atlantic Treaty, Art. 5; Warsaw Pact, Art. 4.

30. Schick, "Peace on Trial — A Study of Defense in International Organization," *W.P.Q.,* Vol. 2, No. 1, 1949, pp. 1-44; Kunz, "Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations," *A.J.I.L.,* Vol. 41, 1947, p. 875.

31. Art. 1(d) of the 1949 Statute; Cmd. 7720, p. 3.

32. Text in *European Yearbook,* Vol. 5, 1959, pp. 347-363; *R.G.D.I.P.,* Vol. 30, 1959, pp. 55-64.

33. Arts. 2(2), 4(2), 18 of the 1949 Statute. See generally, Jean Salmon, "La Convention Europeennee pour le reglement pacificque des differends," *Revue Generale de Droit International Public* (R.G.D.I.P.), Vol. 30, 1959, pp. 21-54.

34. A contracting State which accepts the compulsory jurisdiction of the World Court under Article 36 (2) with reservation is permitted to make the same reservation to the Convention. Art. 35(4).

35. Art. 39.

fails to carry out its obligations under a decision of the International Court of Justice or an award of the Arbitral Tribunal, the other party to the dispute may appeal to the Committee of Ministers of the Council of Europe. Should it deem necessary, the latter, acting by a two-thirds majority of the representatives entitled to sit on the Committee, may make recommendations with a view to ensuring compliance with the said decision or award".[36] But the only effective weapon in the hand of the Committee is suspension or expulsion of a recalcitrant member,[37] a procedure that leaves the dispute which provoked it unsolved. The Convention also sets up procedural rules and machinery for the adjustment of disputes by conciliation and arbitration.

The OAU Charter nowhere expressly prohibits the use of force by member states in their international relations.[38] The principle of absolute dedication to the total emancipation of the African territories which are still dependent[39] seems to imply, however, that the OAU members believe and are convinced that it is legally justifiable to use every means, including force if need be, to liquidate colonialism.[40] The OAU is not a collective self-defence arrangement in the commonly accepted sense, that is to say, it has no machinery for dealing collectively with armed aggression against the territorial integrity of a signatory state.[41] This should not of course be interpreted as meaning that the regional organization cannot legally perform the function of collective self-defence. It is true that the OAU Charter does not mention the right of self-defence; but this omission does not matter as the right is inherent. However, there does exist a collective machinery, the Liberation Committee, for dealing coercively with political regimes that perpetuate colonialism and deny the right of self determination to the black majorities in South Africa, Angola, Mozambique and Rhodesia.[42]

With regard to the obligation to settle disputes peacefully, the OAU Charter calls for the establishment of a Commission of Mediation, Conciliation and Arbitration.[43] The 1964 Protocol, which is an integral

36. Robertson, *op. cit.,* p. 26 *et. seq.*

37. Art. 8 of the 1949 Statute.

38. The OAU, Charter, however, frowns at "political assissination" as well as at "subversive activities" on the part of neighbouring states or any other states. Article 3(5). See also The Accra Declaration on Subversion, especially paragraph 3. Text in *International Legal Materials,* Vol. 5, 1966, pp. 138-139.

39. OAU Charter, Art. 3(6).

40. See Indian Society of International Law, *Asian-African States: Texts of International Declarations,* (New Delhi: 1965), p. 82.

41. At Addis Ababa, the Ethiopian Emperor pleaded in vain for the establishment of a collective machinery for dealing with armed aggression against any African state signatory to the Charter. See Emperor Haile Selassie I, "Towards African Unity," *Journal of Modern African Studies,* (J.M.S.S.), Vol. 1, No. 3, 1963, pp. 281-291.

42. Organization of African Unity, *Basic Documents of the Organization of African Unity,* (Addis Ababa, 1963), p. 18; C.J.R. Dugard, "The Organization of African Unity and Colonialism," *International and Comparative Law Quarterly,* Vol. 16, 1967, pp. 157-190.

43. OAU Charter, Art. 19.

part of the constitutional law of the OAU, sets out procedures and machinery for the pacific adjustment of disputes among member states.[44] What is most significant about the processes of pacific settlement of disputes elaborated in the 1964 Protocol is the rejection of the judicial method of pacific settlement of intra-African disputes. Perhaps to emphasize the rejection of international judicial process, the OAU Charter expressly designates the supreme political organ of the regional organization, the Assembly of Heads of State and Government, as the authoritative interpreter of the constitutional law of the Organization.[45] In relation to non-members of the regional organization, especially the regimes that repudiate the African anti-colonialist ideology, the general black African sentiment was expressed by Taliti of Tanzania in a speech before the Sixth Committee of the United Nations in 1966: "But the African States could not be expected to agree to negotiate indefinitely on disputes arising out of the existence on their continent of colonial domination, racism and apartheid, particularly since certain Western Powers were seeking by double dealing to prevent any progress in the matter".[46] The OAU Charter certainly envisages the necessity of non-peaceful relations with some non-African states that practise colonialism.[47]

The undertaking to refrain from the use of force except in self-defence is part of the international constitutional law of the SEATO, NATO, ANZUS Treaty Alliance, the Warsaw Treaty Organization and the OAS.[48] With the exception of the OAS, these organizations have been established primarily to perform the function of collective self-defence against an aggressor *outside* the respective "region".[49] Structured principally to handle extra-regional problems, these regional organizations lack in their constitutional law institutional procedures and machinery for the pacific settlement of disputes arising between member states. It may, however, be argued that it is not technically impossible for these collective self-defence organizations to be converted into *ad hoe* pacific settlement agencies.[50] The law of the OAS is certainly the most elaborate of all in respect of the meticulous care with which it

44. Text in *International Legal Materials,* Vol. 3, 1964, pp. 1116-1124. For analysis of the Protocol, see T.O. Elias, "The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity", *B.Y.B.I.L.,* Vol. 40, 1964, pp. 336-354; D.V. Degan, "Commission of Mediation, Conciliation and Arbitration of the OAU," *Revue Egyptienne De Droit International,* Vol. 20, 1964, pp. 53-80.

45. OAU Charter, Art. 27.

46. *G.A.O.R.,* 21st Session, Sixth Committee, 934th Meeting, November 21, 1966, p. 206; also the Representative of Zambia (Chipampata), *Ibid.,* 938th Meeting, November 23, 1966, p. 230.

47. Boutros-Ghali, "The Addis Ababa Charter," *International Conciliation,* No. 546, 1964, pp. 31-38.

48. Manila Treaty, Art. 1; North Atlantic Treaty, Art. 1; Warsaw Pact, Art. 1; ANZUS Treaty, Art. 1; CENTO, Art. 1, 3; Rio Treaty (OAS), Art. 1.

49. See Beckett, *op. cit.;* Starke, *The ANZUS Treaty Alliance,* pp. 76-82.

50. David Davis Memorial Institute of International Studies, *Report of A Study Group on the Peaceful Settlement of International Disputes,* (London: 1966); p. 25.

sets out the procedures and rules governing the pacific settlement of disputes. The Pact of Bogota (1948),[51] synthesizing the various Arbitration and Conciliation treaties among the American Republics under the rather loose Inter-American System, details rules governing procedures of Good Offices and Mediation, Investigation and Conciliation, Arbitration and Judicial Process. It is hardly necessary here to examine these various methods of pacific adjustment of disputes. Attention should be drawn, however, to the fact that, unlike the Pact of the League of Arab States and the Addis Ababa Charter, the OAS Treaty on Pacific Settlement accepts judicial process as a method of peaceful settlement of disputes. Rather than create a Regional Court, a proposal supported by some Latin American Republics but consistently opposed by the United States,[52] the High Contracting Parties accepted "the jurisdiction of the [World] Court as compulsory *ipso facto,* without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of juridical nature that arise among them".[53] The International Court of Justice is empowered to decide whether or not a particular dispute falls within the domestic jurisdiction of a state.[54] However, the undertaking to refer legal disputes to the judicial processes of the World Court has been largely ignored. When, for instance, Cuba in 1962 proposed that the legality of the Punta del Este sanctions imposed by the OAS, and of her exclusion from the regional organization be referred to the World Court for an advisory opinion, the three OAS members in the Security Council spearheaded opposition to such a procedure and succeeded in securing its rejection by the Council.[55] In addition to the principle of compulsory jurisdiction of the World Court, the principle of compulsory arbitration is recognized in cases where the World Court rules that it has no jurisdiction to hear and adjudicate a dispute. Of particular relevance for our immediate purpose here is the provision which requires all international disputes arising between OAS members to be submitted to the peaceful procedures elaborated in the constitutional law of the regional organization before being referred to the Security Council of the United Nations.[56] On a purely superficial consideration, one may be tempted to doubt the full compatibility of Article 23 of the OAS Charter with Article 35(1) of the UN Charter. It should, however, be borne in mind that Article

51. Text in F.V. Garcia Amador, *The Inter-American System,* (New York: 1966), p. 289 *et seq.*

52. M.O. Hudson, *International Tribunals,* (Washington: 1944) pp. 175-179; C.C. Fenwick, *The Organization of American States,* (Washington: 1963), pp. 208-213.

53. Pact of Bogota (1948), Art. 31.

54. Peru and the United States made reservations to the effect that they alone have competence to define and determine what matters fall within their domestic jurisdiction.

55. UN Doc. S/PV. 998, March, 23, 1962.

56. Charter of Bogota, Art. 23. See also Pact of Bogota, Art. 50; Rio Treaty, Art. 2.

35(1) of the UN Charter is only a constitutional *right* to be exercised at the discretion of member states. As the said Article does not create a legal duty, there is nothing inconsistent with the UN Charter if members of a regional organization like the OAS willingly agree among themselves to limit their right under the Article so long as, by so doing, the rights of other UN members are not interferred with. An OAS member which goes first before the Security Council in the event of a dispute between her and another OAS member is in breach of the OAS Charter. If the same member-state goes first to the OAS, she is in breach of neither the OAS nor the UN Charter.

The key to the legal compatibility of regional organizations (especially established to perform the function of collective self-defence) with the law of the United Nations lies in the manner in which the *casus foederis* has been formulated. It is to this that the remaining part of this paper addresses itself.

The *casus foederis* of the regional arrangements under consideration is defined slightly differently; but, in each case, the use of the term "armed attack" indicates that consistency with the letter of Article 51 of the UN Charter was intended by the draftsmen of the various treaties.[57] Regional collective self-defence agreements usually demand two types of commitments from their signatories, namely, the commitment to consult, and the obligation to come to the assistance of the victim of an armed attack.[58] The character of the latter obligation varies from one treaty to another. Consider, first, the legal duty to consult. This duty arises if, in the opinion of one of the signatories, a threat of armed attack or a danger to the integrity of the territory and political independence of any signatory party is perceived.[59] The purpose of consultation is not necessarily to agree on the measures which should be taken for common defence. For instance, the constitutional law of the North Atlantic defence system establishes no precise legal duties beyond consultation.[60] This is the position under the ANZUS Treaty[61] and the Manila Treaty. The latter calls upon member states to consult immediately "to prevent and counter subversive activities directed from without against their territorial integrity and political stability"[62]

57. Beckett, *op. cit.,* p. 29; Bowett, *op. cit.,* p. 225, *et seq.;* Starke, *op. cit,,* pp.117, 121; Whiteman, *Digest of International Law,* Vol. 5, (1965), p. 1077 *et seq.*

58. Boutros-Ghali, *Contribution a Une Theorie Generale des Alliances,* (Paris: 1963), p. 34.

59. Manila Treaty, Art. 2; North Atlantic Treaty, Art. 3; Warsaw Pact, Art. 3; ANZUS Treaty, Art. 3; Rio Treaty, Art. 7.

60. Cmd. 7692, *Events Leading up to the Signature of the North Atlantic Treaty with a Commentary on the Text,* (London: 1949), p. 5; Goodhart, "The North Atlantic Treaty of 1949," *Hague Recueil,* Vol. 79, 1951 (II), pp. 221-222; Schwarzenberger, "The North Atlantic Pact," *W.P.Q.,* Vol. 2, No. 3, 1949, p. 312.

61. Art. 3; Starke, *op. cit.,* pp. 110-112.

62. Art. 2, 4. See Ralph Braibanti, "The Southeast Asia Collective Defence Treaty," *Pacific Affairs,* Vol. 30, 1957, pp. 321-341, M.M. Ball, "SEATO and Subversion," *Political Science,* (Willington: N.Z.), Vol. II, 1959, pp. 25-39.

without indicating obligation beyond consultation, although the American commentary on the Treaty expresses the view that the purpose of consultation is "to agree on measures to be taken for the common defence".[63] Under the Rio Treaty, when a signatory state faces threats to the integrity of its territory or political independence consultation is obligatory "in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression".[64] It is not clear from the language of Article 3 of the Warsaw Pact whether consultation in the event of a threat of armed attack on a signatory state leads to an obligation to agree to do something. The Article states that consultation is "with a view to providing for their joint defence and maintaining peace and security".[65] It should be emphasized that the duty to consult when aggression is threatened, as well as preparation for self-defence, is within the letter of Article 51 of the UN Charter.

The commitment of members to come to the assistance of their allies which have been attacked appears to be much stronger in some treaties than in others.[66] In none of the collective defence systems examined in this study is the obligation to assist a victim of armed attack as strong as it is under the Brussels Treaty which provides for automatic "military and other aid and assistance" to any signatory subject to an armed attack in Europe.[67] Under the Manila Treaty and the ANZUS Treaty Alliance, for instance, each party merely recognizes that an armed aggression against any of the parties to the Treaties constitutes a danger to its own peace and security, and undertakes, in that event, to act to meet the common danger in accordance with its constitutional processes.[68] Both Treaties leave it to each member to decide for itself whether aggression has in fact occurred and what measures it will take.[69] The absence of a legal duty to aid a victim of attack may have created defence systems on which members cannot always comfortably rely, nevertheless, this serves the important purpose of bringing both Treaties into consistency with Article 51 of the UN Charter.[70]

The formulation of the *casus foederis* in the North Atlantic Treaty, the Rio Treaty and in the Warsaw Pact appears to create a legal duty for the signatory states to go to the defence of a state which has been attacked and which has requested assistance. To the extent that this is the case, these multilateral treaties may have created obligations beyond the scope of the UN Charter obligation under Article

63. R.I.I.A., *Documents on International Affairs,* 1954, p. 164.

64. Art. 6.

65. Art. 3.

66. Boutros-Ghali, *Contribution a une Theorie general des Alliances,* (1963), p. 59 *et seq.*

67. Art. 4; Cmd. 7599 (London: H.M.S.O., 1949); Beckett, *op. cit.,* p. 23.

68. ANZUS Treaty, Art. 4; Manila Treaty, Art. 4(1).

69. R.I.I.A., *Collective Self-Defence in South-East Asia,* (London: 1956), p. 13; Starke, *ANZUS Treaty Alliance,* (1965), p. 124.

70. Starke, *Ibid.,* pp. 120-121.

51.[71] As was indicated before, the legal duty to assist a victim of armed attack cannot be read into Article 51 of the UN Charter. This is not, however, the same as saying that a legal obligation in a regional treaty to assist a victim of armed attack is contrary to the law of the United Nations.

Like the Arab League's Collective Self-Defence Pact, these three collective security systems regard an armed attack on any of their members an attack against them all, and, in the event of such an attack, obligate members, in the exercise of the right of individual or collective self-defence under Article 51 of the UN Charter, to go to the assistance of the victim or victims of attack.[72] What is left to the discretion of member States is the nature of assistance they are willing to offer.[73] Since the judgement of whether or not the *casus foederis* has arisen is individual, assistance to a victim of attack is not automatic, and, certainly, no member can be drawn into a war automatically against its will.[74] Of the three only the Rio Treaty explicitly contemplates the use of the regional defence system against an aggressor signatory to the treaty.[75]

Finally, in conformity with the constitutional requirements of Article 51 of the UN Charter, the law of these regional defence arrangements provides that measures taken in self-defence shall not only be reported to the Security Council, but also be terminated as soon as the Security Council has taken the necessary action to restore and maintain international peace and security.[76] As the UN Charter does not require regional organizations carrying out the function described in Article 51 to keep it informed of activities "in contemplation",[77] it is difficult to understand the logic of the provision of Article 5 of the Rio Treaty under which the regional organization undertakes to report to the Security Council full information concerning the activities contemplated in the exercise of the right of self-defence.

71. See Kunz, "The Inter-American Treaty of Reciprocal Assistance," *A.J.I.L.,* Vol. 42, 1948, pp. 114-120; Garcia-Mora, "The Law of the Inter-American Treaty of Reciprocal Assistance," *Fordham Law Review* Vol. 20, 1951, pp. 7-14; Thomas and Thomas, *Non-Intervention: The Law and Its Import in the Americas,* (1956), p. 185; F.B. Schick, "Peace on Trial: A Study of Defence in International Organization," *W.P.Q.,* Vol. 2, No. 1, 1949, pp. 29, 33; Grzybowski, *The Socialist Commonwealth of Nations,* (1964), p. 192.

72. North Atlantic Treaty, Art. 5; Rio Treaty, Art. 3; Warsaw Pact, Art. 4.

73. Thomas and Thomas, *The Organization of American States,* (1963), p. 254; Cmd. 7692, (London: 1949), p. 5; Beckett, *op. cit.,* pp. 28-29; Grzybowski, *The Socialist Commonwealth of Nations,* (1964), pp. 190-193.

74. Beckett, *op. cit.,* p. 29; R.I.I.A., *Atlantic Alliance,* (1952), p. 47; Schwarzenberger, "The North Atlantic Pact," *W.P.Q.,* Vol. 2, No. 3, 1949, p. 312.

75. Beckett, *op. cit.;* Boutros-Ghali, *op. cit.,* (fn. 66 above), p. 64.

76. See Daniel Vignes, "La Place des Pastes de Defense dans la Societe internationale actuelle," *A.F.D.I.,* Vol. 5, 1959, p. 69; Bowett, "Collective Self-Defence under the Charter of the United Nations," *B.Y.B.I.L.,* Vol. 32, 1955-56, pp. 149-150.

77. Beckett, *op. cit.,* pp. 16-18; Stone, *op. cit.,* pp. 249-250; Starke, *op. cit.,* p. 78.

VIII

Concluding Comments

The foregoing comparative examination of some aspects of the constitutional law of some selected regional organizations throws some light on two problems of relevance to this study. First, it reveals how similar are the principles and rules of international law embodied in the legal framework of those regional organizations; second, the constitutional law of regional organizations also shows a striking similarity with, and restates the principles of international law codified in the UN Charter. The law of these regional organizations does not differ substantially in the norms of international law it enunciates,[78] even though the character of the society sought by these organizations may be, and, indeed, are different. It does not come as a surprise that the constitutional law of regional organizations should, generally speaking, be compatible with that of the United Nations.

However, if international law is properly understood not as a system of neutral rules but as a continuing process of specialized decision-making[79] in which it is being used by Foreign Offices as an instrument of national policy,[80] there is no need to express great surprise that there does exist perhaps an unbridgeable gap between what is desirable *de lege ferenda* and what in fact exists *de lege lata.* This observation should not be interpreted as meaning that in their international relations states are always prone to disregard the law of nations.[81] It is of course true that international law is usually interpreted in the light of national policy considerations and in support of particular lines of foreign policy. In the final analysis, therefore, it is not very important whether the principles of international law embodied in the legal framework of these regional organizations are a restatement of the well-known principles of the law of the United Nations and of general

78. Compare the conclusion of the Panel discussion on "Diverse Systems of World Order Today," *Proceedings, American Society of International Law,* 1959, pp. 21-45; Howard S. Levie, "Some Constitutional Aspects of Selected Regional Organizations: A comparative Study," *Columbian Journal of International Law,* Vol. 5, No. 1, 1966, pp. 14-67.

79. See generally, McDougal, "Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Enquiry," *Journal of Conflict Resolution,* Vol. 4 1960, pp. 337-354; "International Law, Power and Policy," *Hague Recueil,* Vol. 82, 1953, (I), p. 137 *et seq.;* R.A. Falk, "New Approaches to the Study of International Law," *A.J.I.L.,* Vol. 61, 1967, pp. 477-495. For the view that the great majority of British international lawyers regard international law as a set of neutral rules, see Rosalyn Higgins, "Policy Considerations and the International Judicial Process," *International and Comparative Law Quarterly,* Vol. 17, 1968, pp. 58-84.

80. See H.C.L. Merillat (ed.), *Legal Advisers and International Organizations,* (New York: Oceana, 1966), also *Legal Advisers and Foreign Affairs,* (New York: Oceana, 1964).

81. See L.C. Green, "The Nature of International Law," *U. of T. Law Journal,* Vol. 14, 1961, pp. 176-193; Louis Henkin, *How Nations Behave: Law and Foreign Policy,* (New York: Praeger, 1968); "International Law and the Behaviour of Nations," *Hague Recueil,* Vol. 114, 1965, (I), pp. 171-279.

international law. What is more important is how state practices do in fact reflect the acceptance by states of these principles of law and the obligations arising therefrom. It can hardly be doubted that the practices of regional organizations are bound to modify or even repudiate some of the principles of these regional constitutional laws. This is to be expected in international politics where nations do not always use their international organizations, to prosecute the purposes and principles of those organizations, but rather use the organizations to advance particular national interests.[82] In so far as the consistency of regional obligations with those of UN membership cannot and is not intended to be judged a *priori,*[83] it becomes necessary to examine the operational conduct of these regional organizations in order to determine the extent to which regional obligations lead to duties compatible with those of UN membership.[84]

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82. See, for instance, Jacob Robinson, "Metamorphosis of the United Nations," *Hague Recueil,* Vol. 94, 1958 (II), pp. 514-530.

83. Hans Kelsen, *The Law of the United Nations,* (London: 1964), p. 323, 324.

84. See Rafiu A. Akindele, *Regional Organizations and World Order: A Study of the Problems of Universal-Regional Relationship in the Organization of International Peace and Security,* (Unpublished Ph.D. Thesis, University of Alberta, Edmonton, Canada, 1970) Ch. 7. See also footnote 23 above.

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