CONSTITUTIONAL DEVELOPMENTS OF UNITED NATIONS POLITICAL ORGANS

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We have just heard an admirable tour d'horizon by my colleague and friend, Mr. Meeker. I shall attempt to develop in more specific terms some of the problems mentioned in his speech.

I am to talk about constitutional developments in the politi-cal organs of the United Nations over the first ten years of the United Nations' existence. Being a lawyer I must make it clear that I am using the term "constitutional" in the broadest sense. As Mr. Meeker pointed out, the UN is a loose associa-tion of sovereign states in a world fundamentally dominated by power considerations. We cannot analyze its problems in terms of an orderly community operating under a rule of law.

I

The Growth of the General Assembly Role in the Security Field

I should like to talk first about the constitutional develop-ments in what is perhaps the most important field of UN activ-ity, the field of maintaining peace and security. This function has an element of preserving status quo—preventing forcible change, repelling aggression.

The Security Council was given by the Charter the primary responsibility in this field. And the Council performed ad-mirably, for instance, in the Indonesian case where it not only helped to stop the cruel war between the Dutch and the Indo-nesians, but through an ingenious and imaginative use of varied means of conciliation brought about a negotiated settlement. For obvious political reasons there was enough agreement among the Great Powers to allow the Council to function as the founding fathers at San Francisco thought it should function.

*The speaker made plain that he was speaking personally and unofficially and not necessarily expressing the views of the Department of State.

But unfortunately there have not been many cases in which the Council was able to operate as it did in the Indoesian case.

The Greek case in 1947 is perhaps the first milestone in the shift of the "balance of power" from the Security Council to the General Assembly. A Soviet veto blocked Council action in defense of Greece against the aggressive infiltration and subversion by its Communist neighbors. As a result the case was moved to the General Assembly and this was the beginning of the steady growth of the General Assembly role in the security field. Mr. Dulles argued at the time in the Assembly with considerable impact that the principle of "compensation of power" among the UN organs must operate along with the principle of "balance of power" so that if one organ is incapacitated another must take over. And so the Assembly, originally intended by the Charter to be "the town-meeting of the world," for better or for worse began to move into the business of investigation, conciliation, and even recommendation of sanctions. As the cold war progressed, the development of these powers of the Assembly appeared to be the only alternative to a more or less complete abdiction by the UN of its role in the security field. The Greek situation marked in a sense a milestone also in terms of the U.S. policy toward the United Nations since the United States' military aid program to Greece and Turkey was not channeled through the United Nations. However, the United States legislation embodying the program contained a symbolic recognition of the UN authority in the Vandenberg Amendment. Under this provision, the President of the United States was directed to withdraw all aid if the General Assembly or the Security Council without regard to any veto should find that action taken by the United Nations makes United States aid unnecessary. From the viewpoint of American law this is an interesting instance of a revokable self-limitation which the U.S. imposed upon itself in deference to an international organization.

The Korean case in 1950 marks the second constitutional milestone in the development we are discussing. Because of Soviet absence the Council was able to lay the foundation for military action against the Communist aggression. But when the Russians returned to the Council and blocked further steps the Council retained only a symbolic role, and the real responsibility for further United Nations moves was taken over by the Assembly.

The third milestone was the Uniting for Peace Resolution of 1950 in which the Assembly, to use a very loose analogy,

codified the case law of the Korean case. In this resolution the Assembly made crystal clear its right to recommend collective action against aggression in the event the Security Council is blocked by a veto. The resolution set up the necessary emergency procedure; it set up the Collective Measures Committee, which has since worked out a set of principles based on the Korean experience, to be applied in the event of "another Korea"; and it set up a Peace Observation Commission, the "eyes and ears of the UN," which was to move into any area of international tension as a precautionary measure.

This shift from reliance on legally binding decisions of the Council to voluntary co-operation on the basis of Assembly recommendations was caused by Soviet obstruction of the Council. This obstruction was only one effect of the Soviet policy of aggressive pressures against the entire perimeter of the free world. Another effect of this policy was the emergence of defensive alliances in the free world, not linked organizationally to the UN but pledged to uphold its principles. Until the Korean case it appeared possible that these alliances might for all practical purposes take over the security functions of the free world with the United Nations acting as a forum for debate and conciliation. There were some who believed at the time - and there are some who believe today - that debate and concilation and nothing more should be the function of the United Nations in the security field. The United Nations' role in the Korean case had an important impact on this situation. It is not easy to estimate the long-range effect of this impact. But it may be useful to raise a question or two.

How did the Korean precedent and the Uniting for Peace concept stand up in the course of subsequent events? The Peace Observation Commission machinery was used only in one instance - in the Balkans. It was not sent to Indochina, a scene of large-scale fighting. The Russians considered the fighting in Indochina a civil war outside the scope of the UN, just as they viewed the North Korean aggression against the Korean Republic as a civil war. The French agreed that the Korean war was an international aggression but insisted that the Indochina fighting was their own domestic business not for UN consideration. The U.S. took the view that both the Korean and Indochinese fighting were international problems. These are interesting formulae and rationalizations, but the fact is that because of the French opposition and for other reasons the Indochina problem has never found its way before the UN. The fighting in Indochina has stopped following the Geneva Conference. It would be

interesting to speculate whether the free world would have achieved as good or worse or better settlement in the Assembly than that reached in Geneva. It is difficult to say whether the Uniting for Peace concept will have suffered in the long run by the fact that the Indochina conflict was not brought before the UN.

II

Efforts to Confer New Powers on UN Organs by Treaties

We have thus far analyzed the trend away from binding decisions. But there have been a number of efforts in the opposite direction in the early history of the UN. I shall mention only two instances where states agreed in a treaty to confer on UN organs new powers to make binding decisions not accorded in the Charter itself. One worked, the other did not.

In the Italian Peace Treaty the Western Big Three Powers and the Soviet Union agreed to confer upon the General Assembly the power to find a settlement of the question of the disposition of Italian colonies which would be binding upon the Four Powers. The Assembly did find a solution which was actually put into effect. The advantage, of course, was that the territories involved were outside the Soviet orbit and the Soviet Union could not prevent that settlement.

By way of another example, the parties to the Italian Peace Treaty conferred upon the Security Council the important power of electing a governor for the Free Territory of Trieste and of ensuring the integrity and independence of that Territory. The Security Council, by a formal resolution, accepted this responsibility in 1948 but was unable to agree on a Governor. The Free Territory in fact was never established in the form contemplated by the Treaty. After many meetings the Council, over violent Soviet opposition, decided to postpone any action pending the then proceeding negotiations between Italy, Yugoslavia, the U.K., and the U.S. These powers did reach an agreement on a partition of the territory. The Russians, in what was perhaps their first about-face after Stalin's death, accepted this settlement. From a legal viewpoint, we have a most curious situation of a multilateral treaty provision which was in fact superseded by an agreement concluded by only some of the parties to the multilateral treaty; the resoltuion in which the Council accepted the responsibility for the Free Territory is still on the books - but in fact there is no Free Territory any more. Those despairing over the untidy legal situation will no doubt console

themselves by the fact that after all we do have a generally acceptable political settlement of this troublesome problem. Of course only time will tell whether the settlement will work out to the best interest of everybody concerned. So much for the two examples of new powers conferred by a treaty.

There have been proposals such as the Douglas-Thomas resolution offered in the U.S. Congress in 1949 calling for a treaty which would confer upon the Assembly broad powers to make important binding decisions in the security field. But we cannot expect a reversal of the present trend away from binding decisions unless there is a radical change of the international scene. The situation might be different, for instance, if a general agreement should be reached for a safeguarded regulation of armaments. However, as we have seen, the present trend is not necessarily a bar to UN action in the collective security field.

III

UN Role in "Peaceful Change"

I should now like to talk briefly about some of the constitutional problems which have arisen in another field of UN activity, that of facilitating peaceful change of the status quo. The League Covenant was part of the Peace Treaties, and the League was tied in many ways to the status quo under these Treaties. The Charter of the UN is not tied to any peace treaties. There is also an important Article in the Charter, Article 14, which gives the Assembly a role in facilitating peaceful change; it specifically authorizes the Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin which it deems likely to impair the general welfare or friendly relations." Finally, there is an entire complex of provisions strewn throughout the Charter calling for advancement and progress and change. These are the provisions mentioned by Mr. Meeker obligating the Members to co-operate in the promotion of universal respect for human rights, in the economic and social advancement of their people, and particularly in the progressive self-determination of dependent peoples.

Then, of course, on the other side we have the famous Article 2, paragraph 7, which forbids the UN to intervene in matters essentially within the domestic jurisdiction of states except when it comes to the application of enforcement measures in case of a threat to peace. Speaking in constitutional

terms we are, therefore, faced with a problem of reconciling on one hand the provisions conferring upon the Assembly broad powers to discuss any question within the scope of the Charter and to make recommendations for adjustments of any situation regardless of origin, and on the other hand, the injunction against intervention in domestic matters. Numerous analyses of the relevant Charter provisions have been written in articles and books. But again, what we have here is essentially a political problem. In terms of the raw reality of our changing world of which the United Nations is a part, the problem is to reconcile on the one hand the forces of change, i.e., nationalism, anti-colonialism, anti-westernism, with the forces of status quo standing for the maintenance of the prevailing conditions. In an important measure the maintenance of peace depends upon the reconcilation of these conflicting forces. The problem is complicated for the free world because the Soviet Union is all out for change in the free world but firmly committed to the unhappy status quo behind the Iron Curtain.

When a problem involving a conflict between these opposing forces is brought before the UN the first issue to be decided is whether or not the UN has jurisdiction to deal with the problem. If the answer is in the affirmative, the second question is what the UN can legally do and what if anything it should do as a matter of practical policy. The answers to these questions emerge as a rule only after a clash of political interests manifested frequently in bitter debate. The conflicting parties, while arguing on the basis of Charter provisions and at times in legal terms, basically press for what they consider is their national interest. Strong emotional motives are also frequently brought into play.

The best way of illustrating what I mean is to focus briefly on some of the concrete problems; and I suggest that we take a look at the agenda of the last Assembly. To add a further touch of reality to our discussion, I suggest that we view these problems from the point of view of the Secretary of State sitting in his office in Washington or, what is perhaps even more apropos, heading the U.S. Delegation to the Assembly in New York. The political problems on the last General Assembly agenda which may fall within the "peaceful change" category included: the Tunisian and Moroccan questions, the South African racial problems, the Greek-British controversy over Cyprus, and the Dutch-Indonesian controversy over West New Guinea. Everyone of these problems presents a series of dilemas to the Secretary of State. He, Ambassador Lodge, and their principal

advisers are subjected to concentrated pressures from a variety of foreign spokesmen representing conflicting national interests, as well as from domestic pressure groups. And it takes at times a real effort to reconcile the various views within our Government itself.

Take for instance the problems of Tunisia and Morocco. By treaties with local rulers France has acquired wide powers in these protectorates and has greatly improved the economic conditions. The nationalists under the banner of self-determination press for more voice in the government and for independence. The Arab-Asian group in the UN champions the nationalist case. France claims that the UN has no competence to deal with these matters. I shall never forget the biterness of the first Assembly debate of the Moroccan question in Paris in 1951, Foreign Minister Robert Schuman, speaking for France, and Foreign Minister Zafrulla Khan of Pakistan speaking for the Arab-Asian group, with the rest of the Assembly listening in an uneasy silence. Our Latin-American friends for instance were deeply torn between their traditional support of anti-colonialism and their love for la belle France; the pleasing locale of the Assembly in Paris only added to their difficulty. The Assembly, in a desperate effort to seek a way out, decided to postpone the consideration of the question whether or not to consider the question, a not very subtle way of postponing the whole business. Eventually both the Tunisian and Moroccan questions were put on the Assembly agenda and the Assembly with U.S. support went on record in favor of negotiations between France and the local authorities looking toward increased self-government.

The approach of the UN in dealing with these problems has been pragmatic and political. The Delegations frequently take a position in one case which is diametrically opposed to the position they took in a logically similar case. The United States, I may say with some pride, is perhaps the only one of the Great Powers with a fairly consistent record. As a rule one can find a pattern of consistency based on policy interests and not on a uniform application of identical provisions of the Charter. There are, however, a few principles which have been upheld in a number of instances although one cannot by any means say that they are now generally accepted.

First, there is a well-established practice that the General Assembly itself decides whether or not it is competent to deal with a problem. Many scholars and diplomats feel distressed that questions of competence are not referred by the Assembly

to the International Court of Justice for advisory opinion. They believe that unlike the political approach in the Assembly the Court would seek to establish legal standards for dealing with this vital matter. Some believe that the Court would have seen to it, had it been given a chance, that the UN proceed more cautiously in this delicate field. On the other hand there are those who believe that any advice from the Court would have frozen the line of UN competence much too early in its development to the prejudice of its sound growth; they feel that the problem is essentially a political one and that in any case there is no assurance that the Assembly would accept the Court's advice if it went against the strong feeling of the majority.

Secondly, there is considerable support for the view that mere discussion of the merits of a controversy does not constitute the type of intervention in domestic affairs that is prohibited by Article 2(7). On this theory the Assembly has been quite liberal in admitting cases on its agenda. But where does the prohibited intervention begin?

This query suggests a third point which I hestiate to offer as a principle. There is a fairly broad opposition to establishing special commissions of inquiry or conciliation in cases of this type, either on the pragmatic ground that such commissions would not help in the solution of the problem or because such action is considered to come perilously close to the prohibited intervention. Commissions were nevertheless established in the South African racial conflict cases.

It is not an easy task to evaluate the contribution of the Assembly in the field of peaceful change. To what extent, if any, for instance has the UN contributed to the conclusion of the recent agreement between the French and the Tunisians?

It is argued that the intemperate Assembly debates increase tension and violence. At times some discern a pattern of increased terrorist activities in colonial areas just prior to the Assembly debate on the problems of these areas. Some believe that the UN is being used and abused for the purpose of weakening Western influence in the colonial areas only to open the way for chaos and Soviet expansion.

Back in the eighteen seventies—it is interesting to recall—the Turkish atrocities in Bulgaria (or violations of basic human rights as we would put it today) caused a howl of indignation among the humanitarians of Europe who had previously confined their criticism to Siberia and the Czarist Government. In his farewll speech to the Commons, Disraeli, although deploring the horrible events, could not see why the British Empire

should change its traditional policy and expel the Turks from Bulgaria and Europe generally. He knew that the expulsion of the Turks would mean the arrival of the Russians on the shores of the Mediterranean Sea. Disraeli's great rival, Gladstone, on the other hand, was doing his utmost to whip up the humanitarian sympathies of the English people in support of a war which perhaps would have left Russia in command of the Bosporus and Dardanelles. This is an interesting historical vignette over which one might ponder,—since, had the UN existed in 1876 the Assembly would have discussed "The question of alleged Turkish atrocities in Bulgaria." As it was, the matter was handled by the Great Powers. But the Great Power concert collapsed early in this century and that was one of the reasons why we now have the UN in which most of the world's nations have a chance to express their opinion on a matter of this type.

In evaluating the UN role in this field of peaceful change one might profitably keep in mind that the forces of nationalism have not been created by the UN, and that they exist apart from the UN although they may derive support from it. The Assembly debates obviously produce political and moral pressure on colonial powers to make concessions to nationalism. At times, however, these debates have also a sobering effect on the nationalists. In the North African cases, for instance, the Assembly refused to endorse a call for independence of Morocco and Tunisia and the debate emphasized the need for orderly and peaceful change. At times as a result of a public debate the Government of a colonial power may find it easier, vis-a-vis its own public opinion and its own colonial pressure groups, to move in the direction of responding to reasonable nationalist aspirations. The alternative may be for the nationalist movement to go underground. Despairing over the lack of support from the free world, the nationalists may conclude that there is not hope for a peaceful change and may turn to the very same Communist ideology or terrorism which the colocial powers seek to keep out.

IV

Some Developments in UN Practices with Constitutional Implications

I should like to say a few words on some developments with constitutional implications in the practices and procedures of both the Security Council and the Assembly.

The Council, for instance, in an effort to avoid a Soviet veto developed the so-called "consensus procedure" applied in at least four instances in the Kashmir and Palestine cases. No formal resultion is submitted and voted upon. At the end of the discussion, however, the President offers an informal summary of the majority views expressed in the debate. This summary is included in the record as the consensus. If any Member objects, its objection is also included in the record. But this procedure is helpful generally only where, as in the Palestine and Kashmir cases, there is already in existence some commission or other machinery capable of functioning "on the ground" without further formal Council action. Nevertheless, this procedure is an interesting little phenomenon for us lawyers - a very delicate flower indeed and a symbol of the Council's ingenuity as much as of its impotence.

In the earlier years the Council and the Assembly frequently appointed Commissions or individuals to assist directly in negotiations for a settlement of controversies. In more recent years the Assembly, in dealing with a controversy, as a rule debates it in one of its Committees of the whole and in the plenary, comes up with a resolution calling for direct negotiations by the parties, and expresses general objectives and sometimes guiding principles for a negotiated settlement. Intense negotiations at times take place in the Assembly on the text of such a resolution, as was the case, for example, in the Korean question. But the actual negotiations between the parties are conducted outside the Assembly and without any assistance of Assembly commissions or organs. Thus in the Korean case the armistice negotiations were conducted in Korea for the UN side by the U.S. which was backstopped in Washington by a group of Ambassadors representing the nations with armed forces under UN command in Korea. This group met in the State Department and functioned under only a general guidance of the Assembly resolution.

Another example was the Military Committee composed of U.S., Thailand, Burma, and China, which was formed on U.S. initiative in response to the Assembly resolution calling in general terms for the removal of the Chinese irregular troops from Burma. This Committee managed to have thousands of these troops flown out of Burma but it had no direct connection with the UN. Again in the Kashmir controversy whatever efforts at a settlement were made in the last two years took place outside the UN and without the participation of the special UN Representative who has been available to the parties.

A great many international problems found their way in one form or other before the UN, but in recent years actual negotiations and settlement took place outside the UN. I might mention the Trieste problem, the Suez Canal base, Iranian oil, the Aus trian Treaty, etc. Of course the overriding consideration is to find a solution of a controversy, but we have here, for a variety of reasons including the cold war, a tendency away from negotiations in the UN. It would, however, be interesting to study to what extent the very existence of the UN has affected negotiations carried on outside the UN.

Another interesting modification caused primarily by the cold war took place in the role of fact-finding in the Assembly and for that matter also in the Security Council. Fact-finding in the past was considered an important component of negotiations and peaceful settlement. But the Soviets were unwilling to negotiate in good faith with or without facts, inside the UN or outside the UN, publicly or privately. Given the Soviet con tempt for facts, the laborious process of fact-finding may have been useful only to inform the free world and to preserve the integrity of its position. Exposure of facts may also have created some pressure on the Soviets. But through the long years of the cold war the free world has learned so much about the ways of Communism that the idea of formal fact-finding procedures appeared at times almost absurd. Due principally to Soviet opposition there have not been any recent formal fact-finding procedures. At times the Assembly may have given the impression, to quote from a recent book, of a succession of tableaux morts:

> "The curtain is lifted; the light flashes on; you are revealed either in a favorable and seemly posture or in an awkward one; the light goes off again, and that is that."

There is involved, however, a bit more than this. For example, in the brief proceeding during the last Assembly the Chinese Communists were revealed to the world at large in an exceedingly "awkward posture" by illegally holding 15 American fliers. This fact may have made it considerably more difficult for the Communitsts to persevere in their outrageous conduct.

The absence of fact-finding procedures underlines the political character of the proceedings. Less attention is paid both in the Assembly and Council to quasi-judicial approach,

precedent and form, than was the case in the League of Nations organs. The device of rapporteur who would organize and present the issues is not being used. The Council has never asked for an advisory opinion of the International Court of Justice, and the instances of the Assembly's requests are few and far between. The procedures are exceedingly flexible. This has its advantages in a young organization. The delegates time their speeches according to newspaper deadlines and telecasting schedules in what has been referred to as "diplomacy by loudspeakers." The importance of any statement is carefully measured in terms of the impact on domestic public opinion. But there is also abundant opportunity for private exchanges of views in the lounges and corridors.

V

Conclusion

There are a number of other problems bearing upon the constitutional developments of the UN. One is the question of admission to membership in the UN, a very fundamental question indeed. Another involves the relationship between the UN and the regional defense groupings, which was raised, for instance, in the Guatemalan case before the Security Council last year. Perhaps these questions will be brought up in our subsequent discussion here. At this time I should like to conclude with only two observations.

First, the constitutional shift from reliance upon binding decisions to voluntary co-operation under the Assembly's guidance might be considered by some a step backward on the road toward a better organized world community. But in a world as it is today there is a real question whether the UN could function on any basis other than voluntary co-operation of sovereign states acting in response to an informed world opinion. The Assembly, despite certain disadvantages of the one-member, one-vote formula, is perhaps the best body to provide for voluntary co-operative action which would give expression to the opinion of the community of nations.

And second, those of us who as lawyers have studied American or foreign or comparative constitutional law cannot remain unimpressed by the adaptability of the UN Charter to the changing realities within which it has had to function during the first difficult ten years of its existence.