struct the effort to gain effective collective security in any form and especially through the Security Council. The instances are too frequent, too systematic to admit of any other conclusion, tragic though it is. As the Philippine Foreign Secretary is quoted as saying: "It is difficult to escape the feeling that the opposition to this resolution is inspired by the desire to conceal aggressive aims, to nourish them in secret, and to pursue them by stealth." And this, though in the Charter they agreed to suppress aggression and to refrain from assistance to the aggressor. Mr. Churchill once said in regard to the Charter, "the aggressor who breaks this contract will stand naked in infamy before the embattled conscience of an outraged world."

It is said that the resolution in question has rejuvenated and invigorated the spiritual decline of the United Nations. Nevertheless it would seem that the United Nations is in jeopardy so long as the world is divided into two warring camps, carrying on virulent propaganda, "cold wars," armament races, threatening maneuvers, armed forays or attacks. These only lead to stop-gap measures such as power *blocs,* regional arrangements of collective self-defense and the use of armed force to quell aggression under Chapter VII. That is anything but peace among nations. The only harvest is ill-will and conflict. It is submitted that real peace can only come about when the nations are willing to settle disputes by the use of the peaceful resources open to them in the pacific routines of Chapter VI. No greater reservoirs of peace have been conceived by man. But the mutual will to drain them is lacking.

L. H. Woolsey

LEGALITY OF THE SECURITY COUNCIL RESOLUTIONS OF JUNE 25 AND 27, 1950

The Korean War is the first experiment in international enforcement action by military measures undertaken by the United Nations in the case of a breach of the peace. At the time of writing,[1] the ultimate outcome of this experiment is not yet clear, especially in the light of armed intervention by Communist China at a moment when the Korean War, as such, seemed to have been won. The Korean War has taught us, even up to now, many lessons in the military and political field. It has shown that an international enforcement action is, for all practical purposes, a war and that the most important thing, as in any war, is to win it. It has shown the continuing great importance of the long and unduly neglected laws of war.

The Korean War may give rise to many political problems. It may revive the old debate between the adherents and opponents of international armed enforcement action. It may revive the argument that any such action is in danger of leading to general war. It may bring up the question of whether the United States, as the principal military arm of the United Nations, should and can, at bitter expense in casualties and treasure, take such enforcement action in any corner of the world, whereas this country's

[1] November 15, 1950.

great antagonist always acts by proxy and keeps its own army untouched. On the other hand, it may well be argued that to have done nothing in the case of a flagrant armed attack would have meant the end of the United Nations, just as to have done nothing in the case of Japan's invasion of Manchuria in 1931 was the beginning of the end of the League of Nations. For the United Nations Charter lays down as the very first and most important purpose of the organization, "To maintain international peace and security, and to that end: to take effective collective measures . . . for the suppression of . . . breaches of the peace. . . ." [2]

The Security Council did take action by its resolutions of June 25 and 27, 1950. These resolutions have been branded as illegal, not binding, and as being in violation of the Charter, by the Soviet Union, Communist China, Poland and Czechoslovakia, and their legality has also been questioned here.[3] Contrary to political problems raised by the Korean War, the problem of the validity of the two Security Council resolutions is a strictly legal problem, which, in the light of these attacks, has to be re-examined. The following investigation is exclusively restricted to the problem of the legality of the two resolutions in question.

To declare these resolutions as legal or illegal is to give a value judgment by taking the corresponding legal norms of the Charter as a standard of valuation for the actual conduct of the Security Council. In doing so, it is necessary to interpret these norms. It is true, as Kelsen [4] points out, that any legal document, however carefully drafted, will in most instances allow more than one interpretation which all are legally and logically possible. This is a necessary consequence of the imperfection of any language. It stands to reason that this will be all the more so in the case of the United Nations Charter, which, from the point of view of legal technique, is badly drafted. It is also true that the Charter follows a political approach rather than a legal one. But as long as the organs of the United Nations choose, even from political motives, one of the interpretations which are legally and logically possible, they are perfectly within their rights. True, the United Nations Charter, like the Covenant of the League of Nations, authorizes no organ to give an authentic interpretation. But the practice of the organs has to be taken into consideration. A judgment whether the two resolutions in question were legal, means, therefore, to evaluate them against the corresponding norms of the Charter and the practice of the Security Council, established and consented to by the Members.

That the United States took the initiative in this case is clearly her right as a Member. That the United States bore the brunt in the military enforcement action of the United Nations is equally legal. As Great Britain's

[2] U.N. Charter, Art. 1, par. 1.

[3] See F. B. Schick. "Videant consules," in The Western Political Quarterly, Vol. III, No. 3 (September, 1950), pp. 311–325.

[4] H. Kelsen, The Law of the United Nations (London, 1950), pp. xiii ff.

unwillingness in 1931 has shown, no international enforcement action is possible in a concrete case, whatever the corresponding rules may be, if there is not a great Power able and willing to take the initiative.

1. Whether the Security Council's "primary" responsibility for the maintenance of international peace and security, is an exclusive one, to the exclusion of the other organs, need not be investigated here, as the resolutions in question have been taken by the Security Council.

2. In accordance with Article 39 of the United Nations Charter, the Security Council must, before taking enforcement measures, first determine the existence of any breach of the peace. This the resolution of June 25, 1950,[5] has done. It has determined, first of all, that the armed attack upon the Republic of Korea by forces from North Korea constitutes a breach of the peace. That the armed attack came from North Korea cannot be doubted in the light of the reports by the United Nations Commission on Korea. Nothing in the facts upholds the affirmation in the Soviet statement to the American Ambassador in Moscow of June 29, 1950,[6] that "the events taking place in Korea were provoked by an attack of forces of the South Korean authorities on border regions of North Korea," an affirmation also contained in the Polish note to the Secretary General of June 30, 1950.[7]

3. That the armed attack was directed against South Korea, which is not a Member of the United Nations is legally irrelevant. Contrary to the wording of Article 51 ("armed attack . . . against a Member of the United Nations"), Article 39 speaks of "any"breach of the peace.

4. That North Korea is not a Member of the United Nations is, under Article 39 and Article 2, paragraph 6, equally legally irrelevant.

5. The argument of the above-quoted Polish note that "the Government of the People's Democratic Republic of Korea was constituted which represents the entire Korean people and which is recognized by several countries, including the Republic of Poland," is legally untenable. The condition laid down by general international law for the coming into existence of a *de facto* government is the principle of effectivity. The government of North Korea has never exercised effective control over South Korea. It is equally settled that recognition cannot supply the lack of effectivity prescribed as a condition by general international law.

6. Whether North Korea is to be regarded as a state or not legally makes no difference, for the Security Council "may very well decide that a situation which has not the character of a conflict between states is a threat to international peace and take enforcement action against . . . a group of people involved in this situation."[8]

[5] U.N. Doc. S/1501.

[6] United States Policy in the Korean Crisis (Department of State Pub. 3922, Far Eastern Series 34, July 1950, Doc. 95), p. 64.

[7] U.N. Doc. S/1545.

[8] Kelsen, *op. cit.*, p. 731.

7. The argument that the events in Korea constituted only civil war and that, therefore, no intervention by the United Nations is permissible according to Article 2, paragraph 7, is, of course, legally untenable. For even a civil war, if it was one, may constitute a breach of the peace, and Article 2, paragraph 7, excepts from this prohibition the application of enforcement measures under Chapter VII.

8. The argument of the above-quoted Polish note that there were disputes between North and South Korea and that "the Korean people desires to achieve the unification of the whole Korean nation within one State," is not to the point. Apart from the fact that such unification, also strongly wanted by the United Nations, was made impossible only by the attitude of the Soviet Union, the settlement of disputes as such and the measures of enforcement for breach of the peace must be clearly distinguished. It is the difference between Chapters VI and VII. It is, within the Organization of American States, the difference between the Rio Treaty of 1947 and the Pact of Bogotá of 1948.[9] That is why Article 40 of the United Nations Charter states that "provisional measures shall be without prejudice to the rights, claims or position of the parties concerned."

9. The resolution of June 25 is, as to content, perfectly legal. Having determined a breach of the peace, the resolution takes provisional measures, in accordance with Article 40 of the Charter, by calling for the immediate cessation of hostilities. Such "call" is a decision and, therefore, binding. Article 40 further provides that "the Security Council shall duly take account of failure to comply with such provisional measures," and this the resolution of June 27, 1950,[10] has done.

10. Particularly sharp attacks against the legality of the two resolutions have been made from the procedural point of view. It must be admitted, and is generally agreed, that the Security Council could legally adopt these resolutions only because of the absence from those meetings of the Soviet representative, who otherwise would in all probability have vetoed them. But the problem is whether those resolutions, taken in this absence, are legal. The first problem is that of the quorum. It is correct that where, as in the Charter, there is no particular rule concerning the quorum, all members must be present in order to enable the organ to transact business. "However, in the practice of the Security Council, absence of a member, even of a permanent member, does not prevent this body from adopting a resolution." [11]

11. One of the principal arguments against the legality of the two resolutions, an argument made by the Soviet Union, Poland, and by the note of Czechoslovakia to the Secretary General of June 29, 1950,[12] is the representation of China in the Security Council by Dr. Tsiang. This argument is used in three forms: that Dr. Tsiang, being "merely the representative

[9] See Pact of Bogotá, Art. VIII.
[10] U.N. Doc. S/1511.
[11] Kelsen, *op. cit.*, pp. 244–245.
[12] U.N. Doc. S/1523.

of the Kuomintang group," has no authority to represent China, and that, therefore, the resolutions are illegal; that, for this reason, China as a permanent member of the Security Council, was not represented, so that there were two permanent members absent; finally, that the second resolution was not carried with seven votes to one (Yugoslavia), two abstentions (India, Egypt) and one absent (Soviet Union), but only with six votes; it was therefore, it is said, not a resolution, but only the personal and not binding expression of the opinion of six members of the Security Council. Now it must be admitted that the representation of China by the representative of a government which is reduced to Formosa is certainly paradoxical. But this is a consequence of the fact that recognition of an effective general *de facto* government is no legal duty. It is not more paradoxical than the recognition by the Executive, and hence, by the courts of this country, of the representative of the Kerenski government as the sole representative of Russia, years after that government had completely disappeared. It is further to be noted that only the Security Council decides on the seating or unseating of the representative of a member, and that no vote has been possible, up to now, to unseat the present representative of China. The whole problem is now under study in the 1950 session of the General Assembly. But in any case this argument of the Soviet Union must, in contemplation of law, be considered as waived by Mr. Malik's return to the Security Council. Did he preside over an "illegal" Council? Why did the Soviet delegate veto the re-election of the Secretary General, if anything which the Council would do is illegal anyway?

12. A further argument, strongly maintained by the Soviet Union, Poland and Czechoslovakia, is that the resolutions were illegal and invalid because of the absence of the Soviet Union. The United States[18] has argued legally that Article 28 of the Charter prescribes that "The Security Council shall be so organized as to be able to function continuously" and that, therefore, this "injunction is defeated if the absence of a representative of a permanent member is construed to have the effect of preventing all substantive action by the Council." But it could be argued from Article 28 that the members of the Security Council have a legal duty to be present at the meetings of the Council, that the absence constitutes a violation of Article 28. For, although, as Kelsen points out, the second sentence of Article 28, paragraph 1, that "Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization," is most unfortunately worded, yet it contains the words: "for this purpose," namely, to enable the Security Council to function continuously.

13. Finally, it is said that the absence of the Soviet Union prevented any legal resolution by the Security Council, as resolutions on non-procedural matters—and the resolutions in question were certainly of this character—must be adopted, in accordance with Article 27, paragraph 3, "by an af-

[18] Statement by the Department of State, June 30, 1950, *op. cit.*, note 6, pp. 61–63.

firmative vote of seven members including the concurring votes of the permanent members." This paragraph certainly can be interpreted in the sense that the concurring votes of *all* the permanent members are necessary; but, as Kelsen shows,[14] there is also a second interpretation legally possible, by *argumentum a contrario* from Articles 108, 109, where it is specifically prescribed that the two-thirds majority of the members must include *"all"* the permanent members of the Security Council. Under this second interpretation, Article 27, paragraph 3, would mean "including the votes of the permanent members, present and voting."

14. Indeed, it is this second interpretation which prevails in the practice of the Security Council. This is already shown in the accepted practice that abstention by a permanent member is not a veto. The Statement of the Department of State of June 30, 1950,[15] lists the principal cases of abstention by a permanent member and then continues: "The voluntary absence of a permanent member from the Security Council is clearly analogous to abstention." This is legally not tenable; for a precedent on abstention is only a precedent on abstention, not on absence. But there *is* a precedent on absence, when Mr. Gromyko walked for the first time out of of the Council meeting. The Security Council, at its 30th meeting, in the Iranian case adopted a resolution by nine votes in the absence of the delegate of the Soviet Union. And Mr. Gromyko did not attack the legality of this decision after his return.

The investigation of this problem leads, therefore, to the conclusion that the resolutions taken by the Security Council on June 25 and 27, 1950, were legal and valid, weighed, from a strictly legal point of view, in the light of the corresponding rules of the United Nations Charter and of the practice of the Security Council.

JOSEF L. KUNZ

PREVENTIVE WAR CRITICALLY CONSIDERED

Members of the American Society of International Law are by inference charged by the Constitution of their Society with doing all that is possible to promote the study and development of international law and the conduct of international affairs on the basis of law and justice. For this purpose it is not sufficient to study and advocate the development of the law itself or for its own sake. Much attention must be given, certainly much more than has been given in the past, to the second section of the mandate, partly because of its own importance and partly to provide the kind of international situation where the law can thrive and be effective—which in turn is calculated to promote peace and justice. Friends of international law cannot afford to evade even the most difficult and delicate issues in the field of international relations on the ground that they are purely political in character.

[14] Kelsen, *op. cit.*, pp. 239–241.

[15] *Supra*, note 13.