measures should be taken to bring about compliance. This is particularly significant in cases where the international decisions express principles or rules of law, rather than recommendations alone. It is my impression that the scholars of international law and organization have not adequately examined the diverse measures taken and the issues raised in respect of compliance and coercive enforcement. Our three speakers are well-qualified to point the way to such further studies and to provide guidelines and ideas. But, there are other areas of enforcement which we are going to cover as well.

Our first speaker is going to deal generally with enforcement and inducement for compliance under the UN Charter. We are fortunate to have Carl-August Fleischhauer, who is the Under-Secretary-General of the United Nations and the Legal Counsel. He has held that position since January 1983. In the last few weeks he has acquired the heaviest set of responsibilities any United Nations legal adviser has had. It would be fascinating to hear him tell us about all the matters he has to deal with, but that would take him away from his assigned subject. I do want to express our tremendous gratitude to him for joining us today when he has so many pressing things to do. He will be followed by Professor Frederic Kirgis, whom most of you know. Professor Kirgis has been prominent in the work of the Society, a member of the board of editors of the *American Journal of International Law* and a professor at Washington and Lee University School of Law. He will be followed by Professor Mary Ellen O'Connell, of the Indiana University School of Law. Professor Kirgis will talk about law, enforcement and compliance through the specialized agencies of the United Nations. Professor O'Connell will talk about law enforcement of UN decisions through national tribunals.

**REMARKS BY CARL-AUGUST FLEISCHHAUER***

I feel honored to have been invited to contribute to your panel on "Compliance and Enforcement in the United Nations System." My particular contribution will deal with "Enforcement and Inducing Compliance under the United Nations Charter."

The Charter of the United Nations creates rights and obligations. This follows already from its two basic provisions, Articles 1 and 2. Article 1 defines, in general but precise form, the purposes for which the Organization is set up. Based on the devastating experiences of the Second World War, they comprise the maintenance of international peace and security; the development of friendly relations among nations based on the principle of equal rights and self-determination of peoples; the achievement of international cooperation in solving international problems of an economic, social and humanitarian character, including the promotion and encouragement of respect for human rights; and the harmonization of the actions of nations in the attainment of these common ends.

The enumeration of the purposes of the Charter is followed, in Article 2, by a list of principles in accordance with which the Organization and its member states have to act in the pursuit of the purposes. These principles are again formulated in a broad but precise way and they constitute a veritable code of conduct. The principles include the recognition of the sovereign equality of states, the obligation to settle disputes peacefully, and the prohibition of the threat or use of force in international relations. The way in which the purposes and principles of the Charter are formulated indicates that it was meant to go much further than a

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mere declaration. This is confirmed by the fact that the authors of the Charter deliberately chose for it the form of a formal multilateral treaty rather than that of a declaration.

Moreover, the two articles on the purposes and principles are then followed by more than one hundred articles which create the fora and provide further ways through which the purposes are to be achieved and the principles realized. It is therefore only natural that there is also provision made for enforcement and inducement of compliance with the duties and obligations flowing from the Charter. Enforcement in the sternest and strictest sense is foreseen for the decisions of the Security Council when, under Chapter VII of the Charter, it takes action with respect to threats to the peace, breaches of the peace and acts of aggression. Other parts of the Charter expressly provide for means that can be applied in order to induce states to live up to their Charter obligations. In addition, states acting within the United Nations or in the execution of mandates conferred upon them by UN organs, have developed more and sometimes quite new ways and means of ensuring compliance with duties following from the Charter.

I propose now to address first the enforcement measures and then the inducement of compliance, as provided for in the Charter, and thereafter additional means of securing compliance with the Charter-related duties and obligations as developed by practice. Thereafter I would like to draw one or two conclusions. Needless to say, in doing so, I speak exclusively in my personal capacity.

Until very recently, the methods of enforcement provided for in Chapter VII of the Charter were looked upon as something largely theoretical. This was due to the fact that decisions under Chapter VII, like all other substantive decisions of the Council, presuppose not only that there is a majority of nine among the fifteen members of the Security Council supporting them, but also that there is no veto from one of the permanent members. Due to the Cold War, this prerequisite for action under Chapter VII has very seldom and then only to a limited extent been realized. Lately, however, enforcement under Chapter VII has moved to the forefront of public interest since the Gulf crisis was dealt with, in all its phases, under that Chapter.

I would like to identify several levels of enforcement methods under Chapter VII, all of which presuppose a determination by the Security Council of the existence of a breach of the peace, a threat to the peace, or an act of aggression. The most far-reaching competence vested in the Security Council under Chapter VII is to decide a collective military enforcement action or—as it is put in Article 42—"such action by air, sea, land forces as may be necessary to maintain or restore international peace and security." Article 42 provides that such action can take various forms and may include "demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations." If the Security Council decides to take such action, all members are under an obligation to accept and carry out its decisions. So far, the Security Council, although it has in three instances authorized the use of force after having determined the existence of a breach of the peace or a threat to the peace, has never taken enforcement action under Article 42.

The first instance relates to the complaint of aggression upon the Republic of Korea. By Resolution 82 (1950) of 25 June 1950, the Security Council determined that the armed attack on the Republic of Korea by forces from North Korea constituted a "breach of the peace" and recommended, only two days later, by Resolution 83 (1950) "that the Members of the United Nations furnish such assist-
ance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area."

The second example occurred when the Council, in 1966, in the Southern Rhodesia context, called upon the British Government "to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia."1

The third example are two resolutions adopted during the Gulf crisis in 1990, the first one being Resolution 665 (1990)2 which provided for the enforcement at sea of the trade embargo against Iraq and occupied Kuwait, if necessary by a limited use of force. The second resolution is, of course, the widely discussed Resolution 678 (1990)3, which authorized member states cooperating with the Government of Kuwait "to use all necessary means to uphold the implementation of resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." As in the Korea case, this resolution is in my view not a resolution adopted under Article 42 of the Charter, since it does not provide for a collective enforcement action by the United Nations, let alone under its command. It constitutes, however, the exercise of power of the Council under Chapter VII.

Chapter VII regulates, moreover, the use of measures not involving armed force to enforce decisions of the Security Council. Such measures comprise, above all, the imposition of economic sanctions. So far, this means has been resorted to only three times: the first time was the comprehensive trade embargo against the illegal minority regime in Southern Rhodesia between 1966 and 1979;4 the second time was the arms embargo against South Africa, imposed in 1977 and in force up to the present day.5 The third case relates to the sanctions resolutions adopted during the Gulf crisis, in particular Resolution 661 (1990)6 which provides for a full-fledged trade and financial embargo against Iraq and occupied Kuwait with the declared objective of compelling Iraq to withdraw immediately and unconditionally all its forces from Kuwait, to restore its sovereignty and territorial integrity and to restore the authority of the legitimate Government of Kuwait.

The system provided for in Chapter VII for the enforcement of decisions relating to breaches of the peace, threats to the peace or acts of aggression has no parallel in other parts of the Charter. From among the Charter provisions aiming at giving the Organization the means of inducing states to comply with their duties and obligations flowing from the Charter, I would like to cite first of all Article 6 of the Charter. That provision gives the General Assembly the possibility, upon recommendation of the Security Council, of expelling a member state from membership in the organization if it has been found to have "perpetually violated the Principles contained in the Charter."

Less far-reaching, but still dramatic, is the suspension of membership. Article 5 provides that a member of the United Nations "against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership." Suspension from membership is again to be decided upon by the General Assembly upon recommen-

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ation by the Council and it does not follow automatically from a decision by the Security Council that preventive or enforcement action against a member state is taken.

Neither Article 5 nor Article 6 has ever been used in the forty-five years of UN history. The general abstinence with regard to Articles 5 and 6 might be due to lack of agreement between the veto powers in the Security Council, or it might be a sign of political wisdom. Member states, however, seem to have not always been satisfied with it and this accounts for the repeated attempts by some member states, or groups of member states, to use the procedure of credentials verification as a back door to the suspension of membership rights. While that procedure is basically meant for the act of examining the formal correctness of the credentials submitted by delegations to the General Assembly, it has been used time and again to scrutinize and attack, through the credentials, the legality and the policies of the issuing government. A case in point is, of course, South Africa, the credentials of which have not been recognized since 1974; but, in that case, the reason given was the nonrepresentativity, owing to apartheid, of the issuing government, and therefore, there was still some link to the nature of the credentials. Other attempts involved the credentials of the Israeli delegation in the General Assembly but these were defeated on procedural grounds.

Another important provision aimed at inducing compliance with a Charter provision is Article 19 according to which “a Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years.” Unlike Articles 5 and 6, and contrary to a widespread public belief, this provision is constantly and rather automatically applied by the General Assembly. The difficulty with Article 19 is that, due to the time-span foreseen in the provision, in the case of default of a big contributor, the organization is likely to suffer enormously before the penalty can be applied. Also, as the financial crisis of 1962/65 has shown, when eventually France and the Soviet Union found themselves in an Article 19 situation, the political fallout of the mere threat of the application of Article 19 against permanent members of the Council can be devastating.

The normal way of inducement of compliance with legal obligations is, of course, to submit allegations of noncompliance to a court. The Charter has set up the International Court of Justice as its principal judicial organ and the Statute of the Court, which is an integral part of the Charter, vests it with the competence to decide on legal disputes between states. A weakness of the proceedings before the Court as a means of inducing compliance lies, however, in the well-known fact that the Statute, in deference to the principle of sovereignty, makes the competence of the Court dependent on its recognition by the individual states. On the other hand, Article 96 of the Charter gives the General Assembly and the Security Council the right to ask for advisory opinions from the Court “on any legal question” and other organs can be authorized to ask for such opinions on “legal questions arising within the scope of their activities.” Although such opinions are not legally binding, their weight is such that they must be regarded as an effective means of inducement to compliance under the Charter. Judgments of the Court in state-state proceedings are, however, binding between the parties. In case of failure of compliance with the duties incumbent upon a party under a judgment rendered by the Court, Article 94 of the Charter gives the Council the competence to recommend or decide on measures to be taken to give effect to the judgment. This is another Charter provision aimed at the inducement of compliance with a legal
obligation flowing from the Charter which so far has not been made use of in practice. Beyond the ICJ, a whole arsenal of means for pacific settlement of disputes provided for in Chapter VI of the Charter, and in particular Article 33, is meant to foster inducement of compliance especially with the principle of peaceful settlement. The difficulty with all these means is that they are voluntary in character and cannot, by themselves, be imposed on the parties to a dispute.

Finally, Chapter XII of the Charter on the International Trusteeship System provides for subtle means of inducement of compliance in the form of fact-finding and reporting procedures which put the states concerned under pressure.

As a means of inducement of compliance not foreseen in the Charter, but developed by practice, I would refer, first and foremost, to the various forms of UN peacekeeping which were all born out of the long nonfunctioning of the system of collective security foreseen in Chapter VII and are all based on the principle of consent. These UN practices comprise the deployment of observer missions which are to control the compliance with armistice agreements, agreements on troop withdrawal or reduction, as well as the sending of disengagement forces in order to prevent breaches or further breaches of the obligation to peacefully settle disputes. Some of these missions have been sent in order to supervise the undertakings given by individual states to carry out free elections or referenda. Not foreseen in the Charter, these activities have nevertheless become a hallmark for the United Nations.

Next, I would like to refer to an important innovation in international law which was developed in some of the major conventions concluded under the auspices of the Organization in the field of human rights. Here, UN practice developed the installation of supervisory bodies to which states party to the conventions regularly have to report, where they have to answer questions addressed to them and to which, in some cases, individuals can apply. The Human Rights Committee set up under the International Covenant on Civil and Political Rights is perhaps the best known of these supervisory bodies. Important as these innovations are, and much as they reduce the weight of the internal-affairs argument in the area of human rights, they do not go far enough, as we witness in these days in Kurdistan.

I would also like to refer to the dispute settlement clauses which are contained in virtually all conventions concluded under UN auspices as an example of the progressive development of an existing feature of international law in order to induce compliance with a Charter duty, namely, the peaceful settlement of disputes. These clauses are meant to overcome the voluntary element in the choice of the means of settlement. In the beginning, these clauses were drafted rather traditionally as straightforward ICJ clauses, but they were adapted over time to conditions prevailing in the international community which were not always favorable to straightforward reference to the ICJ. Part XV of the 1982 United Nations Convention on the Law of the Sea is a particularly illustrative example of the imaginative ways in which the UN community deals with dispute settlement clauses.

Finally, I would like to state that fact-finding missions and reporting duties are, independently from Chapter XII of the Charter, increasingly used in UN instruments as a means of controlling and inducing compliance with engagements undertaken.

This, of necessity brief, overview shows that member states have, in practice, accepted that there is enforcement and inducement of compliance under the Charter. They have accepted that the Charter is more than just a solemn declaration of principles. The overview shows also that the means of enforcement and
inducement to compliance have had an uneven fate in the practice of the Organization; some were resorted to, others not or only rarely. Some of the means of enforcement and inducement of compliance, as we sadly witness particularly in the field of human rights, are insufficiently developed. All in all, I have the impression that we are witnessing here a struggle of states with themselves; they realize that enforcement and inducement of compliance is necessary in order to achieve the principles and purposes of the Charter without which, as they realize, they cannot live peacefully together. At the same time, they are sovereignty-minded and they seek to serve their national egotism. I think that we will witness this struggle still for some time to come.

There is one final point which I wish, however, to make quite strongly in this context. The existence in law and in practice of enforcement and inducement of compliance does not make the United Nations a world government. The Organization was conceived as, and remains to this day, an intergovernmental organization where the decisions are made by member states and not by supranational bodies or international bureaucracy. Although the Security Council has some supranational characteristics when it acts under Chapter VII and takes decisions binding upon other states, even then it is the member states of the Council that act, and not some kind of world government body no longer dependent on instructions from capitals. This, however, puts a heavy burden and great responsibility on member states acting in the various UN bodies and, in particular, in the Security Council.

REMARKS BY FREDERIC L. KIRGIS, JR.*

The UN specialized agencies all have norms of one sort or another that are designed to govern the conduct of their member states. They have devised various ways to enforce their norms. Before I get to those, I need to say a little bit about the norms themselves.

Some of the norms are formal and binding on all members. They include rules about the functioning of the organization, usually found in the organization’s constituent instrument or sometimes in its rules of procedure. For example, the typical specialized agency, except the International Monetary Fund and the other financial agencies, has rules for payment of annual dues as established by the plenary organ. These rules are supported in most cases by formal sanctions as they are in the UN itself. Other formal operating rules may not have sanctions attached, but are nevertheless binding, such as rules about how decisions are to be made within the organization.

Some binding norms are not directed at the internal functions of an organization. In many cases, these norms are adopted by multilateral treaties under the auspices of the specialized agency. The International Labour Organisation (ILO) has been the most prolific, having adopted more than 170 labor conventions so far. When norms are created by treaty, of course, they bind only those states that become parties to the treaty—not necessarily all member states of the organization. But some constituent instruments do create substantive norms, as well as internal procedural ones, and these of course do bind all the members. The Chicago Convention, creating the International Civil Aviation Organization (ICAO), is an example; so is the International Monetary Fund Agreement.

Other norms are created by the agencies themselves, without requiring each member to accept them affirmatively in order to be bound. For example, the

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