THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON CERTAIN EXPENSES OF THE UNITED NATIONS: A CRITICAL ANALYSIS

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The International Court of Justice, on July 20, 1962 delivered an advisory opinion which represents a major contribution to the development of the "constitutional law" of the United Nations Charter.

The opinion can truly be classified as one of the milestones in the development of International Law and United Nations Law by the International Court. The Court, in its reasoning, did not limit itself to a narrow determination of the issue presented, but rather discussed broader organizational issues related to the functioning of the United Nations. Among the more important issues for which the Court's opinion has significant implications, are the following: the role of the General Assembly vis-a-vis the Security Council in the maintenance of international peace and security; the scope of the General Assembly's apportionment power; the effect of ex post facto acts of a United Nations organ; the role of the Secretary-General as an agent of the Security Council and the General Assembly; the significance of the Genex préparatoires, past practice of a U.N. organ, and above all, the principle of effectiveness in Charter interpretation. Finally, the opinion has direct political implications by reason of its implicit relationship to the sanction of Article 19 of the Charter.

PART I—BACKGROUND

In November, 1956, at the height of the Suez crisis, the General Assembly, in order to facilitate conditions of peace in the Middle East, authorized the creation of a United Nations Emergency Force (UNEF), to be composed of national units of various Member States, under United Nations command. 1 Subsequently, in July, 1960, with the outbreak of violence in the Congo, the Security Council authorized creation of a comparable force (ONUC) 2 to restore order in that strife-torn country. 3 Although both forces were to be composed


2. The letters ONUC are derived from the French Organisation des Nations Unies en Côte (CN, Organiser) in the Congo.

of military units, their purpose was "peace-keeping," to be carried out only with the consent of their respective host countries. Their status was defined as "more than an observer's corps, but in no way a military force. . . ." Expenses for both operations, although never expressly incorporated into the regular budget of the United Nations, were to be apportioned amongst the Member States in accordance with the regular scale of assessments.

Certain States, most notably, France, the Soviet Union and other members of the Soviet bloc, refused to pay their assessed share of the expenses of either the UNEF or ONUC operations, or both, on the grounds that the General Assembly lacked legal power to assess them for the expenses involved. By the end of 1961, this refusal to contribute had placed the United Nations in a serious financial crisis. The financial report issued at that time by the Secretariat indicated that the balance outstanding on UNEF amounted to $25 million, and for ONUC, to $34 million. This prompted the Secretary-General to warn the General Assembly that unless something was done about the situation, the Organization would be faced with imminent bankruptcy. Furthermore, he noted that the financial difficulties confronting the United Nations had become so serious as to threaten "the ability of the Organization to carry out its primary responsibilities and approved programmes."

In the face of this financial crisis, it was proposed that the Assembly seek "authoritative legal guidance as to obligations of Member States under the Charter of the United Nations," by referring the matter to the International Court of Justice for an advisory opinion. The Assembly agreed to seek such an opinion through the adoption of Resolution 1516 (XV). The resolution was accepted by the General Assembly by a vote of 30 in favor, 14 against, 12 abstentions, with 11 votes cast in abeyance. The purpose of the resolution was to obtain a legal opinion on the question of the status of peace-keeping operations and their financial implications. The Court was requested to provide an opinion on the questions raised by the resolution, and the question of the legality of the peace-keeping operations and their financial implications was referred to the Court for an opinion. The Court was also requested to address the issue of the financial implications of peace-keeping operations and the legal obligations of the Member States in this regard. The Court was requested to provide an opinion on the question of the status of peace-keeping operations and their financial implications. The Court was requested to address the issue of the financial implications of peace-keeping operations and the legal obligations of the Member States in this regard.
resolutions authorizing establishment of the peace-keeping operations concerned.\textsuperscript{18}

The Court commenced its opinion by dealing with a number of preliminary questions.

It had been argued that the Court should refuse to give an opinion, in accordance with the retrospective under Article 65 of its Statute, since the question submitted to it was "intertwined with political questions," and thus, not a suitable subject for judicial determination by the Court. To this, the Court replied, that although the interpretation of the United Nations Charter would undoubtedly have political significance, the question was a "concrete legal" one—the interpretation of Article 17, paragraph 2, of the Charter—and the Court "cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision." In support of this stand, the Court referred to earlier advisory opinions, and in particular, the Peace Treaties case (First Phase), in which it was stated that "the reply of the Court, by an 'organ of the United Nations,' represents its participation in the activities of the Organization, and, in principle, should not be refused."\textsuperscript{19}

The Court then considered the question of what material it could examine in reaching its conclusions. Discussion of this question was prompted by the General Assembly's rejection of a French amendment to the draft resolution requesting the Court's advisory opinion. The French amendment would have framed the request so as to include not merely the question of whether the given expenditures were included within the meaning of the term "expenses of the Organization," but also the further question of whether the resolutions authorizing the expenditures were "decided on in conformity with the Charter," as had been argued that Assembly rejection of the French amendment indicated complete opposition to an examination by the Court of the validity of the underlying Assembly resolutions.\textsuperscript{20} On the other hand, it was argued, that this very limitation of the scope of the Court's consideration, should lead the Court to refuse to give the opinion requested on the grounds that no satisfactory reply could be formulated by the Court on such a restricted jurisdictional basis.\textsuperscript{21} To these submissions, the Court replied that rejection of the French amendment could in no way affect the scope of the Court's investigation. "It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion or a question posed to it for an advisory opinion. In the course of its opinion, the Court did in fact examine the validity of the underlying resolutions in order to ascertain whether the given expenditures had been incurred in fulfillment of a United Nations purpose. The Court then proceeded to deal with the substantive issues and based its opinion upon the following considerations:

The term "expenses of the Organization" in the text of Article 17, paragraph 2, does not contain any implied limitation, restricting its operation to administrative or regular expenses. Rather the term must be read as referring to all expenses incurred in carrying out the purposes of the Organization. Since the expenditures in question were incurred for the purpose of maintaining international peace and security—man-

\textsuperscript{18} The majority opinion limited itself to determining whether the given expenditures were included within the meaning of the term "expenses of the Organization," and did not enter into a consideration of two further possible questions bearing upon an interpretation of Article 57(1) (a), the question of appropriateness by the General Assembly, and the meaning of the phrase "shall be borne by the Members." Opinion, p. 157-158.

\textsuperscript{19} The Court referred to its decision in the "domestic" subject of the obligations of Member States. The intention to define narrowly the question avoided was also reflected in the obligatory charge on the terms of the case (as noted by Judge Pictorius, Opinion, p. 190), from Financial Obligations of Members of the United Nations (the stipulated all documents submitted to the Court), i.e., Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter). However, it is clear that the obligation of Member States was meant to follow as a logical consequence, in agreement with the terms of the Charter provisions. This is confirmed by the Court's rulings in the conference that although the "proper course of the resolution containing the request refers to the General Assembly, the need for authoritative legal opinion on" the obligations of Member States . . . it must be assumed that in demanding an opinion of the General Assembly, it would be provided in such a manner as to make the requesting tribunal an opinion which the Court would give on the question, properly so opinion at 159. However, the separate opinion of Judge Pictorius in which he indicates that it is possible for certain expenditures by declared as "expenses of the Organization," without giving rise to a concomitant obligation on all Member to contribute, in other words, for permissive U.N. functions, such as temporary and emergency maintenance of the United Nations, p. 159-160, see also discussion of Judge-Korten on this pre-

\textsuperscript{19} Opinion, pp. 157-159. See also discussion of Judge Korten on this pre-

\textsuperscript{20} U.N. Gen. Ass. Off. Rec. 16th Sess., Amended, a. 62 (A/680) (1961). The report reads that the Court has held that: "The expenditures . . . declared by the General Assembly of the United Nations in accordance with the meaning of Article 17, paragraph 2, of the Charter, are 'expenses of the Organization.'"

\textsuperscript{21} See, for example, the remarks of the Canadian representatives to the General Assembly: "It would . . . be dangerous for this Assembly to lay down a large number of its powers, without an occasions of the Charter prescribing it. This is confirmed by the Court's rulings in the conference that although the "proper course of the resolution containing the request refers to the General Assembly, the need for authoritative legal opinion on" the obligations of Member States . . . it must be assumed that in demanding an opinion of the General Assembly, it would be provided in such a manner as to make the requesting tribunal an opinion which the Court would give on the question, properly so opinion at 159. However, the separate opinion of Judge Pictorius in which he indicates that it is possible for certain expenditures by declared as "expenses of the Organization," without giving rise to a concomitant obligation on all Member States to contribute, in other words, for permissive U.N. functions, such as temporary and emergency maintenance of the United Nations, p. 159-160, see also discussion of Judge-Korten on this pre-

\textsuperscript{22} Opinion, p. 157. Subsequently, the Romanasen representative opposed Assembly action on the advisory opinion on the grounds, inter alia, that the Court exceeded its authority by examining the validity of the Charter and the Court's decisions. Opinion, p. 198. See infra, p. 292. The Court did not deny the Court's ability to examine the validity of the French amendment. See infra, p. 292.
ferly a chief purpose of the Organization—they, therefore, constituted “expenses of the Organization.”

The court then proceeded to examine the general structure and scheme of the United Nations Charter, in order to determine the powers of the General Assembly to authorize expenditures for the operations in question. On the basis of this examination, the Court again concluded that no limitation restricting the budgetary powers of the General Assembly, was to be implied. The Court found that Article 11, paragraph 2, and Article 14, separately, gave full power to the General Assembly to establish peace-keeping operations with the consent of the States concerned. Furthermore, it rejected arguments based on Articles 24, 11(2) and 43, which sought to restrict the powers of the General Assembly in the sphere of the maintenance of international peace and security. The Court supported its conclusions by a detailed reference to the past practice of United Nations organs. In conclusion, therefore, it was held that General Assembly resolutions relevant to the operations of UNEF and ONUC were fully valid, and that expenditures for these operations constituted “expenses of the Organization” within the meaning of Article 17, paragraph 2.29

B. CONCURRING OPINIONS

Judge Spiropoulos30 concurred with the majority in a separate opinion, in which he expressed the view that the Court should not have considered the inherent validity of the resolutions of the General Assembly and the Security Council relating to the operations involved. Such an examination by the Court was barred by implication from General Assembly rejection of the French amendment. Nevertheless, the request could be answered affirmatively. The General Assembly resolutions authorizing the financing of UNEF and ONUC were concerned with fulfillment of United Nations purposes; they were validly adopted; and they, therefore, created obligations for the Members of the United Nations.

Judge Spender,31 in his separate opinion, likewise found it unnecessary to consider the validity of the resolutions. Once the General Assembly had authorized expenditures which clearly were incurred in furtherance of the purposes of the Organization, an obligation arose for all members to share in these expenses.32 Judge Spender also appended to his opinion, general observations on the interpretation of the Charter, with particular regard to the use of travaux préparatoires,

and the past practice of United Nations organs as criteria of Charter Interpretation.

Judge Fitzmaurice33 expressed reservations with respect to certain matters raised in the majority opinion. The topics discussed in his opinion include the subject of Ultra vires, the measure of reliance to be placed on past practice of United Nations organs, and the general scope of the budgetary power of the General Assembly. In his consideration of the latter topic, he analyzed the significance of the term “expenses,” and considered the possibility of an expenditure ranking as an “expense of the Organization,” without necessarily establishing an obligation on the part of Member States to contribute.34

Judge Morelli35 in his separate opinion, analyzed the possibility of invalidating a United Nations resolution. Such invalidation could take place only where the resolution involved represented the exercise of a manifest excess of authority, as, for example, where the required majority had not been obtained, or where the resolution was completely unrelated to United Nations purposes. Questions of competence, however, were not to be placed in that category, and therefore, each United Nations organ must be the judge of its own competence. For this reason, the validity of the resolutions of the General Assembly authorizing the expenditures in question must be upheld. Once the authorizing resolutions are held to be valid, the validity of the basic resolutions establishing ONUC and UNEF need not be considered. “They constitute only circumstances which the Assembly had to have regard to and satisfy itself as to the existence of” in adopting the resolutions authorizing the given expenditures.

C. DISSENTING OPINIONS

President Wislarski,36 in a short but powerful dissent, argued that the resolutions of the General Assembly authorizing and apportioning the expenses could not bind the Member States any more than the original resolutions upon which they were based. The original resolutions setting up UNEF and ONUC only had recommendatory effect, and were not binding on Member States voting against them. Therefore, the resolutions authorizing expenditures for these operations could have no more obligatory effect.

Judge Basdevant,37 in his dissent, considered that the Court should have refused to entertain the request, since as framed, it did not con-
tain "an exact statement of the question upon which an opinion is required," in accordance with Article 65, paragraph 2, of the Statute of the Court. The question did not state clearly whether the Court should determine the validity of past expenditures alone, or whether the inherent validity of the authorizing resolutions should also be ascertained. The reply to the latter question would have resulted in determination of the validity of future expenses as well. Nor were such significant questions as related to the apportionment of the expenses by the General Assembly, and the obligations of Member States to contribute, included within the request (albeit they may have been intended). Rather, the request, by asking whether "the expenditures authorized 'constituted' expenses of the Organization" was simply expressing a "form of words," and was not properly subject to determination by the Court.

Judge Moreno Quintana29 dissented on the ground that defeat of the French amendment in the General Assembly prevented the Court from considering the validity of the resolutions authorizing the expenditures, and thus seriously restricted the scope of the Court’s considerations and did not permit it conscientiously to accomplish its task in the present case. Judge Quintana in the course of his opinion also indicated that Article 17, paragraph 2, in his view, referred strictly to administrative expenses. Furthermore, he did not find it logical to distinguish between the use of armed forces for peace-keeping purposes only and for coercive action. The former could readily be converted to the latter with any new outbreak of hostilities. All expenses which related to the maintenance of peace and security should in his view devolve upon Members of the Security Council.29

Judge Koretsky30 dissented on the ground that the question presented to the Court was "political" rather than "legal," and was therefore unsuitable for determination by the Court. On the substantive issues involved, he held that the forces in question were not properly established, in accordance with the Charter provisions, specifically Article 43 of the Charter. Furthermore, Article 43 governs all matters relating to peace-keeping operations, including the financial aspects. The General Assembly, having the power only to recommend, could not, by virtue of apportionment, impose an obligation on all Member States to contribute.

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Judge Bustamante31 dissented because, in his view, the question of whether the expenditures involved constituted expenses of the Organization could only be answered by the Court after the resolutions, by virtue of which the expenses were incurred, were pronounced legal and valid by the competent organ of the United Nations. Since this definition had not been given, the Court could not commence to determine the question presented in the request.

PART III—ANALYSES OF THE OPINION


Over and above the specific reply which the Court gave to the question submitted for its consideration, the Court, by means of its general review of Charter provisions, has furnished legal confirmation of developments within the United Nations which have, in effect, increased the powers of the General Assembly vis-à-vis the Security Council. This is one of the outstanding elements which endow the opinion with far-reaching constitutional significance in the sphere of United Nations Charter Law. The Court, by means of its liberal interpretation, has been able to ascribe far greater powers to the General Assembly in the realm of the maintenance of international peace and security than would appear to have been the intention of the original framers of the Charter. This expansion of General Assembly authority goes far toward providing legal validity to the Uniting for Peace Resolution.

It will be remembered that that resolution asserted the "right and responsibility" of the General Assembly to assume a positive role in the maintenance of international peace and security. The experience of the Korean War had demonstrated that under normal circumstances, the Security Council, as a result of the veto, would be powerless to react to aggression, in a case where such aggression was tacitly (if not actively) supported by a major power. Thus, the Uniting for Peace Resolution, basing itself upon a broad interpretation of the Charter, sought to confirm the principle that the General Assembly retained residual authority in the field of international peace and security; and that in the event of aggression or threat of aggression, such residual authority both permitted and obligated the Assembly to...
to take collective measures, in the form of recommendations to Member States, even as to the employment of armed force. 28

At the time of its adoption, this resolution was bitterly attacked by members of the Soviet bloc, who asserted that this claim of authority by the Assembly in the field of peace and security, amounted to an illegal amendment of the Charter, since the latter specifically reserved such powers to the Security Council. 29 In the instant case, a similar line of reasoning was presented to the Court as grounds for invalidating the operations in question, and for denying legal obligation to contribute to the resultant expenses. 30 By rejecting these arguments in the present case (through a literal interpretation of Charter provisions) the Court has effectively enhanced the authority of the General Assembly in the field of international peace and security, and has thus lent added legal authority to the Uniting for Peace Resolution. 31

Such legal confirmation of the enhanced powers of the General Assembly resulted from the Court's delineation of the respective functions and powers of the Security Council and the General Assembly, within the framework of the Charter. This delineation led the Court to conclude that:

The provisions of the Charter which distribute functions and powers to the Security Council and the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security. 32

This conclusion was reached through a detailed study of the relevant provisions of the Charter.

Article 24

Article 24 of the Charter declares:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security. . .

On the basis of this article, it was argued that all matters relevant to the maintenance of international peace and security fell exclusively within the competence of the Security Council and that the General Assembly lacked power to undertake any activities in this sphere at all. 33

The Court, in rejecting this view, said:

The responsibility conferred on the Security Council by Article 24 is "primary," not exclusive. . . The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security. . . Thus: while it is the Security Council which exercises the exclusive power of order to take the direct measures of action, functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. 34

Judge Koretsky, however, in his dissenting opinion, presented a different interpretation of Article 24. Drawing on other official language versions of the Charter text, he contended that 'the word 'primary' is not used in Article 24 in the sense of an ordinal number (i.e., first, second, etc.), but . . . in the hierarchical sense. . . However, the interpretation adopted by the Court would seem to be the more reasonable one, in the light of the "plain meaning" of the English text. 35

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29 See remarks of Soviet representative in 2d S.C. Rep. 32d Sess., 317th meeting, 1st Comm. at 83 (1949). Ed., 306th meeting, p. 112. Upon the Committee's adoption of article 101, Russia declared that all records for which it had been broken, enumerating thirteen Charter articles which, in his opinion, had been violated. Ed., 306th meeting, p. 144.


31 The Romanian representative later argued before the General Assembly, that the Court's advisory opinion should be rejected, on the grounds, later on, that that opinion was invalid, being based implicitly on the illegal precedent of the Uniting for Peace Resolution, U.N. Doc. No. A/C. 5/53, 965, at 2-7 (1950).

32 Opinion, p. 164.

33 See remarks of Romanian representative, U.N. Gen. Asm. 9th Sess., 97th Meeting, 5th Comm. at 290 (1941); Written Statements of Czechoslovakia and of Portugal in Plenipot., pp. 177 & 225.

34 Opinion, p. 165.

35 Id. p. 174.

36 Gross, "Responsibilities of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice," 11 Int'l Org. 1, 2 (1957), accepting, in effect, the strength of Judge Koretsky's argument. The Court should have taken into consideration the interpretation of Article 24 in relation to the interpretation of Article 101. This raises a question of general treaty interpretation where there is a discrepancy between the various language versions. On the attitude of the Permanent Court of Justice with regard to this question, see Hudson, The Permanent Court of International Justice, 1920-1945, at 636-639 (1943). With respect to Charter Interpretation, it is the view of Goodrich & Hamburgh, Charter, that the Polish representative declared that all records for which it had been broken, enumerating thirteen Charter articles which, in his opinion, had been violated. Ed., 306th meeting, p. 144, that "countering that the English text of the Charter was the one . . . in the Permanent Court of Justice, as in the case of the "normal equality of all the official languages." See also Riesew & Muhler, A History of the United Nations Charter at 930 (1970), for a description of the discrepancies surrounding the translation of the English text with the other language versions. However, the Court made no reference to the problem of discrepancy between the various language versions, and it is quite possible that the majority did not agree with Judge Koretsky as to the existence of such a discrepancy in the instant case.
passing resolutions of a general nature—relatively to the maintenance of international peace and security—while barring it from dealing with specific situations, such as the UNEF or ONUC operations—for this would be tantamount to taking action.55 To this the court replied that the term “action” in Article 11, paragraph 2, referred to coercive or enforcement action only.56 The court went on to say:

The word “action” must mean such action as is solely within the province of the Security Council. The “action” which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely “Action with respect to threats to the peace, breaches of the peace, and acts of aggression.” If the word “action” in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly, in respect of a province of action directed toward the maintenance of international peace and security was reserved for the Security Council by force of Article 11, paragraph 2.57

The court understood this argument to imply that the last sentence in Article 11, paragraph 2, limited the General Assembly to

56 U.N. Charter Art. II, Par. 2, reads as follows: “The General Assembly may discuss any question relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a State which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations to the parties concerned with a view to securing a peaceful settlement of such disputes, or to other international organizations established for the purpose of peaceful settlement of disputes. In particular, the General Assembly may call upon any of the parties concerned to conform with such recommendations, or to refrain from such action as would frustrate the purpose of such recommendations.”
57 See U.S. House of Representatives, 86th Cong., 2d Sess., Hearings on the United Nations, S. Doc. No. 131, 86th Cong., 2d Sess., pp. 141-142; H.J. Res. 358, 85th Cong., 2d Sess.; and H.R. Res. 459, 85th Cong., 1st Sess., 3d. of Cong., 1st Sess., p. 465. As long ago as 1945, the General Assembly of the United Nations had approved a resolution authorizing the use of armed forces for the enforcement of Security Council resolutions. This was the resolution of the General Assembly adopted on April 23, 1945, which was incorporated into the United Nations Charter as Article 26. The resolution of the General Assembly was not to be considered as an interpretation of the Charter, but rather as a recommendation to member states to consider the implications of the Charter with respect to the use of armed forces. The United Nations Charter, Article 26, provides that the use of armed forces shall be subject to the control of the Security Council. The resolution of the General Assembly was adopted in response to the threat of aggression by Germany and Japan, which had been declared to be belligerent by the Security Council. The resolution was intended to provide a basis for the use of armed forces in the enforcement of Security Council resolutions, and was not intended to create a new or independent authority of the General Assembly to use armed forces. The resolution was not intended to be interpreted as an authorization to use armed forces in the absence of a Security Council resolution authorizing such action. The resolution was intended to be a statement of policy and a recommendation to member states to consider the implications of the Charter with respect to the use of armed forces. The resolution was not intended to be interpreted as an authorization to use armed forces in the absence of a Security Council resolution authorizing such action. The resolution was intended to be a statement of policy and a recommendation to member states to consider the implications of the Charter with respect to the use of armed forces.
eral Assembly was empowered by virtue of the first sentence in Article 11, paragraph 2, "to organize peace-keeping operations, at the request, or with the consent, of the States concerned," and that the argument which sought, by reference to the second sentence in that paragraph, to limit the budgetary authority of the General Assembly with respect to the maintenance of international peace and security, was unfounded. Thus, by applying a strict interpretation to the word "action" in the limitation imposed on the General Assembly in Article 11, paragraph 2, the Court expanded the General Assembly's scope of authority to cover all action in the field of international peace and security, save "coercive or enforcement action."

However, it should be noted, that this enhancement of General Assembly powers does not, of its own, provide complete endorsement of the Unitig for Peace Resolution. That resolution claimed the right of the General Assembly to recommend the use of armed force, if necessary. The opinion, although it accorded the Assembly a positive role in the sphere of international peace and security, only went so far as to validate "peace-keeping" operations, i.e., noncoercive action. It said nothing of the Assembly's power to recommend the use of armed force under different circumstances.

Notwithstanding this fact, the opinion indirectly affords some insight into the stand of the Court with regard to certain arguments that had previously been presented as grounds for validating the Unitig for Peace Resolution. In particular, the approach adopted by the Court in its discussion of General Assembly power to establish the UNEF operation would seem to cast some doubt on the strength of a Canadian argument put forward at the time of the adoption of the Unitig for Peace Resolution. In accordance with that argument, the General Assembly, although it could not "order enforcement action, was empowered to recommend it; the proviso in Article 11, paragraph 2, dealt not with the kind of action that was open to the General Assembly, but rather, with its ability to either order or recommend such action.

In sum, there is no warrant for it in the Charter. Any use of armed forces intended for whatever purpose implies by definition enforcement action. The case of Katanga is particularly revealing in this connection . . . When there has been dead and wounded, bombardments on both sides, when civilian populations have paid the price, when cease-fire and other military agreements have been negotiated between two belligerent groups, it is not easy to evade the analysis of the question of enforcement action by restricting the interpretation to a purely grammatical construction disconnected in previous decisions of the Court." 84, p. 364.

83 Id., p. 164.
84 Id., p. 165.

Article 43

This Article provides that Members shall negotiate agreements with the Security Council, on the initiative, what armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. This Member States will make available to the Security Council on its call. According to paragraph 2, of the Article:

Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
It was argued that such agreements were intended to include specifications concerning the allocation of costs of enforcement actions, and that it was exclusively within the province of the Security Council to arrange for meeting such expenses. Therefore, the General Assembly, notwithstanding its general budgetary powers, was, by force of Article 43, excluded from considering expenditures for the maintenance of international peace and security. In the words of the Czech Statement to the Court, "In adopting the respective resolutions concerning the establishment of... (UNEF) and... (ONUC) and in approving the method of their financing, the General Assembly acted ultra vires acts in disregard of the Imperative provisions of Chapter VII of the Charter stipulating that issues of this kind fall under the exclusive authority of the Security Council."19 The Court, however, dismissed this argument on the ground that Article 43, as part of Chapter VII of the Charter, was solely concerned with enforcement actions, and that neither UNEF nor ONUC fell within that category. The authority of the General Assembly to apportion the expenses of noncoercive operations was unaffected by Article 43.20

But the Court, in fact, went further than this, and declared that the suggested interpretation of Article 43, which would require the enrolment, pp. 178. See also the Soviet Memorandum and Oral statement, Plaa- dago, pp. 273, 402-404; and remarks of the Soviet representative, U.N. Gen. Ass. Off. Rec. 165, 10th Comm., 10th & 11th meetings at 286, 293 (1951); Pinary, 10th Mtrg, Dec. 20, 1961, pp. 1115, 1116. The Czech statement in support of its contention that enforcement costs would fall to be considered exclusively by the Security Council under Chapter VII of the Charter, was included in the report of Rapporteur M. Paul Benoyi at San Francisco, entitled, "Economic Problems of Enforcement Action," which seemingly did not understand the provisions of Article 43 which is declaratory of the Powers of the Security Council, and in approving the method of their financing, the General Assembly acted ultra vires acts in disregard of the Imperative provisions of Chapter VII of the Charter stipulating that issues of this kind fall under the exclusive authority of the Security Council. The Court, however, dismissed this argument that Article 43 as part of Chapter VII of the Charter, was solely concerned with enforcement actions, and that neither UNEF nor ONUC fell within that category. The authority of the General Assembly to apportion the expenses of noncoercive operations was unaffected by Article 43.20

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Security Council to negotiate in advance all relevant agreements, including those related to the financing of enforcement actions, was inherently mistaken, in that it was far too restrictive of Security Council discretion.21 The suggested interpretation of Article 43 was criticized on two grounds.22 Firstly, it was unreasonable to expect that all possible costs of an enforcement action could be anticipated by the Security Council, and arranged for in advance agreements, at a moment far removed from the time of action. Moreover, Article 50 of the Charter envisaged the possibility that in certain cases the application of Security Council measures would call for an adjustment of the economic burden falling on different States. If the Organization itself were to provide the relief determined upon, then the resultant financial assistance would become an expense of the Organization, subject to apportionment under Article 17, paragraph 2.23

Secondly, the Court maintained, to assure that all enforcement action must be covered by agreements concluded under Article 43 "would seem to exclude the possibility that the Security Council might act under some other Article of the Charter." It was not logical to conclude that "the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have

89 Plaadago, p. 178. See also the Soviet Memorandum and Oral statement. Plaadago, pp. 273, 402-404; and remarks of the Soviet representative, U.N. Gen. Ass. Off. Rec. 165, 10th Comm., 10th & 11th meetings at 286, 293 (1951); Pinary, 10th Mtrg. Dec. 20, 1961, pp. 1115, 1116. The Czech statement in support of its contention that enforcement costs would fall to be considered exclusively by the Security Council under Chapter VII of the Charter, was included in the report of Rapporteur M. Paul Benoyi at San Francisco, entitled, "Economic Problems of Enforcement Action," which seemingly did not understand the provisions of Article 43 which is declaratory of the Powers of the Security Council, and in approving the method of their financing, the General Assembly acted ultra vires acts in disregard of the Imperative provisions of Chapter VII of the Charter stipulating that issues of this kind fall under the exclusive authority of the Security Council. The Court, however, dismissed this argument that Article 43 as part of Chapter VII of the Charter, was solely concerned with enforcement actions, and that neither UNEF nor ONUC fell within that category. The authority of the General Assembly to apportion the expenses of noncoercive operations was unaffected by Article 43.20

90 Enrolment is, p. 166.

Security Council to negotiate in advance all relevant agreements, including those related to the financing of enforcement actions, was inherently mistaken, in that it was far too restrictive of Security Council discretion.21 The suggested interpretation of Article 43 was criticized on two grounds.22 Firstly, it was unreasonable to expect that all possible costs of an enforcement action could be anticipated by the Security Council, and arranged for in advance agreements, at a moment far removed from the time of action. Moreover, Article 50 of the Charter envisaged the possibility that in certain cases the application of Security Council measures would call for an adjustment of the economic burden falling on different States. If the Organization itself were to provide the relief determined upon, then the resultant financial assistance would become an expense of the Organization, subject to apportionment under Article 17, paragraph 2.23

Secondly, the Court maintained, to assure that all enforcement action must be covered by agreements concluded under Article 43 "would seem to exclude the possibility that the Security Council might act under some other Article of the Charter." It was not logical to conclude that "the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have

89 Plaadago, p. 178. See also the Soviet Memorandum and Oral statement. Plaadago, pp. 273, 402-404; and remarks of the Soviet representative, U.N. Gen. Ass. Off. Rec. 165, 10th Comm., 10th & 11th meetings at 286, 293 (1951); Pinary, 10th Mtrg. Dec. 20, 1961, pp. 1115, 1116. The Czech statement in support of its contention that enforcement costs would fall to be considered exclusively by the Security Council under Chapter VII of the Charter, was included in the report of Rapporteur M. Paul Benoyi at San Francisco, entitled, "Economic Problems of Enforcement Action," which seemingly did not understand the provisions of Article 43 which is declaratory of the Powers of the Security Council, and in approving the method of their financing, the General Assembly acted ultra vires acts in disregard of the Imperative provisions of Chapter VII of the Charter stipulating that issues of this kind fall under the exclusive authority of the Security Council. The Court, however, dismissed this argument that Article 43 as part of Chapter VII of the Charter, was solely concerned with enforcement actions, and that neither UNEF nor ONUC fell within that category. The authority of the General Assembly to apportion the expenses of noncoercive operations was unaffected by Article 43.20

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not been concluded.64 Furthermore, "Articles of Chapter VII of the Charter speak of "situations as well as disputes, and it must lie within the power of the Security Council to police a situation even though it does not resort to enforcement action against a State. The costs of actions which the Security Council is authorized to take constitute 'expenses of the Organization within the meaning of Article 17, paragraph 2.'66"

Fifthly the Court, in its interpretation of Article 43, has, on the one hand, confirmed a wide scope of discretionary action for the Security Council; and, on the other hand, has determined that all costs of Security Council action, enforcement or otherwise, which are not covered by prior agreement, and which are assumed by the Organization, are apportionable—not by the Security Council—but by the General Assembly, under Article 17, paragraph 2. In reaching the above conclusions, the Court did not rely upon preparatory acts and subsequent scholarly commentary, which pointed to the conclusion that enforcement costs were not expected to be apportionable by the Assembly under Article 17.68 Rather, the Court seems to have reached these conclusions solely on the basis of the express provisions of the Charter.

Article 14

The Court, in the course of its opinion, offered an observation which would seem to provide yet further possibilities for expanding the powers of the General Assembly. The Court remarked:

"The powers of the General Assembly stated in Article 14 are not made subject to the provisions of Article 11, but only of Article 12, Furthermore, as the Court has already noted, the word "measures" [contained in Article 14] implies some kind of action. So far as concerns the nature of the situations in the Middle East in 1956, they could be described as "the maintenance of international peace and security" [in the language of Article 11]. Since the resolutions of the General Assembly in question do not mention upon which the powers are based and the experience used in most of them might imply reference to either Article 14 or Article 11, it cannot be excluded that they were based upon the former rather than the latter Article."

64 Opinion, p. 167.
66 Ibid., p. 167.
68 See supra, p. 244, note 59.
68 Opinion, p. 167.
68 Article 14 reads as follows: "Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter."

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This interpretation of General Assembly authority reveals a major source of strength and vitality for expanding the scope of General Assembly powers. The Court has, in the quoted extract, effectively reinforced the authority of the General Assembly to recommend "action" as an appropriate "measure" for adjusting "any situation . . . which it deems likely to impair the general welfare or friendly relations among nations."66 Previously, this article had been thought of as a mild curative for situations in need of adjustment, especially in the realm of treaty revision.66 As one authority expressed it in 1949, "Article 14 represents a modest approach to the problem of 'peaceful change' in a dynamic world."67 The Court's interpretation of this article offers a new dimension to this "modest approach" for solving the world's problems.

However, the exact scope of Article 14 was not defined by the Court. At first glance, it would seem that this article may be seeking to reinforce its view that the General Assembly possesses power to initiate peace-keeping operations. Thus, regardless of how the term "action" in Article 11, paragraph 2, might be defined as to restrict the powers of the General Assembly, Article 14 supplied a fully independent basis for the action in question.

Another interpretation of the Court's remarks, however, may well deem the Court to be saying more than this.68 Seemingly, the Court felt that Article 14, since it is not subject to the proviso of Article 11, paragraph 2, adds in some degree to the authority of the General Assembly to recommend measures relevant to the maintenance of international peace and security. But in the light of the Court's interpretation of Article 11, paragraph 2, and more particularly, considering the narrow interpretation of the word "action" in that paragraph, it is clear that the General Assembly can recommend all measures short of coercive or enforcement action on the basis of Article 14.14 then, must be deemed to empower the General Assembly to undertake something even beyond strictly peace-keeping functions. What these additional "measures" were was not spelled out by the Court, since the present case did not call for a determination of the matter. In one can only speculate as to whether Article 14, thus interpreted, might not provide a further basis for rationalizing the United Nations Peace Resolution with the Charter. At the time that resolution was adopted,
numerous representatives sought to confirm its validity by reference to Article 14—but subsequent comment has strongly criticized this submission.63

It should be remembered, that the Court's reference to Article 14, is in any case dictum, since the Court had already reached its conclusion on the basis of Article 11. Nonetheless, it is a significant comment on the overall authority of the General Assembly.

As a supplementary note to this section, it should be pointed out that, although Article 11, paragraph 2 (first sentence), and Article 14 were referred to as two distinct legal bases for General Assembly establishment of peace-keeping operations, the Court did not seek to premise no legally binding effect upon any of these paragraph 2, established a means for imparting a mandatory character to General Assembly resolutions.

It had been generally assumed that resolutions of the General Assembly carried no more than recommendations of a political and moral, rather than a legal, nature. Thus, as one writer has expressed it, "It is clear to any student of the Charter that a resolution of the General Assembly . . . is no more than a recommendation, and that it can have no legally binding effect upon any nation."64 On this basis, it was argued in the Pleadings that since the original resolution establishing the peace-keeping operation bore no more than recommendatory authority, the resultant financial resolutions relating to that operation could command no greater than the original resolution. Thus, the Soviet Statement, after citing Article 10 of the Charter, as indicative of the recommendatory nature of General Assembly resolutions, declared, "The U.N. Member States themselves determine their attitude to these resolutions. All measures that follow from the General Assembly resolutions are also of only recommendatory nature and cannot establish legal obligations for the Member States of the Organization."65

The Court, however, did not accept these submissions, and in effect, declared that, regardless of the fact that the original General Assembly resolution initiating a certain move bore only recommendatory authority, the financial resolution related to that move, imposed, by virtue of Article 17, paragraph 2, a specific obligation on all Member States to share in the resultant expenses. Thus, a given Member State, although it may have voted against the original resolution, nonetheless, becomes obligated to share in the expenses incurred in the process of carrying out the resolution, once the General Assembly has apportioned those expenses amongst the Member States. The end result is that, although Member States cannot be obligated to participate directly in an action recommended by the General Assembly, they still remain obligated to participate indirectly by bearing a portion of the expenses resulting from such action.

This Interpretation of Article 17, paragraph 2, giving the Assembly

63 See Kelsen, Recent Trends in the Law of the United Nations, 972 (1961), in which he argues that Article 14 limits the General Assembly to recommending measures for the general adjustment of situations—whereas the Uniting for Peace resolution contemplated possible use of armed force.

64 In a rather ambiguous sentence, the Court said, "This power of the General Assembly (to organize peace-keeping operations) is a special power which in no way derogates from its general power under Article 11 or Article 14, except as limited by the last sentence of Article 11, paragraph 2." Opinion, pp. 164-65.


novel mandatory powers, was the basis of sharp criticism in a number of minority opinions.

President Winhardt remarked:

A serious legal objection to the validity of the General Assembly resolutions authorizing and appropriating the expenses may be briefly formulated as follows: these resolutions ignore the fact that the resolutions authorizing the operations have the character of recommendations. By levying contributions to meet the cost of the operations from all States in accordance with Article 17, paragraph 2, the resolutions of the General Assembly appear to disregard the fundamental difference between the decisions of the Security Council which are binding on all Member States (Chapter VII of the Charter) and recommendations which are not binding except on States which have accepted them.17

Judge Koretsky expressed a similar view in this manner:

The General Assembly may only recommend measures. Expenses which might arise from such recommendations should not lead to an obligatory apportionment of them among all Members of the United Nations. That would mean to convert a non-mandatory recommendation of the General Assembly into a mandatory decision; this would be to proceed against the Charter, against logic and even against common sense.18

The Court, however, found it both logical and legal. Actually, the majority opinion did not specifically deal with this problem. Rather, in the course of its general observations on the provisions of the Charter, separately and as a whole, the Court found that no inherent restriction limited the budgetary power of the General Assembly in dealing with matters such as those under consideration. By the general tenor of its opinion, it implied that the alternative would simply result in the complete undermining of the Organization.

This consideration was most forcefully expressed in the separate opinion of Judge Sperber. He declared:

... any apportionment... made by the General Assembly under Article 17 (2) of the Charter cannot legally be challenged by any Member State. Its decision may not be impugned and becomes binding upon each Member State. It would be anachronism to interpret the Charter as if each Member State were an independent interpreter of whether or not that particular expense was an expense of the Organization, within the meaning of Article 17 (2), and could, by its own interpretation, be free to refuse to comply with the decision of the General Assembly.19

18 Id., p. 287. (Emphasis in text.)
19 Id., p. 183. See, to the same effect, Oral Statement of the Netherlands representative: "If the financial obligation to pay contributions could be challenged by a Member State... the door would be open for endless amount of litigation and the Organization's powers would be diminished to the lowest degree."
A similar line of reasoning would seem to underlie the majority opinion, without it being expressly stated.

2. Enormous Potential of General Assembly Power as a Result of Article 17, Paragraph 2.

Objection to the Court's interpretation of Article 17, paragraph 2, was not limited to a difficulty in finding legal support for imposing a compulsory quality to what had originally convoluted as a mere recommendation. Several members of the Court found further fault in such an interpretation by virtue of the potentially unlimited power that Article 17, paragraph 2, would bestow on an international organization to obligate municipal governments and, in effect, act as a superstate.

Judge Moreno Quintana, in his dissenting opinion, remarked:

... if all the Member States of the United Nations were obliged to bear burdens over and above the responsibility to which they had committed themselves, then the financial power of the Organization would be substituted for the national powers of each of its Members. It is established that the United Nations is not a super-State, as the Court affirmed in its Advisory Opinion on the reparations for injuries suffered in the service of the United Nations.

Judge Tatsuna, in his dissenting opinion, also referred to the problem. He acceded the greatest respect to assertions which claimed that "to seek to make the financial decisions of the Assembly prevail over the will of the parliamentary authority of each State would amount to admitting the existence in the United Nations of a supra-national power which would be in conflict with the Charter (Article 2, paragraphs 1 and 2)."

This line of argument had been most forcefully presented by the French Government both in the General Assembly debates, and before the Court. In the Assembly debate, the French representative had declared, "the General Assembly has not the right, merely by voting on a budget to extend the competence of the United Nations; if it had the mere competence of the Assembly in budgetary matters would confer on that organ the powers of a world government."

The Written opinion, ..., that of membership in a club. In the latter, no question of sovereignty arises, but only the right of retention, as opposed to resignation, of membership.

25 This topic is intimately related to the subject of ultra vires, dealt with in the next section. Yet, the two topics are distinct. The present section considers the question of the absolute power of the General Assembly to impose financial obligations on Member States, in accordance with Article 17(2). The next section deals with the validity of ultra vires acts, of whatever nature, committed by any United Nations organ, and falling within the overall scope and functions of the Organization.

26 Opinion, p. 289.
27 Id., p. 302.

Statement of France to the Court, cited this remark, and developed the argument yet further: "The General Assembly would ... only have to give ... its resolutions a financial expression, in order for them to assume for States the same consequences as if the Assembly had endowed with unlimited competence." Such power would impose on Member States "the obligation to tax their citizens and induce their parliament to vote the credits fixed by the Assembly and the taxes needed to pay them... Such an abuse of the international personality of the United Nations would lead to its becoming a super-State, of which the Court spoke in 1949."

Once again, this argument was not specifically dealt with in the majority opinion. The separate opinions, the separate opinions, did broach the problem.

Judge Spender, after acknowledging the argument, briskly rejected it, on the ground that such considerations lay outside the ambit of the Court's jurisdiction. It was essentially a political problem: "Any political consequences which may flow from its [the Court's] decision is not a matter for its concern."

Judge Fitzmaurice, however, treated the matter with much more deference. He stated:

It was suggested ... that the mere fact that certain expenditures had been actually apportioned by the Assembly was conclusive as to their validity ... It amounts to saying that even if, on an objective and impartial assessment, given expenditures had in fact been invalid and the fact properly brought to the attention of the Assembly, they would nevertheless stand automatically validated by the act of the Assembly ... This is a view which I am unable to accept. It is too extreme. Moreover, I do not read the Opinion of the Court as going too far... for, if the Assembly had the power automatically to validate any expenditure, this would mean that, merely by deciding to spend money, the Assembly could, in practice, do almost anything, even something wholly outside its functions, or maybe those of the Organization as a whole. Member States would be bound to contribute, and accordingly a degree of power, if not unlimited, certainly much greater than ever contemplated in the framing of the Charter, would be placed in the hands of the Assembly.

For this reason, he concluded that Member States, in certain circumstances, must retain at least, as a last resort, the right of not paying. However, he would restrict such a discretion strictly to the occasion where the expenditures failed to produce even a prima facie presumption that they were valid and proper. "Only if the invalidity of the expenditure was apparent on the face of the matter, or too manifest to be
However, Judge Fitzmaurice himself recognizes the difficulties involved in the suggested categorization; the line between “essential” and “permissive” functions is not a “hard and fast” one, and is, more often than not, subject to “changing concepts,” since the non-essential of today may be the critically important of tomorrow. He concludes by acknowledging that the question of possible limitations on the application of Article 17, paragraph 2, has not been fully or satisfactorily resolved.

As indicated earlier, the majority opinion did not even deal with the question of such possible limitations. Implicitly then, Article 17, paragraph 2, would seem to impose a binding obligation on all Member States to participate in any General Assembly activity, and which are only means financially, once the requisite majority endorsed the financial apportionment. This might be the case, irrespective of whether the resolution dealt with a serious political problem or a relatively unimportant social or economic project, and irrespective even of the extent to which the resolution manifestly failed to conform with the powers of the General Assembly under the Charter.

In theory, then, the 89 “economically less developed” Member States of the General Assembly could (assuming they were united), impose any form of financial obligation they deemed fit on the 26 remaining “economically developed” States. Thus, for example, the General Assembly might initiate by resolution a vast program of relief or technical aid to under-developed areas. The resultant financial resolution could then impose binding obligation on all Member States to contribute in accordance with the regular scale of assessments. It is a fairly safe assumption that such a project, without the active consent of either East or West (and particularly the latter), would be still-born; and perhaps, most social and economic projects will, in the future, continue to be financed on a voluntary basis. On the other hand, it is not too difficult to envisage cases in which it would be in the interest of either East or West to have the United Nations promote a specific economic venture, with the resultant costs apportioned obligatorily on Member States. This could, perhaps, have been done with respect to the Congo technical and financial assistance programs—which, as is known, was supported by voluntary contributions, and received the active support of the

90 Id., p. 201.
91 Judge Fitzmaurice raised the question of whether a bare majority might not suffice to obligate Member States with respect to expenses dealt with outside the regular budget—since Article 1B only “budgetary questions,” not of “financial resolutions.” Opinion, p. 204, n.6.
92 Id., p. 212-33. In practice, this limitation may amount to an imposition of a purely procedural requirement. Obviously, if the requisite majority of the General Assembly sought to obligate all Member States to contribute financial aid in a given situation, when avoiding the restrictions of Article 1B, it need only formally adopt the desired scheme by means of two separate resolutions, one, to recommend a specific project, and the other, to compel payments by means of Article 17, paragraph 2.
93 Gros, op. cit., p. 25, also points out that the suggested categorization does not accurately reflect the Charter since Article 18 spells and 25 dealing with social and economic matters contain mandatory language, whereas Articles 10, 11 and 14 relating to the political activities of the General Assembly are couched in permissive terms.
94 Opinion, p. 215.
95 For a fuller discussion of this latter point, see section on ultra vires, p. 216, infra.
96 As a matter of fact, Judge Fitzmaurice’s restriction that such a program should have an obligatory status, due to its integral relationship with the general peace-keeping operations—without giving his view that economic assistance programs, in general, may perhaps not involve obligatory contributions. Opinion, p. 215.
West. Any attempt by the Assembly to apportion the expenses of this program would, naturally, have met with the same recalcitrance in the Soviet bloc, as was evidenced with regard to the apportionment of the costs of the peace-keeping operations of the United Nations. The attitude of the West with respect to future projects is itself open to doubt. Would, for example, the United States and other Members of the Western bloc, contribute with equanimity to United Nations projects involving Cuba in an advisory role in which the West is violently opposed—even were there such contributions to be made obligatory under Article 17, paragraph 2? Would those States then consider themselves bound by any such contributions in the same manner as the Russian Proposals?

The answer of the United States, delivered in the Oral Proceedings before the Court would seem to be an unequivocal "Yes." The United States representative declared, "The United Nations can pay for what it is empowered to do, and it is empowered to do a lot." But it seems extraordinary that the United Nations can be made to pay for the costs of such a scheme.

The Members of the General Assembly both to initiate the action and to make the necessary financial arrangements. If these Members can be made to do so, then the activities engaged in are immediately related to the express purposes of the United Nations; if they are approved in due course according to the regular procedures of one of its organs having competence over the subject-matter; if they do not contravene any prohibition of the Charter nor infringe the sovereign powers of individual States—if conditions such as these are satisfied, I can perceive no reason why the United Nations should not be able to levy assessments on a voluntary basis for the purposes of these activities.99

This statement, remarkable in its own right, as a concession of extraordinary power to an international body with resultant diminution of national sovereignty, appears even more surprising in the light of the United States attitude with respect to two relatively minor events (involving rather insignificant financial sums), in the rather recent past. The most recent event concerned a 1961 series of SUNFED agricultural projects, one of which was designated for Cuba. The United States protested against this designation, but was outvoted. In furnishing its voluntary contribution to the Food and Agricultural Organization, the United States stipulated that no part of its contribution should be used to promote the Cuban project.

98 Even the voluntary method of financing the Congo technical and financial assistance program was conditioned by the Soviet Union. See Oral Statement of U.S.S.R. representative, Pleadings, p. 401.
99 However, see supra, p. 251, n.90.
100 Pleadings, p. 424.
gations on the wealthier States, could well lead to a disruption of the Organization. It has, indeed, been said that "the power to tax is the power to destroy;" but where the power to tax belongs to a numerical majority of economically weak and under-developed States, while the numerical minority consists of the economically and politically powerful States—one may well question whether an attempt to exert such power might not destroy the Organization itself, rather than affect the sovereignty of the States concerned.

From a practical viewpoint, it is believed that the majority of States will exercise due caution in the use of their powers under Article 17, paragraph 2, and will not attempt to stretch such powers, or the patience of the major contributing States, to the breaking point—although the legal confirmation of extended powers may point to bolder moves in the future.

C. Ultra Vires

In the course of the Pleadings, it was suggested that the Court might give an affirmative answer to the question posed in the request, without entering into an examination of the substantive validity of the resolutions by which UNEF and ONUC had been created and financed. This the Court could do by considering the question an a purely technical basis. Expenditures had been made, and the Organization was indebted to third parties. Therefore, even if the original resolutions lacked validity (having been passed by an organ lacking competence), this internal irregularity could not free the Organization of the obligations incurred in its name towards third parties; and the membership remained obligated to contribute to the settlement of those debts.144 The question before the Court, which asked "do the expenditures constitute expenses of the Organization" called for an affirmative answer regardless of the status of the original resolution.

Although, as indicated above, the Court found the UNEF and ONUC operations to have been validly established, nonetheless it made reference to the doctrine of ultra vires, stating:

...when the Organization takes action which warrants the p. 350

that it was appropriate for the fulfillment of one of the stated pur-

poses of the United Nations, the presumption is that such action is not ultra vires the Organization.

If it is agreed that the action in question lies within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner contrary to the General Assembly's division of functions among the several organs which the Charter prescribes, one moves to the internal law, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expenses incurred was not an expense of the Organization. Both national and international law contemplate cases in which the body corporate or politic may be bound as to third parties, by an ultra vires act of an agent.145 This statement would seem to constitute a major innovation in the legal functioning of the United Nations. Moreover, it is a novel interpretation of the principle that ultra vires acts of an agent bind the principal. Normally the operation of this rule would be limited to instances where the agent creates liabilities for the principal toward a third party—each being a separate entity. In this instance, the agent involved is the General Assembly, and the third parties involved are mainly Member States; and it is alleged that if the General Assembly acts in an ultra vires manner, i.e., by taking action beyond the scope of its powers, this action of the General Assembly (i.e., the agent) will bind all the Members of the Organization (i.e., the principal—including any possible protesting minority) for liabilities incurred toward third parties (i.e., certain Member States), as if the incident had involved entirely separate entities as principal, agent and third party. This is truly a novel adaptation of the rule; for clearly here the question of obligations of Member States involves an internal rather than an external matter. It is one thing for the majority who voted for an action to be liable for the resultant expenses. It is another to obligate the entire membership for such expenses on the basis of an ultra vires doctrine. Furthermore, such a concept of ultra vires could radically affect the structure and scheme of the United Nations Charter.

Both these points are touched upon by Judge Fitzmaurice: The Court...has in the possibility that even if...the Assembly was not acting in conformity with the division of functions established by the Charter, this would not cause the resulting expenditures to cease being expenses of the Organization, provided that the related activities came within the functions of the Organization as a whole...It follows that internal irregularities would not affect liabilities definitely incurred by or on behalf of the Organization, in relation to third parties outside the Organization's internal membership. But what is really in question here is the relationship of the Member States inter se, and with the Organization as such, and there can be no doubt that, in
principle at least, expenditures incurred in excess of the powers of the expending body are invalid expenditures. The question is, are they invalid if they merely exceed the powers of the particular organ authorizing them, but not those of the Organization as a whole? But . . . the question of the financial obligations of Member States in relation to the Organization is a question moving on the internal plane; and if an instrument such as the Charter of the United Nations and the Act of the United Nations is most sharply raised in the dissenting opinion of President Winiarski. He declared:

"The fact that an organ of the United Nations is seeking to achieve one of those purposes [of the Charter] does not affect its ability to carry it into effect. The Charter, a multi-lateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action. The intention of those who drafted it was clearly to avoid the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council."

It would seem that President Winiarski stands on firm ground in questioning the correctness of automatic validation of General Assembly acts, merely because they accord with the general purposes of the Organization. It is one thing to validate acts of the General Assembly by applying a liberal interpretation to the Charter provisions; it is another to validate blatant ultra vires acts of this same organ by reference to general Charter purposes and principles.

The Court's pronouncement on the subject of ultra vires theologically imposes tremendous power to the General Assembly. In view of the fact that the purposes and principles of the United Nations Charter are very broadly stated, the General Assembly could seemingly initiate action in an unlimited range of situations. Although such action would initially bear only recommendatory authority, by introducing the force of Article 17, paragraph 2, and its mandatory effect on the assessment of expenses, the powers of the General Assembly

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188 1951 DP. 250. Cf. Chief Justice Marshall's comments in Marbury v. Madison. "To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" 1 Cranch 137, 1 L. Ed. 60 (1803).

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"hly in the sphere of international relations, could become practically limitless.

Thus, for instance, if the requisite majority of the General Assembly sought to deal with the Angola or South African situations by force, it could declare those situations to involve a breach of the peace, and recommend military action by Member States. This function in an exclusive manner to

without ever referring the matter to the Security Council, and without reference to the United Nations or Article 2, paragraph 7, protecting the principle of the domestic jurisdiction of Member States, would create no legal barrier, since the proviso in that Article, stipulate that the application of enforcement action by the Security Council under Article VII, is not to be prejudiced by the principle. Since the action is within the powers of the United Nations as a whole, the illegality of the General Assembly's action would be a matter of merely internal consequence. The resultant expenses, could, nevertheless, be apportioned amongst all Member States, creating legal obligations to contribute to the operations involved. Perhaps the foregoing illustration is an extreme one; nonetheless, the Court's views on the subject of ultra vires do point the way for a possible new self-assertion by the General Assembly of its own powers and authority.

D. Delegation of Authority to the Secretary-General by the Security Council and the General Assembly

The advisory opinion provided legal confirmation of the practice of the Security Council and the General Assembly of delegating tasks and responsibilities to the Secretary-General of the United Nations.

It will be remembered that the Soviet challenge to the validity of ONUC was premised, inter alia, on the charge that the Secretary-General had violated provisions of the Charter in his interpretation of security council directives. That charge was based, specifically, on the wording of Article 48, paragraph 1 of the Charter, which states:


191 The second basis for challenging the validity of ONUC, as noted earlier, was the fact that the General Assembly, rather than the Security Council, had undertaken to finance the ONUC operation. See supra, p. 123, n. 68.

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The action required to carry out the decisions of the Security Council (for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

From this Charter provision, the Soviet representative deduced, "it follows that the Security Council alone can determine which of the Members of the United Nations must participate in actions for maintaining international peace and security. The Charter does not invent any other body with such rights." Yet, in the case of ONUC, the Secretary-General himself had determined the list of States invited to participate in ONUC. "The Security Council has in fact been debarred from directing the United Nations Operations in the Congo. The United Nations Operations in the Congo have been directed by the Secretary-General alone."1111

The Court, however, rebutted this submission by referring to the text of Security Council resolutions authorizing the Secretary-General to take the necessary steps, and subsequent Council and Assembly resolutions (all unanimously adopted) commending him on his actions:

In the light of such a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General in implementing the [original] resolution . . . it is impossible to reach the conclusion that the operations in question usurped or impinged upon the prerogatives conferred by the Charter on the Security Council. The Charter does not forbid the Security Council to act through instruments of its own choice: under Article 29 it "may establish such subsidiary organs as it deems necessary for the performance of its functions"; under Article 98 it may entrust "other functions" to the Secretary-General.1112

The Court thus confirmed the right of the Security Council and the General Assembly to establish "subsidiary organs" which might be composed of elements outside the particular organ,1113 and could even be another principal organ of the United Nations, such as the Secretary-General. The significance of this aspect of the opinion lies in the fact that the Court endorsed the possibility of the Security Council or the General Assembly, utilizing the Secretary-General as an executive with discretionary powers, should the situation warrant it. This legal confirmation of a steady practice enhances the role that the Secretary-General may assume in the successful functioning of the Organization.

1111 Plaidsy, pp. 400-01.

1. The Principle of Effectiveness

One of the criteria by which treaties have traditionally been interpreted is the principle of effectiveness—which seeks to give effect to the treaty as a whole in the light of its underlying purposes.1114 This principle conflicts basically with another rule—that of restrictive interpretation of treaties—in accordance with which, it is not to be assumed that States have surrendered any sovereignty beyond what has been expressly conceded. However, tribunals have, in practice, generally preferred the former to the latter principle—and this has been particularly true of the practice of the Permanent Court of International Justice and its successor, the International Court of Justice.

The International Court has been notably consistent in applying the principle of effectiveness to treaties relating to international institutions and organizations.1115 Provisions of such treaties have been liberally interpreted so as to enable the organization involved to fulfil the basic purposes for which it was created. This application of the doctrine has been referred to as the principle of "institutional effectiveness." With regard to the Court’s interpretation of the United Nations Charter, Lauterpacht was led to remark that the Court has acted on the principle of effectiveness “on a scale so large as to bring its pronouncements on the subject within the category of judicial legislation.”1116

The most noteworthy example of the Court’s application of this principle was given in its advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations.1117 The dominant theme of that opinion is expressed in these terms: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."1118 This enabled the Court to determine that this "supreme type of international organization could not carry out the intention of its founders if it was devoid of international personality."1119

The Court reiterated this broad view of Charter interpretation in its advisory opinion on the Effects of Awards of Compensation Made

1114 For a lucid treatment of the principle of effectiveness in the interpretation of treaties see Lauterpacht, The Development of International Law by the International Court, Part IV (1958); See also Hudson, op. cit., pp. 650-52.
1115 Lauterpacht, op. cit., Chap. 18.
1116 Id., p. 275.
1118 Id., p. 182.
1119 Id., p. 179.
by the United Nations Administrative Tribunal, in which it declared that capacity to set up such an administrative tribunal "arises by necessary intention of the Charter." 120

In the present case, the Pleadings of those States seeking an affirmative reply, contained numerous references to the principle of effectiveness, as enunciated in the previous opinions of the International Court. Thus, in the words of the Danish Statement, "Consistent with its jurisprudence, the Court should interpret the provisions of the Charter in such a way as to ensure a maximum of effectiveness, with a view to the fullest possible realization of the aims and purposes to which Members of the United Nations are committed by the Charter. It is ... submitted that the circumstances of the present case are such as to justify once again the reliance upon that principle." 121

The same point was made by the Irish representative before the Court, "If the principle is acceptable ... it will be apparent that powers of the United Nations to effect the operations in the Middle East and the Congo must be implied of necessity." 122

The United States representative, in particular, placed great emphasis on the principle of effectiveness in his Oral Statement before the Court. He drew a parallel between judicial statements regarding interpretation of the United Nations Constitution, and the role of the International Court with respect to Charter interpretation, quoting the famous words of Chief Justice Marshall in McCulloch v. Maryland, "We must never forget, it is a constitution we are expounding." After citing the Court's own pronouncement in the Reparations case, he concluded with a stirring appeal.

The Court needs no reminder that it is dealing with a constitutive instrument, regulating, within its scope, important relations among men and nations, meant to endure for many years, designed to promote great ends and intended to grant powers adequate to serve the purposes for which it was established. The constitution we are expounding here must contain within it the authority to mount and support the actions by which, in the years since its adoption, the United Nations has successfully defended a precarious peace. 123

121 Pleadings, p. 164.
122 Id., p. 198. See also Written Statement of Ireland, Id., pp. 251-52; and Oral Statement of the Norwegian representative, Id., p. 362.
123 Id., p. 427. Cl. Oral Statement of Soviet representative, in which he contended that the principle of effectiveness was "nilities," "merely groundless and dangerous," and was generally opposed to the views expressed in the Danish Statement, p. 411. See also dissenting opinion of Judge Korsy, in which he voiced similar criticism of that principle, and concluded that it was synonymous with "the long age condemned formula: 'The ends justify the means.'" Opinion, p. 268.
generally, results in restrictions on national sovereignty—a development which humanity cannot view with misgivings in the light of present-day international needs. As Lauterpacht has said, "The Court has, as a rule, taken a critical and independent view of some of the notions which have been traditionally associated with the conception of sovereignty in the international sphere and which are inimical to the basic ideas of a society under the rule of law." An appreciation of the use made by the Court of the principle of effectiveness may enable us to understand the Court's position in this case as to the application of two other well-established elements in treaty interpretation—travaux préparatoires and subsequent conduct of the parties.

2. Travaux Préparatoires

The principle enunciated by both the Permanent Court of International Justice and the International Court of Justice has been that travaux préparatoires should be utilized as an instrument of treaty interpretation only in the elucidation of a doubtful text. Where, however, the text of a convention is sufficiently clear in itself, the rule has been that "there is no occasion to have regard to preparatory work."1217

Lauterpacht in his review of the practice of the two courts, concluded that in reality, both Courts, more often than not, have recourse to the travaux préparatoires in support of a determination reached on other bases as well.1218 Such recourse was, in his estimation, both proper and necessary, since in interpreting a treaty, a court should seek to unravel the true intention of the parties with respect to the text in question. Regarding the attitude of the International Court of Justice, Lauterpacht discerned two distinct phases. The first, up until 1951, was marked by a severe reluctance on the part of the Court to refer to the travaux préparatoires. Thus, for example, in the advisory opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, the Court found that the relevant words in their natural and ordinary meaning made sense in the context, and concluded that "it is not permissible, in this case, to resort to travaux préparatoires."1219 While not excluding the use of travaux préparatoires entirely, the Court, in this period, was not prepared to doubt "the plain meaning of words."

The second phase commenced in 1951 with the advisory opinion on the question of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and was followed by the case concerning Rights of Nationals of the United States of America in Morocco. In these and subsequent cases, the Court exhibited a reluctance to consider the "natural and ordinary meaning" sufficient on its own, as a basis for determination of the questions posed. Rather, the travaux préparatoires were "used apparently without qualifications and almost as a matter of course."1220

The present case would seem to indicate that the International Court has reverted to the attitude it had adopted in the first phase described by Lauterpacht, viz., a willingness to consider the text clear, and corresponding reluctance to resort to travaux préparatoires.

In discussing the Court's examination of Article 43,1221 it will be remembered, reference was made to a submission presented in the Pleadings by Czechoslovakia to the effect that the intention of the framers of the Charter, as revealed by UNICIO Documents, was that costs of enforcement action were not to come under the terms of Article 17, paragraph 2. This Czech submission was supported by reference to a Commentary on the Charter, which likewise interpreted the UNICIO Documents in this sense. As noted earlier, the Czech argument was countered by Australia, in its Written and Oral Statements. The intention of the participants at San Francisco regarding Article 43, was also the focus of another disagreement involving UNICIO Documents. The document in question concerned an Australian draft amendment to what eventually became Article 43, which would have barred election to the Security Council of any State which had not, within a certain period, concluded an agreement with the Security Council under Article 43. The draft amendment was eventually withdrawn by Australia. South Africa, in its Written statement, cited the episode as evidence that the Charter framers did not wish to invoke the operation of Article 19 (as derived from Article 17)'s expenses resulting from operations involving the use of armed forces."1222 The Australian Statements sought to rebut the South African argument, by citing evidence that the Australian proposal was designed to deal with failure to negotiate agreements, and not failure to meet financial obligations.1223 The Australian interpretation was supported by the United States.1224

The Pleadings thus reveal that both Czechoslovakia and South
Africa submitted evidence from UNCO Documents (the former, more substantial—the latter, less so) that the original intention behind the Charter was that enforcement costs should not be subjected to General Assembly apportionment under Article 17 (and that Article 19 should consequently also not be applicable). The Australian Government, in particular, submitted counterweighing evidence. Presumably then, an analysis of Article 43 would have warranted an examination of the relevant travaux préparatoires. The Court, however, proceeded to declare categorically (albeit it was dictum) that Article 43 could not be expected to cover all enforcement costs, and any such costs not covered by advance agreements would naturally fall to be apportioned by the General Assembly under Article 17, paragraph 2. Manifestly then, the Court was applying the basic principle that where the text of a convention is clear, no reference to travaux préparatoires is called for. In the instant case, the Court did not even consider it necessary to advert to the existence of relevant travaux préparatoires, and to attempt to rationalize them with its own interpretation. Apparently, the relevant provisions of the Charter (Articles 43, 49 and 50) were held to logically compel the Court's interpretation and thus no recourse to the travaux préparatoires was considered warranted.

The Court's stand with regard to travaux préparatoires in this case is in marked contrast to its attitude toward another element of treaty interpretation, namely, the subsequent practice of the parties.

3. Subsequent Practice

The Opinion referred frequently to the practice of United Nations organs for confirmation of the Court's own interpretation of the relevant Charter provisions. In so doing, the Court cited with approval its earlier stand in the advisory opinion on Competence of the General Assembly for the Admission of a State to the United Nations, in which it had utilized the consistent practice of United Nations organs as an element of Charter interpretation.108

In the present case the Court, in fact, relied even more heavily on this element of Charter interpretation, citing at each stage, the relevant United Nations practice. Thus, for example, in discussing Article 17, the Court remarked, "Actually, the practice of the Organization is entirely consistent with the plain meaning of the text."109

Again, in discussing Article 11, paragraph 2, the Court said, "The practice of the Organization throughout its history bears out the foregoing elucidation of the term 'action' in the last sentence of Article 11, paragraph 2."110 And, after concluding its review of UNEF finances, the Court stated, "The Court concludes that, from year to year, the expenses of UNEF have been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter."111

It is thus evident that the Court's utilization of subsequent practice as an element of interpretation in this case, contrasts significantly with its non-use of that other element of interpretation, travaux préparatoires. This difference in attitude is perhaps best explained in the light of the earlier discussion on institutional effectiveness. Fundamentally, the Court was seeking to interpret the Charter so as to give effect to the broad purposes to which it was dedicated. In fulfillment of this aim, the terms of the Charter were interpreted in accordance with their "natural and plain meaning," in the light of overriding Charter purposes. Travaux préparatoires which seemed to point to different conclusions were, therefore, quite understandably, disregarded; while the subsequent practice of the Organization, which represented, as it were, the practical application of Charter purposes, and which fully confirmed an interpretation which it had already arrived at, was, quite naturally, cited as corroborative evidence of the proper meaning to be attached to the Charter provisions.

Although the subsequent practice of parties to a treaty is an acknowledged element of treaty interpretation, nonetheless, the Court's heavy reliance on this criterion in Charter interpretation is open to question. Firstly, it should be remembered that what is involved here is the steady practice of United Nations' organs, not the repeated acts of individual parties to a treaty. Resolutions of the organ concerned (i.e., the practice) may not have been consistently adopted by unanimous vote (and in the case before the Court, some of the resolutions involved were the subject of vigorous protests on the part of a minority—including a number of great powers).112 Secondly, in a very real sense, reference to past practice can be very much begging of the question. The very fact that a United Nations organ has requested an advisory opinion on a certain matter, implies either that the practice it has adopted is not yet fully established, or that, even if established, is not fully determinative of the legal interpretation to be accorded the specific Charter provisions involved.

108 See, for example, on p. 174 of the Opinion, the Court's consideration of G.A. resolution 1089 (XI) of 21 December 1956. This resolution was adopted by a two-thirds majority, and in fact, encountered considerable difference of opinion. Cf. the views of Judge Koretsky on the same resolution, id., p. 162.

109 Id., p. 165.

110 Id., p. 172.

111 Id., p. 157.

112 Id., p. 159.
Judge Fitzmaurice raised the latter point in his separate opinion. He said:

I would have preferred to see less reliance on practice and more on ordinary reasoning. The argument drawn from practice, if taken too far, can be question-begging... (it is indeed the validity of some part of that practice which is put in issue by the present Request).

Judge Spender, in his separate opinion, denied the validity of utilizing practice of United Nations organs as a basis of Charter interpretation. In his view, "subsequent conduct may only provide a criterion of interpretation when the text is obscure." He entertained "considerable doubt whether practice of an organ of the United Nations has any probative value either as providing evidence of the intentions of the original Member States or otherwise a criterion of interpretation." Judge Spender maintained that the principle of subsequent conduct should be given a very restrictive operation in general treaty interpretation. In his view, it was only as a form of evidence, and applicable where the text of the treaty was obscure or ambiguous. Furthermore, subsequent conduct, either as a form of estoppel or of treaty interpretation, was essentially limited to the case of bilateral treaties, or multilateral treaties, where unanimity of conduct obtained. However, in the interpretation of the United Nations Charter, reference to subsequent conduct becomes extremely tenuous. The United Nations Charter was not simply a multilateral treaty in which the parties thereto were fixed and constant. Consequently, the practice of the parties at any given moment, could hardly provide a conclusive interpretation of the Charter; nor was it possible to equate the subsequent conduct of the parties of a treaty with the practice of an organ of the United Nations, which was merely the expression of a majority vote.

In conclusion, Judge Spender declared: It [the Charter] cannot be altered at the will of the majority of the Member States, no matter how often that will is expressed or asserted against a protesting minority and no matter how large be the majority of Member States which asserts its will in this manner or how small the minority... The majority has no power to extend, alter or disregard the Charter.

In effect, Judge Spender claimed that to rely on the practice of United Nations organs as a principle of Charter interpretation was to subvert the provisions of the Charter for the free-wheeling will of the majority. It meant giving sanction to the will of the majority, even if that will be manifestly ultra vires. More than that, it means establishing such an ultra vires act, as a binding precedent for subsequent Charter interpretation.

The Court observed that it did not share Judge Spender's views—either as to the applicability of subsequent conduct in general treaty interpretation, or as to the use of the practice of United Nations organs in Charter interpretation. Firstly, the Court was not prepared to circumscribe reference to subsequent conduct to instances where the text was obscure or ambiguous. In this respect, the Court was following a trend already evident in the decisions of the Permanent Court of International Justice, to accord greater weight in general treaty interpretation, to the subsequent conduct of the parties. The Harvard Research, in Article 19 of its Draft on the Law of Treaties, incorporated this principle of subsequent conduct, and in support, referred to the decisions of the Permanent Court of International Justice. McNair accords the principle of subsequent conduct the force of a judicial rule of treaty interpretation. Lauterpacht also points out the steady movement towards acceptance of subsequent practice as a general criterion of construction.

Secondly, and this is the more novel aspect of the Opinion, the majority was not prepared to acknowledge a distinction between the subsequent conduct of parties with respect to general treaty inter-

Nevertheless, it must be acknowledged that Judge Spender’s views on this subject are both sound and formidable. It may be that the Court, by such heavy reliance on past practice of United Nations organs, has effectively opened a new and flexible channel of Charter interpretation; it is to be hoped that this channel will not, in the future, become a floodgate.

The most balanced view presented on this subject was probably that of Judge Fitzmaurice, who indicated that although it is impossible to regard the practice of the United Nations as conclusive, "it cannot be less than very material; and even if a majority vote cannot in the formal sense bind the minority, it can, if consistently exercised in a particular way, suffice to establish a settled practice which a tribunal can usefully and properly take account of."

It may perhaps be argued that the majority opinion itself did not mean to go far beyond this standard—namely, of using subsequent practice primarily as confirmation of an interpretation independently arrived at.

F. Political Implications of the Opinion as Related to Article 19 of the Charter

On December 19, 1962, the General Assembly, by a Vote of 76 to 17, with 8 abstentions, adopted a resolution which declared that the Assembly "accepts the opinion of the Court on the question submitted to it." During the earlier debate in the Fifth Committee, a Jordanian amendment to the draft resolution had been rejected. That amendment would have had the General Assembly "take note of," rather than "accept," the Court’s opinion. Those States which had, all along, sought an affirmative reply from the Court vigorously opposed the Jordanian amendment. The significance of the proposed change was clearly understood. General Assembly acceptance of the advisory opinion would confirm that the Assembly had integrated the Court’s ruling into its own law, thereby invoking the sanction of Article 19, with respect for peace-keeping operations; and, if be it noted, the sanction of Article 19, as framed, applies automatically, without necessitating any express action on the part of

102 Opinion, p. 201.
103 G.A. Resolution 1184(A)(17).

the Assembly. However, were the Assembly merely to "take note" of the Court’s opinion, it might be argued that the Court’s ruling had not actually become part of United Nations law, as determined by the General Assembly. Therefore, it could always be contended, that Article 17, paragraph 2, did not include UNEF or ONUC expenses, and that Article 19 was, therefore, not applicable. The operation of Article 16, in such case, might require positive Assembly action at the time of default. However, since the Assembly did, in fact, "accept" the Court’s opinion, Article 19 should theoretically, apply to any State sufficiently in arrears on its assessed dues (including the assessed contributions to the peace-keeping operations).

It is common knowledge that the Soviet Union qualified for this "distinction" on January 1, 1964, and is therefore eligible for loss of vote at the next Assembly session. It also is widely known that numerous Member States are most reluctant to have the sanction of Article 19 applied against such a major power as the Soviet Union. A move of this sort, they fear, might well result in Soviet withdrawal from the United Nations—or, at the very least, in Soviet attempts at sabotaging the normal functioning of the Organization. In the view of these States, the problem of United Nations finances is essentially a political one, requiring a negotiated settlement. This stand is one that commands the support of eminent writers on the subject. Legal compulsion backed by judicial opinions, it is argued, will not resolve the financial crisis. Only a diplomatic solution can eliminate the present financial deficit, and ensure that the Organization will not be defunded by new financial crisis the next time it initiates some sort of peace-keeping operation.

Member States of the Western bloc, however, especially the

105 However, this generally accepted interpretation of Article 19 has not passed unchallenged. It was, in fact, the subject of a series of letters in May, 1963. At that time, the U.N. Secretary-General notified the President of the General Assembly (Zadulla Khan of Pakistan) that Haiti was two years in arrears. Zadulla Khan, in reply, indicated that he would have drawn "the attention of the Assembly to the consequences of Article 19" if the right of the Assembly to sanction Article 19 had been properly exercised. The latter never came to a boil, since Haiti made sufficient payment to reduce its arrears below the required minimum. Subsequently, the Soviet Union representative, in a letter to the Secretary-General, declared that the absence of the sanction of Article 19 could only be justified by a two-thirds majority of the General Assembly—since Article 18 required such a vote with regard to "the suspension of the rights and privileges of membership"—and could not operate automatically.

From the foregoing, it can be seen that even if Article 19 should be deemed to apply automatically an Assembly vote will be called for at one stage or another—either to sustain a ruling by the Assembly President or to institute the sanction.

On the procedure, majority rules, and other details of suspension under Article 19, see Hogue, op cit, pp 1277-82.

United States, are resolutely pressing for the application of Article 19. It may be asked: what considerations are prompting this forceful stand? The short answer might be: these States are firmly convinced the Soviet Union will constitute, rather than lose its vote in the Assembly. In other words, they are betting “the gamble will pay off.” More significantly, however, they are convinced that the alternative to forcing the issue could be at least as destructive of the Organization as Soviet withdrawal. The precedent established by inaction might well lead to a piecemeal disintegration of the Organization. Any State objecting to this or that item in the UN budget, would be free to withhold payment until the matter was adjusted to suit its demands, Article 19 would become a dead letter. To differentiate between major and minor expenses, between expenses included in the regular budget and those not so included, would be to deny the very essence of the Advisory Opinion, and would make the request and reply an exercising in futility. Moreover, to adopt the view that a major power should be accorded a special status, so that its contribution would be a matter of choice, while that of a smaller power a matter of obligation, would amount to an introduction of the veto into the General Assembly—and would result in a negation of the authority asserted by the Assembly in the Uniting for Peace Resolution. Vital organizational activities might well be paralyzed at critical moments; and the United Nations, by its inability to initiate action, might be condemned to the role of a diplomatic debating society.

As for negotiating on the subject of financing peace-keeping operations, such a course, in the eyes of the West, would be beset by great difficulties, precisely because the divergent stands reflect deep-seated differences with respect to international crises. By definition, the Soviet Union is a revolutionary State, eager to foment revolution wherever the opportunity presents itself. Consequently, peace-keeping operations, which are designed to restrain violence and strife—and which are by their very nature non-revolutionary, if not actually anti-revolutionary—will agitate Soviet interests. For the West, on the other hand, the establishment of peace-keeping operations by a neutral United Nations, is a crucial factor in preserving peace in areas of the world undergoing radical transformation from colonial to independent status. Such operations offer hope that the West will not itself become involved in minor conflicts in which it has no dedicated interest, and which could easily erupt into major conflagrations.

The dichotomy then, is clearly posed, with seemingly little room for a middle course. The opposing viewpoints were classified by Hamar Akroyd in this manner. “On the one hand,” he said, there are certain Members who “conceive of the Organization as a static conference machinery,” while, on the other side, are Members who “conceive of the Organization primarily as an instrument of Government through which they jointly . . . try to develop forms of executive action, undertaken on behalf of all Members, and aiming at forestalling conflicts and resolving them, by appropriate diplomatic or political means, in a spirit of objectivity and in implementation of the principles and purposes of the Charter.”

To all intents and purposes then, the lines are drawn between those seeking a maximalist interpretation of Charter provisions, and those desirous of a minimalist interpretation. However, upon further reflection this supposed clash of principle is not so rigid as one might imagine. In fact, the entire conflict has something of an air of artificiality, and even opportunism, about it. No one really doubts that if the peace-keeping operations in question had been so conducted as to promote, rather than hinder, Soviet interests, the “shoe would be on the other foot,” with the Soviet Union insisting on obligatory apportionments and the West (and especially the United States Congress) most reluctant to contribute. Thus, in a sense, the debate is not concerned with general principles of maximalist or minimalist interpretation, but rather, with the interpretation to be adopted with reference to the present peace-keeping operations conducted in the manner that they are. Should the General Assembly, for instance, seek to utilize the extensive powers accorded to it in the advisory opinion, so as to institute peacekeeping, or perhaps even enforcement action, in South Africa or Angola, it may be safely assumed, that the Western attitude would undergo a swift change. Similarly, were the General Assembly to attempt to finance expensive economic or social projects by mandatory assessments, there is little reason to doubt that the West would balk at contributing. In truth then, the crux of the problem is not the existence of General Assembly power, but the measure of control that major States should have in its application. The General Assembly, as presently constituted, allows for decisions to be made (resulting in
Minding apportionment) by States, a majority of whom have minimal financial involvement in the undertaking. Major States are asked to assume a disproportionate share of the financial burden without receiving, in return, an equivalent amount of authority in determining the nature and policy of the undertaking. So long as major States are denied a voice proportionate to the size of their financial contribution—so long will they continue to assert the right to withhold payments. This principle is as valid for the United States as it is for the Soviet Union. As one writer expressed it, "the U.N. does not have a financial crisis, but a political and constitutional crisis that should be dealt with as such."1135

The problem involved in this "constitutional crisis—viz., the serious disparity between contribution and control—has engaged the attention of writers for some time now. As early as 1955,1136 one writer highlighted the problem in these terms:

Majority decisions in the equillibrarian General Assembly are likely to be undemocratic in the sense that they do not represent a majority of the world's population, unrealistic in the sense that they do not reflect the greater portion of the world's real power, morally unprepossessing in the sense that they cannot be identified as expressions of the dominant will of a genuine community, and for all these reasons ineffectual and perhaps even dangerous.1137

The most favored solution is a system of weighted voting1138—whereby a State's voice would be adjusted so as to reflect more faithfully its share in the Organization's financial burden. Such an adjustment would not grant any one State a veto—but it would at least enable the major contributing States to exercise a greater measure of authority in guiding the activities of the Organization.

The difficulties of establishing a more equitable system of voting in the General Assembly are great, and the problem has become even more accentuated.

1135 Jackson, op. cit., p. 127. (Emphasis in text.)
1136 Since then, with the great influx of newly independent African States, the problem has become even more accentuated.
1137 Claude, Sandals into Flowhards, p. 120.
the role of the Secretariat in acting as an executive of the General Assembly or the Security Council under certain conditions.

The above conclusions, reached by means of a liberal interpretation of Charter provisions, accurately reflect the practical developments that have occurred in the functioning of the Organization. But the Court, in certain instances, seemed to go far beyond the sphere of present day operation of the Charter. In particular, the broad and sweeping nature of the authority conferred on the General Assembly to obligate Member States for all form of expenses, and the Court’s comments on the effect of an ad referendum act of a United Nations organ, open up serious possibilities of supplying judicial warrant for unruliness and unrestricted powers. This is especially so, in view of the undue respect accorded in the opinion to consistent practice of a United Nations organ as a fully valid basis of Charter interpretation.

The effect of the opinion is to grant power—without defining limitations. The consequences can, in a sense, be as dangerous for the future of the Organization, as the grant of too little power.

In the light of the foregoing, it must be acknowledged that the separate opinion of Judge Fitzmaurice deserves special attention. He recognizes the problem of unrestricted power, and seeks to imply certain limitations, thereby striking a necessary balance between too little and too much authority.

Ultimately, however, it must be recognized that the judicial pronouncement of the Court, as significant as it is, can not reasonably be expected to furnish a complete solution to the crisis facing the U.N. That crisis, in the final analysis, can only be resolved by a revision of the present voting system, so as to enable those bearing the financial burden to receive a proportionate voice in directing the policies of the Organization. Only thus will the Organization be enabled to successfully fulfill the purposes for which it was created.