THE FINANCING OF UNITED NATIONS PEACE-KEEPING OPERATIONS

By Linda Piccinini*

> The Secretariat finds itself in a difficult position. On one hand, it has to pursue "vigorously" the policy decided upon by the General Assembly and the Security Council. On the other hand, it is continuously fighting against the financial difficulties with which these decisions under present circumstances face the Organization. Of course, the Organization cannot have it both ways.[1] Will this Organization face the economic consequences of its own actions and how will it be done? Further, if it is not willing to face the financial consequences of its own decisions, is it then prepared to change its substantive policies? There is no third alternative.[2]
>
> Dag Hammersjkold

The question of who shall bear the financial responsibility for United Nations peace-keeping operations has been one of the most politically and legally difficult questions ever faced by the Organization in defining its functional role in world affairs. While the question of financing peace-keeping operations may appear to be in and of itself minor or merely a technical aspect of the overall function and operation of the Organization, in reality it represents one of the most complex matters ever dealt with by the U.N., with significant ramifications for the overall effectiveness of the Organization in responding to world conflicts. Indeed, the political and legal importance of the question is well evidenced by the fact that when the matter was presented to the International Court of Justice in 1962 for an advisory opinion, a record twenty-four States submitted written presentations (See Appendix No. I:1); and nine States appeared to orally argue the question, including the premier appearance of the Soviet Union before the Court (See Appendix No. I:2).

As John Stressinger noted:

> No more important question has come before the present International Court. Although it is difficult at the moment to estimate how far this Advisory Opinion may determine the authority or the effectiveness of the Organization in years to come, it can be claimed that it represents a landmark in the history and jurisprudence of the Court. . . .[3]

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1 U.N. Document A/c.5/843 (November 21, 1960), p. 8.

2 *Ibid.*, p. 1.

3 John G. Stoessinger and associates, *Financing the United Nations System* (Washington. D.C.: The Brookings Institute, 1964), p. 12.

It is the purpose of this paper to examine the legal aspects of the financing of peace-keping operations as they existed in the fiscal crisis of the 1960's. In doing this, a consideration of the historical and political development of those operations which precipitated the crisis—the United Nations' Emergency Force (UNEF) and the United Nations Force (ONUC) in the Congo—shall be undertaken to provide a perspective for the legal arguments involved. An analysis of the 1962 Advisory Opinion of the International Court of Justice shall be undertaken as will a consideration of the impact of the opinion on the immediate and long-run functioning of the United Nations.

The Importance of the Issue

The political and legal importance of the financial issue lies in the nature of the question itself. On its face, the question is as important as the financial solvency of the Organization for this is quite literally what was at issue in 1962—the debts of peace-keeping operations in the Middle East and the Congo which alone were greater than the entire anticipated budget of the U.N. Thus, for the sake of the solvency and continued operation of the other facets of the Organization, the question had to be decided.

In terms of the practical implications, unless the mounting debts were paid, a radical curtailment or termination of the particular operations or a reliance on a single state or group of states for financial support would be necessitated. Either alternative, however, is unacceptable and would greatly impair, if not totally destroy, the credibility and functioning of the Organization. The former is impractical given the crisis situation which necessitated the operation; a point which is ironically borne out by the hindsight of history in that war which erupted just months after U.N.E.F. was removed in 1966. The latter alternative entails an inevitable reliance by and affiliation of the U.N. with a particular ideological position, negating its usefulness as a global forum and making it a mere extension of a particular monied foreign policy. Thus, the significance of where the financial liability for these expenses lies is readily apparent. If peace-keeping expenses are "expenses of the Organization" within the context of Article 17 (2) (See Appendix No. I:3), then the liability is obligatory and must be paid by all member States in accordance with Article 17 (especially paragraph 2) and Article 19 (See Appendix No. 4). If such costs are not "expenses of the Organization," then the mounting debts of the operations would mandate some drastic action by the Organization to prevent its own fiscal imbalance.

It is interesting to note the often drawn comparison between the financial crisis of the U.N. and the failure of the League of Nations to secure effective financial support which contributed to the eventual collapse of the League. Implicit in this, of course, is the prediction of the eventual collapse of the U.N. because of a similar failure on its part to gain practical financial support for its operations (though unlike the U.N., there were no provisions in the Covenants of the League obligating contributions). However, an investigation of the respective U.N. and League situations reveals the existence of a basic and crucial difference which negates the contention of impending doom.

> The fiscal plight of the League was a symptom of a struggle over its very existence. Many States questioned the "raison d'etre" of the League; others had tolerated it; certainly, no state had wanted it to move beyond the concept of a "static" conference machinery. In that sense, the League's chronic weakness was the result of a struggle between nihilists and conservatives: those who would relegate it to the peripheries of their national policies. The former attitude had led to active hostility, the latter to political neglect and indifference.
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> The financial plight of the U.N. is not the expression of a struggle over the Organization's existence. All states have accepted its presence (as evidenced by thirty years of operation and the solvency of the regular U.N. budget).
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> The struggle is being waged between those who wish to maintain the U.N. as a "static conference machinery" and those who wish to give it increasing strength and executive authority. Viewed in this light, the financial crisis of the U.N. does not indicate that the Organization has fallen into political collapse but rather, that the membership has not yet been willing to ratify its rise to a higher plane of evolutionary development. . . . At its heart is not so much the problem of economic incapacity to pay the costs, but of the unwillingness to pay for politically controversial operations. . . .[4]

Therefore, the U.N.'s financial crisis is inherently different from that of the League. And it is precisely this inherent difference which further complicates the already complex financial question. For inherent in the question of who shall pay the cost of peace-keeping operations is the underlying question of what and who shall determine the proper role and scope of the U.N. in settling world conflicts.

While it might be argued that this issue underlies many U.N. disputes, it is particularly so here in that the peace-keeping function contains potentially the most direct challenge to individual state sovereignty in favor of the development of an international superstructure. The ability to collectively dispatch and maintain U.N. forces to areas of world conflict, while representing one of the prime goals of the Organization, is the major infringement on the individual actions of the States (as France and the Soviet Union noted), particularly the superpowers because of their global involvement and commitment. Thus, Leo Gross noted,

> The U.N. needs not to be reminded that its members are sovereign states and will not be commanded if they cannot be persuaded.[5]

The abrogation of State Sovereignty in the mandate of responsibility for the maintenance of international peace and security to the U.N. is in and of itself a politically and legally complex issue, complicated in this instance by the financial question. Associated with this are the political questions relating to the proper structural delineation of power among the Security Council, the General Assembly and the Secretary General in authorizing and controlling

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[4] *Ibid.*, pp. 293-294. See also, Norman J. Padelford, "Dept and Dilemma: the U.N. Crisis," *India Quarterly*, XIX (Oct.-Dec. 1963), p. 311-314.

[5] Leo Gross, "Expenses of the United Nations for Peace-Keeping Operations—The Advisory Opinion of the International Court of Justice," *International Organizations*, XVII (Winter 1963), p. 35.

peace-keeping operations (complicated further by the Uniting for Peace resolutions), the validity of the activities which accrue the expenses as mandated by the proper U.N. organ, and the ability to interpret the U.N. Charter and to bind other members to that interpretation. The nature of the issue itself and its inherent ramifications make the financial question one of the most important issues the Organization ever concerned itself with, for in actuality, the U.N. was concerning itself with its own future development and effectiveness. Before engaging in a consideration of the legal issues involved in the financial question, a general examination of the regular budgetary procedures and of the growth of U.N.E.F. and O.N.U.C. to critical financial proportions shall be undertaken to provide the basis from which many of the legal arguments used before the International Court of Justice were drawn.

The Regular Budget

One issue which was to form a basis for a majority of contentions before the International Court of Justice (abbreviated I.C.J.) was the proper definition of the regular budget of the U.N. and the relation of the peace-keeping expenses to those included as the expenses of the Organization within the regular budget. The regular budget of the U.N. is divided into eight broad categories: 1) sessions of the General Assembly and councils, 2) personnel (comprising approximately 60% of all budgetary expenditures), 3) building and equipment maintenance (15%), 4) special expenses, 5) technical programs, 6) special missions and related activities, 7) the Office of the U.N. High Commission on Refugees, and 8) the I.C.J. These expenses are considered predominantly household expenses of the Organization; that is, those costs needed to provide for the continued existence of the Organization. In addition, there is also the Working Capital Fund, established in 1946, on the recommendation of the Preparatory Commission as a fund "from which the Secretary General was authorized to advance 'such funds as may be necessary to finance budgetary appropriations pending receipt of contributions." This account was formed, at an initial level of $25 million and expanded to $40 million in 1963, to alleviate financial pressure on the Organization resulting from the lag between the billing of current accounts as certification of assessments and their collection (during which time the Organization was incurring "living expenses") and to provide funds for emergency operations (including peace-keeping operations) necessitated after the appropriations had been finalized.

Since 1947, the following resolution has been substantially adopted without dissent:

> *Resolved,* that if, as a result of a decision of the Security Council, commitments relating to the maintenance of peace and security should arise in an estimated total exceeding $10 million before the General Assembly is due to meet again, a special session shall be convened to consider the matter. Secretary General has authority to draw in the Working Capital Fund for expenses but is required to submit supplementary budget estimates to cover amounts so advanced.[6]

[6] Norman J. Padelford, "Financing Peace-Keeping—Politics and Crisis," *International Organizations,* XIX (Fall 1965), p. 415.

In 1952 some adverse votes were recorded but they can be attributed to the Korean conflict. In addition, the Secretary General has available to him the use of all monies in special funds and accounts held by him for unforeseen emergency situations. There is also an annual resultory appropriation for unforeseen and extraordinary expenditures authorizing the Secretary General to utilize up to $2 million without any prior approval (by the Advisory Committee for Administrative and Budgetary Questions) for any expense as long "as they relate to the maintenance of peace and security." Although it should be noted that the determination of what is an expense for the maintenance of peace and security is left to the Secretary General, it should also be noted that if additional funds are necessary, they can be secured by the Secretary General after consultation with the Advisory Committee. The funds for these expenses come primarily from member State assessments. (See Appendix No. 5), in accordance with Articles 17, 18, and 19 of the Charter.

Traditionally, the regular budget has always contained provisions for financing peace-keeping operations. The U.N. Truce Supervision Organization in Palestine (begun in 1949), the U.N. Conciliation Commission for Palestine (1949), the U.N. Military Observer Group in India and Pakistan (1950), the U.N. Representative for India (1950), the U.N. Commission for the Unification and Rehabilitation of Korea (1950), the U.N. Observer Group in Lebanon (1958), and the U.N. presence in Laos (1959) have all been normally financed through categories of the regular budget—specifically through the special expense and special mission and related activities categories (The 1950 Korean police action is not included here because the financing for the operation was fully voluntary and was at no time included as part of the regular budget of the U.N.).

Initially, these measures were individually funded from the Working Capital Fund and were integrated into the regular budget when the next budget was drawn. Thus, it has been the general practice of the Organization to include the cost of peace-keeping operations in the regular budget and to apportion them to the general membership in accordance, with Articles 17, 18 and 19. It should be noted here that the degree of expense of these operations was relatively small. For example, the cost of all the previously mentioned operations from 1948 through 1953 was $58 million, with the largest single expenditure occurring in 1958 at $6.79 million. In relation to the aggregate budget, the largest percentage of the regular budget devoted to peace-keeping expenditures occurred in 1949 as 12.6% of the total regular budget. It is interesting also to note that no strenuous objection was made to the inclusion of these expenses within the regular budget. Although this may be due in large measure to the relatively small scale and cost of the operations as well as the general political consensus for each mission. The Soviet Union alone in the late 50's had voiced an objection to this exclusionary practice, however, these objections were heard only in the Fifth Committe and never reached the plenary sessions or influenced the payment of the Soviet assessment and the States were remarkably conscientious in paying their assessments. Indeed, until the situation with U.N.E.F. and O.N.U.C. arose in the 1960's, the regular budget was remarkably solvent. However, considering the existence of

Article 19, perhaps this is not so remarkable or unexpected. Payments averaged, before the 16th Plenary Session, 98% of the assessed amounts, and at no time did the total amount of arrears ever exceed 15% of the entire budget.

Note should be made that the largest single debtor, accounting for ¾ of the total arrears debt, was China, as represented by Taiwan. This situation existed because China was assessed the 5th largest contribution because of her claim on the millions of people and resources of the mainland. Thus, Taiwan was paying for all of China from the resources of Taiwan. However, China's debt never totalled the sum for two years which would have subjected them to Article 19 sanctions.[7] The only significant problem regarding the regular budget has been the claim by some states—most notably the U.S.S.R. and at times the U.K.—that the budgets are growing too rapidly (from $50 million in the first years to $478 million in 1975). This question is not new to the international Organization. As Inis Claude noted,

> Before coming to grips with the political aspects of these problems, we would do well to note that the history of general international organization has been marked by the tendency of States to invest only the most meager of his resources and those grudgingly in such financial institutions. If poverty is a perennial virtue of international agencies, it is one born of necessity imposed tight-fisted States. In short, there is ample precedent for the World Organization's condition of financial stringency. *Viewed in historical perspective, the budget of the U.N. and the specific agencies have been more, not less, generously supported than might have been expected.* (Emphasis added)[8]

Thus, the regular budget, including these relatively small scale and politically inoffensive peace-keeping operations, is, of itself, stable and solvent.

> So far as the regular budget of the Organization is concerned, there is no major financial crisis, and none is in prospect. States evidently recognize the need for and the utility of a broad international forum and they are, by and large, willing and able to pay for it. It is a reasonably safe prediction that the routine administrative costs of the U.N. will gradually increase, and that member States will, while grumbling about this trend and attempting to check it, continue to make the necessary payments. . . .
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> Significant political issues arise only when the question is posed as to what, if anything, the U.N. is to do beyond the agreed minimum of providing a setting for multi-lateral or parliamentary diplomacy. . . . It is in connection with operational functions that major financial and political problems arise and become entangled. In the first place, the execution of programs in this (the political and security) field tend to be, by the normal standards of international organizations, extraordinarily explosive. In the second place, such programs tend to be politically contentious, partly but not entirely, because of their unusual financial implications.[9]

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7 *Op. Cit.*, Stoessinger, p. 85.
8 Inis L. Claude, Jr., "The Political Framework of the U.N. Financial Problems," *International Organizations*, XVII, (Autumn 1963), p. 832.
9 *Op. Cit.*, Stoessinger, pp. 6-7.

And this is exactly the category in which U.N.E.F. and O.N.U.C. can be placed. The arguments advanced by the respective countries should be noted in this analysis since many of these same arguments were presented before the I.C.J. In addition, it is interesting to note that all of the Justices voted according to the stands taken by their respective countries.

U.N.E.F.

The financial crisis over peace-keeping operations began first with the United Nations Emergency Force (U.N.E.F.) which was established by General Resolution 1000 (E.S.-I). U.N.E.F. represented the first action ever taken by the General Assembly based on the inability of the Security Council to act because of a veto blockage under the provisions of the Uniting for Peace Resolutions. The resolutory action was occasioned after British-French-Israeli-Egyptian action had forced the closing of the Suez Canal and was in response to a proposal by Canadian Lester Pearson, that peace be restored by the presence of a U.N. force.

U.N.E.F. was established on a vote of 64—0 with 12 abstentions on November 5, 1957. Egypt voted in favor and publicly said it would welcome the force into its territory to restore peace and security (and this became the basis for later legal contentions). Secretary General Hammerskjold then established a ten nation, 6,000 man unit, including an initial force from the Palestine Observer Group, specifically excluding troops from any of the major powers. However, it was apparent that the cost of such a unit, including the necessary support facilities would quickly deplete the Working Capital Fund and other special regular budget provisions (remembering that the budget for that year was set in September and extended for the entire fiscal year, and that this expense arose in November), and therefore required debt financing. Thus, on November 21, the Secretary General requested that a special account of $10 million be established to finance the Middle Eastern operation, and that the $10 million be raised on the basis of the 1957 regular budget apportionment schedule.

> I have . . . considered it imperative to seek the concurrence of the General Assembly in the following matters: first, the establishment of a United Nations Emergency Force Special Account; secondly, the establishment of this Account in an initial amount of $10 million; thirdly, the authorization of advances from the Working Capital Fund for the purpose of interim financing of the force; fourthly, authorization to establish necessary rules and procedures and to make necessary administrative arrangements for the purpose of ensuring effective financial administration and control of the Account so established.[10]

The device of a special account, it appears, was employed because of the time discrepancy involved in attempting to amend the regular budget to include the expense and urgent need to station U.N. forces immediately.

[10] G. A. O. R., 11th Session, 596th meeting, Paragraphs 223-5.

> I wish to make it . . . clear that while funds received and payments made with respect to the Force are to be considered outside the regular budget of the Organization, the operation is essentially a United Nations responsibility and the Special Account to be established must, therefore, be construed as coming within the meaning of Article 17 of the Charter. [11]

On November 26, the Secretary General's request was granted by the General Assembly on a 52-9-13 vote. On December 3, the Secretary General informed the General Assembly that all future expenses (and it was now apparent that operation would be lengthy and costly) of the U.N.E.F. would be apportioned by the 1957 scale, touching off one of the most heated debates in the history of the Organization. In what would prove to be the political and legal division throughout consideration of this matter, the U.S. and the Western States supported the Secretary General while the U.S.S.R., the Arab States, and Eastern Europe claimed that the cost of U.N.E.F. should be borne entirely by the British, French and Israeli aggressors.

The Latin States adopted a somewhat middle view favoring U.N.E.F. "as an institution which is necessary for peace and as a basis for the evolution of a permanent instrument of military action by the U.N.," recognizing "the political expediency and the principle of equity which made it necessary for all Member States to contribute to the maintenance of the force" but noting that they could "not regard, as either just or equitable, an assessment system according to which the financial contribution to be made by member states are in proportion to the regular admiinstrative budget of the U.N." The final result was the adoption of the Secretary General's proposal 62-8-7, establishing a degre of collective financial responsibility [Appendix IV].

However, political and economic reality (primarily the inability of the Latin American States to meet their obligations based either on general fiscal instability or a difficulty in currency conversion to U.S.—then the official U.N. currency) intervened and the U.S. agreed to bear one-half of all U.N.E.F. expenses over the initial $10 million. This had the effect of significantly lowering each State's assessed share by one-half. It is apparent that this was done to gain support of the Latin American States for the proposal.

As the annual costs of the operation mounted, the collective non-U.S. half of the expenses went largely unpaid (1957—$15 million, 1958—$25 million, 1959—$15 million, 1960—$20 million, 1961—$19 million, 1962—$19 million, 1963—$19 million, 1964—$17.5 million, and 1965—$17.5 million) [Appendix II].

Annually, one-third of the assessed cost went unpaid, and had to be met out of the limited Working Capital Fund. The new African States pleaded financial hardship. The Latin American States varied in their responses but one of the more commonly used arguments was that the U.N.E.F. was established by a resolution and therefore, no state was legally obligated to pay for it. The Soviet and Arab position remained unchanged—they felt that payment sould be made by the "aggressor states" only. Alone, the U.N. might have been able

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[11] *Ibid.*

to tolerate the U.N.E.F. expenditures without deep concern for its fiscal solvency, although it should be noted that in floor debates over the budget, several Latin States raised the legal question of the validity of the apportionment of an expense incurred by General Assembly resolution which in and of itself is only recommendatory in nature. But in addition to U.N.E.F., the U.N. became involved in the Congo, and the cost of this operation threatened to bring the Organization to its financial knees [Appendix III].

O.N.U.C.

The U.N. operation in the Congo was the result of a July 12, 1960 request of the President and Prime Minister of the Congo for military assistance in the wake of political instability left by the colonial Belgium withdrawl and the threatened intervention by the major powers. The Secretary General, in accordance with Article 99, brought the matter to the attention of the Security Council, which, on July 14, authorized the Secretary General,

> to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary until, through the efforts of the Congolese Government, with the technical assistance of the U.N., the National Security Forces may be able, in the opinion of the Government, to meet fully their tasks.[12]

The Secretary General again excluded all troops from major powers and assumed direct control of the operation. By July, there were 10,000 men in the Congo, 15,000 by August, 16,500 by September; and by the end of three months, and average of 20,000 troops from 29 states were involved costing $66.6 million in 1960 alone (July through December). Actually, only $48.5 million was the declared debt as the U.S. and the U.S.S.R. waived reimbursement of $10 and $15 million respectively for transportation charges.

O.N.U.C. was the largest undertaking ever attempted by the U.N., singularly and collectively. The plans for financing such a massive and politically controversial operation were the source of prolonged debate and deep discussion with the Assembly. Much of the controversy centered on the very nature of the Congo operation and on the personal leadership exercised by the Secretary General over the troops. Indeed, Russia charged the Security General with usurping the power of the Security Council in the operation.

Norman Padelford and others have suggested that had a different approach to the recruitment of troops, their deployment in the Congo, and the role of the Secretary General been used, France and quite possibly the U.S.S.R. might have well paid their assessment and at least tacitly supported the operation.[12] After long consideration, an African proposal, supported by the U.S., establishing an ad hoc account which specifically stipulated that O.N.U.C. costs were expenses of the Organization within the meaning of Article 17 and therefore assessable as binding legal obligations of the members subject to Article 19 was adopted 45-15-25 after a Polish amendment to

[12] *Op. Cit.*, Padelford, p. 454.

delete the legal obligation required by Articles 17 and 19 provisions was defeated 40-27-17 (budgetary matters require a ⅔ majority for approval rather than a simple majority).

Some of the other proposals considered included a Latin proposal that the members of the Security Council bear the major financial burden because of their ratification of the operation; a Communist bloc proposed that the U.N. should not bear the cost but that the Belgian colonizers, as "chief culprits", should be held responsible; and a proposal favored by the Secretariat that the expenses be included in the regular budget and apportioned by the 1960 assessment scale, under the auspices of Articles 17 and 19. In 1961, O.N.U.C. cost the U.N. $135 million—the largest single expense ever incurred by the Organization. While the U.S. advocated the doctrine of collective financial responsibilty, the U.S.S.R. (which had refused to pay its 1960 assessment) contested the payment on the grounds that O.N.U.C. was a Security Council action in the sense of Article 48 and that under Article 11, the Security Council, and not the General Assembly, should decide the question. The Secretary General's reply was that to wait for Security Council financing would lead to a total paralysis of the entire operation and thus negate the intent of the operation and of the U.N.

The Latin States and India raised a fundamental legal question when O.N.U.C. was termed a special expense involving armed forces under Article 42 and then deduced the nonapplicability of Article 19 from the San Francisco proceedings. The Secretary General denied the enforcement nature of the O.N.U.C. and termed it an internal security function within the borders of a member state. The General Assembly agreed to apportion the cost in accordance with the 1960 scale (54-15-33) although Article 17 was not referred to. Stoessinger noted that:

> Reductions were again granted to obtain the necessary ⅔ majority in the plenary Assembly. [13]

Apparently, the political manipulations concerning the cost of O.N.U.C. were intense in this U.S.—U.S.S.R. confrontation to the point of near bribery of smaller states. Additionally the obligatory nature of the expense was not referred to. Instead, the resolution described the costs as "extraordinary expenditures." The U.S.S.R. used this point before the I.C.J. in claiming that O.N.U.C. was not apportionable within the regular budget.

The 1962 resolution, when O.N.U.C. was incurring expenses of $10 million a month and only 24 states had paid their assessment, was even weaker than the preceeding resolutions, noting that O.N.U.C. expenses were essentially different from Article 17(2)'s expenses of the Organization in the regular budget to accomodate many of the smaller States who feared the consequences of Article 19. But by 1962, the U.N. was in serious financial difficulty primarily due to the ever-increasing cost of O.N.U.C. The default rate was over 70% with two permanent Security Council members—France and U.S.S.R.—withholding payment and a third—China—in default.

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[13] *Op. Cit.*, Stoessinger, p. 118.

Finally, after Acting Secretary General U Thant informed the Organization of the "impending bankruptcy," the possibility of forcing payments through Article 19 arose. In a heated floor debate, a question of the applicability of Article 19 devices because of characteristics of the O.N.U.C. and U.N.E.F. expenditures arose. Again, after prolonged consideration, it was decided by a 31-10-20 Fifth Committee vote and a 52-11-32 General Assembly vote to send the issue to the I.C.J. for an advisory opinion. The Soviet bloc States, however, stated in advance that they would not consider themselves bound by the opinion because the matter was political and therefore, outside the jurisdiction of the I.C.J. Thus, the stage was set for legal consideration of the question.

The I.C.J. Opinion

Pursuant to Article 65 (2) of the Statute of the I.C.J., on December 27, 1961, the following question was deposited at the Registry of the I.C.J.:

> Do the expenditures authorized in the General Assembly resolutions . . . relating to the U.N. operations in the Congo undertaken in pursuance of the Security Council resolutions . . . and General Assembly resolutions . . . and to the expenditures authorized in General Assembly resolutions . . . relating to the operations of the U.N.E.F. undertaken in pursuance of the General Assembly resolution . . . constitute "expenses of the Organization" within the meaning of Article 17(2) of the Charter of the U.N.? [14]

The question, as submitted to the Court, proved in itself to be a source of considerable controversy and dispute—evidencing some of the intense feelings surrounding the financial questions—the impliedly related question.

As stated, this question asks the I.C.J. to consider only the validity of the expenses of U.N.E.F. and O.N.U.C. as "expenses of the Organization" within the context of Article 17(2). It makes no mention of the validity of the underlying enabling resolutions pursuant to which the expenses were incurred. This very narrow phraseology, if literally construed in accordance with Article 65(2)'s "exact words" clause, would limit the scope of the question to exclude the validity of O.N.U.C. and U.N.E.F. per se, the Unity for Peace resolution impliedly, and the entire question of the scope of the respective organs in peace-keeping operations. This is considerably more narrow than the question proposed by France in the committee drafting sessions which would have asked the Court:

> If the expenditures authorized in General Assembly resolutions were decided in conformity with the provisions of the Charter and, if so, do they constitute expenses of the Organization within the meaning of Article 17(2) of the Charter of the U.N.? [15]

The effect of this rewording would have been to change the basis of the request to consider the validity of the resolutions authorizing U.N.E.F. and O.N.U.C. rather than just the nature of the resultant expenses of these operations.

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[14] Certain Expenses of the U.N.—Article 17(2) of the Charter, July 20, 1962, No. 262, p. 152-3.

[15] U.N. Document A/1.378, December 16, 1961, p. 34.

Although, in a broad sense, the questions are not unrelated, the General Assembly question was more limited in its scope and confined solely to the question of incurred expenses rather than the validity of the resolutions under which the expenses were incurred. The arguments against the French proposal in the U.N. dealt directly with this point. The Canadian representative argued that if such a constitutional decision was sought, it would set a dangerous precedent, sending the Assembly to the I.C.J. to decide the validity of every action questioned by a member state, placing an undue burden on the I.C.J. and negating the effectiveness of the Organization.[16]

On a practical basis, there would probably be no surer way to condemn the U.N. to a role of impotency in the midst of world crisis than to permit or sanction wholesale challenges to the Charter. It must be remembered that the I.C.J. is not the final authority on interpretation of the Charter. The attempts to so designate the I.C.J. were defeated at San Francisco. Thus, any attempt to prescribe to the I.C.J. by practice or resolution, sole power of interpretation, as the French wording might well have initiated would be an *ultra vires* extension of the Charter and therefore illegal. In addition, disagreement with the opinions of the I.C.J. or refusal of the General Assembly to adopt and affirm a controversial issue would most certainly injure the prestige of the I.C.J. (because of the political considerations) and seriously impair the viability of the I.C.J. as legal arbitrator. Indeed, the I.C.J. would undoubtedly have found itself steeped in intense political controversy rather than legal reasoning. In addition to the persuasive Canadian arguments, the Danish representative challenged the very concept of the French proposal on the grounds that:

> It would be meaningless to maintain than an action taken with the active support of an overwhelming majority of the member States in a situation of intense gravity should be considered meaningless.[17]

On the strength of arguments of this nature, the Assembly defeated the French proposal 12-20-61. However, the inherent question of the validity seemed to pervade the proceeding before the I.C.J. as every state favoring a negative decision referred to the matter in varying degrees [Appendix VI].

The I.C.J. took note of the question and declared that the specific wording of the question as put to the I.C.J. did not prevent the I.C.J. from deciding whether the disputed expenses were decided on in conformity with the Charter or from integrating Article 17(2) and the "expenses of the Organization"—the essence of the French proposal—in light of the provisions of the Charter as a whole. If the I.C.J. determined that these elements were relevant to their consideration of the matter, they declared that the defeated French proposal was valid and the specific question before them invalid. Thus, the I.C.J. moved to establish its own limits on the extent of the question it would consider in the interest of obtaining all material having a bearing on the matter. Many of the Justices, however, found this concession insignificant.

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16 *Op Cit.*, Stoessinger, p. 53.
17 G.A.O.R., 11th Session, 276th meeting, paragraph 18.

Justices Basdevant and Bustamente y Rivero based their dissents in large measure on the specific wording of the question. President Winaiski was critical of the wording of the issue as were Justices Fitzmaurice, Quintava and Spiropoulos. Part of their displeasure with the question may lie in the tremendous potential of legal questions which was put before the I.C.J.

In a court which often finds itself without cases to hear, the possibility of dealing with such complex legal issues as the overall right of apportionment (as President Winaiski favored), the obligatory nature of the debts incurred by the non-obligatory resolutions, the Unity for Peace resolution, etc. paled a more narrow consideration of expenses after the fact. The question as it was finally interpreted by the I.C.J. was narrow in scope and dealt with whether specified expenditures were expenses of the Organization without considring the question of the financial obligations of the Members.

The narrowness can be seen in the fact that originally the title of the case was *The Financial Obligations of the Members of the United Nations* and which changed to the more restricted *Certain Expenses of the U.N.*[18] The I.C.J. had defined the question to consider:

> a moment logically anterior to apportionment just as a question of apportionment would be anterior to a question of a Member's obligation to pay.[19]

The question of apportionment and of a Member's obligation to pay were considered logically anterior to the question of the fundamental "expense of the Organization." Logically, if an expense is an "expense of the Organization," then apportionment and the obligation to pay naturally follows (even though their own overall legality is questionable).

The decision by the I.C.J. to accept a narrow definition of the question reflects what many authorities consider to be a prime example of the beneficial use of judicial caution. Had the I.C.J. considered any of the broader questions, it might well have found itself undermining the viability of the U.N. instead of promoting what Justice Spender called the "institutional effectiveness" of the Organization and the Charter. Indeed, had the I.C.J. used a broad interpretation, it might well have found itself in the entanglement the Canadian delegate had warned against. Any consideration of the operations would, by its nature, have necessitated a strict interpretation of the validity of each case, therefore never fully resolving the issue but merely the solvency of the Organization's immediate instance of it.

The I.C.J. seemed to realize, too, the essentially political nature of the question it was being asked to decide. The fact that the General Assembly decision to send the matter to the I.C.J. was so divided and that the Soviet bloc had already stated its intention not to be bound by the decision seemed to weigh heavily with the I.C.J. who had to be concerned not only with the purely legal aspects of the question, but also with the political acceptability of its decision and the future prestige of such opinion of the I.C.J. Indeed, the I.C.J. seemed to well realize what R.Y. Jennings noted:

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[18] *Op Cit.*, Leo Gross, p. 12.

[19] "Certain Expenses of the U.N." (Article 17, Paragraph 2 of the U.N. Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, p. 151.

> Nor is a Court an altogether suitable body to pass upon some of these essentially political questions raised by the attack upon the basic resolution.[20]

The I.C.J. had to balance its concern for the viability of the Charter and the U.N. with the political reality of intruding too far into individual State sovereignty and negating the gradual development of both up to this point.

The decision of the Court to confine itself to the narrow issue at hand—to settle the pressing issue at hand rather than delve into the legal ramifications—was a wise one. As the U.N. balanced on the brink of financial ruin, it would have been almost meaningless to issue a more encompassing opinion which, because of its legal aspects, might be unacceptable to the majority of the states, thus damaging the prestige of the I.C.J., but also placing the U.N. no better off than when it first came to the I.C.J.

The I.C.J. began its opinion by considering the argument that there existed a limitation on the term "budget," in the form of an "administrative" and "operational" differentiation—as used in Article 17. If it had found that such a qualification did in fact exist, then it would have impliedly limited the budgetary authority of the General Assembly to that area only as the Soviet Union contended it should be.

The Justices began their consideration of the question by first defining the abstract concept of the "expenses of the Organization" referred to in Article 17, (2), and in the question presented to the Court by the General Assembly. Although the majority opinion noted that the definition was outside of the realm established by the narrow interpretation of the question by the Court, the Justices felt that without an explicit definition and criteria for the term, no definitive decision could be reached concerning the validity of the certain specified expenses of O.N.U.C. and U.N.E.F. as such "expenses of the Organization."

The question was also important because, in establishing the basic criteria of what constitutes an "expense of the Organization," the Court was effectively deciding the issue before it. If the Court chose to accept a broad, liberal definition which would include the cost of peace-keeping operations such as O.N.U.C. and U.N.E.F., the question would be effectively resolved in favor of the expenses as "expenses of the Organization"; and therefore as apportionable costs which the Member states must bear or face the consequences of Article 19.

If the Court decided on a narrow, strict interpretation, then limitations as to the purpose of the expense, the administration of the funds and the specific operation and the specific use of the funds might apply and become the crucial factor in determining the question before the Court. If the expenses of O.N.U.C. and U.N.E.F. exceeded these limiting criteria, then the expenses would not be "expenses of the Organization," and would not be the legal obligation of the Member states.

This later possible interpretation is the position advanced by those states seeking a negative reply to the question from the Court. The arguement,

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[20] *Op Cit.*, Leo Gross, p. 35.

advanced primarily by the Soviet Union and its bloc countries, was that there existed a limitation to the terms "expense" and "budget" as used in Article 17, paragraphs 1 and 2, respectively, which specifically excluded the cost of peace-keeping operations from the regular budget and the category of "expenses of the Organization," and therefore also from the influence of Articles 17 and 19 (apportionment and payment). Inherently, what was being contested here was the basic unlimited authority of the General Assembly over all matters of the budget. For from its exclusive control over the budget, and all financial matters concerning the Organization, the General Assembly could very well broaden the scope of its authority to one day encompass all those powers not explicitly denied it in the Charter. (A comparable situation can be seen in the development and expansion of the "power to regulate interstate commerce" clause in the U.S. Constitution. The development of the interpretation of the clause has expanded the scope of government intervention to include those items having even the most indirect link with interstate commerce.)

Thus by defining some limit on the budgetary authority of the General Assembly in restricting their power to only certain financial aspects—specifically, to the administrative budget of the UN and not to the operational budget which would include peace-keeping operations—the Soviet Union was attempting to retain to itself and to the Security Council (in which it had the right of veto to effectively block any motion) a vestage of control over the budget. Inherent, of course in the control of the budget is also the control over the scope of operations and the direction and degree of involvement of the Organization in world affairs.

In searching for an independent criteria to define the "expenses of the Organization," the Court relied heavily on the "plain meaning of the text" approach as opposed to the telescopic or intent-of-the-framers approach for interpretating the term. It should be noted that in the oral arguments, the States favoring an affirmative reply from the Court, namely: the United States, the United Kingdom, Australia, Canada, Denmark, Ireland, Italy, Japan, the Netherlands, and Norway all favored the use of this approach. Conversely, for the most part, those states which argued for the negative position: Portugal, Spain, Upper Volta and the Soviet bloc countries seemed to demonstrate a decided preference for the intent-of-the-framers approach. The reasoning behind these preferences can be readily deduced. On the plain face of the text, no restricting adjectives or phrases appear to limit the scope of Article 17. Thus, as the Court itself noted, ". . . since no qualification is expressed in the text of the Charter, it could be read in, only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole, or from some particular provision thereof which makes it unavoidable to do so in order to give effect to the Charter." [21] Thus a difficult burden of proof, as it were, in showing that such restrictions do exist is placed squarely on those advocating the negative position. Thus it was only natural

[21] *Op. Cit.*, Opinion, p. 159.

that the states advocating the negative position should seek to use another method to determine the meaning of the phrase.

While the matter of selecting an appropriate criteria for investigating the question itself might have become a source of controversy and conflict, the matter was allayed somewhat by the fact that states advocating both the affirmative and the negative positions relied on this textual plain meaning approach in varying degrees as they attempted to show the relation of Article 17 to the rest of the body of the Charter. Indeed, while Professor Tunkin of the Soviet Union used the framer's-intent as the basis for his argument on the administrative/operational limitation on Article 17, he used the textual approach to illustrate the inconsistencies (as he saw them) of Article 17's application to the peace-keeping operations in relation to the rest of the Charter. Indeed, Czechoslovakia utilized both the framer's-intent and the textual approaches in its arguments on the limitations to the terms of "expenses" and "budget."

While the selection of an interpretative basis can be viewed as a victory for the affirmative position, the reliance by the Court on mutually reinforcing supportative data obtained from an investigation into the *Travaux Preparatoires of the San Francisco Conference* and the *Dumbarton Oaks Meeting Reports,* from the actual practice of the United Nations, and from the overall intent of the Charter as a whole and as individual articles and provisions would seem to diminish the impact of the particular methodology selection. The use of a variety of approaches to develop supporting evidence for a conclusion would seem to void any possible objections to the practice of the Court in reaching its decision.

Additionally, the choice of the reliance on the textual approach seems well-founded, not only because of the general usage of this approach by a large number of the States involved, but also because of the basic nature of the question involved. On an interpretation of the U.N. Charter, it seems only logical and reasonable that the Court should consider the textual meaning of the words in their particular context. This is precisely what the textual approach does. It provides a clear, distinct, face value determination of what the Charter mandates. Investigation into the San Francisco Conference records shows that this aproach is perhaps not altogether sufficient for this particular case, in that the direct intent and reasoning of the framers of the Charter is not always evident and is often subject to individual interpretation. For example, at one point in its oral arguements, the Soviet Union supported its claim of an administrative limitation on Article 17's "budget" and "expense" terms by citing the fact that at the San Francisco Conference, the original order of the article's paragraphs concerning apportionment of expenses and the general budgetary expenses of the Organization had been inverted, placing the budgetary paragraph before the apportionment clause. The positional change of these clauses, the Soviet Union argued, represented a realization by the framers that only administrative costs should be apportioned and that consequently, expenses related to the operational activities of the Organization should be financed differently.[22] The Soviet contention was

[22] Oral proceedings, Prof. Tunkin, USSR, p. 321.

disputed by the United States who argued that the reversal was merely for the sake of organization within the structure of the article.[23]

An investigation into the *Travaux Preparatoires* to trace the development of the Article 17 reveals only that the change did occur. No reasons for the reversal were given by the committee.[24] Thus, primary reliance on the framer's-intent for the definition of the "expense of the Organization" might well have proven somewhat ambiguous, as might a reliance on the intent of the general document. While the textual approach is also open to interpretative discrepancies, the extent to which a contradiction can exist is limited by the explicit words themselves. Of course, the fact that the Court sought and found supportative evidence for their textual based conclusions by the other investigative methods negates many of the inherent ambiguities and makes the reliance on the textual approach and the decision itself all the stronger.

The decision to utilize the face value approach appears well founded and prudent on the part of the Court.

Employing this approach, the Court established that:

> It would be possible to begin with a general proposition to the effect that the "expenses" of any Organization are the amounts paid out to defray the costs of carrying out its purposes, in this case, the political, economic, social, humanitarian and other purposes of the United Nations . . . Or, it might simply be said that the "expenses" of an Organization are those which are provided for in its budget.[25]

From this initial point, the Court considered the previously alluded to contention that there existed a qualification of "administrative" to the words "expense" and "budget" as they appear in Article 17, paragraphs 1 and 2, respectively. The position that such a qualification did in fact exist was based in part on a treatise, *A Commentary on the Charter of the United Nations* (2nd Ed., London, 1949) of L. M. Goodrich and Edvard Hambro which stated that the expenses referred to in Article 17 (2) do not include the costs of enforcement actions and operations.[26] Both the Portugese and Czech positions relied on this treatise and developed from it a rationale for the differentiation of the expenses of the Organization.

> The Czechoslovak Government sought to establish the existence of a broad distinction between the financing of "normal" expenditures and the financing of "non-normal" expenditures. "Non-normal" expenditures, in that Government's view would always include expenditures connected with the establishment and support of armed forces employed in actions for the maintenance or the restoration of peace. The Czechoslovak Government saw in the seperate reports and debates at San Francisco on the drafting of Articles 17 and 49 justification for the distinction between "normal" and "non-normal" expenditures, and, in respect of U.N.E.F. and O.N.U.C. expenditures,

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[23] *Ibid.*, Abram Chayes, p. 174.
[24] *Travaux Preparatories*, Summary Report of the Seventh Meeting of Committee II/2, May 1945, p. 1342.
[25] *Op. Cit.*, Opinion, p. 158.
[26] Rosalyn Higgins, *United Nations Peace Keeping 1946-1967* Vol 1, *The Middle East*, (London: Oxford University Press, 1969).

> claimed that the primary responsibility for contribution must rest with the "guilty" States [i.e., Belgium, France, Israel, and the United Kingdom].[27]

Those States which adopted the position that no such qualification existed relied on the textual account of the article for support. As the Australian arguement noted:

> Nowhere in the Charter is a distinction made between ordinary or special or extraordinary expenses or budgetary provisions. The cardinal rule of interpretation, that of effectiveness, must lead the Court to uphold the validity of the assessing resolutions adopted by the Assembly in the exercise of its Charter powers.[28]

And similarly, British Sir Reginald Manningham-Buller told the Court in his country's oral argument that:

> Article 17(2) means all expenses of the Organization, whether or not they were included in the regular budget. . . . There is no language in the Charter to qualify the "expenses of the Organization. . .[29]

The Court began its analysis of the matter by noting that in Article 17, (3), the term "administrative budgets" is specifically used in reference to the financing of specialized agencies. From the inclusion of these words (which did not change significantly in their development throughout the San Francisco Conference)[30], the Court deduced that the framers of the Charter recognized the difference between administrative and operational budgets. It was therefore logical for the Court, utilizing the plain meaning criteria, to note that being cognizant of the different types of budgets and expenses, if the framers had intended to establish such a distinction in regard to the "budget" and "expenses" of Article 17, paragraphs 1 and 2, they would most certainly have included the qualifying words in the text as they did in Article 17, (3).[31] Indeed, carrying his line of reasoning one step further, one could well deduce from the fact that nowhere in the Charter is a qualifying term such as administrative or operational used, that the framers had no intention of including any such restrictive clause of the budget and the expenses of the Organization, and thereby also on the budgetary authority of the General Assembly.

Leo Gross, in an article published after the Court handed down its opinion, advanced the argument that the framers of the Charter intended for the United Nations to operate

> in the footsteps of the League of Nations and (being) familiar with the establishment of specialized agencies, intended to say "regular" or "administrative" budget. They were familiar with the distinction and did not provide

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27 Supra. #20, p. 1185.
28 *Ibid.*, p. 1185 citing the written submission of Australia to the International Court of Justice.
29 Oral proceedings, Sir Buller of Britain, p. 241.
30 Supra., #24, Summary Report of the fourth Meeting of Committee IV/1, April, 1945, p. 921.
31 *Op Cit.*, Opinion, p. 159.

for an operational budget. There were two natural reasons for it: in the first place operational functions were entrusted by governments to the specialized agencies rather than to the United Nations; and in the second place, the vital operational function of the Organization, that is enforcement of action, was especially provided for in Article 43 of the Charter.[32]

However, while this argument sounds plausible, it does not explain the specific reference to administrative budgets in 17 (3) and the absence of the reference in the preceeding two paragraphs. If Gross's argument has merit, then why didn't the framers specifically clarify each expense if they perceived a basic difference between the regular budget expense and the specialized agency expense. Indeed, why is there no mention of an operational expense and budget for the specialized agencies, which would seem the more logical alternative if the framers perceived the regular budget as administrative and the budget and expenses referred to in paragraph 3 as administrative? Given this, the word "administrative" should not appear, but the word operational should. The fact that it does not reveals a weakness in the basic structure of the argument. In addition, research into the development of Article 17 at the San Francisco Conference reveals that paragraph 3 originally preceeded paragraph 2. One of the reasons, it appears, that the order was reversed was to make the intent of the article more definitive. From this one could well imply that the budget and expenses of paragraphs 1 and 2 are related to each other while being separate and distinct from the administrative expenses referred to in 17 (3). Indeed, one is hard pressed to explain the difference in these terms except by the reasoning employed by the Court.[33]

In addition, Gross and the contention itself, fail to note the case of the *Contributions of the State of El Salvador to the Expenses of the League of Nations*[34] in which a subcommittee of jurists declared that the expenses of the International Labor Organization were indeed expenses of the Organization as were *all* expenses legally incurred by the organs of the League without qualification to the nature of the expense.

Gross's argument and the entire contention is sustained neither by the reasoning of the Court, the apparent actions and intent of the framers, nor the history of the League.

Although the I.C.J. reached its decision that no qualification existed through sound legal interpretative reasoning (with which argumentation is difficult), the Court chose to examine the practice of the U.N. to provide general support for their arguments, but also to specifically counter the claim advanced by the Soviet Union that the U.N. practice in the financing of peacekeeping operations was to function outside of the regular budget. Citing the Korean action as the only applicable precedent because of the combat nature of the operation and the scale of the force which both showed similarities to the O.N.U.C. and U.N.E.F. operations, the Soviet Union noted that the

[32] Supra, #5, p. 14.
[33] *Trauvaux Preparatories.* Summary Report of the 37th Meeting of the Coordination Committee, p. 1361.
[34] *League of Nations Documents,* 1st Committee, League of Nations, 3rd Assembly, Plenary, Vol. II, p. 191-4. A,128,922.V. (1922).

expenses of Korea had been paid through voluntary contributions and that at no time was the expense included in the regular budget for payment by the Membership.

Finding support for their general denial of any qualification of the term "expense," the Court noted:

> Actually, the practice of the Organization is entirely consistent with the plain meaning of the text. The budget of the Organization has from the outset included items which would not fall within any of the definitions of "administrative budget" which have been advanced in this connection. Thus, for example, prior to the establishment of, and now in addition to, the "Expanded Programme of Technical Assistance" and the "Special Fund" both of which are nourished by voluntary contributions, the annual budget of the Organization contains provisions for funds for technical assistance. . . . Although during the Fifth Committee discussions (in 1962) there was a suggestion that all technical assistance costs should be excluded from the regular budget, the items under these heads were all adopted . . . without a dissenting vote. The "operational" nature of such acts so budgeted is indicated by the explanations in the budget estimates for example, the requests for the continuation of the operational programs in the field of economic development. . .[35]

The General Assembly, like the framers of the Charter, are also cognizant of the difference between administrative and operational budgets, as evidenced by the fact that when the Constitution of the International Refugee Organization was drawn, the General Assembly accepted differentiated budgets and programs. Thus clearly knowing the differences between the two types of budgets and expenses, and adding qualifying stipulations only when administrative budgets and expenses alone are contemplated, it can be assumed from the practice of the UN that the Organization as a whole realizes the difference and accepts the unqualified terms of Article 17 as applying to the total regular budget and just to administrative expenditures. In addition, it should be noted that no qualifying distinctions exist in the Financial Regulations of the United Nations which were initially adopted in 1950 by a unanimous vote, including those States now contesting the matter. In considering this piece of evidence, it is important to note the 1950 date, because it indicates that several years of peace-keeping operations and expenditures had already occurred. Thus the General Assembly was well aware of the financing of peace-keeping operations, even if they were on a smaller scale than O.N.U.C. and U.N.E.F., so if they had wished to distinguish the funding for a peace-keeping operation by a special extra-budgetal account, they could well have done so. The inference from their failure to do so is that they were satisfied with the inclusion of these peace-keeping expenses in the regular budget of the Organization as "expenses of the Organization."

The Court also took note of the 1961 Report of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations which showed as one of its few unanimously accepted

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35 *Op. Cit.*, Opinion, p. 160.

(by the General Assembly) articles — Article 22: "Article 22. Investigation and Observation operations undertaken by the Organization to prevent possible aggressions should be financed as part of the regular budget of the U.N."[36]

Thus, the practice of the U.N. was not to delineate between administrative and operational expenses in the regular budget, therefore including peacekeeping expenses, as operational expenses, within the regular budget. Consequently, the Court stated that:

> Whether or not expenses incurred in discharge of this obligation become "expenses of the Organization" cannot depend on whether they be administrative or some other kind of expense.
>
> The Court does not perceive any basis for challenging the legality of the settled practice of including such expenses as these in the budgetary accounts which the General Assembly apportions among the Members in accordance with the authority which is given to it. . . .[37]

Given the set of facts as such, the practice of the U.N. is clearly not to distinguish between the regular and administrative and operational expenses and budgets. This clearly supports the conclusion of the Court in denying that such a qualification does indeed exist.

One point should be made at this juncture regarding the reliance of the Court on the practice and the conduct of the Organization in establishing a legal basis for their decision. Considerable concern has been generated by the I.C.J.'s use of practice in this case, as evidenced by the references to the matter in the separate views of President of the Court Winiarski and Justices Percy Spender and Gerald Fitzmaurice. Indeed, Justice Sir Spender devotes considerable time and effort in his concurring opinion to this subject (see appendix VI).

While there may be sufficient cause for concern over the unbridled reliance on the practice of the U.N. or any other international organization to form the primary basis for a judicial opinion, the evidence of the case and the opinion support the contention, that such unlimited use did not exist here. In the *Certain Expenses* case, the practice of the U.N. was considered in a strictly supportive role. At no time was it the sole determinant of a point made by the Court. In such a supportive role the consideration of the practice of the Organization, particularly on a matter which is closely related to the functional aspects of the Organization is wise. Indeed, it would seem frivilous to analyze the exact words of the text and the intent of the framers if one did not also consider the practical effectiveness given to the words and the intent by the interpretation of the Member States as evidenced by the practice of the Organization. The Court cannot issue a decision or an advisory opinion with a total disregard for the functional reality of the U.N. and its members.

The contention, however, that Court consideration is mandated because the U.N. represents a world legislative body and that its actions and practices are sources of international law, I find utterly preposterous and unfounded

[36] *Ibid.*, p. 161-2.
[37] *Ibid.*, p. 162.

given the intensely political nature of the body (as evidenced by the trade-off of affirmative budget votes for reductions in the apportioned total of a State's contribution to the U.N. mentioned earlier), the lack of an agreed consensus of the U.N. as in fact a source of international law, the lack of the key element of opinion *juris sive necessitas* in the actions and practices of the Members, etc. Indeed, it is similarly difficult to accept the premise that the practice of the U.N. should be considered evidence of customary international law, for many of the same reasons.

However, when the practice of the U.N. is placed in its proper perspective and not elevated to unfounded and unreasonable legal heights, the practice of the Organization can be a valuable supportive tool, as it was in the *Certain Expenses* case, supporting the intent of the framers and the meaning of the text. For if one is to challenge the textual meaning of a Charter clause, he must also reconcile the fact that the clause has been adhered to by the Members for years under the assumption that they were legally justified. Thus, one must consider the practice of the UN, for while in and of itself it may not form a legal basis, its impact on the nature of the question and the decision warrants its consideration. Therefore, practice, when properly relied upon represents a factor which it serves the Court well to consider, as it did in the *Certain Expenses* case. Indeed, given the composite of the multi-faceted approach — the caliber of the supportive practice, the intent of the framers and the textual meaning — it appears difficult to argue with this aspect of the Court's decision.

Several Justices however — Justices Bustamante y Rivero, Koretsky, Moreno Quinana, Basdavante, and President Winiarski — dissented from the view held by the majority — Justices Badawi, Wellington Koo, Spiropoulos, Spender, FitzMaurice, Tanaka, Jessup, Morelli, and Vice-President of the Court Alfaro — in regard to this matter. Justice Koretsky, who interestingly enough adopted the position of his own government, the U.S.S.R., dissented totally from the majority opinion. Concerning this particular matter, Justice Koretsky declared flatly that, "It is known that the financing of peace-keeping operations is not made within the regular budget. One should apply to Article 43 and not to Article 17 . . ."[38]

Justice Morelli also took exception to the decision of the Court and reasoned that two separate types of expenses inherently exist in Article 17. He differentiated between one type of expenditure referred to in paragraph 1 in which the General Assembly only *may* authorize the expenses, whereas the other type, alluded to in paragraph 2, *has* to be authorized by the General Assembly to be a valid expense. Justice Morelli thus places the type of restriction on the budgetary authority of the General Assembly which the Soviet Union impliedly hoped to achieve.

The views of these Justices, however, were in the minority as the majority held that no qualification existed on the terms "expenses" and "budget" in Article 17. The single most persuasive piece of legal reasoning in this decision

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[38] *Op. Cit.*, Opinion, p. 267—the dissenting opinion of Justice Koretsky.

appeared to be the existence in 17(3) of the budgetary restriction for the specialized agencies. From the existence of this stipulation, it was simply a logical step to question why, if the intent existed, such a similar restriction was not in evidence in words a mere paragraph away. The only logical conclusion which could be drawn was that drawn by the majority — that there never existed any intent to qualify the terms and to so restrict them.

Having satisfied itself that within the context of Article 17 there existed no qualification of the budget or the expenses of the Organization, the Court then turned to an investigation of the general Charter to ascertain if such a qualification existed elsewhere to limit the terms. In this analysis, the Court found itself outside of the narrow construction they had placed on the question and in the realm of related issues. While the Court found itself considering many of the questions it had hoped to avoid by the narrow construction, the earlier limitation permitted the Court to consider these issues only in so far as they related to the immediate question of the qualification of the expenses, and not in and of themselves. Indeed, if the Court had not proceeded in this way, the Opinion would probably be several hundred pages longer and more complex, and the question of the validity of the O.N.U.C. and U.N.E.F. expenses as apportionable expenses of the Organization might well have gotten lost in the shuffle of issues — to the dismay and the insolvency of the United Nations.

Primarily in response to the presentation and arguments of the Soviet group of States, the Court considered the possibility of a combined restrictive effect embodied in Articles 11, 39, 41, 42, 43, and 48 of the Charter which set forth the powers of the Security Council in situations which threaten the peace, breach the peace or are open acts of aggression. The contention of the USSR regarding the expenses in the context of their actions was the same as it had been in the General Assembly through the numerous resolutions and debates, and was also remarkably similar to those arguments which the Soviet government used in the discussions of the Uniting for Peace resolution. (In essence, this is what the Soviet Union perceived this case to be-— a confrontation over the Uniting for Peace Resolution under the guise of the financial issue.)

The Soviet argument was based in a very strict construction and interpretation of the Charter, particularly those articles relating to the power of the Security Council. According to the argument, as presented before the Court, the Charter had vested in the General Assembly only the power to discuss, consider, study, and recommend on matters relating to the maintenance of international peace and security. Specifically, it was contended that the General Assembly was empowered only to make recommendations, and even then only when the Security Council is not considering a matter concerning international peace and security. The Assembly, Professor Tunkin argued, lacked the proper authority to take action or to cause the functional realization of any of its recommendations pertaining to this specific area of competence. Any action, it was argued, which entailed the use of armed force or force of any kind was the responsibility of the Security Council and of the Security Council alone. The General Assembly, it was further argued, could not assume the role of mandating payment for peace and security operations since these operations

were outside of the realm (functionally) of the Assembly. The necessary financial arrangements for such operations involving the use of force and duly authorized by the Security Council, were to be decided by the special agreements procedure of Article 43 and not by the general provisions of Article 17. The existence of Article 43, it was argued, clearly indicated that the expenses of peacekeeping were not to be considered expenses of the Organization under the terms of Article 17, but rather were special, extraordinary expenses handled by the Security Council in their functions related to international peace and security. In relation to the validity of the particular expenses, the Soviet bloc countries claimed that U.N.E.F. was created in open violation of the Charter and in a flagrant attempt to bypass the Security Council and its security function by way of the Uniting for Peace Resolution. Similarly, it was alleged that O.N.U.C. also violated the security provisions of the Charter because although it had been duly authorized by the Security Council, the Secretary-General, Dag Hammarskjold, had overridden the Security-Council's function by his direct control of the operations of the units in the Congo. The Soviet Union noted that both operations should have been established and administered in accordance within Articles 42-6 by the Security Council alone, and that the failure to have been established in this manner meant that these operations and their assessing resolutions were ultra vires to the Charter. And, reiterating the elements of their General Assembly speeches, because this element of strict legality was lacking, the Soviet representative claimed, States were refusing to pay their "illegal apportionments," causing the financial insolvency of the Organization.

Professor Tunkin commented on the financial implications of the legal issue as he perceived it.

> We should not sacrifice the principles of the United Nations' Charter, on which depends the very existence and the future of the Organization, even though by that sacrifice we might reach a more simple solution of this or that current problem.
>
> In this connection, . . . I would like to invite your attention to a very dangerous tendency which can be seen throughout the written replies of some governments and also the statements of the representatives which have been made in this Hall.
>
> This tendency consists of opposing the so-called effectiveness of the United Nations to the provisions of its Charter. Roughly speaking, according to this conception, it is necessary to strive for the so-called effectiveness of the United Nations, disregarding the provisions of the Charter and in accordance with the principle "The end justifies the means."
>
> The above-mentioned tendency emanates from a conception that is usually called "realistic." This so-called realistic conception reflects the main features of the "position of strength" policy and it is an attempt to provide a theoretical justification of that policy. . .
>
> I would like to state that the above-mentioned realistic conception is full of a nihilistic attitude to the international law and in its extreme manifestation regards international law as a legal "straight-jacket" for diplomacy and calls to remove this legal straight-jacket. . . .

> The opposing of the effectiveness of the United Nations Organization to the observance of the principles of the United Nations Charter is legally groundless and dangerous.[39]

The States advocating the affirmative position seemed content not to consider these related issues to the depth they were pursued by the Soviet Union. As Sir Reginald Manningham-Buller noted:

> The validity of the relevant Security Council and General Assembly resolutions authorizing the UNEF and the Congo operations is not in terms submitted to the Court. However, if and so far as the answers to the question referred to it by the General Assembly may depend on the validity of those resolutions, the British Government would support their validity on the assumptions and to the extent that (i) they were within the purposes of the United Nations as expressed in the Charter and (ii) they required the consent of the governments concerned.[40]

The U.S. position was similar although somewhat stronger.

> How can the main purpose of the Organization, the maintenance of international peace and security, be regarded as an "extraordinary" activity? The Security Council has no budgetary or fiscal competence nor can it be said to have exclusive competence in peace actions. The expenses were authorized in a correct procedural manner, with the assent of a two-thirds majority of member States, and could not be ultra-vires.[41]

In considering this argument, the Court challenged the basic concept upon which the argument of the Soviet Union rested — their interpretation of the words "primary responsibility" in Article 24 to give the Security Council exclusive authority in all matters related to international peace and security. Noting the wording of Article 24:

> Art. 24.: In order to insure prompt and efficient action by the United Nations, its Members confer on the Security Council the primary responsibility for the maintenance of international peace and security. . .[42]

The Court declared that:

> The responsibility conferred is "primary" and not exclusive . . . "in order to ensure the prompt and effective action [of the United Nations] . . ." To this end, it is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor.[43]

In support of this contention, the Court further stated:

> The Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with the international peace and security. Article 14

[39] Oral proceedings, Prof. Tunkin, p. 350.
[40] *Ibid.*, Abram Chayes, p. 186.
[41] *Ibid.*, Sir Buller, p. 224.
[42] U.N. Charter Article 24 para. 1.
[43] *Op. Cit.*, Opinion, p. 163.

> authorizes the General Assembly to "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the purposes and principles of the United Nations." The word "measures" implies some kind of action, and the only limitation which Article 14 imposes on the General Assembly is the restriction found in Article 12, namely, that the Assembly should not recommend measures while the Security Council is dealing with the same matter unless the Council requests it to do so. Thus while it is the Security Council which, exclusively, may order coercive action, the function and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies, the making or recommendations; they are not merely ortatory.[44]

Continuing with the right of the General Assembly to take "action," the Court noted the enforcement powers already solely within the jurisdiction of the General Assembly by Article 18 in relation to Articles 5 and 6. The Court cited the specifics of the expulsion of Members and the supervision of the rights and privileges of Membership as well as the all encompassing term "budgetary questions" and noted that in these matters the General Assembly has the sole power of enforcement subject to the recommendations which the Security Council might provide. But the Court went a bit further and seemed to note that this strict delineation of power to the point of inter-organ rivalry is foolish when it noted: ". . . but there is a close collaboration between the two organs [in these matters]." [45] It chose instead to cite the higher motives for which the United Nations was formed and to which the organs are supposedly working together toward. Viewed in this respect, the opinion of the Court goes beyond a mere interpretation of the words of the Charter to what is perhaps a more important interpretation of the goals and ideals of the Charter and the feasibility of achieving them.

This particular portion of the opinion has been the subject of intense discussion, pro and con, since it was handed down by the Court. The reason for the interest is obvious, the ramifications of this portion are tremendous for the future of the United Nations. First by its interpretation of "primary responsibility," the Court gave legal sanction to the incursion of the General Assembly into the areas of the maintenance of international peace and security. It gave validity to the "actions" the General Assembly might take — ranging from the stationing of an observer force, which the General Assembly had done as early as 1949, to operations the size of the Congo operation. The validity of the General Assembly to take such "action" necessarily meant that there was an inherent duty among the Members to bear the financial burdens of such a valid act of the General Assembly. Inherent in this opinion also, is somewhat of an implied sanction for the Uniting for Peace Resolution in that the General Assembly is permitted to take "action" for the maintenance of international

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[44] *Ibid.*, p. 163.
[45] *Ibid.*, p. 163.

peace and security. However, the fact that the Court notes that enforcement power lies solely within the realm of the Security Council and not the General Assembly would seem to imply a strong challenge to the legality of the resolution. But Uniting for Peace was not the subject of the opinion, and peripheral comments may shed more darkness than light on the question.

Second, the Court established in the General Assembly supremacy over the control of the U.N. budget—administrative, operational and regular budget expenses and the costs of United Nations peace-keeping forces combined. The important power of the purse was vested in the hands of the General Assembly for all U.N. expenses, revenues, apportionments, etc. In these two conclusions alone, the Court has strengthened and advanced the importance and the prestige of the General Assembly to the benefit not necessarily of the General Assembly at the derision of the Security Council, but to the benefit of the goals and the purposes of the United Nations for the benefit of all members of the world community. The cumulative effect of these two interpretations was to enhance what Justice Spender termed "the institutional effectiveness of the United Nations as an international organization and the viability of the Charter as a flexible legal document in a politically changing environment.

Carrying the analysis of Article 17 and the Charter as a whole further, the Court considered the restrictive nature of Article 11(2), that ". . . Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion." To this, the Court said:

> The Court considers that the kind of action referred to in Article 11, paragraph 2, is coercive or enforcement action. This paragraph, which applies not to merely general questions relating to peace and security, but also to specific cases brought before the General Assembly . . . under Article 35. . . . The word "action" must mean such action as is solely within the province of the Security Council.
>
> The practice of the Organization throughout its history bears out the foregoing elucidation of the term "action" in . . . Article 11(2). Whether the General Assembly proceeds under Article 11 or under Article 14, the implementation of its recommendations for setting up commissions or other bodies involves organizational activity — action — in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations.[46]

This is a vital element, for if one can accept this interpretation of the term "action" and the extent of involvement that it entails, one can accept the entire nature of the Opinion, for herein lies the crucial question of the extent of the involvement of the General Assembly in world conflicts. While the Court did not seek to accurately define exactly what operations and actions were within the authority of the General Assembly, it did limit them by setting the upward limit of their involvement — the enforcement and coercive

[46] *Ibid.*, pp. 164-165.

action with is reserved solely to the discretion of the Security Council. However, the Court left open who shall determine if a particular action is enforcement or coercive or within the bounds of the function of the General Assembly, leaving this issue, quite wisely I think, to the political negotiations and circumstances of each immediate crisis rather than mandating a rule which itself might prove dilatory and superfluous to the maintenance of international peace and security — the purpose of the entire operation.

Justices Quintana, Koretsky and Rivero, however all disagreed with the distinction drawn by the majority. For them, the distinction between the types of operations was much too subtle and vague to be effective. As Justice Koretsky noted: how is the operation in the Congo different from that in Korea? Justice Quintana also pursued a similar line of reasoning in his dissenting opinion and questioned in detail who should arbitrate jurisdictional disputes over enforcement operations. Each Justice then proceeded to restate their separate beliefs that authority for such enforcement operations lies not in the General Assembly, but in the Security Council alone. They interpreted the Charter as mandating to the General Assembly only the power to discuss and to recommend, and not to act under any circumstances.

After reading the differing opinions, one tends to get an immediate impression that the majority is perhaps too idealistic in striving for the goals of the Organization and the prevention of all future wars and the other purposes of the UN. However, it is necessary, I believe, to realize the context within which the Court was operating, for then, the Court appears to be tempering its legal reasoning with political reality. Faced with the imminent bankruptcy of the United Nations and the internal power struggle between the respective power blocs which became delineated between the Security Council and the General Assembly, the Court found itself in the position of having to issue an opinion which was first legally proper, and second and equally important, one which would be acceptable to the United Nations (recalling that the Soviet bloc had already announced its intention not to be bound by the decision of the Court), as well as attempting to maintain the prestige and legal integrity of the Court. In this sense, the Court is acutely aware of the political realities of the world and in reaching its decision is trying to balance them while retaining the legal integrity and effectiveness of the Court.

In considering the decision in this light, the majority opinion, even though they rely on general terms and do not clearly and specifically define some of their terms, is actually a carefully designed and intricately balanced frame which serves to further the Organization as a whole by accepting the political reality of the power struggle and the need for effective UN action in global disputes while specifically setting the limits of this advance, permitting that to be decided in the political realm of the UN in which the opinion will be given force if it is to be useful and, quite literally, if the ICJ is to remain as an impartial juridicial source for the governments of the world. And throughout all of this balancing, the Court provides a legally accurate and acceptable opinion of the question at hand.

Turning to Article 43 as one of the last points of contention, the Court

dealt with the claim that the Security Council, being responsible for international peace and security and the special agreements related thereto, was responsible also for the financial obligations, or at least for arranging the financing, incurred by all peace-keeping operations. This derogated directly from Article 17 under which the General Assembly functioned and sought to prescribe a degree of financial control and therefore actual control over peace-keeping forces to the Security Council where the veto still prevailed. The Court seemed to deal with this contention somewhat out-of-hand by noting that O.N.U.C. and U.N.E.F. were not enforcement actions per se and were therefore not subject to any of the Chapter VII restrictions and limitations, including Article 43. But conceeding that even if Article 43 did apply to the expenses in question, the Court stated that it could not accept a limiting view of the article, or for that matter of any article of the Charter. For as the Court noted, it was entirely possible for the Security Council to have the General Assembly carry out this function at its behest through the General Assembly's apportionment power, and in accordance with Article 29 of the Charter. Indeed, as the Court noted, if one of the parties to a dispute wishes the financial cost borne by all of the members of the UN for whatever reason, it would be virtually impossible for the Security Council to achieve because of their lack of authority in this general budgetary aspect. This function is reserved in the Charter, as we have just proven, solely to the General Assembly. Thus, even if Article 43 were applicable, such a limited interpretation as that proposed by the Soviet Union was unacceptable to the Court in light of the realities and legalities of the distribution of powers within the United Nations under the Charter.

After having finally dismisssed all of the objecting arguments and finally having established a criteria for the expenses of the Organization, the Court then turned to consider the U.N.E.F. and O.N.U.C. costs as expenses of the Organization within the meaning of Article 17(2). The Court established their purpose for the examination by stating that:

> In determining whether the actual expenditures authorized constitute "expenses of the Organization within the meaning of Article 17, paragraph 2 of the Charter," the Court agrees that such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an "expense of the Organization." . . .
>
> The primary place ascribed to international peace and security is natural, since the fulfillment of the other purposes will be dependent upon the attainment of that basic condition. The purposes are broad indeed, but neither they nor the power conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the Organization, the presumption is that such action is not *ultra vires* the Organization.[47]

[47] *Ibid.*, pp. 167-168.

There is special significance in this statement by the Court in that it modifies one of the premises established by the Court in the *Lotus* case.[47a] In that case, the Court pronounced that rules of law which are binding on States must emanate from their own free will and in accordance with their own sovereign intentions. Therefore restrictions upon independent States cannot be assumed. However, here, the Court is stating that the explicit provisions of the Charter may bind States to common purposes. These two principles are not altogether removed from one another in that the States which have signed the U.N. Charter have signed the document of their own free will and have in effect agreed to be bound by the Charter as an international treaty. Still, the concept that a State may be bound to support one of a number of broad purposes of the Organization represents a step forward from the original *Lotus* decision. While many might argue that it represents a step in the direction of a world government by abridging the sovereignty of the Member States, on a more conventional scale, it represents the acceptance of the United Nations as an international organization by the members, and as a personality in world affairs which may bind all Member States regardless of their particular political persuasion or involvement in the world situation.

There is another interesting aspect which this interpretation by the Court provides. This particular opinion negates the possibility of demands for restitution, etc. should the Uniting for Peace Resolution specifically, but also applying to the basis for any other peace-keeping operation, be declared in and of itself ultra vires or for some reason non-functional in the light of the Charter. If Uniting for Peace was declared to be *ultra vires* at some future point, then it is quite conceivable that those States which contributed money and resources to operations such as U.N.E.F. might well expect some sort of reimbursement. The decision here, negates that possibility in that the action was undertaken to achieve one of the prime purposes of the Organization, the maintenance of international peace and security, and being done for this purpose, it cannot be *ultra vires,* and therefore the expenditures were valid and non-refundable.

As if to answer an anticipated question, the Court further briefly elucidated on this point, but did not venture to go too far with the matter in that it was not directly related to the certain expenses quesion at hand. The Court noted that an action might, be "within the purposes of the UN, carried out 'in a manner not in conformity with the division of functions among the several organs which the Charter prescribes" and still be *inter vires* as far as the United Nations was concerned.

> 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 were 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.[48]

While the Court was careful to note that on this question of *ultra vires*

[47a] The S.S. "Lotus" (France v. Turkey) *Permanent Court of International Justice,* P.C.I.J., Ser. A, No. 10, 2 Hudson, World Court Reports 20 (1935).

[48] *Ibid.,* p. 168.

it was venturing to explain its reasoning rather than to issue a definitive statement of international law, the point of the reasoning is not lost. The Court is clearly giving primary import to the purposes of the Organization in determining the validity of financial questions rather than to more narrow concerns such as the exact delineation of power, etc.

The Court lastly proceeded to relate O.N.U.C. and U.N.E.F. to the "purpose of the Organization" criteria it had established to test if indeed these two operational expenses can be considered as expenses of the Organization. First considering U.N.E.F., the Court noted that it was a creation of the General Assembly (however, their previous statement relating to the proper organ function seems to end any challenge to this point) and was created without dissent, and at the invitation of several of the participants. The purpose of U.N.E.F. was to promote and to maintain peace and security in the area. The duties envisioned for the Force at its creation were noncoercive. From this data, as well as the statements and the written submissions of the Secretary-General as to the purpose of the operation, the Court had no difficulty in deducing that U.N.E.F. was not an enforcement operation and was therefore not subject to Chapter VII of the Charter.

The Court also apparently did not have difficulty with the fact that U.N.E.F. was financed from a special ad hoc account, ruling that this did not imply an obligation separate from the regular budget and from the assessment principle. The Court thus stated definitively that U.N.E.F. expenses were and had been from their initial occurrence, expenses of the Organization within the meaning of Article 17, paragraph 2.

The peculiarities of the O.N.U.C. financing also did not seem to bother the Court. They noted the initial Security Council authorization for the force, again a matter which had no dissent. They rejected a claim by the Soviet Union again that although there was proper authorization, the execution and administration of the operation had violated the Security Council mandate and that the Secretary-General had exceeded his authority in his conduct of the operation. The Court cited Article 29 and 98 of the Charter in support of authority of the Secretary-General to act in favor of the Security Council, once the Council has designated to him that responsibility. Any disagreement with the conduct of the operation was inherently a political matter which it served the Court well to remain out of. Indeed, if dissatisfaction with the performance of the Secretary-General was widespread, the original mandate could be withdrawn, revesting authority in the Security Council itself. The absence of a consensus to do this however indicated a political dissatisfaction which the Court avoided.

The Court had a somewhat more difficult time in declaring that O.N.U.C. was not an enforcement action, as several of the dissenting Justices noted in their respective opinions. The Court declared that O.N.U.C. did not represent an armed force but rather relied on the definition of the Secretary-General which termed the action "an action of the Member States coming to the aid of a State experiencing internal turmoil. It was not an action between two States, but rather an action internal to one State." Agreeing that O.N.U.C. was not a military action against another State, the Court held that O.N.U.C. was not within the realm of the powers and functions of the Security Council.

On the question of the financing of O.N.U.C. which it will be recalled contained the progressively weaker worded resolutions disclaiming the obligatory nature of the expenses, the Court refused to consider the number of resolutions before them and instead argued that the specific wording of the financing resolutions was not appropriate for the I.C.J. to consider. Rather, the Court relied on the different scales of assessment which were established and the different basis for apportionment which were developed for each resolution. From this, the Court was able to conclude that the expenses of O.N.U.C. were definitely within the realm of Article 17.

Thus the Court returned an opinion which served to further the development of the Organization, resolve the present legal question before the Court, and establish a foundation for future decisions to expand upon. The opinion of the Court was in many ways imperfect,—for example, often creating more questions than it answered, as in matter concerning the purposes of the Organization and expenditures the Court did not consider who shall determine the extent of conformity to the purpose of the Organization, what shall occur if an act is found to be *ultra vires* in part, etc. While several of the individual Justices did consider these and a number of different related questions, such as the authority to mandate payment for the provisions of a non-binding recommendation or resolution, the definition of majority and consensus in determining financial liability, the responsibility of States who vote against funded operations in making payments to finance that operation, etc., and these provide for interesting analysis and debate, the larger impact was made by the majority opinion, and for that reason, this consideration will confine itself to that opinion only. Yet for its weakest moments, the opinion is a strong legal argument with well-conceived reasoning and legal interpretation. In countering the argument for a restrictive interpretation of the terms in Article 17, the opinion is also strong, demonstrating good legal reasoning. In the matters of the relation of the Security Council and the General Assembly, the Court provides a clear, logical reasoning for its determination.

In general, this advisory opinion of the Court was well-reasoned and sound. In those areas where the Opinion was vague or uncertain, a degree of benefit seems to have been derived in that the opinion retained its political viability without losing any of its legal character.

But the Opinion itself did not end the matter of peace-keeping funding. When the Opinion was presented to the General Assembly, the Soviet Union moved that the body merely take note of the opinion (a definite slap to the prestige of the Court). The vast majority of the General Assembly, however, disagreed with the Soviet position and the opinion was accepted by a large majority. But an advisory opinion of the International Court of Justice carries no enforcement provision, other than perhaps the reliance on the prestige and judicial authority of the Court to persuade adherence. When the opinion was returned, the U.N. was still in financial difficulty. The $200 million bond issue which the U.N. had floated was not sufficient to cover the mounting cost of doing business. In addition, subscriptions to the bond issue had not been borne as evenly as had been hoped, and there still existed a substantial amount of unsold notes.

The opinion of the Court did seem to have some bearing on many of

the unpaid members. Liabilities which had been mounting for years began to be repaid to the Organization by many of the smaller States. However, the Soviet Union adamantly refused to pay any portion of the cost of the peace-keeping operations. Thus in 1963, when the Soviet Union fell more than two years behind in the payment of its assessment, a move was begun to institute action under Article 19 of the Charter. (It should be remembered that the incident which initially triggered the bringing of the case to the I.C.J. was the question over whether Article 19 could be used.) Article 19 had never been invoked in the history of the U.N.—there was one incident in 1961 when Haiti fell more than two years behind; however her envoy to the U.N. did not appear to claim his seat and to vote until some of the debt had been paid. The political maneuvers which were involved in this U.S.-U.S.S.R. show-down have been well documented. For a moment, however, I would like to consider the matter which was the center of so much controversy during this time—the procedure for the removal occassioned by Article 19.

The Soviet Union claimed that a 2/3 vote was necessary to remove her vote in the General Assembly. The U.S. for the most part argued that a mere declaration from the President of the Assembly was sufficient to strip Russia of her voting privilege. This issue was never fully resolved, even after the controversy was ended. But a reference to the San Francisco Conference reveals that initially in Article 18—the article which mandates a 2/3 voting procedure—a provision had been included requiring such a vote for the expulsion of a member and for the removal of voting privileges. In the development of the Article, it was agreed that a simple majority would be sufficient to remove a voting privilege. The change, which had interesting ramifications because of translational difficulties, was accomplished and the provision for the 2/3 vote was deleted. Thus a simple majority vote of the General Assembly would have been sufficient to have removed Russia's vote according to the clearly expressed intention of the framers of the Charter.

What does the future hold for the financing? The question is difficult to answer. All peace-keeping operations after O.N.U.C. and U.N.E.F. have been financed through voluntary contributions or through special contributions by the States directly involved in the conflict. Thus the question which threatened to quite literally destroy the U.N. in the 1960's has never really been answered, perhaps because the basic underlying questions have never been answered. It has merely been allayed. Given another U.N. action such as Korea which would require general support, one can only assume that the crisis which developed in the 60's would reappear in the 70's, with perhaps a very different outcome. Indeed, a Uniting for Peace type of action may not even be necessary given the disenchantment of the U.S. with the United Nations. Since the U.S. consistently makes the largest general voluntary and voluntary peace-keeping contributions to the Organization, a severe crisis could develop merely because the U.S. decided not to contribute.

In closing this paper, I am reminded of what was said in the beginning—that the financial crisis was actually a crisis over the role of the U.N. in world affairs. In retrospect, this appears even more true. The financial crisis will end when the member states—all member states—decide that the U.N. is an indispensible part of international relations and agree to financially support

it as such. Until that time, the Organization will have to "pinch pennies" because financial help will not be forthcoming until that time.

APPENDIX I

Number 1

The Countries were: Australia, Bulgaria, Byelorussia Soviet Socialist Republic, Canada, Czechoslavakia, Denmark, France, Ireland, Italy, Japan, Netherlands, Portugal, Rumania, South Africa, Spain, Ukranian Soviet Socialist Republic, Union of Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, and Upper Volta.

Mexico, the Philippines, and Poland referred the I.C.J. to their General Assembly arguments.

Number 2

These were: Canada, represented by M. Marcel Cadieux; the Netherlands, represented by Professor W. Riphagen; Italy, represented by M. Ricardo Monaco; The U.K. of G.B. represented by the Right Honorable Sir Reginald Manningham—Buller, Q.C.; Norway, represented by Mr. Jens Eversen; Australia, represented by Sir Kenneth O'Caoimki, S.C.; U.S.S.R., represented by Professor G. I. Tuskin; and the United States, represented by Abram Chayas.

Number 3

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.
2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.
3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Number 4

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceeding two full years. The General Assembly may, nevertheless permit a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Number 5

Income from other sources include funds made available through various Member related general income sources, i.e., rental income and invested

revenues, the sale of U.N. postage stamps, U.N. publications, services to headquarters visits as in New York and Geneva, etc.

As the revenue from these sources increase, in relation to the aggregate U.N. budget, the amount, though not the percentage of each Member's assessed contribution to the General Budget is decreased. However, assessments still provide the vast majority of funds—over 70% of budget of the Organization.

APPENDIX II

U.N.E.F. Forces

Country	*Men & Officers*
Brazil	630
Denmark	562
Canada	945
India	1,249
Norway	613
Sweden	424
Yogoslavia	710
	5,133

Largest cash contributors:

US—$23 million
UK 2.5 million
Fra. .4 million.

—John Stoessinger. *Financing the United Nations System* (Washington, D.C.: The Brookings Institution, 1964), p. 111-2.

O.N.U.C. Forces

Country	*staff person.*	*combat troops*	*air person.*	*admin. person.*	*Total*
Argentina	2		48		50
Austria	1			46	47
Brazil			2		2
Canada	16		19	273	308
Congo (L)		616			616
Denmark	7		5	87	99
Ethiopia	11	2,982	46		3,039
Ghana		704			704
India	77	4,618	112	928	5,735
Ireland	43	690		5	738
Italy	2		8	58	68
Liberia	4				240
Malaya	8	236			1,620
Netherlands	1	1,612			6
Nigeria	20		5		1,734
Norway	10	1,714			149
Pakistan	40		78	61	698
Sierra Leone	122		658		122
Sweden	117	651	200	84	952
Tunisia	2	1,044			1,046
	371	14,989	1,181	1,542	17,973

Cash contributors: US—$10.3 million, USSR, 1.5 million, Canada—.65 million, UK—.52 million. [Ibid., p. 120.]

APPENDIX III

The Polish position:

It is self-evident that the cost of freeing the Canal, which has been immobilized by the British-French attack, as well as the other expenses linked with the return of the Near Eastern situation to normal, cannot be borne by all the Members of the United Nations, but must be borne by the Governments which committed the aggression. (Per Poland, GAOR, 11th sess., 592nd plen. metg., para. 81.)

The Byelorussian SSR position:

The delegation of the Byelorussian SSR yesterday voted against the draft resolution proposed by the Secretary-General for the allocation of a pleminary sum of $10 million for the maintenance of the United Nations Emergency Force. We consider that the United Kingdom, France and Israel, which perpetrated the aggression against Egypt, should bear the burden of any expenses arising from the maintenance of the Force. (Ibid., 597th mtg., para 32.)

The Soviet position:

These States are aware that the establishment of a United Nations Emergency Force resulted from the armed attack of the United Kingdom, France and Israel on Egypt and consider that it would therefore be reasonable and fair if the cost of maintaining the Force were borne by the States responsible for the aggression. Such a method of financing the cost would correspond to one of the basic and most important principles on contemporary international law, under which a State that has committed aggression must bear both material and political responsibility for it.

It is therefore entirely legitimate that a number of the Member States have announced that in principle they refuse to make any contribution towards financing the United Nations Emergency Force and at the same time that some other States, as the Secretary-General points out in his report, have declared that they cannot make any voluntary contributions towards the expenses of the Force. . . . The Soviet delegation considers that to relieve the United Kingdom, France and Israel of material responsibility for the expenditure arising out of their aggression against Egypt, including the cost of maintaining the United Nations Emergency Force, and to place this responsibility on the shoulders of other States which resisted that aggression and themselves suffered losses from the prolonged obstruction of the Suez Canal, would be incompatible with elementary concepts of fairness and with the principles on which the United Nations is based. (GAOR, 12th sess., 720 mtg., para. 137-9.)

APPENDIX IV

68. Our position may be summed up by the following three points: we are in favour of the maintenance of the Emergency Force as an institution which is necessary for peace in the Middle East and as a basis for the evolution

of a permanent instrument of military action by the United Nations; we recognize the political expediency and the principle of equity which make it necessary for all Member States to contribute to the maintenance of the Force; we cannot, however, regard as either just or equitable an assessment system according to which the financial contributions to be made by Member States are in proportion to their contributions to the regular administrative budget of the United Nations.

69. Our arguments in support of the latter objection may be briefly stated as follows.

70. In the first place, we consider that, in the case of the Middle East, the Emergency Force became necessary owing to the individual action of certain Powers which, in our opinion, thus became primarily responsible for the crisis which compelled the United Nations to set up the Emergency Force. We consider also that this responsibility cannot and should not be limited to political matters, but must inevitably include financial liability.

71. Secondly, we believe that peace is a universal responsibility and that stability in the Middle East must therefore be a matter of international concern. Apart from these general interests, however, we also believe that there are material interests, which affect certain Powers and certain European and Asian geographical areas much more directly than others. I must point out that these material interests cannot fail to exercise an influence on the question of stability in the Middle East.

72. Thirdly, we consider that not only the nations outside these regions, but more particularly the peoples of the area, have a more direct responsibility, owing to the tensions and instability prevailing among them, and that a more determined effort on the part of these peoples would decrease the risks which have made it necessary to establish and maintain the Emergency Force. This responsibility of causality and this direct interest in survival should entail not only political, but also financial responsibility.

73. Fourthly, Article 24 of the Charter establishes the primary responsibility of the members of the Security Council for the maintenance of peace and, in our opinion, this responsibility rests with the five great Powers who are permanent members and have the privilege of the veto, so often attacked by the Latin American countries. We firmly believe that the greater the privilege, the greater the responsibility, and that this responsibility is not limited to political matters. Our congratulations are due to the United States for the efforts it has made through voluntary contributions, over and above its regular contribution. We regret that another great Power has refused to make any contribution whatsoever, and hope that this will be remedied in the future. Finally, we are surprised that two other great countries have not made a greater effort.

74. Fifthly, we know that the defence budgets of the great Powers are reckoned in millions; that is not the case of the countries in my region. For these great Powers, the contribution to the Emergency Force is but a drop in the financial torrent of their military appropriations; but for the small countries of the United Nations, the increase of their contribution by 50 per cent—for that is what the effort demanded of us amounts to—entails extraordinary

sacrifices. We realize that this effort must be international and we therefore do not refuse to contribute, but we should like to do so on a more equitable basis.

75. Sixthly, the financial sacrifice of the more highly developed countries would mean one more tax for their citizens and one luxury the less in their daily life; for the less-developed countries, however, where the level of living is very low and where constant effort is exerted to raise this level inch by inch, against tremendous odds, the financial sacrifice asked of us does indeed mean one more tax, but not one luxury the less. It means that we would have to dispense with something vitally necessary, some remedy for the ills that oppress our peoples. It would not be amiss to point out to public opinion outside this assembly hall that a Latin American citizen pays more to the United Nations than a citizen of the United States of America; and it is in this proportion that we are asked to contribute to the Emergency Force. We quite realize that the voluntary contributions of the United States of America exceeded its regular contribution in 1957. Would that that example were followed by other great Powers!

76. Seventhly and finally, it should be borne in mind that the Emergency Force paradoxically seems to relate to a permanent emergency and that, like so many other bodies established on a short-term basis by the United Nations, it shows every sign of continuing for years.

77. It is painful to present all these arguments, but my Government has obligations to its own people. In speaking of financial matters, in which selfish interests always tend to appear, it is usually forgotten that questions relating to contributions must always be based on an inexorable principle of justice and equity. There is no modern country which does not realize that in contributions justice lies in proportionality, but there seems to be a tendency at times to forget the criteria of judgement and the standards to which the proportions must be adjusted.

78. For these reasons, my delegation will be unable to support the draft resolution (*A/L.235 and Add. 1*) to which I have referred and, in explaining our position, I should like to submit my Government's formal reservation with regard to any obligations to which this draft resolution may give rise if it is adopted by the Assembly. I would also extend this reservation to the doubtful interpretation whereby a draft resolution such as that proposed may be held to place obligations upon Member States under Article 19 of the United Nations Charter.

79. I cannot and should not leave this rostrum without expressing on behalf of my Government our gratitude for the timely and generous effort of the Governments of Brazil, Canada, Colombia, Denmark, Finland, India, Indonesia, Norway, Sweden and Yugoslavia, countries which, at great sacrifice, have sent contingents to the United Nations Emergency Force. Our gratitude is also due to the United States for its exceptional financial support. (Ecuador, 11th sess., 721st meeting, para. 68-74.)

32. My delegation considers that there are circumstances in which the United Nations collectively and its Members individually must assume financial responsibilities in connection with a specific situation. But in this par-

ticular instance, where the situation was brought about through the deliberate action of certain Member States, the Government of El Salvador can hardly be expected to agree to contribute in any way towards the costs of clearing the Suez Canal of the obstructions which prevent it from operating normally.

33. It would like to refer in a general way to the theory of human responsibility. Within a given State, when an offence of any kind is committed, there is as we all know a twofold responsibility: criminal responsibility and civil responsibility. If we apply this to the case under discussion, we cannot but conclude that those responsible for the present situation in the Middle East should bear the responsibility for restoring the situation as it existed before the events which have taken place in Egypt since the end of last month. In any case, if there is to be any sharing of the costs involved in clearing the Suez Canal, then the users of the Canal, those who benefit from its use, should be the ones to bear the financial responsibility.

34. I am certain, and I should like to state emphatically and very clearly, that neither the Executive nor the Legislative Assembly of my country could agree to endorse any legislation under which El Salvador would contribute to the costs involved in the clearing operations. I should like our position on the question to be perfectly clear, because the solemn responsibilty of the delegation of El Salvador towards the General Assembly is involved. This morning we learned that some countries are proposing to undertake the clearing of the Suez Canal on their own account. If that is so, what I said is superfluous. However, in any event, I must state that my delegation is very much concerned with this aspect of the question and wishes to place on record that it could not endorse any resolution to such an effect. [*Per El Salvador, GAOR, 11th sess., 596th mtg.*]

APPENDIX V

Several writers, most notably, Leo Gross, have criticized the U.N. for the time lag between the incurrance of the expenses and the request for the opinion. Gross noted that:

> ideally it should have been, to the Court for an opinion before the first financial resolutions on UNEF and ONUC were adopted or immediately after they were adopted, or as soon as it was established that Members were in arrears, there would not have been an impressive series of resolutions before the Court, but one or none. The question then would clearly have been whether the expenses which it was proposed to incur (sic), or which in fact had been incurred on a provisional basis, could be regarded legally as coming within the budgetary powers of the Assembly under paragraphs 1 or 2, or both, of Article 17. The Court then would not have been able to rely on a string of resolutions and to attach probative value to them. (Lea Gross. "Expenses of the United Nations For Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice," *International Organizations* XVII, March 1963, p. 18.

While this point is well taken, the Court, as Gross notes later in his article, used sound judicial reasoning in defining the basis of the question

and in utilizing ipse dixit of the General Assembly as supportative rather than as primary basis for its decision.

While it may be argued that the Court was placed in a political situation such that a decision in the affirmative was inevitable, this reasoning overlooks the independent nature of the Court and the sound legal reasoning presented in support of the decision. The decision of the Court was supported not only by an analysis of the meaning of the words as they appeared in the text, but also by an examination of the San Francisco proceedings and the intent of the entire Charter. For, as the Court so aptly noted in the *Eastern Caribbean* case: "The Court, being a Court of Justice, cannot, even in an advisory opinion, depart from the essential rules guiding their activity as a Court." (States of Eastern Caribbean, 23 July 1923, PCIJ, Series B, no. 5, p. 29)

Thus the Court used the principles of law in the *Certain Expenses* case and disregarded the political overtones, although perhaps not completely, and handed down a judicially sound opinion.

APPENDIX VI

France and South Africa both carried their contention over the question before the Court to the point that they orally argued that the Court should refuse to respond to the Request of the General Assembly. They based their arguments on the grounds that 1) the ambiguous and equivocal nature of the question which made it impossible in their view to render a legal opinion; 2) that any opinion would result in a de facto revision of the constitutional rules of the Charter and 3) that if any opinion was rendered, it should examine the reaison d'etre of the initial resolutions in relation to their conformity with the letter and spirit of the Charter before considering the expenses incurred as a result of the resolutions.

In answering this claim, the Court noted that it could only refuse to respond to such a request of the General Assembly on the basis of "compelling reasons" which the majority of the Justices felt were absent here. The Court made it clear that they considered the case a matter of treaty interpretation and noted that:

> It is true that most interpretation of the Charter of the United Nations will have political significance, great or small. In the nature of things, it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision. . . (Opinion, p. 155.)