Defence List of Authorities

1. International Court of Justice, Certain Expenses of the United Nations, Advising Opinion of 20 July 1962 (summary)

2. D. Sarooshi, *The United Nations and the Deployment of Collective Security*, 1999, pp. 41, 104, 159.

3. *Trial of the Major War Criminals*, Vol. 22, p. 461, retrieved on 12 November 2003, from http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm.

CERTAIN EXPENSES OF THE UNITED NATIONS (ARTICLE 17, PARAGRAPH 2, OF THE CHARTER)

Advising Opinion of 20 July 1962

The question of certain expenses of the United Nations (Article 17, paragraph 2, of the Charter) had been put to the Court for an advisory opinion by a resolution adopted by the General Assembly of the United Nations of 20 December 1961.

By nine votes to five the Court declared that the expenditures authorized in certain General Assembly resolutions enumerated in the request for opinion, relating to the United Nations operations in the Congo and in the Middle East undertaken in pursuance of Security Council and General Assembly resolutions likewise enumerated in the request were "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

Judges Sir Percy Spender, Sir Gerald Fitzmaurice and Morelli appended to the Opinion of the Court statements of their Separate Opinions. President Winiarski and Judges Basdevant, Moreno Quintana, Koretsky and Bustamante y Rivero appended to the Opinion of the Court statements of their Dissenting Opinions.

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The President of the Court, in pursuance of Article 66, paragraph 2, of the Statute, having considered that the States Members of the United Nations were likely to be able to furnish information on the question, fixed 20 February 1962 as the time-limit within which the Court would be prepared to receive written statements from them. The following Members of the United Nations submitted statements, notes or letters setting forth their views: Australia, Bulgaria, Byelorussian Soviet Socialist Republic, Canada Czechoslovakia Denmark, France, Ireland, Italy, Japan the Netherlands, Portugal, Romania, South Africa, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Upper Volta. At hearings held from 14 to 21 May the Court heard oral statements by the representatives of Canada, the Netherlands, Italy, the United Kingdom of Great Britain and Northern Ireland, Norway, Australia, Ireland, the Union of Soviet Socialist Republics and the United States of America.

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In its opinion the Court first recalled that it had been argued that the Court should refuse to give an opinion, the question put to it being of a political nature, and declared that it could not attribute a political character to a request which invited it to undertake an essentially judicial task, namely the interpretation of a treaty provision. In this connection the Court recalled the principles previously stated by the Permanent Court of International Justice in the Advisory Opinion concerning the *Status of Eastern Carelia* and by the present Court in the Advisory Opinions concerning the

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase) and *Judgments of the Administrative Tribunal of the ILO upon Complaints made against Unesco,* and found no "compelling reason" why it should not give the advisory opinion which the General Assembly had requested of it.

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The Court then examined the view that it should take into consideration the rejection of a French amendment to the request for advisory opinion. The amendment would have asked the Court to give an opinion on the question whether the expenditures related to the indicated operations had been "decided on in conformity with the provisions of the Charter".

On this point the Court observed that the rejection of the French amendment did not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were "decided on in conformity with the Charter", if the Court found such consideration appropriate. Nor could the Court agree that the rejection of the French amendment had any bearing upon the question whether the General Assembly had sought to preclude the Court from interpreting Article 17 in the light of other articles of the Charter, that is, in the whole context of the treaty.

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Turning then to the question which had been posed, the Court found that it involved an interpretation of Article 17, paragraph 2, of the Charter, and that the first question was that of identifying what are "the expenses of the Organization".

The text of Article 17, paragraph 2, referred to "the expenses of the Organization" without any further explicit definition. The interpretation of the word "expenses" had been linked with the word "budget" in paragraph 1 of that Article and it had been contended that in both cases the qualifying adjective "regular" or "administrative" should be understood to be implied. According to the Court this would be possible only if such qualification must necessarily be implied from the provisions of the Charter considered as a whole.

Concerning the word "budget" in paragraph 1 of Article 17, the Court found that the distinction between "administrative budgets" and "operational budgets" had not been absent from the minds of the drafters of the Charter since it was provided in paragraph 3 of the same Article that the General Assembly "shall examine the administrative budgets" of the specialized agencies: if the drafters had intended that paragraph 1 should be limited to the administrative budget of the United Nations organization itself, the word "administrative" would have been inserted in paragraph 1 as it had been in paragraph 3. Actually, the practice of the Organization had been from the outset to include in the budget items which would not fall within any of the definitions of "administrative budget" which had been advanced. The General Assembly had consistently included in the annual budget resolutions provision for "unforeseen and

extraordinary expenses" arising in relation to the "maintenance of peace and security". Every year from 1947 through 1959 the resolutions on these unforeseen and extraordinary expenses have been adopted without a dissenting vote, except for 1952, 1953 and 1954, owing to the fact that in those years the resolution included the specification of a controversial item-United Nations Korean war decorations. Finally, in 1961, the report of the Working Group of Fifteen on the Examination of the Administrative and Budgetary Procedures of the United Nations had recorded the adoption without opposition of a statement that "investigations and observation operations undertaken by the Organization to prevent possible aggression should be financed as part of the regular budget of the United Nations." Taking these facts into consideration, the Court concluded that there was no justification for reading into the text of Article 17, paragraph 1, any limiting or qualifying word before the word "budget".

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Turning to paragraph 2 of Article 17, the Court observed that, on its face, the term "expenses of the Organization" meant all the expenses and not just certain types of expenses which might be referred to as "regular expenses". Finding that an examination of other parts of the Charter showed the variety of expenses which must inevitably be included within the "expenses of the Organization", the Court did not perceive any basis for challenging the legality of the settled practice of including such expenses in the budgetary amounts which the General Assembly apportioned among the Members in accordance with the authority which was given to it by Article 17, paragraph 2.

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Passing then to the consideration of Article 17 from the standpoint of its place in the general structure and scheme of the Charter, the Court found that the general purposes of that Article were the vesting of control over the finances of the Organization and the levying of apportioned amounts of the expenses of the Organization. Replying to the argument that expenses resulting from operations for the maintenance of international peace and security were not "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter, inasmuch as they fell to be dealt with exclusively by the Security Council, and more especially through agreements negotiated in accordance with Article 43 of the Charter, the Court found that under Article 24 the responsibility of the Security Council in the matter was "primary", not exclusive. The Charter made it abundantly clear that the General Assembly was also to be concerned with international peace and security. Under paragraph 2 of Article 17 the General Assembly was given the power to apportion the expenses among the Members, which created the obligation of each to bear that part of the expenses which was apportioned to it. When those expenses included expenditures for the maintenance of peace and security, which were not otherwise provided for, it was the General Assembly which had the authority to apportion the latter amounts among the Members. None of the provisions determining the respective functions and powers of

the Security Council and the General Assembly supported the view that such distribution excluded from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.

Replying to the argument that with regard to the maintenance of international peace and security the budgetary authority of the General Assembly is limited by Article 11, paragraph 2, under which "any such question [relating to the maintenance of international peace and security] on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion" the Court considered that the action referred to in that provision was coercive or enforcement action. In this context, the word "action" must mean such action as was solely within the province of the Security Council, namely that indicated by the title of Chapter VII of the Charter: "action with respect to threats to the peace, breaches of the peace, and acts of aggression". If the interpretation of the word "action" in Article 11, paragraph 2, were that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly might make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, had no application where the necessary action was not enforcement action.

The Court found therefore that the argument drawn from Article 11, paragraph 2, to limit the budgetary authority of the General Assembly in respect of the maintenance of international peace and security was unfounded.

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The Court then turned to the examination of the argument drawn from Article 43 of the Charter which provides that Members shall negotiate agreements with the Security Council on its initiative, for the purpose of maintaining international peace and security. The argument was that such agreements were intended to include specifications concerning the allocation of costs of such enforcement actions as might be taken by direction of the Security Council, and that it was only the Security Council which had the authority to arrange for meeting such costs.

After stating that Article 43 was not applicable, the Court added that even if it were applicable, the Court could not accept such an interpretation of its text for the following reasons. A Member State would be entitled, during the negotiation of such agreements, to insist, and the Security Council would be entitled to agree, that some part of the expense should be borne by the Organization. In that case such expense would form part of the expenses of the Organization and would fall to be apportioned by the General Assembly under Article 17. Moreover, it followed from Article 50 of the Charter that the Security Council might determine that an overburdened State was entitled to some financial assistance. Such financial assistance, if afforded by the Organization, as it might be, would clearly constitute part of the "expenses of the Organization". Furthermore, the Court considered that it could not be said that the Charter had left the Security Council impotent in the face of an emergency situation when agreements under Article 43 had not been concluded. It must lie within the power of the Security Council to police a situation even though it did not resort to

enforcement action against a State. The costs of actions which the Security Council was authorized to take therefore constituted "expenses of the Organization within the meaning of Article 17, paragraph 2".

Having considered the general problem of the interpretation of Article 17, paragraph 2, in the light of the general structure of the Charter and of the respective functions of the General Assembly and the Security Council, with a view to determining the meaning of the phrase "the expenses of the Organization", the Court proceeded to examine the expenditures enumerated in the request for the advisory opinion. It agreed 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 was not one of the purposes of the United Nations it could not be considered an "expense of the Organization". When the Organization took action which warranted the assertion that it was appropriate for the fulfilment of one of the purposes of the United Nations set forth in Article 1 of the Charter, the presumption was that such action was not *ultra vires* the Organization. If the action were taken by the wrong organ, it was irregular, but this would not necessarily mean that the expense incurred was not an expense of the Organization. Both national and international law contemplated cases in which the body corporate or politic might be bound by an *ultra vires* act of an agent. As the United Nations Charter included no procedure for determining the validity of the acts of the organs of the United Nations, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council adopted a resolution purportedly for the maintenance of international peace and security and if, in accordance with such resolution, the Secretary-General incurred financial obligations, those amounts must be presumed to constitute "expenses of the Organization". Recalling its Opinion concerning *Effects of Awards of Compensation made by the United Nations Administrative Tribunal,* the Court declared that obligations of the Organization might be incurred by the Secretary-General acting on the authority of the Security Council or of the General Assembly, and that the General Assembly "has no alternative but to honour these engagements".

This reasoning, applied to the resolutions mentioned in the request for the advisory opinion, might suffice as a basis for the opinion of the Court. The Court went on, however, to examine separately the expenditures relating to the United Nations Emergency Force in the Middle East (UNEF) and those relating to the United Nations operations in the Congo (ONUC).

As regards UNEF, the Court recalled that it was to be set up with the consent of the Nations concerned, which dismissed the notion that it constituted measures of enforcement. On the other hand, it was apparent that the UNEF operations were undertaken to fulfil a prime purpose of the United Nations, that is, to promote and maintain a peaceful settlement of the situation. The Secretary-General had therefore properly exercised the authority given him to incur financial obligations; the expenses provided for by such obligations must be considered "expenses of the Organization". Replying to the argument that the General Assembly never, either directly or indirectly, regarded the expenses of UNEF as "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter", the Court stated that it could not agree with this interpretation. Analysing the resolutions relating to the financing of UNEF, the Court found that the establishment of a special account did not necessarily mean that the funds in it were not to be derived from contributions of Members as

apportioned by the General Assembly. The resolutions on this matter, which had been adopted by the requisite two-thirds majority, must have rested upon the conclusion that the expenses of UNEF were "expenses of the Organization" since otherwise the General Assembly would have had no authority to decide that they "shall be borne by the United Nations" or to apportion them among the Members. The Court found therefore that, from year to year, the expenses of UNEF had been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2.

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Turning next to the operations in the Congo, the Court recalled that they had been initially authorized by the Security Council in the resolution of 14 July 1960, which had been adopted without a dissenting vote. The resolution, in the light of the appeal from the Government of the Congo, the report of the Secretary-General and the debate in the Security Council, had clearly been adopted with a view to maintaining international peace and security. Reviewing the resolutions and reports of the Secretary-General relating to these operations, the Court found that in the light of such a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly of the actions of the Secretary-General, it was impossible to reach the conclusion that the operations in the Congo usurped or impinged upon the prerogatives conferred by the Charter of the Security Council. These operations did not involve "preventive or enforcement measures" against any State under Charter VII and therefore did not constitute "action" as that term was used in Article 11. The financial obligations which the Secretary-General had incurred, in accordance with the clear and reiterated authority of both the Security Council and the General Assembly, constituted obligations of the Organization for which the General Assembly was entitled to make provision under the authority of Article 17, paragraph 2, of the Charter.

In relation to the financing of the operations in the Congo, the Court, recalling the General Assembly resolutions contemplating the apportionment of the expenses in accordance with the scale of assessment for the regular budget, concluded therefrom that the General Assembly had twice decided that even though certain expenses were "extraordinary" and "essentially different" from those under the "regular budget", they were none the less "expenses of the Organization" to be apportioned in accordance with the power granted to the General Assembly by Article 17, paragraph 2.

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Having thus pointed out on the one hand that the text of Article 17, paragraph 2, of the Charter could lead to the conclusion that the expenses of the Organization were the amounts paid out to defray the costs of carrying out the purposes of the Organization, and on the other hand that the examination of the resolutions authorizing the expenditures referred to in the request for the advisory opinion had led to the finding that they had been incurred with that end in view and having also analyzed and found

unfounded the arguments which had been advanced against the conclusion that the expenditures in question should be considered as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations, the Court arrived at the conclusion that the question submitted to it by the General Assembly must be answered in the affirmative.

THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY

The Delegation by the UN Security Council of its Chapter VII Powers

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and control over the exercize of its delegated power this may provide sufficient guarantee that the delegator's decision-making processes are brought to bear on the exercize of the power.[155] As long as the Council exercizes effective overall authority and control over the use of its delegated Chapter VII powers, the role of the five Permanent Members is sufficiently guaranteed. However, the danger with a delegation of Chapter VII powers is that once the power is delegated then a Permanent Member could veto a proposed subsequent decision of the Council that was intended to exercize the Council's authority and control over the way in which the delegated power was being exercized. It is for this reason that the observance of the conditions that attach to a delegation of Chapter VII powers to Member States are of such importance:[156] in particular the clear specification by the Council of the objective for which powers are being delegated, the fulfilment of which will lead to the automatic termination of the delegation of powers.[157]

The additional institutional characteristic of the Council's decision-making processes that must be guaranteed when delegating Chapter VII powers is that provided for by Article 44 of the Charter, as explained above.[158]

In summary, for a delegation of discretionary Chapter VII powers to be lawful, the Council must ensure that it retains the right at all times to change the decision of its delegate so that it can exercize effective authority and control over the way in which the delegated powers are being exercized.[159]

[155] See *supra* notes 146–7 and corresponding text. Moreover, in the case of the veto-power in the Council, the five Permanent Members have the right initially of course to veto the decision to delegate Chapter VII powers. This is of considerable importance to Schermers and Blokker in order for the Council to have the competence to delegate these powers: Schermers and Blokker, *supra* note 34, pp. 154–5.

[156] For these conditions, see *infra* Section II in Chapter 4.

[157] See further on this requirement: *infra* notes 51–60 in Chapter 4.

[158] See *supra* notes 134–6 and corresponding text.

[159] Cf. the position in Canada where the issue of a delegation of discretionary power without the concomitant setting of limits to the exercize of that power has arisen in the Canadian Supreme Court case of *Gavin et al.* v. *The Queen* ((1956) *ILR*, p. 154). In that case, seventeen fishermen were convicted for contravening section 7(b) of the Lobster Fishery Regulations for the Maritime Provinces of Quebec. The Regulations imposed restrictions on the time and size of the lobster catch in certain areas of the Gulf of St Lawrence. (*Ibidem.*) Chief Justice Campbell upheld the validity of a delegation of discretionary powers in the following terms: 'As the Parliament of Canada has not directly passed any legislation fixing a relevant limit for fishing operations in the locality concerned, we must consider whether Parliament has effectively delegated its power in that respect to the Governor in Council, and, if so, whether the latter has effectively exercized such delegated powers so as to validate section 7(b). It cannot be disputed that Parliament had the power to delegate its legislative authority to the Governor in Council or other body of its creation. If such delegation has taken place, the depository of the powers and authority of Parliament can exercize those powers and authority, to the extent delegated, as effectively as Parliament itself could have exercized them. It may, as the appellant's counsel urges, be eminently desirable that Parliament should specifically enact as much of its substantive legislation as possible, especially on points of fundamental importance, and should entrust to the other bodies only a limited discretionary authority to provide for varying

preclude the Council from later making an authoritative interpretation of its earlier stated objective.

The question which remains is whether the Council must specify in some detail the level of force to be used by States in order to achieve the Council's stated objectives. White is of the opinion that such a specification by the Council is necessary for the authorization to be considered as being 'adequately centralized'.[62] Requiring the Council to specify the level of the use of force to be undertaken is not, however, particularly helpful. The Council is delegating in many cases the power of command and control over the military force to the States which are supplying the forces. It must surely be left to these States to decide what degree of force should be used to attain the Council's stated objective.[63] This does not of course mean that States when carrying out military enforcement action can evade their responsibilities under customary and treaty law and not respect their international humanitarian law obligations;[64] an important one in this case being the use of a proportionate force to achieve the Council's objectives.[65]

The second condition—which is closely related to the obligation of the Council to specify the objectives of a military enforcement action—is that the Council must conduct a continuous review of the enforcement action. The obligation to undertake supervision rests primarily on the Security Council, but there is a concomitant obligation on Member States to submit themselves to such supervision. This obligation is of fundamental importance to the Council being able to ensure that it can exercize its overall authority and control over the exercize of its delegated powers, and is, moreover, necessary for the Council to be able to make, if it so wishes, the decision when its stated objective has been achieved and thus when the delegation of powers ceases to exist.[66] UN supervision is also necessary to ensure a degree of transparency in the way that the delegated Chapter VII powers are being exercized.[67] This is important for the legitimacy of any

[62] White, *supra* note 9, p. 105.

[63] See also Chayes, A., in '1991 Friedmann Conference on Collective Security', *Columbia Journal of Transnational Law*, 29 (1991), at pp. 510–11; and Seyersted, *supra* note 6, p. 318.

[64] See Schachter, O., *International Law in Theory and Practice* (1994), p. 401; Seyersted, *supra* note 6, p. 203; and Gardam, J., 'Legal Restraints on Security Council Military Enforcement Action', *Michigan Journal of International Law*, 17 (1996), p. 285 *et sequentia*, and 'Proportionality and Force in International Law', *AJIL*, 87 (1993), p. 391.

[65] Gardam, *ibidem;* and Bowett, *supra* note 45, pp. 54–5. For application of this requirement in practice, see, for example, *infra* notes 63 & 64 and corresponding text in Chapter 5.

[66] See also Borg Olivier, *supra* note 54, p. 25; Weiss, T., 'Overcoming the Somalia Syndrome—"Operation Rekindle Hope?"', *Global Governance*, 1 (1995), p. 171 at p. 177; and Sewall, S., 'Peace Enforcement and the United Nations', in *Peace Support Operations and the US Military* (Quinn, D., ed.) (1994), p. 101 at p. 104.

[67] See also the statement by the Russian representative in the Security Council: S/PV.3413, p. 24.

be no punishment of crime without a pre-existing law. "*Nullum crimen sine lege, nulla poena sine lege.*" It was submitted, that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had, defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on 63 nations, including Germany, Italy, and Japan, at the outbreak of war in 1939. In the preamble, the signatories declared that they were:

"Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated ... and all changes in their relations with one another should be sought only by pacific means ... thus uniting civilized nations of the world in a common renunciation of war as an instrument of their national policy...."

The first two articles are as follows:

"Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies