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Certain Expenses of the United Nations (Advisory Opinion)

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A. Factual Background

1 In 1956 the United Nations General Assembly (→ *United Nations, General Assembly* [‘UNGA’]) authorized the creation of the UN Emergency Force I (‘UNEF I’), which was first to secure the withdrawal of British, French, and Israeli troops that had invaded Egyptian territory, and then to serve as a buffer force along the → *armistice* line on the Sinai Peninsula. In 1960 the UN Security Council (→ *United Nations, Security Council* [‘UNSC’]) established the UN Operations in the Congo (‘ONUC’; see also → *Congo, Democratic Republic of the*), part of which involved a military force charged with certain functions in the process of settling the conflict in that country.

2 The costs of the two operations, to the extent that they were not covered by voluntary contributions, were treated by the UNGA essentially in the same way as other expenditures of the UN: by apportioning them among the Member States as provided by Art. 17 (2) → *United Nations Charter* [‘UN Charter’] see also → *International Organizations or Institutions, Financing of*). Some States objected to that procedure and refused to pay the sums apportioned to them.

3 In view of the serious lack of funds resulting from that refusal, the UNGA requested an advisory opinion of the → *International Court of Justice (ICJ)* on the question whether the expenses authorized by the UNGA in relation to the two → *peacekeeping forces* constituted ‘expenses of the Organization’ within the meaning of Art. 17 (2) UN Charter (see also → *Advisory Opinions*).

B. Contents

4 The ICJ, seeing no compelling reason why it should decline the request, answered this question affirmatively on 20 July 1962 in *Certain Expenses of the United Nations* in the light of Art. 17 (2) UN Charter (Advisory Opinion). At the beginning of its reasoning the ICJ pointed out that it would apply to Art. 17 (2) UN Charter the general rules of treaty interpretation and that in doing so it would lend special importance to the manner in which the organs of the UN have consistently interpreted the provision in question (→ *United Nations Charter, Interpretation of*; see also → *Interpretation in International Law*).

5 The ICJ began its analysis with the question of inherent limitations of the UNGA’s budgetary powers (→ *United Nations Budget*). These powers are not limited to the regular or administrative budget, nor can a limitation be derived from the distribution of competences between the UNGA and the UNSC in matters relating to peace and security. The responsibility of the UNSC under Art. 24 UN Charter is ‘primary’ (Art. 24 (1) UN Charter), not exclusive. The powers of the UNGA in this field are not limited to discussion, the initiation of studies and the making of recommendations. Only the taking of action, which the ICJ interprets to mean coercive or enforcement action under Chapter VII UN Charter (see also → *Collective Security*), is reserved to the UNSC by virtue of Art. 11 (2) UN Charter. That provision, however, does not limit the budgetary authority of the UNGA, nor does Art. 43 UN Charter as *lex specialis* give the UNSC exclusive budgetary powers for enforcement actions.

6 The central problem arising was the relationship between the legality of UN actions and the validity of the resolutions providing for their financing. For the ICJ, however, the decisive test was not so much the legality of the action as such, but the relationship of an expenditure to the purposes of the UN (→ *United Nations, Purposes and Principles*), of which the maintenance of peace and security is, of course, a primary one. It followed that expenditure made for a purpose which is not one of the purposes of the UN does not constitute ‘expenses of the Organization’ in the sense of Art. 17 (2) UN Charter.

7 The ICJ divided that relation by setting up two complementary presumptions, the first of which referred to the relation between action and purposes. When ‘the Organization takes actions which warrants the assertion

that it was appropriate for the fulfillment of one of the stated purposes of the UN, the presumption is that such action is not ultra vires the Organization' (*Certain Expenses of the United Nations* 168). The mere fact that an action might be carried out by the wrong UN organ, ie in violation of the horizontal distribution of powers within the UN, 'would not necessarily mean that the expense incurred was not an expense of the Organization' (ibid). Thus, even irregular actions by a UN agent could bind the UN vis-à-vis third parties and incur expenses for it (see also → *Agents*), as long as it keeps within the purposes set out in Art. 1 UN Charter. The second presumption concerned the relation between an authorized UN action and its implementation having financial consequences:

If the UNSC adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General (→ *United Nations, Secretary-General*) incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization' (ibid).

Both presumptions taken together led the ICJ to answer the questions posed to it in the affirmative.

8 This line of argument was criticized in a number of separate and dissenting opinions. For example, Judge Winiarski held that the ICJ was going too far in disconnecting the legality of a UN action from the validity of its financial distribution among Member States (*Certain Expenses of the United Nations [Dissenting Opinion of President Winiarski]* 233–34). Judge Fitzmaurice would not accept that the power of the UNGA to take binding financial decisions should extend beyond 'obligatory' activities such as those for the maintenance of peace and security (*Certain Expenses of the United Nations [Dissenting Opinion of Judge Sir Gerald Fitzmaurice]* 212).

9 Although in its reasoning the budget resolutions were legal even if the military operations concerned were not, the ICJ nevertheless continued by examining the legality of both UNEF I and ONUC. As to the former, the ICJ opined that it did not constitute an enforcement action which only the UNSC would have been empowered to decide on. Rather, it was a non-coercive operation undertaken to fulfill a prime purpose of the UN, that is, to promote and maintain a peaceful settlement of the situation. Consequently, the expenses resulting therefrom were 'expenses of the Organization' within the meaning of Art. 17 (2) UN Charter, and, as the ICJ showed in some detail, have been treated as such by the UNGA. As legal bases the ICJ discussed Arts 11 and 14 UN Charter, showing a slight preference for the latter, but left the question open.

10 Also with regard to ONUC, the ICJ abstained from deciding on which particular article of the UN Charter the operation was based, but again it did not consider it an enforcement action. The ICJ acknowledged the freedom of the UNSC 'to act through instruments of its own choice' (*Certain Expenses of the United Nations* 177) in order to pursue the purpose of maintaining international peace and security, and pointed in this respect to Art. 29 and 98 UN Charter which authorize the UNSC to establish subsidiary organs and to entrust certain implementing functions to the UN Secretary-General ('UNSG'; see also → *United Nations Committees and Subsidiary Bodies, System of*). The ICJ rejected the allegation that the UNSG had exceeded the mandate given to him by the UNSC. Finally, the ICJ confirmed its conclusion by pointing out that the expenses incurred for ONUC were in practice essentially treated as such by the UNGA.

C. Relevance

11 The significance of Certain Expenses of the UN for current international law, is, broadly speaking, fourfold. On the theoretical level, this concerns issues of treaty interpretations and of competences of international organizations. On the more practical side, consequences arise for the division of powers between the UNSC and the UNGA relating to → *peacekeeping* operations and for the budgetary powers of the UNGA.

1. Treaty Interpretation

12 Certain Expenses of the UN involves several issues of interpretation of treaties under international law, even though the ICJ did not address them explicitly. First, the ICJ implicitly confirmed the principle of → *effectiveness*—also described as *ut res magis valeat quam pereat*—which is one of the recognized interpretation rules that have not found their way into the relevant Arts 31, 32 and 33 → *Vienna Convention on the Law of Treaties (1969)* ('VCLT'). In the case at hand, the ICJ referred to the principle when it said that even an unqualified term in a treaty provision—here it was the word 'budget' in Art. 17 (2) UN Charter—could be amended by reading a qualification into it, if such qualification must be necessarily implied from the provision of the UN Charter as a whole or from some particular provision thereof 'which makes it unavoidable to do so in order to give effect to the Charter' (*Certain Expenses of the United Nations* 159). Thus, in relevant cases the teleological maxim of *ut res magis valeat quam pereat* could even override the wording of a treaty if this would be necessary in order to give the latter the intended effects.

13 Secondly, *Certain Expenses of the United Nations* raises the question of the interpretative value of the practice of the UN and its organs on which the ICJ relied in its reasoning to a remarkable extent. Whereas Art. 31 (3) (b) VCLT provides for subsequent practice in the application of a treaty as a means of interpretation only if it 'establishes the agreement of the parties' regarding that interpretation, the ICJ appears to take UN organ practice into account without actually examining if in any instance it reflected the → *consent* of the States Parties to the UN Charter. Thus, the conclusion could be that in the case of a treaty establishing an international organization Art. 31 (3) (b) VCLT has to be understood as referring to the organ practice of the organization concerned in its own right. In any case, for the interpretation of the UN Charter the subsequent practice of UN organs plays a decisive role. Here also the majority opinion met with substantial criticism in the separate and dissenting opinions.

2. Implied Powers of International Organizations

14 Although the ICJ did not expressly argue in favour of implied budgetary powers of the UNGA (see also → *International Organizations or Institutions, Implied Powers*), its line of reasoning refers at one point to the well-known implied powers doctrine and seems to give it a rather loose reading. In its advisory opinion on → *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* the ICJ applied a more restrained version of the doctrine in assuming implied competences of an organization only if they are 'essential to the performance of its duties' (at 172) under its founding treaty. In *Certain Expenses of the United Nations*, however, the ICJ seems to assume that implicit powers of an organization such as the UN can arise from its purposes, rather than its duties, and do not have to be 'essential' (*ibid*), but merely 'appropriate' (*Certain Expenses of the United Nations* 168) for their fulfillment. Even if the relevant passage is only phrased as a—rebuttable?—presumption, it appears to contain the argumentative potential for substantially extending the competences of almost every international organization.

3. Peacekeeping Powers of UN Organs

15 The ICJ rules on the distribution of powers relating to international peace and security between the UNGA and the UNSC. In the system of the UN Charter the UNGA must be seen to possess relevant competences of its own, such as the powers of recommendation under Arts 11 (2) and 14 UN Charter and the powers of decision under Arts. 5 and 6 UN Charter. Art. 11 (2) UN Charter empowers the UNGA, by means of recommendations to States or to the UNSC, to organize peacekeeping operations at the request, or with the consent, of the States concerned. But, Art. 14 UN Charter can also serve as legal basis for such an operation.

16 The UNSC, on the other hand, possesses the exclusive competence to order coercive enforcement actions pursuant to Chapter VII UN Charter. It is only that kind of action to which the restriction clause in Art. 11 (2), last sentence UN Charter, refers. The prerogative of the UNSC implied in that clause only applies to enforcement actions. Under the provisions of Chapter VII UN Charter, however, the UNSC may also adopt non-coercive actions, such as the mere policing of a situation.

17 The implementation of such an operation, including the selection of participating States, can under Art. 98 UN Charter be entrusted to the UNSG, provided that its actions are subject to the consideration and control of the UNSC. The ICJ leaves open possible limits of that authorization and how close that control has got to be in order to be in accordance with the division of powers provided for in the UN Charter.

4. Budgetary Powers of the UN General Assembly

18 The budgetary powers of the UNGA under Art. 17 (2) UN Charter are being shaped and sharpened by the opinion of the ICJ. They extend to all expenses incurred for fulfilling one of the purposes of the UN, even if the action adopted was neither coercive nor mandatory and not binding upon the Member States. Art. 17 (2) UN Charter therefore seems to provide an independent basis of authority for the UNGA to create legally binding obligations for Member States.

19 This includes the power to set up a budget for peacekeeping operations and to apportion the relevant expenses among the Member States. The resulting obligation of the latter to contribute to the financing of those operations is today generally accepted, even if several Member States have on various political grounds refused to pay their contributions. The consequential financial problems for the UN and its peacekeeping activities remain unsolved.

20 Beyond its being linked to the purposes of the UN, the budgetary power of the UNGA under Art. 17 (2) UN Charter is not dependent on the overall lawfulness of the actions for which the expenses were incurred. In particular, the fact that an operation to be financed infringes the horizontal distribution of powers between UN organs, would not affect the power of the UNGA to distribute its costs among Member States and, thus, the latter's ensuing obligation to pay for it. It would follow that the possibility for Member States to challenge unilaterally an action taken by the UN may be reduced to the allegation that it had no reasonable connection with the UN purposes. In contrast to this, however, actual practice has quite regularly seen the refusal of payment being used by States as a means to challenge the legality of UN actions, practice or even the usefulness of institutions.

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