The Special Assessments Case

James A. Rendall

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Commentary

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Reading this along with the statement of Cartwright, J., that "the appellant purchased relaying rail; he did not purchase 'potential relaying rail' or scrap that might be transformed into 'relaying rail,'" can it be inferred that a buyer need not do anything to bring the goods up to contract standard, however trivial the work might be?

A final question that might be investigated in a more thorough examination of the *Rennymede* case is whether or not words of quality can ever be part of the description of goods in a contract for the purposes of the *Sale of Goods Act*? This argument was presented in the Court of Appeal but no mention was made of it in the judgments. Quality is a matter of degree. At some point a line must be drawn between the goods on one side of contract quality and the goods on the other side which are not. The location of this point may be a very difficult question of fact. Perhaps it would be more conducive to modern business for the law to take no note of words of quality in descriptions of goods in contracts where a right of rejection of the goods is involved.

It would seem that the simplest view and the one with the most certainty—so important an element in commercial law matters—is the principle enunciated by Lord Low in the *Aitken* case, that is, that goods of a "different description" in sec. 29(3) mean goods of a different "kind". However, the highest court in the land has decided to extend this principle. Exactly how much they have extended it seems to be uncertain, but the case does seem to provide another example of the view that doubt will be resolved in favour of the buyer.

PATRICK J. CULL*

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*Mr. Cull is in the third year at Osgoode Hall Law School.

I. THE SIGNIFICANCE OF THE CASE

This result was generally acclaimed as being a proper and even triumphant one—a result which vindicates the action of the Secretary General and shores up the very foundations of the U.N. Organization.

Indeed, the judges who dissented expressed their regret that they felt compelled to do so. Judge Moreno Quintana went on to say:

It would have been for me a matter of great satisfaction to contribute in the exercise of my judicial function to the most effective realization of the essential purpose of the Organization.²

Judge Quintana also remarked:

An egalitarian solution, taking the financing of operations mainly based on military action as being a normal expense of the Organization to be apportioned among all Members States, seems an attractive one from the point of view of the cause to be served by the purpose in question.³

And again, Judge Quintana commented that “As an ideological position, the [view that the expenses in question were expenses of the Organization] is the most attractive ...”⁴ But “It remains to be seen whether it is correct from the legal point of view.”⁵

Five judges found themselves unable to give an affirmative answer to the legal question. Those judges who felt compelled to dissent did not overlook the extreme significance of the case before them. Of the problem posed Judge Bustamante said:

We are faced with a situation of uncertainty which cannot be ignored. The financial crisis which has occurred within the Organization is only the reflection of another crisis the subject of which is the very substance of the Charter.⁶

Financial crisis

Indeed, the very fact of the financial crisis was an element in leading the dissenting judges to insist upon a careful legal decision of the validity of the resolutions authorizing action and authorizing the expenditures as a basis for deciding the question actually put to the Court.

Judge Bustamante said:

A particular and an important aspect of the objectives raised to the inclusion in Article 17, paragraph 2, of expenditure for the maintenance of peace is the amount—every day a larger amount—of that expenditure, in view of the great extension of the armed interventions of the United Nations to preserve or restore peace.⁷

Judge Bustamante went on to point out that the enormous expenses of the U.N. sought to be assessed against the Members imposed on some States a severe test of solvency of their national budgets. He

²Ibid. 239.
³Ibid. 240-1.
⁴Ibid. 243.
⁵Ibid. 243.
⁶Ibid. 307.
⁷Ibid. 301; for example, the 1961 assessments for U.N.E.F. and O.N.U.C. amounted to $150,000,000.
noted that the General Assembly had already recognized this problem and had taken steps to reduce the incidence of the liability on some of the less wealthy States. But such a stop-gap response by the General Assembly is not sufficient.

Need for charter review

It is clear to me that, at the time of signature of the Charter, none of the States Members could have foreseen that the obligations which they acknowledged in respect of the Organization could one day conflict with their obligations under municipal law vis-à-vis their national communities. Nobody foresaw that the increase in expenditure of the United Nations could one day endanger the solvency of national budgets. But since this state of affairs has arisen subsequently to the coming into force of the Charter, it is obvious that such a new factor calls for very special consideration by the competent organ of the Organization. The apportionment of assessments according to the system of budgetary scales has been the subject of continual criticisms. Some more explicit and formal compromise between the budgetary necessities of the United Nations and the constitutional problem of the objecting States must therefore be arrived at, so as to incorporate in the Charter settlement some further rule covering the new situation.

This comment is typical of Judge Bustamante's judgment. The need for "consideration by the competent organ" is its theme. Like the other dissenting members of the Court, Judge Bustamante based himself on the manner in which the question was framed—the objection being that the question as posed precluded a proper, and indeed essential, decision on the legality of the resolutions pursuant to which the expenses were incurred. As a result, the five dissenting judges found it impossible to give an affirmative answer to the question posed.

Unlike the others, Judge Bustamante conceded the possibility of a finding that these resolutions were legal and stood ready to answer affirmatively to the question actually posed should such a finding be made by "the competent organ".

An equally emphatic statement of the significance of this advisory opinion as the one above quoted from the opinion of Judge Bustamante may be found in the judgment of Judge Moreno Quintana.

To say that this new advisory opinion might decide the fate of the United Nations in the years to come would certainly be rash, but it may at least be affirmed that its effects would be far-reaching. It relates to a matter as decisive as that of the financing of the Organization for the achievement of its purpose of maintaining international peace and security.

Primary purposes of the U.N.

The maintenance of peace and security, of course, is a primary aim of the U.N. Organization as is stated in the opening words of the
The primacy of this purpose in the Charter received comment frequently in the majority and concurring opinions. The majority opinion said:

... it is apparent that the operations were undertaken to fulfil a prime purpose of the United Nations ... and expenses resulting from such obligations must be considered “expenses of the Organization within the meaning of Article 17, paragraph 2”.

Judge Spiropoulos found room in a one page concurring judgment to approve particularly this view, and Judge Sir Percy Spender agreed, with a small wrinkle added. He said, not that expenses incurred in pursuit of a basic aim of the Charter were automatically “expenses of the Organization”, but that such expenses having been incurred it was up to the General Assembly to determine whether they were “expenses of the Organization”.

The end does not justify the means

The rejoinders made by the dissenting judges to this emphasis on the primary purposes of the U.N. ranged from Judge Koretsky’s criticism of the majority for having accepted, uncritically, the repeated assertions in the various General Assembly resolutions that the expenses were made pursuant to the “guiding principles” of the United Nations to his comment that limiting itself to the purposes of the Organization without attention to the necessity for strict observation and proper interpretation of the provisions and rules of the Charter must lead the Court to “the long ago condemned formula: ‘the ends justify the means’.”

President Winiarski also denied that the end would justify the means.

The Charter has set forth the purposes of the United Nations in very wide, and for that reason too indefinite, terms. But ... it does not follow, far from it, that the Organization is entitled to seek to achieve those purposes by no matter what means. The fact that an organ of the United Nations is seeking to achieve one of those purposes does not suffice to render its action lawful. The Charter, a multilateral treaty which was the result of prolonged and laborious negotiations, carefully created organs and determined their competence and means of action.

Judge Moreno Quintana expanded this point, asserting that there was no need to invoke implied powers conceived to achieve the basic

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12 Chapter I. Purposes and Principles. Article 1. The purposes of the United Nations are:

1. To maintain international peace and security ...


14 Ibid. 180.

15 Ibid. 182. See also Judge Spender’s comments on p. 185 and again on p. 186 to the effect that the stated purposes of the Charter are a prime consideration in its interpretation.

16 Ibid. 235.

17 Ibid. 268.

18 Ibid. 230.
purposes of the Organization "when explicit powers provide expressly for the eventualities under consideration."\(^{19}\) This assertion, of course, is based on his opinion that U.N.E.F. and O.N.U.C. were operations undertaken pursuant to explicit Charter powers, an opinion not shared by the majority. Thus, one of the most fundamental differences of opinion between the majority and minority members of the Court was whether the operations under discussion were "Enforcement Actions" for which provision is made in Chapter VII of the Charter.

**Possibility of the United Nations being unable to act**

President Winiarski considered the separation of fields of competence so fundamental that it might mean the Organization would be unable to act at all in certain cases. He stated:

> The intention of those who drafted [the Charter] was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully established fields of competence, as can be seen, for example, in the case of the voting in the Security Council. It is only by such procedures, which were clearly defined, that the United Nations can seek to achieve its purposes. It may be that the United Nations is sometimes not in a position to undertake action which would be useful for the maintenance of international peace and security or for one or another of the purposes indicated in Article I of the Charter, but that is the way in which the organization was conceived and brought into being.\(^{20}\)

**II. THE SETTING**

**Charter**

Limitations of space preclude any attempt at a full outline of the Charter provisions and division of functions between the General Assembly and the Security Council.

Briefly, it may be said that Chapter IV of the Charter gives the General Assembly general powers of discussion and recommendation on all matters within the scope of the Charter,\(^{21}\) specific powers of consideration and discussion of questions pertaining to international peace and security\(^{22}\) and power to make recommendations in relation to such questions,\(^{23}\) power to initiate studies and make recommendations to promote international co-operation in all fields,\(^{24}\) and powers to consider reports from the Security Council and other organs of the United Nations.\(^{25}\) In addition, the General Assembly is given the financial responsibility for the Organization. Article 17 gives it the duty of considering and approving the budget of the Organization, apportioning the "expenses of the Organization" among the Members,\(^{26}\) and considering and approving the financial and budgetary arrangements of any specialized agencies of the United Nations.

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19 Ibid. 245.
20 Ibid. 230.
21 Article 10.
22 Article 11.
23 Article 14.
24 Article 13.
25 Article 15.
26 Article 17, para. 2.
Articles 11, 12 and 14 make it clear that in matters involving international peace the General Assembly shall defer to the primary competence of the Security Council. In Chapter V the Security Council is specifically given primary responsibility for the maintenance of international peace and security.\(^{27}\)

Chapter VII of the Charter is headed “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” It specifies the powers of the Security Council to deal with such situations by various means, including the use of force if necessary. Article 43 empowers the Security Council to conclude special agreements with Member States for the supply of armed forces and other assistance for the maintenance of peace.

Chapter XV provides for the Secretariat. Article 97 constitutes the Secretary General “the chief administrative officer of the Organization”. Article 98 charges him with the responsibility of so acting at all meetings of the General Assembly, Security Council, Economic and Social Council, and the Trusteeship Council and with the duty to “perform such other functions as are entrusted to him by these organs.”

**Factual background**

In effect, what happened in the Suez crisis was that the General Assembly requested the Secretary General to submit “a plan for the setting up . . . of an emergency international United Nations Force to secure and supervise the cessation of hostilities”,\(^{28}\) authorized him “to arrange with the parties concerned for the implementation of the cease-fire and the halting of the movement of military forces and arms into the area”\(^{29}\) and, pursuant to the proposals of the Secretary General, established “a United Nations Command for an Emergency International Force.”\(^{30}\) This was U.N.E.F. In a later series of resolutions, the General Assembly authorized expenditures by the Secretary General for the operations of U.N.E.F. and sought various ways of financing them, settling finally on a modified scheme of apportionment similar to that used for assessing Members' liability for the regular expenses of the Organization.

In the Congo, action was initially taken by the Security Council which called upon all States to refrain from action which might impede the restoration of law and order, called specifically on Belgium to withdraw its troops, and authorized the Secretary-General to provide the Congolese government with the necessary military assistance to restore national security. When the Security Council reached an impasse in its attempt to pass a resolution which was opposed, the General Assembly was called into Emergency Session and, with some

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27 Article 24.
28 Resolution 998 (ES-1), Nov. 4, 1956.
29 Resolution 999 (ES-1), Nov. 4, 1956.
30 Resolution 1000 (ES-1), Nov. 5, 1956.
amendments, passed the desired resolution. The General Assembly subsequently authorized expenditures up to $10,000,000 per month, and again sought the means of financing them.

III. THE PROBLEM

The specific question put to the Court for its advisory opinion was:

Do the expenditures authorized in [the various General Assembly resolutions referred to above] constitute ‘expenses of the Organization’ within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?

The French delegation had proposed an amendment to the resolution requesting the opinion. This amendment would have asked the Court to consider, as a matter preliminary to answering the above question, whether the expenditures relating to the indicated operation were decided on in conformity with the provisions of the Charter. The majority opinion appears to assume that a negative answer to this preliminary question would have ended the quest and determined that a negative reply must be given to the question actually posed.

It would be possible to move the enquiry a stage further back again to consider whether the action by which the expenses were incurred was itself taken in conformity with the Charter. This question involves a bifurcation of its own—first, was the action validly authorized, and secondly, was it validly carried out?

In theory at least, this series of enquiries may be viewed as either conjunctive or disjunctive. It is certainly arguable that the General Assembly can only authorize expenditures for “legal” actions and operations and that only those expenses which have been validly authorized may qualify as “expenses of the Organization”. On the other hand, it is also arguable that the tests stand independently, that the General Assembly may validly authorize expenditures for operations not “legally” authorized to be undertaken, and that expenses authorized by the General Assembly will be “expenses of the Organization” notwithstanding that they may not have been validly authorized.

The first view was taken by the dissenting judges. Though it may be true, as Judge Moreno Quintana remarked, that the affirmative is the more attractive position ideologically, it is clearly the case that adoption of what I call the conjunctive view of the three levels of enquiry greatly favours those who adopt the negative position. They need only establish a failure to comply at any one of the three levels. In fact, they attacked at all three levels. They asserted that the action was “illegally” authorized inasmuch as the Security Council, not the

31 The 1960 assessments for O.N.U.C. amounted to $60,000,000, and the 1961 assessments for O.N.U.C. were $120,000,000. Together with the assessment for U.N.E.F., the 1961 cost was more than twice the regular budget of $72,000,000.

General Assembly, has responsibility for maintenance of peace; in any event, it was alleged that the Secretary General exceeded his mandate in carrying out the action. It was further asserted that the General Assembly could not validly authorize expenditures so incurred and that, in fact, its modifications of the scheme of assessment were political bribery. Finally, it was said that Art. 17 does not contemplate such expenses, responsibility for which must devolve upon the Security Council or the States whose conduct necessitated them or upon the States whose interests were most closely involved. This argument may also be applied at the second level, i.e., the General Assembly cannot validly authorize such expenditures.

In contrast, only two of the majority judges adopted the disjunctive test. Judge Sir Percy Spender and Judge Morelli considered that the General Assembly could make a binding apportionment of the expenses irrespective of whether they were validly incurred or authorized. Judge Sir Gerald Fitzmaurice considered that an expense must have been validly incurred to rank as an "expense of the Organization" and, as noted above, the majority opinion apparently assumed that to qualify, expenses would have to be "decided on in conformity with the Charter". Judge Spiropoulos considered that he was precluded from considering this question in view of the rejection of the French amendment.

In fact, then, the French amendment was defeated in the General Assembly, but this was not the unqualified boon to the proponents of the affirmative that one might have expected. There arose the technical question whether, by rejecting the amendment, the General Assembly had foreclosed the Court from considering the issue of validity of the resolutions authorizing the expenditures under discussion. There was a variety of inferences on this point. The majority opinion dismissed the suggestion that the General Assembly would in any way "seek to fetter or hamper the Court in the discharge of its judicial functions." Judge Spiropoulos stated quite flatly that the action of the General Assembly did preclude the Court from examining the validity of the authorizing resolutions. Judge Sir Percy Spender considered the question academic as, in his opinion, the answer to the question actually posed was not thereby affected. He felt that the Court should not go into matters unnecessary for its purpose and should therefore decline to examine the validity of the authorizing resolutions. Judge Sir Gerald Fitzmaurice found such an examination necessary as he considered that to qualify as an "expense of the Organization" it must first be shown that an expense had been validly incurred. Judge Morelli agreed with Judge Spender that an affirmative answer to the question posed did not depend upon the

33 Supra, p. 542.
35 Ibid. 181.
36 Ibid. 182.
conformity to the Charter of the authorizing resolutions.\textsuperscript{37} In any event, he considered the General Assembly action had precluded the Court from “deciding” whether those resolutions did conform though the Court remained free to “consider” the point if it found it necessary in arriving at a decision.

Probably the most significant aspect of the French amendment and its rejection was that it provided the dissenting judges with the foundation for a technical objection. Judge Basdevant took the view that the request for an opinion did not make clear “whether the Court should purely and simply start from the existence of ‘expenditures authorized’ or whether it should first of all ascertain whether those expenses were properly authorized by the General Assembly.”\textsuperscript{38} For that reason, he said, the Court was unable to render an opinion as the request for an opinion must contain “an exact statement of the question upon which an opinion is required.”\textsuperscript{39} Judge Moreno Quintana agreed that the Court was precluded from examining the validity of the authorizing resolutions and was therefore effectively prevented from answering the question put to it.\textsuperscript{40} Judge Koretsky also considered that the Court was prohibited from examining the authorizing resolutions. He attacked the manner in which the question was framed from a different angle, however, saying that the General Assembly had put a question connected with resolutions already adopted and expenses already effected. He objected to this as calling for “a quasi-judicial appraisal of the effected expenses” rather than an answer “in the form of principle, based on an interpretation of the Charter.”\textsuperscript{41} Judge Basdevant had also objected that the request sought “a retrospective evaluation of what was done up to the end of 1961,” rather than guidance for present and future undertakings.\textsuperscript{42} Judge Bustamante’s view of the effect of the rejection of the French amendment was similar to that expressed by Judge Morelli. He thought that the Court was not prevented from considering any matter relevant to its reasoning process, but that the “operative part” of its opinion could not include a decision on the validity of the authorizing resolutions.\textsuperscript{43} Judge Bustamante, therefore, did not agree with his dissenting colleagues that the Court should not answer the question posed. He simply found himself unable to give an affirmative answer to it without a prior finding, by the “competent organ”, that those resolutions were valid.

Another technical objection demanded the attention of the Court. There was raised a preliminary objection to the Court’s competence

\textsuperscript{37} Ibid. 216.
\textsuperscript{38} Ibid. 235.
\textsuperscript{39} Wording taken from Article 65, paragraph 2, of the Statute of the International Court of Justice.
\textsuperscript{40} I.C.J. Reports 1962, pp. 247 and 252.
\textsuperscript{41} Ibid. 254.
\textsuperscript{42} Ibid. 238. The majority opinion specifically agreed that the Court is only asked to answer a question related to certain expenses already made, but did not view this fact with the same alarm—see Ibid. p. 158.
\textsuperscript{43} Ibid. 288.
to render an opinion on the basis that the question posed was a political one, whereas Article 65 of the Statute of the International Court of Justice empowers the Court only to "give an advisory opinion on any legal question". In any event, it was said, the power given is discretionary and the question before it was at least so intertwined with political considerations that the Court should decline to answer. The majority opinion dismissed this objection, saying:

It is true that most interpretations 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.44

Judge Koretsky was the only judge who disagreed specifically with this statement. He considered that the problem was basically a constitutional one rather than a budgetary one and that "political issues prevailed over juridical considerations" to such an extent that the Court should refrain from giving an opinion.45 Judge Koretsky also commented on the political manoeuvring in the General Assembly preliminary to the adoption of some of the resolutions approving the expenses of U.N.E.F. and O.N.U.C. He pointed out that a steadily increasing number of States had been abstaining from voting on these resolutions and suggested that the modification by which the assessment of some of the smaller States was reduced by crediting thereto the voluntary contributions received was introduced in order to, and did to some extent, influence the voting. This is probably a fair comment. It is also fair to say, as he did, that the question before the Court was basically a constitutional one rather than a budgetary one. This is the implication of the comments on the extreme significance of the case noted at the beginning of this article. However, that does not determine, necessarily, that the question is political rather than legal. Constitutional interpretation involves legal questions through, as the majority opinion conceded, it may also involve political consequences—in this case of great significance.

IV. THE JUDGMENT

Basically, the position taken by the opponents to the inclusion of the U.N.E.F. and O.N.U.C. costs in the "expenses of the Organization" can be stated in one sentence—"Those expenses do not form part of the regular budget of the Organization; they are expenses essentially different in nature from the regular expenses and, being incurred as a result of an enforcement action under Chapter VII of the Charter, they are the responsibility of the Security Council." The majority opinion, of course, rejects this statement in all its implications which are, broadly, four in number.

(1) Regular Budget: The argument that the expenses under review did not form part of the regular budget was dismissed by the
majority opinion on two grounds. In the first place, the majority denied that the word “budget” in Article 17, paragraph 1, is to be qualified by the word “regular” or any similar adjective which would impliedly exclude operational costs. They contrasted the wording of paragraph 1 with that of paragraph 3 of Article 17 wherein certain specific functions are given to the General Assembly in respect of various administrative budgets. In the second place, the majority opined that the power in paragraph 2 is, in any event, not limited by reference to paragraph 1—i.e., in apportioning the “expenses of the Organization” the General Assembly is not restricted to considering only expenses within the “budget”.

Both of these contentions were rejected by Judge Koretsky who was particularly emphatic that paragraph 1 of Article 17 does limit paragraph 2. In support of his view he cited the discussions and preliminary drafting at San Francisco during the course of which the order of the two paragraphs was reversed.

(2) Different Nature: The dissenting judges frequently referred to the fact that the expenses of U.N.E.F. and O.N.U.C. were of an extraordinary nature. Judge Koretsky dealt with this at great length, pointing out that the General Assembly, in its numerous resolutions concerning these expenses, had consistently recognized their extraordinary character, and noting that even when the General Assembly first decided to apportion the expenses it proposed to do so “in the same manner as” and “in accordance with” the regular scale of assessments—i.e., an analogy rather than an equation with the regular expenses of the Organization. It was also pointed out that a Special Account was set up for these expenses.

The majority said:

the establishment of a Special Account does not necessarily mean that the funds in it are not be derived from contributions of members as apportioned by the General Assembly.

They also noted that:

Article 17 is the only one in the Charter which refers to budgetary authority or to the power to apportion expenses, or otherwise to raise revenue;
it accordingly contains the authority to deal with all the expenses—be they ever so extraordinary.

A particularly interesting commentary on the obligation of members to contribute was provided by Judge Sir Gerald Fitzmaurice whose opinion on this point it is impossible to do justice in a few lines. He maintained a strict requirement that the expenses be both, (1) of the genus “expense” and, (2) validly incurred (conditions met

46 Ibid. 159-162.
48 Ibid. 173.
49 Ibid. 162.
by these expenses, he found). He also conceded some difficulty with respect to costs incurred pursuant to the exercise of permissive powers as contrasted with the performance of a duty. Basically, however, his position was that a Member assumes a liability to pay its share from the very fact of joining the Organization. This obligation is not created by Article 17, but is a pre-existing one which that Article simply quantifies (or, more correctly, empowers the General Assembly to quantify). There is, then, an obligation on all Members to contribute to the cost of essential activities of the Organization, no matter how extraordinary they may be. He drew two analogies to private law—one a reference to the right to recover, under a contract of employment, those expenses which are reasonable and necessary and have been incurred in the normal course of business—the other an analogy with the member of a community or of a club who can be compelled to contribute to the costs incurred by his government or club committee. Like the club member, the Member States of the United Nations have the alternative of paying their dues or resigning their membership.

Judge Moreno Quintana denied this viewpoint, indirectly at least. He conceded the obligation to pay for indispensable expenses, by which he meant administrative expenses. But

... if all the Member States of the United Nations were obliged to bear burdens over and above the responsibility to which they had committed themselves, then the financial power of the Organization would be substituted for the national powers of each of its members. It is established that the United Nations is not a super-state ... 51

Leaving aside the consideration that by the words “over and above the responsibility to which they had committed themselves” Judge Quintana was begging the very question to which Judge Fitzmaurice was providing a possible answer, it will be seen that this statement denies any analogy to the position of an individual of a community.

This comment leads to a consideration of the “Sovereign Equality” objection. As President Winiarski pointed out, one of the basic tenets of the Charter is that “the Organization is based on the principle of the sovereign equality of all its Members.” Judge Bustamante and President Winiarski both stated that this principle demands close attention to the separation of functions between the Security Council and the General Assembly. “Decisions” of the Security Council are binding, they asserted, upon all Member States (State Sovereignty being surrendered to that extent); “recommendations” of the General Assembly are not. This point involves a consideration of the argument that the Security Council has sole responsibility for financing “enforcement actions”—an argument based on a prior contention that the Security Council has sole authority to carry out “enforcement actions.” This argument was met, by those

50 See particularly Ibid. pp. 202-207.
51 Ibid. 248.
52 Article 2, paragraph 1.
who sought to uphold the assessments, by a three-point rejoinder. First, there was no “enforcement action”. Secondly, even if there was, the Security Council does not have the sole competence to pursue such action. Thirdly, in any event the General Assembly, not the Security Council, had the responsibility for financing such action.

(3) Enforcement Action: The majority opinion reviewed the facts and denied that either the U.N.E.F. or the O.N.U.C. operation was an “enforcement action”.\(^5\) In contrast, Judge Moreno Quintana’s view of the facts was that

> When there have been dead and wounded, bombardments on both sides, when civilian populations have paid the price, when cease-fire and other military agreements have been negotiated between two belligerent groups, it is not easy to evade the analysis of the question of enforcement by restricting the interpretation to a purely grammatical construction...\(^5\)

(4) Authority and Responsibility of the Security Council:

This point actually involves two contentions. For the opponents to the assessment it was said, first, that the Security Council has the sole authority and responsibility for enforcement actions, and secondly, even if that is not so, the Security Council, having primary authority and responsibility for such actions, has the responsibility for their financing. The champions of the assessments denied that the Security Council has sole authority and responsibility for enforcement actions though they did concede that organization’s primary responsibility. Secondly, they said that regardless of who may have the primary or sole responsibility for the actions, it falls to the General Assembly to settle the financing.

The basic opposition position was stated briefly by Judge Moreno Quinana who pointed out that Article 24 of the Charter imposes on the Security Council a primary responsibility for the maintenance of peace and security, this being a mandate from the rest of the Members and one which the permanent Security Council members can not renounce or revoke.

> But such a privilege would seem also to have its counterpart. The exercise of the right to administer world affairs goes together with the duty of furnishing the necessary means for the accomplishment of that duty.\(^5\)

Judge Koretsky urged that the responsibility of the Security Council in this area is not only primary, it is exclusive.

> People say that you cannot have two coachmen in the driver’s seat. In the cause of the struggle for international peace and security... the organizational confusion would only have been harmful. Therefore the Charter clearly enough delimits the functions of the Security Council and those of the General Assembly.

To place the Security Council, as the Opinion does, beside the General Assembly, considering them as interchangeable in solving and implement-

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\(^5\) Ibid. 246.
\(^5\) Ibid. 249.
ing the tasks of maintaining international peace and security, would be objectively to replace the Security Council by the General Assembly, to put the Council aside and thereby undermine the very foundations of the Organization.56

Judge Koretsky approved as "the proper way of solving the problem" of expenses the Ghanian delegation's draft resolution which proposed to "refer the question immediately to the Security Council for consideration."57

The dissenting judges also relied on the provisions of Article 43 which empowers the Security Council to conclude "agreements" with individual States for the supply of men, equipment and other assistance. They inferred that this imposes on the Security Council an obligation to provide, or arrange for, the financing to support any "agreements" which may be entered into.

The majority opinion rejected the claim of sole responsibility for the Security Council. It attributed primary responsibility only to that organ. Rather than the division of functions, the opinion emphasized that "there is a close collaboration between the two organs."58

The Opinion stated that the General Assembly is not restricted to discussion and recommendations. Speaking of the wording of Article 14, which empowers the General Assembly to "recommend measures for the peaceful adjustment" of situations, the majority said:

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.59

The majority also pointed out that Article 18 permits the General Assembly to make certain "decisions", some of which have dispositive force and effect—decisions on questions of suspension of membership, expulsion of members and budgetary questions. The majority dealt with the question of "action", opining that the sort of action which is solely within the province of the Security Council is "enforcement action" of the type contemplated in Chapter VII of the Charter.

It may be seen at this point that the majority position becomes somewhat tenuous. They were actually conceding to the Security Council sole authority over enforcement actions, but denying that U.N.E.C. and O.N.U.C. were actions of that type. It is difficult to ignore the comments of Judge Moreno Quintana who dismissed the casuistic attempts to prove that these were not the sort of "enforcement actions" contemplated by the Charter. He insisted that the facts bespeak eloquently enough of the degree of "enforcement" which ultimately became necessary.

56 Ibid. 272.
57 Ibid. 282.
58 i.e. the Security Council and the General Assembly: see Ibid. 163.
59 Ibid. 163.
It is also difficult for the majority judges to show what sort of “action” the General Assembly is authorized to conduct. The “decisions” authorized by Article 18 include decisions on very important matters, but do not include decisions on enforcement actions. And it should be noted that even the “measures” mentioned in Article 14 may only be recommended by the General Assembly.

The majority position suffers further from the fact that the concurring opinions scarcely concerned themselves with these issues.

These matters were not overlooked by the dissenting judges, however. They particularly emphasized the restriction on General Assembly powers to “recommendation”. President Winiarski commented that it is difficult to see how such a recommendation can be transformed into a binding obligation. Judge Koretsky also asserted that if expenses pursuant to a recommendation can lead to an obligatory assessment this amounts to the conversion of a non-mandatory recommendation into a mandatory decision—a proceeding “against the Charter, against logic and even against common sense.” He emphasized throughout his judgment that such a proceeding diminishes in an unwarranted fashion the role of the Security Council and extends that of the General Assembly. He denied specifically that Article 14 authorizes the General Assembly to take “action” to maintain peace. He considered that Article 14 is not concerned with peace-keeping operations at all. If it did permit the General Assembly the powers suggested by the majority then Articles 11 and 12, which carefully define the General Assembly’s role in respect of the maintenance of peace and security, would be redundant.

Several other somewhat incidental issues arose in the majority opinion and brought comment from some of the other judges.

Unanimity of Votes: The majority pointed out that many of the resolutions authorizing the U.N.E.F. and O.N.U.C. operations and their financing were passed without dissent. This point assumed importance for Judge Sir Gerald Fitzmaurice who conceded the difficulty of reconciling the non-obligatory nature of the General Assembly’s resolutions with the obligatory character of the assessment for the expenses. He considered that any objection was waived by States who voted in favour of the resolutions or who abstained from voting, but had some doubt about the States who voted against the resolutions.

Judge Koretsky objected to the inferences drawn by the majority from the fact of failure to oppose the resolutions. He commented that the U.S.S.R. delegation abstained from voting against resolutions

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60 Ibid. 234.
61 Ibid. 287.
62 Ibid. 259.
63 In contrast with the obligatory nature of the Security Council “decisions” which, by virtue of Charter Article 25, all Members agree to accept and carry out.
whose form it disapproved because it was in sympathy with their purposes. If, however, abstention is to entail the consequence suggested by Judge Sir Gerald Fitzmaurice, then the Soviet delegation will have to “make another evaluation of abstention from voting.”

For his part, Judge Fitzmaurice was able to assuage his doubts by relying on the force of majority vote—a deliberate departure, as he pointed out, from the procedure under the League of Nations in which unanimity was required.

But a majority voting rule is meaningless unless, although the States of the minority are not formally bound as regards their own action, they at least cannot prevent or impede the action decided on from being carried out aliunde. This they obviously could do if they had a species of veto, the exercise of which, through the refusal to contribute financially, would enable them to prevent or seriously impede the action concerned.

**Inference from Subsequent Conduct:** The majority opinion cited the numerous Security Council and General Assembly resolutions in prosecution of the Middle East and Congo operations and denied that it is possible to impeach those operations “in the light of such a record of reiterated consideration, confirmation, approval and ratification by the Security Council and by the General Assembly”.

Judge Sir Percy Spender, however, in an opinion given over largely to a discussion of interpretation of treaties with specific reference to the United Nations Charter, greatly restricted the application of the so-called “Rule of Subsequent Conduct”—a rule of interpretation which infers from the subsequent conduct of parties to a treaty what was their intention when they signed. Judge Spender pointed out that the rule demands careful application even to a bilateral treaty; in a case such as the Charter the rule is of practically no assistance at all.

President Winiarski also disputed that subsequent practice has any inferential value; in any event, he said, the subsequent practice was not uniformly consistent with the view of the majority.

Even Judge Sir Gerald Fitzmaurice, who displayed some sympathy with the principle of subsequent conduct, remarked that it has little force in the present circumstances. He reminded the Court that Members are at all times free to make voluntary contributions though not recognizing any obligation to do so. In his view, the proper inference is that many payments have been made simply because Members were “unwilling in the last resort to withhold a contribution.”

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64 I.C.J. Reports 1962, p. 260; see also pp. 278-9.
65 Ibid. 211-2.
66 Ibid. 176; see generally pp. 174-7.
67 Ibid. 176-2.
68 Ibid. 201.
Case Comment

Each Organization Judge of its own Competence:

The majority opinion asserted that even if the Middle East and Congo operations were undertaken by the wrong organ this would mean it was irregular as a matter of internal structure but not necessarily that the expenses incurred are not “expenses of the Organization”. The Opinion then pointed out the absence of an ultimate authority to interpret the Charter and acts taken under it.

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, each organ must, in the first place at least, determine its own jurisdiction.

Judge Sir Gerald Fitzmaurice sympathized with this view only so far as to agree that the fact that the expenses, incurred in apparent furtherance of the purposes of the Organization, have been placed on the agenda, gone through the usual procedural stages and been approved by a two-thirds majority raises a “strong prima facie presumption” that they are valid and proper. He also agreed that each organ is the judge of its own competence in the first instance in the sense that the objection must be first raised in the organ. He considered that a ruling made by the organ could not, however, validate an invalid act. To uphold that view, he said, would be to assert that the General Assembly, by deciding to spend money, could perform functions wholly outside its function—perhaps beyond the scope of the Organization itself. This objection, of course, was met by the majority insistence that only expenses which are related to the Charter purposes could be “expenses of the United Nations.”

Judge Fitzmaurice also denied the applicability of the concept of “internal irregularity”. The majority had remarked that “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.” Judge Fitzmaurice conceded the correctness of this comment where third parties are concerned, “but what is really in question here is the relationship of the Member States inter se, and vis-à-vis the Organizations as such...”

President Winiarski revealed that the fact that there is no ultimate authority vested in some organ cuts both ways. It is for the very reason that no tribunal is competent to make a finding of nullity that the task of objecting to competence must fall upon individual States. This, somehow, seems to lend an element of righteousness to the objections taken.

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69 Ibid. 168.
70 Ibid. 204.
71 Ibid. 203.
72 Ibid. 168.
73 Ibid. 200.
74 Ibid. 232.
Judge Bustamante did not agree that there is no authority to
determine competence. He conceded the presumption that all organs
are careful to remain within their competence. However, to deny
that the resolutions of any organ are not subject to review “would
amount to declaring the pointlessness of the Charter or its absolute
subordination to the judgment—always fallible—of the organs”.

Accordingly, he thought that objections must be considered by
the Organization itself. He thought this the implication of Article
96 which provides for advisory opinions.75

The Opinions of Judges Morelli and Bustamante:

With a majority opinion, four concurring opinions, and five
dissenting ones to consider it is no easy task to determine exactly
what the advisory opinion of the Court really does stand for. Many
of the points raised by the majority were not considered, or were
limited, by the judges who concurred. The dissenting judges were
somewhat more consistent, but their opinions were still far from
uniform. The two most compelling opinions, I think, are those
written by Judges Morelli and Bustamante. Both were rather moder-
ate in their view and their opinions have a good deal in common
though they also differ on an essential matter.

Judge Morelli conceded the necessity, in determining whether
an expenditure qualifies as an “expense of the Organization” of
ascertaining the validity of its approval by the General Assembly. He
then considered at some length the concept of validity—pointing out,
first of all, the dual requirements which face any set of rules to
determine validity. There is a requirement that acts be “legal,” i.e.,
conform to whatever the rule requires. There is also a requirement
of “certainty”—a requirement which is jeopardized by an extreme
elevation of the importance of the requirement of “legality”, and
which is destroyed if objections to “legality” are at all times open.
Judge Morelli then observed that in municipal law non-conformity of
an act to the rule may entail either a “mere irregularity” or an
“invalidity”, which latter, in turn, may result in either “absolute
nullity” or “voidability”. Voidable acts, of course, are legal and
binding until avoided according to the prescribed remedies. Avoid-
ance becomes impossible if these remedies are not exercised within
the prescribed times or if the competent supervisory organ declines
to recognize the defect. So is the requirement of “certainty” sup-
ported in municipal law.

In the case of the United Nations Judge Morelli noted, the
situation is quite different. As there is no “competent tribunal”
and no machinery for “avoidance”, there is no room for a category
of “voidable” acts.

75 Ibid. 304.
An act must necessarily be either “valid” (although perhaps irregular) or an “absolute nullity”. As the same need for certainty dictates that the incidence of absolute nullities be kept to a minimum, the result, according to Judge Morelli, is that the rules of conformity of acts for an international organization such as the United Nations must be substantially less strict than in municipal law.

It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. This, as Judge Morelli remarked, is similar to saying that each organ of the United Nations is the judge of its own competence.

He went on to say that, though the General Assembly cannot act arbitrarily, it is empowered to consider the resolutions authorizing action as one of the factual elements in deciding whether to approve and assess the expenses incurred, and its decision based on those factual elements will be final. It is important to note that this finality is a limited sort of finality. The General Assembly is not supervising the earlier resolutions. Its decisions on those are final only in the sense that the authorization of expenditure is final.

Judge Morelli’s opinion, then, was that the resolutions authorizing action need not be examined by the Court as to their validity and the resolutions authorizing the expenses were valid. Ergo the costs of U.N.E.F. and O.N.U.C. are “expenses of the Organization”. This, apparently, is the sort of “transformation” of non-mandatory General Assembly recommendations into mandatory assessments against which President Winiarski and Judge Koretsky inveighed.

As mentioned, Judge Bustamante’s opinion is moderate. He stands out from the rest of the dissenting judges by reason of the paucity of actual objections which he raises. Judge Moreno Quintana’s comment may be recalled to the effect that the Security Council has a mandate from the United Nations Members to administer world affairs—a mandate which it can not renounce. Judge Bustamante said that, while the Security Council cannot delegate its functions and upset the “spheres of competence” laid down by the Charter, it can, in extreme circumstances, and did, return its mandate to the Organization which gave it. In the case of U.N.E.F. the extreme circumstances arose because two of the permanent Members of the Council were incapacitated by reason of their involvement in the conflict.

Judge Bustamante felt that the discussion of Article 43 raises two questions—one of fact and one of law. As a matter of law, he considered that Article 43 does not impose an imperative duty to deal with threats to international peace by means of “special agree-

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76 Ibid. 223; see, generally pp. 221-4.
77 Ibid. 224-6.
78 Supra, p. 452.
ments". On the facts, however, he considered that U.N.E.F. and O.N.U.C. were, at least in part, conducted pursuant to such agreements. He speculated whether the costs of operations pursuant to those agreements should be borne by,

(a) the States called upon in the agreements, to act; or

(b) those States and the Organization together; or

(c) the Organization alone.

He concluded in favour of solution (b) and thought that the portion to be borne by the Organization would, in principle, constitute an "expense of the Organization".81

Judge Bustamante was quite prepared to say that:

in principle ... it may be affirmed that the expenses incurred by armed actions legally undertaken for the maintenance of peace are expenses of the Organization within the meaning of Article 17, paragraph 2.82

However, the theme of his entire opinion was that there is required a decision by some "competent organ" that these were, indeed, expenses "legally undertaken" etc. For it is on this essential point that he had to differ from Judge Morelli. There was quoted earlier Judge Bustamante's comment that to deny that all resolutions are subject to review would negate the Charter's value.83

Dealing specifically with Judge Morelli's reasoning he said:

... it has been said that the General Assembly's resolutions regarding the commitment of resources for the operations in the Middle East and in the Congo or the financing of operational expenditures ("derived" resolutions) are themselves independent and ought not to be considered as depending on the basic resolutions which authorize military operations. Each organ of the United Nations—it is said—is the judge of its own competence; and the financial resolutions of the Assembly have, in themselves a binding force which proceeds from the authority and the judgment of this organ, independently of the connection with the basic resolutions. A legal defect of any kind which might affect these last resolutions would not, therefore, communicate its defect to the financial resolutions of the Assembly. I do not agree with this view. One cannot demolish by this type of reasoning the substantial and objective connection of cause and effect between the resolution authorizing armed action and a resolution providing for funds to cover the expenditure involved. The legitimacy of the Assembly's competence to fulfil its duty of financing the Organization's expenses is one thing; whether the purpose of the expenses and the method of financing are or are not in conformity with the Charter is a very different matter. An examination of this latter question is in my opinion permissible with regard to all types of resolution. Moreover, some of the objections raised cover, not only the basic resolutions but also in a direct fashion those of a financial nature, with regard to the apportionment of the burden of the expenses among all the States.84

81 See, generally, Ibid. 298-301.
82 Ibid. 303.
83 Supra, p. 556.
84 I.C.J. Reports 1962, p. 306.
V. THE ANALYSIS: TRIUMPH OR TRAGEDY?

How the Great Democracies
Triumphed,
and so
were able to Resume
the follies
Which Had so Nearly
Cost them Their
Life

The Theme of: Triumph and Tragedy
Winston S. Churchill

It may be that the above subtitle is unnecessarily and shamelessly pretentious. It may develop that the advisory opinion rendered in the “Special Assessments” case is neither a triumph nor a tragedy. It may prove just another faltering step along the long road to international harmony and understanding. But it is tempting to apply pretentious terms to the case because, from present perspective, its significance looms very large indeed. It was not exaggeration when Judges Moreno Quintana and Bustamante stated that the question involved was as basic as the very substance and purpose of the United Nations Charter. Judge Quintana also said of the advisory opinion:

The exercise of the Court’s advisory jurisdiction which derives from Article 96 of the Charter and from Article 65 of the Statute of the Court . . . is growing from year to year. It may soon perhaps become more important than the Court’s jurisdiction in contentious proceedings, which does not always satisfy the aspirations of those who would have preferred the tribunal with international jurisdiction to be established on other bases.85

This is apparently a reference to the rather frustrating position occupied by the Court in respect of ordinary international disputes. In these cases the Court has jurisdiction only if they are referred to the Court by the parties.86 Apart from those arising from treaties according to whose terms the parties have agreed to submit all disputes to the Court, very few international disputes are referred to the Court. Once the contention has arisen, only the party which anticipates a decision in its favour is desirous of having recourse to the Court.

Article 96 of the United Nations Charter, however, permits any United Nations organ to request an advisory opinion from the Court.87 In this way, majority opinion is able to overcome the

85 Ibid. 240.
86 Statute of the International Court of Justice, Article 36, paragraph 1.
87 Quare, in passing, the force of an advisory opinion. It is generally thought to be, as the terminology implies, of moral and persuasive force only. Article 94 of the Charter imposes on all Members on obligation to comply with the “decision” of the International Court of Justice in any care to which they are “parties”. The Security Council is authorized to decide upon measures to guarantee the observance of these obligations. Even if, as seems likely, this Article does not apply to advisory opinions such opinions are not to be denigrated for having persuasive force solely. The [FOOTNOTE CONTINUED ON NEXT PAGE].
objections of those who fear an unfavourable decision. Jockeying should be eliminated.

Surely it would be tragic, then, if this Opinion should come to represent nothing more than the same sort of political manoeuvring. It has been hailed as a triumph for the cause of peace—a reaffirmation that the United Nations is not helpless in situations of peril to international security. The Organization can not only take decisive action, it said, but it can also call upon all Members to contribute to the costs of financing such action.

What sort of triumph will it be if the dissident Members withdraw from the “Club”—the recourse suggested by Judge Sir Gerald Fitzmaurice—or if the General Assembly is compelled to act to suspend the privileges of membership? Perhaps this would still be a triumph of sorts so long as the affirmative position of the majority could be insisted upon as being an undeniably correct and proper view. Unfortunately, it does not seem to me to be possible to so insist.

Newspaper comment at the time of publication of the opinion included the sorrowful reflection that the five dissenting votes included those of the French, Soviet Union and Polish judges—a circumstance, it was said, that smacked more of political considerations than of coincidence. For his part, Judge Koretsky disapproved the General Assembly financing proposals as political manoeuvring designed to gain voting support. Inevitably, power politics has reared its head throughout and the majority position will find it difficult to avoid the same stigma.

Whatever the reasons given for judgment, it is hard to resist the accusation that the majority Opinion diminishes the role of the Security Council. It is hard to resist the inference that those States who espouse this viewpoint, dissatisfied with the restrictive procedures of the Security Council, are seeking a political gambit. Especially are these inferences difficult to resist when the request is framed, or interpreted, to exclude all consideration of the actual validity of the action taken and to include only a narrowly legalistic question.

At the very least, this extremely important issue merits, as proposed by Judge Bustamante, a consideration by a “competent organ” of the validity of the action taken and the authorization of financing therefor.

James A. Rendall*

Statute of the Court, though it empowers the Court to “decide” issues between States, is almost silent about the sanctions which may be applied. Article 61, paragraph 3, authorizes the Court to require compliance with the terms of its judgment before admitting proceedings in revision.

88 See, for example, editorial comment of the Toronto Globe and Mail, July 23, 1962.

*Mr. Rendall, LL.B. is presently under articles with McDonald, Davies & Ward, Toronto.