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Multilateralism à la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget

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Abstract

Article 17 of the UN Charter establishes the duty of Member States collectively to provide financial support for the organisation, according to an apportionment scale decided by the General Assembly. Since the 1950s, certain members have unilaterally tried to challenge the duty to pay assessed contributions either on political or on legal grounds. This practice has recently posed serious threats to the financial viability of the UN because of selective withholding by the United States, the largest contributor to the UN.

This paper argues that unilateral selective withholdings aimed at advancing national values or priorities have no basis in the Charter. However, unilateral withholdings may be admissible as a last resort remedy for Member States to protect themselves against possible *ultra vires* or illegal acts of UN organs. To prevent abuses of this remedy, its exercise should be limited to clear violations of the law and be conditioned by three criteria: a) specific necessity, b) integrity, and c) consistency. In the absence of a centralized system of judicial review in the UN, these criteria would help prevent and minimize abuses of the *ultra vires* claim.

1 Introduction

In the first part of the eighteenth century, the Neapolitan philosopher G.B. Vico developed a philosophy of history that was to become known as the theory of cycles.¹ According to this theory, historical development is the peculiar product of the human spirit, rather than of accidental events and it is characterized by periods of intellectual progress (*corsi*) which are followed by periods of regress (*ricorsi*). From this constant flux the movement forward of history is born.

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¹ G.B. Vico, *Principij di scienza nuova* (1725–1744).

The development of multilateral institutions throughout this century, and the United States' attitude toward them, seems like the posthumous confirmation of Vico's theory.

The First World War produced the Wilsonian project, the 14 points and the League of Nations, only to see the United States later reject Wilson's 'internationalism' in the name of a unilateral 'constitutional' model derived from its peculiar history and legal tradition.

With the Second World War, it was F.D. Roosevelt's moral vision, his 'four freedoms' programme that helped shape the United Nations, its human rights agenda and the Nuremberg Tribunal. For more than two decades the United States succeeded in accommodating its national security interests within the multilateral framework of the United Nations. But as early as in the mid-1960s, with the vast changes brought about by decolonization, the situation begins to change and an increasing unilateralist mood takes hold and reaches its peak in the mid-1980s.²

If we look at the contemporary scene, little has changed in the pattern of recurrent shifting from positions of generous support of multilateral institutions to bold assertions of self-interest and unilateral action. The best example of this pattern is provided by the change in attitude from the Gulf War of 1991 to the recent crisis in Kosovo. In the first instance the United States successfully placed its strategic interests within the framework of the UN responsibilities under Chapter VII of the Charter and managed to mobilize a successful military coalition which drew its strength and

² In 1965 the United States intervened militarily in the Dominican Republic; I. Claude, *The OAS, the UN and the United States, International Conciliation* (n. 547, 1964) 4 ff.; in the same year of the decision to start bombing North Vietnam and thus escalating the Vietnam conflict. In the economic sphere, it is useful to remember that in August 1971 the United States announced the historical decision to suspend the convertibility of the dollar into gold, an action which in itself discarded the option of seeking solutions through the reform of the multilateral financial system (IMF). See J. Gowa, *Closing the Gold Window: Domestic Politics and the End of Bretton Woods* (1983). In 1974, the United States led a sustained opposition toward the majority-supported project of the New International Economic Order. In 1985 it withdrew from UNESCO on management and political-orientation grounds and in the same period withdrew the declaration of acceptance of the compulsory jurisdiction of the ICJ, a decision stemming from the controversial unilateral action taken by the United States in and against Nicaragua; see, for the US position, 'Statement concerning U.S. Withdrawal from the Nicaragua Case, 18 January 1985', reprinted in Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987) 473–475; for a critical review see D'Amato and O'Connell, 'United States Experience at the International Court of Justice', in Damrosch, *ibid.* 403–422; Hargrove, 'The Nicaragua Judgement and the Future of the Law of Force and Self-Defence', *AJIL* (1987) 135–143. It is in this period that the United States begins to refuse to pay portions of assessed contributions (in particular, in 1985, with the *Kassebaum-Solomon Amendment*, a 20% reduction, from 1987, of the total US contribution to the UN ordinary budget, was decided in order to persuade the Organization to modify the General Assembly voting system and to adopt a weighted voting proportional to the financial contribution provided by the voting member. See *Foreign Relations Authorization Act, Fiscal Years 1986 and 1987*, Pub. L. No. 99–93). This gave rise to the most serious financial crisis of the UN and to the problem of à la carte use of the Organization that is the object of the present discussion.

legitimacy from the UN mandate.³ In the second, reliance on unilateral action, albeit under the cloak of NATO, has led to unprecedented assertion of the legality of large-scale aerial bombardment of a state without Security Council authorization and without any foundation in international law other than the controversial doctrine of ‘necessitated’ humanitarian intervention.⁴

2 Limits to Unilateralism

Judged against this background of complex and ever changing relations between the United States and the UN, the question of what limits and remedies apply to unilateral withholdings of assessed contributions, mainly presents a political problem. As such it should be addressed at a policy level by analysing what are the realistic options today in seeking to achieve a difficult reconciliation between, on the one hand, a dominant power’s national security agenda, and, on the other, the requirement that the UN remains an objective and impartial institution representative of the whole international community and based on the rule of law. This, of course, is the most important aspect of the matter. However, to the extent that I was invited to contribute to this symposium in my capacity as a lawyer, and to the extent that international law can be kept separate from international politics, the following analysis will focus on issues of law relating to both the interpretation of the UN Charter and to customary international law. Thus, I will try, first, to address the issue of what is the legal basis and scope of the UN power to assess contributions in the sphere of security and maintenance of peace. Secondly, I will identify the limit of that power within the scheme of principles and purposes of the UN. Thirdly, I will suggest normative criteria

³ See Clark and Beck, *International Law and the Use of Force* (1993); Miele, *La guerra irachena secondo il diritto internazionale* (1997); Rowe (ed.), *The Gulf War 1990–91 in International and English Law* (1993); Villani, *L’ONU e la crisi del Golfo* (1991). See also United Nations, *The United Nations and the Iraq-Kuwait Conflict, 1990–1996* (1996).

⁴ For a legal assessment of NATO action, see Simma, ‘Cassese’, *EJIL* (1999); Ronzitti, *Riv. Dir. Int.* (1999) 476–482; Cannizzaro, *Riv. Dir. Int.* (1999). For the doctrine of humanitarian intervention, see Brownlie, ‘Humanitarian Intervention’, in Moore (ed.), *Law and Civil War in the Modern World, Baltimore and London* (1974) 217–228; Farer, ‘An Inquiry into the Legitimacy of Humanitarian Intervention’, in Damrosch and Scheffer (eds), *Law and Force in the New International Order* (1991) 185–201; Franck and Rodley, ‘After Bangla Desh: the Law of Humanitarian Intervention by Military Force’, *AJIL* (1973) 175 ff.; Harris (ed.), *The Politics of Humanitarian Intervention* (1995); Henkin, ‘Humanitarian Intervention’, in Henkin and Hargrove (eds) *Human Rights: an Agenda for the Next Century* (1994) 383–403; Lillich, ‘Humanitarian Intervention — A reply to dr. Brownlie and a plea for constructive alternatives’, in Moore (ed.), cited *supra*, 229–251; Meron, ‘Commentary on Humanitarian Intervention’, in Damrosch and Scheffer (eds) cited *supra*, 212–214; Michalska, ‘Humanitarian Intervention’, in Mahoney and Mahoney (eds) *Human Rights in the Twenty-First Century — A Global Challenge* (1993) 393–404; Phillis and Cady, *Humanitarian Intervention — Just War vs. Pacifism* (1996); Picone, ‘Interventi delle Nazioni Unite e obblighi *erga omnes*’, in Picone (ed.), *Interventi delle Nazioni Unite e diritto internazionale* (1995) 517–578; Ramsbotham and Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (1996); Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985).

to be applied to minimize and control the exercise of a Member State's right to contest the legality of UN acts. Finally, I will focus on the legal consequences of, and available remedies for, disputes arising from unilateral withholdings based on alleged violations of the UN legal order.

3 The Power to Assess

If the UN is to discharge its responsibility in the field of the maintenance of peace effectively, it is axiomatic that it must be able to secure and dispose of the necessary funds for the organization and conduct of the required operations. As is well known, such funds come from two sources: (i) voluntary contributions, and (ii) assessed contributions. Voluntary contributions by governments or by non-governmental entities are, in principle, extra-budgetary funds spontaneously paid in order to finance specific operations or services contemplated by the Charter — e.g. economic and technical assistance under Article 66 para. 2 or in order to augment budgetary funds already allocated for the implementation of institutional operations, such as peace keeping or humanitarian operations.⁵ This source of funding has become increasingly important and it often provides a stable parallel source of funding through the so-called 'pledging conferences' where potential donors announce their contributions and the operations of services for which they are to be used.⁶

For such voluntary contributions the problem of *à la carte* payments does not arise at a legal level. States remain free to pay as they choose for the simple reason that the relative expenses cannot be qualified as part of the UN budget and as such subject to the compulsory allocation by two-thirds majority of the General Assembly as provided by Articles 17 and 18 of the Charter.⁷

A different legal regime applies to assessed contributions. Article 17 para. 1 of the Charter gives the General Assembly the power and the responsibility of approving the budget. This Article establishes, in para. 2, the duty of Member States collectively to provide financial support for the Organization. This same paragraph entrusts the

⁵ See B. Conforti, *Le Nazioni Unite* (1996), now translated into English as *The Law and Practice of the United Nations* (1996) 272.

⁶ Such a type of funding permits the involvement as well of non Member States of the relevant organization. For instance, within UNESCO there has been a strong drive to develop alternative voluntary contributions in order to finance specific programmes such as research and service programmes of the Intergovernmental Oceanographic Commission (IOC), an organization that is part of UNESCO but enjoys a certain operational and financial autonomy. The United States participates in the IOC's activities without being a member of UNESCO (see Intergovernmental Oceanographic Commission, National Contributions, United States, <http://ioc.unesco.org/iyo/activities/countries/usa.htm>). Similarly, the United States participates with ad hoc contributions to the financing of the World Heritage Convention to which it is a party without being a member of UNESCO (see World Heritage Committee, 1997–1999, <http://www.unesco.org/whc/commit.htm>).

⁷ The only apparent exception to this rule is the ordinary programme of technical assistance established in 1948 by res. n.200-III whose expenses are part of the ordinary budget and are to be allocated by the General Assembly under Art. 17. However, this exception only confirms the rule because of the rather modest amount of money involved and because of the reiterated reservations formulated by donors, including the United States, to the effect of stressing the voluntary character of such contributions. See Conforti, cited *supra* note 5, at 234–235 and 272–273.

General Assembly with the competence to apportion the expenses of the Organization among Member States. These expenses must be understood to include also expenses incurred for the purpose of maintenance of peace and in particular for the purpose of enforcement action under Chapter VII.⁸ A contrary view had been advanced in the past by the Soviet Union and other countries of the former communist bloc arguing that Security Council peace enforcement action, rather than being covered by Article 17, ought to be financed within the framework of the ad hoc agreements contemplated by Article 43 of the Charter.⁹

This restrictive view of Article 17 has no basis in the Charter. The language of Article 43 does not even mention the financial aspects of Security Council operations under Chapter VII and is concerned exclusively with the military aspects of such operations. Further, even if one were to read financial aspects into the text of Article 43, it is common knowledge that no agreements under this Article have ever been concluded by the UN. Therefore, to hold that such agreements are the only legal basis for apportioning expenses for the maintenance of peace would be tantamount to undercutting the legality of all UN expenses deliberated pursuant to Security Council responsibilities under Chapter VII. This conclusion would be manifestly absurd; it is contrary to over 50 years of UN practice,¹⁰ and is contradicted by the ICJ advisory opinion of 1962 on *Certain Expenses of the UN*.¹¹

Similarly, there is no basis in the Charter for limiting the scope of Article 17 to

⁸ See 'Certain Expenses of the United Nations', ICJ Reports (1962) 151 ff. This view is also supported, *inter alia*, by Conforti, cited *supra* note 5, at 268. *Contra*, see Gross, 'Expenses of the United Nations for Peace-Keeping Operations: the Advisory Opinion of the International Court of Justice', *International Organization* (1963) 13–15; Gross's opinion is based on the remark that the meaning of Article 17 of the Charter is compatible with an interpretation opposite to the Court's. In particular, the drafters of the Charter clearly knew the distinction between 'regular' and 'operational' budget, and in Article 17 they implicitly make reference only to the first. The reasons that justify the missing of a specific exclusion of the second kind of budget should be found, according to this view, in two circumstances: first of all, operational functions were entrusted not to the Organization as a whole but to the specialized agencies; secondly, the function of enforcement of action was especially provided by Article 43. This position, however, in the question of the expenses for UNEF and ONUC actions, was supported by only a few members (see *infra* note 12).

⁹ This thesis was articulated in great detail by the Soviet Union at the time of the controversy over the expenses sustained by the UN operation in the Congo. See ICJ Pleadings (1962) 273.

¹⁰ The practice following UNEF and ONUC operations is almost entirely coherent with the ICJ advisory opinion of 1962. The economic burdens produced by the financing of the subsequent peace-keeping operations, in fact, have always been considered 'expenses of the Organization to be borne by Member States in accordance with Article 17, paragraph 2, of the Charter of the United Nations'; see, *inter alia*, UNEF-II and UNDOF operations (GA Res. 3101 (XXVIII), 11 December 1973, 3211 (XXIX), 29 November 1974, 3374 (XXX), 28 November 1975, 31/5, 22 December 1976, 32/4, 2 December 1977), and, more recently, UNOSOM (Res. 47/71, 1 December 1992), UNIFIL (47/205, 22 December 1992) and UNPROFOR (47/210, 22 December 1992) peace-keeping operations. The only exceptions to this practice are given by the UNFICYP operation (see Security Council Official Records, 19th year, 1097th–1102nd meet., 1138th meet., 1159th meet., etc.), and the mission of observers in Yemen (see Flory, 'La mission d'observation des Nations Unies au Yemen', *Annuaire Français de Droit International* (1963) 612 ff.), both contemporary to UNEF and ONUC operations, and decided to be financed by voluntary contributions only to avoid the dispute determined by those operations.

¹¹ See ICJ Reports (1962) 165 ff.

ordinary activities and related administrative costs (staff, salaries, running costs for headquarters etc.) as opposed to *extraordinary* activities which, according to this view, would include peace maintenance operations to be financed by extra-budgetary funds. This distinction was advanced by some states¹² in the case of *Certain Expenses* but was correctly rejected by the ICJ in its already cited 1962 advisory opinion.¹³

To conclude, there is no serious doubt, that, in principle, expenses for the maintenance of peace form part of the general UN budget and may be apportioned as such by the General Assembly according to the scale of assessment determined pursuant to Article 17 of the Charter.

4 The Limits to the Power of Assessment

We must turn now to the more difficult question whether, in order to evaluate the à la carte approach, certain limits apply to the General Assembly's fiscal powers in determining and allocating the budget under Article 17.

This question, as we know, has plagued the life of the Organization since its early stages and it has given rise to innumerable instances of members challenging UN authorized expenses, from the Korean war to Suez, from the Congo operations to the United States withholding of contributions in the mid-1980s and early 1990s. Although it is not possible, here, to examine this practice in detail,¹⁴ a distinction must be made, for the purpose of the present discussion, between the case in which the refusal to pay the assessed contributions is justified on *political* grounds, e.g. as a means of pressure to bring about a given policy decision or institutional reform, and the case in which the withholding of payment is justified as a *legal* remedy against perceived breaches of the law or *ultra vires* acts by the UN.

In the first instance, withholding of assessed contributions is not permissible and constitutes a breach of the collective duty that members have to contribute to the finances of the Organization in accordance with the modalities set forth in Article 17. This Article gives the General Assembly the power to apportion the expenses of the Organization among Member States. This power is not purely recommendatory — as it normally is under Article 10 of the Charter — but has binding effect on Member States. This was clearly recognized by the ICJ in its 1962 advisory opinion on UN Expenses.¹⁵

¹² In particular by USSR (see *Memorandum of the USSR Government*, ICJ Pleadings (1962) 270 ff.) and France (see ICJ Pleadings (1962) 408).

¹³ ICJ Reports (1962) 159 ff.

¹⁴ For a review of this practice, Duke, *The UN Financial crisis: A History and Analysis* (1992); Conforti, *La funzione dell'accordo nel sistema delle Nazioni Unite* (1968) 130 ff.; Conforti, *supra* note 5, at 266 ff.; see also the 12 June (1986) Memorandum by the UN's Legal Counsel, Carl-August Fleischauer, *Financial Crisis at the United Nations*, cited by Alvarez, 'Financial Responsibility', in Schacter and Joyner (eds), *II United Nations Legal Order* (1995) 1103, n. 64.

¹⁵ *Certain Expenses* case (1962) ICJ Reports 164. See also the separate opinion by Judge Fitzmaurice, *ibid.*, at 208 ff., who argues that even in the absence of a specific provision such as Article 17, the power to assess contributions should be recognized as an 'implied power' to be derived from the Charter as a matter of 'inherent necessity'.

Therefore, if a Member State wishes to pursue a given policy objective or desirable reforms of the UN, such as the reform of the Security Council or budgetary reforms as was required by the United States Congress in 1985 with the Kassebaum amendment,¹⁶ that state may use its vote and political influence, but not measure of financial withholding, to contribute to the realization of the desired outcome. All the more so when the desired outcome is a reform of the Charter, as mandated by the United States' legislation requiring weighted voting in budgetary matters. In this case, there is a specific procedure to be followed pursuant to Articles 108 and 109 of the Charter. These Articles, together with Article 2 para. 2 on sovereign equality of all UN members, exclude surreptitious modifications of the Charter law through financial blackmail by a Member State, no matter how important that member may be.

Likewise, it is inconsistent with the Charter to pursue a policy of selective withholding to favour certain programmes at the expense of others depending on whether they advance preferred national 'values' or priorities. Such an approach was theorized by Ambassador Kirkpatrick in the early 1980s, but it has no basis in the legal order of the UN.¹⁷

When a member considers certain policy goals or the institutional reforms of the UN so essential as to condition its continued membership, in the last resort, that member may have to consider withdrawing from the Organization, but may not remain a member and selectively refuse to pay on grounds of political expediency.¹⁸

When the justification for refusing assessed payments rests on legal grounds, which is the case with a great number of disputes involving withholdings,¹⁹ the question

¹⁶ For an in depth analysis of the implications of this type of United States legislation, see Alvarez, 'Legal Remedies and the United Nations à la Carte Problem', *Michigan Journal of International Law* (1991) 232–242; for a critical view of the Kassebaum amendment, see Franck, 'Unnecessary UN-Bashing Should Stop', 80 *AJIL* (1986) 336 f.

¹⁷ 'The U.S. Role in the United Nations': *Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 54 (1983).

¹⁸ The radical step of withdrawing was taken by the United States and the United Kingdom in the mid-1980s with respect to UNESCO. Experience shows that such politically motivated withdrawal may indeed have positive effects in terms of improving the accountability, efficiency and transparency of the Organization and also in terms of facilitating the timely return of the withdrawing state. In fact, the United Kingdom rejoined UNESCO in 1998 and the United States is expected to follow suit rather soon. It should be remembered that the United States had earlier withdrawn from ILO (1977) to then resume membership in 1980. See Jordan, 'Boycott Diplomacy: the US, the UN, and UNESCO', 44 *Public Admin. Rev.* (1984) 283.

¹⁹ Perhaps the most well-known example of withholding on legal grounds is the refusal to pay the expenses for UNEF and ONUC operations; in particular, USSR, France and a few other members (see, *inter alia*, the Mexican position, CIJ Pleadings (1962) 408) based their dissent on three grounds: (i) illegitimacy of the UNEF operation decided by GA, which is incompetent to deliberate actions *ex* Article 42 of the Charter; (ii) extraordinary character of expenses for peace-keeping operations (iii) lack of foundation of a GA power to decide about all kind of expenses, because such power would give to the Assembly the character of world government. Also the Soviet refusal to pay the expenses for the celebrations of 1950 Korean War was based on the alleged illegitimacy of resolutions (SC Res. 83, 27 June 1950 and 84, 7 July 1950) that authorized armed intervention, because they were taken by the Council in absence of USSR (see Conforti, *supra* note 7, at 267). Finally, the United States' refusal to give financial contribution for the Law of the Sea Preparatory Commission was induced by the lack of connection of the commission with the UN system (see *infra*, note 34 and corresponding text).

becomes more complex. First, in this case, the issue of legality extends from the budget-related resolutions contemplated by Article 17 to the substantive resolutions approving the controversial activities for which the expenses are deliberated. Further and more fundamentally, when the refusal to pay assessed contributions is justified on grounds of law, the issue inevitably becomes intertwined with a set of broader questions that unfortunately have never found a definitive solution in the more than 50 years of life of the Organization. These questions are: do UN organs possess an authoritative and binding *potestas interpretandi* of the Charter in the course of discharging their functions and adopting the relative acts? Even if such *potestas* is admitted, can it be stretched to the point of covering also patent violations of the Charter denounced by individual states objecting to the relevant act? To the extent that we admit, even in exceptional cases, the possibility of unilateral challenges of the legality of UN resolutions, is such a challenge to be limited to alleged violations of the institutional law of the Charter or should it extend to general norms of international law? In case of dispute, who is the ultimate judge of the legality?

The debate over these questions has produced abundant international law literature which is characterized by a striking variety of opinions. One current of opinion has advocated an unconditional and final authority of UN organs in the interpretation of the Charter;²⁰ while another one has denied such authority in the absence of any express provision of the Charter to this effect.²¹

Although recognizing such authority in principle, another view admits that the binding effect of a UN resolution may be exceptionally challenged by an individual state when the illegality of the act is 'apparent on the face of the matter'.²²

Still other views rely on domestic law analogies to argue that as in domestic law a corporate entity may be bound vis à vis third parties by *ultra vires* acts, so in UN law third parties who have a stake in the implementation of the UN resolution must be protected by eliminating the risk of unilateral challenges to the validity or legality of UN resolutions, especially when such resolutions have a financial character.²³

²⁰ Kopelmanas, *L'organisation des Nations Unies*, I (1947) 267 ff.; Higgins, *The Development of International Law through the Political organs of the United Nations* (1963) 67; Kelsen, *The Law of the United Nations* (1950) 783 ff., who, however, removes Art. 2, para. 7 from the scope of binding interpretation by UN organs.

²¹ For this view, see Rousseau, 'l'indépendance de l'état dans l'ordre international', 73 *Recueil des Cours* 2 (1948) 247 ff.; Virally, *L'ONU d'hier à demain* (1961) 107 f.; Gross, *supra* note 8, at 11; Conforti, *supra* note 14, at 58 ff., whose position stands out for his attempt at characterizing the acts of the UN in 'consensual' terms rather than in terms of 'institutional' deliberations; Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles on Friendly Relations', 2 *Recueil des Cours* (1972) 503 ff.; Conforti, *supra* note 5, at 14 ff. The validity of this position seems to be confirmed by, *inter alia*, Doc. 887 (IV/2/39 of 9 June 1945), which solves in a strongly negative way the question whether the General Assembly would have a statutory 'sovereign competence to interpret the provisions of the Charter'.

²² See separate opinion by Fitzmaurice in the *UN Expenses* case, ICJ Reports (1962) 203 ff.

²³ This line of reasoning can be found in the 1962 advisory opinion on the *UN Expenses* case, ICJ Reports, 168 ff.; in the 1954 advisory opinion on the 'Effects of the Awards of Compensation', ICJ Reports (1954) 59 ff.; and it has been forcefully taken up again by Alvarez, *supra* note 16, at 229 ff.; Alvarez, 'Financial Responsibility', in *United Nations Legal Order* cit. 1108 f.

Domestic law analogies have also been used to distinguish between absolute nullity and voidability of the acts in order to limit Member States' legal challenges to the case of absolute nullity, which would include clear cases of incompetence of the organ, patent violations of the law and gross excess of power.²⁴

Faced with such vast diversity of opinions on the matter, it is our view that the correct approach to the question under discussion must take into account the reality of the UN Charter as an international treaty to be interpreted and applied in light of international law and not in light of questionable analogies with domestic law. In this perspective it is difficult to share the view expressed by the ICJ in that part of the 1962 opinion, and by some commentators,²⁵ which postulates that the assessment power of the General Assembly could cover any kind of expense as long as the activities to be financed may be encompassed within the object and purposes of the UN. Indeed, the purposes of the UN are not well defined. Besides the maintenance of peace, they include economic cooperation, human rights, dispute settlement, cooperation in criminal law, and almost any type of action in the social and cultural sphere. To link the criterion for assessing the legitimacy of UN expenses to such general purposes would entail transforming the General Assembly or the Security Council into an institution endowed with a general 'taxing' power more alike to a sovereign state²⁶ than to an international organization. This is all the more so because of the readiness shown by the ICJ in the cited advisory opinion to accept the constitutional law theory of 'implied powers' in order to legitimize the exercise of competence not contemplated by the Charter but deemed to be necessary for the attainment of the 'purposes' of the

²⁴ See individual opinion by Judge Morelli in the already cited case concerning UN expenses, ICJ Reports (1962) 220 ff. In the view of the Italian judge the distinction between *absolute nullity* and *voidability*, that, in almost all national systems, reconciles in an excellent way the double requirement of legality ('that is to say, conformity of the act with the legal rule') and certainty, cannot be applied in the case of acts of international organizations, and in particular the acts of the United Nations. In this peculiar system 'there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. . . There are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the Organization can occur. . . This prevents the conditions for the validity of acts of the Organization being given an extension similar to that of the conditions for the validity of acts under municipal law. . . If . . . the same extension were given to the conditions for the validity of both these classes of acts, very serious consequences would result for the certainty of the legal situations arising from the acts of the Organization. The effectiveness of such acts would be laid open to perpetual uncertainty. . . This makes it necessary to put a very strict construction on the rules by which the conditions for the validity of acts of the Organization are determined, and hence to regard to a large extent the non-conformity of the act with a legal rule as a mere irregularity having no effect on the validity of the act. It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples may be a resolution which had not obtained the required majority, or a resolution vitiated by a manifest *excès de pouvoir*. . .'

²⁵ See Sloan, *United Nations General Assembly Resolutions in Our Changing World* (1991) 16.

²⁶ See Arangio-Ruiz, *supra* note 21, at 518, n. 115; Conforti, *supra* note 5, at 269; Gross, *supra* note 8, at 5 ff.; Zoller, 'The "Corporate Will" of the United Nations and the Rights of the Minority', *AJIL* (1987) 631. See also separate opinion by Judge Fitzmaurice, *Certain Expenses of the United Nations*, ICJ Reports (1962) 203.

organization.²⁷ This view cannot be shared, not only because of its inconsistency with the reality of the UN Charter as a treaty, but more cogently because it is belied by the actual practice of the UN. It is hardly necessary to remember that the 1962 ICJ advisory opinion on the UN expenses did not succeed in finding practical application. The recalcitrant states, including France, the communist bloc and several countries from Latin America, Africa and Asia maintained their refusal to contribute to the expenses for UNEF and ONUC and in the end the General Assembly resolved the dispute in 1965 with a compromise formula whereby shortfalls caused by some members' refusal to pay were compensated by voluntary contributions.²⁸

Subsequent practice confirms this early precedent; it demonstrates the unwillingness of the General Assembly unconditionally to push its assessment powers over the legal objections of Member States, and it shows preference for consensus deliberation in the preparatory decision for the budget and for voluntary contributions to meet the expenses required for the maintenance of peace.²⁹

It is in light of this reality and practice, not in view of some abstract model of domestic law or of implausible world government, that one should look for a framework of principles capable of preventing or minimizing the problem of à la carte contributions. It is our view that such principles must reflect the necessity of reconciling two compelling needs inherent to the international-consensual character of the UN system: on the one hand, the need to ensure a reasonable degree of certainty of the law in the functioning of the UN organs, which requires a general presumption that those organs are acting in accordance with the law; on the other hand, the need to preserve the right of every Member State to adhere in good faith to a different interpretation of the law and to protect itself against the adverse effects of what is perceived to be an illegal or invalid deliberation.

In this perspective, the first principle we consider essential to achieve such a desired balancing is what we may call the principle of *legality*. This principle has been recognized by the ICJ as a general limitation on the power of UN organs³⁰ and it entails a limit also to the assessment power of the UN in the sense that the expenses

²⁷ The theory of 'implied powers' was used by the Court in previous cases also, especially in the Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations* (ICJ Reports (1949) 174 ff.), in the case of *The International Status of South Africa* (ICJ Reports, (1950) 128 ff.) and in the Advisory Opinion on the *Effects of Awards of Compensation made by the United Nations Administrative Tribunal* (ICJ Reports (1954) 47 ff.). For a critical review of the theory see Makarczyk, 'The International Court of Justice on the Implied Powers of International Organizations', in Makarczyk (ed.), *Essays in International Law in Honor of Judge Manfred Lachs* (1984) 501–518; Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations', *BYIL* (1970) 111–155; Skubiszewski, 'Implied Powers of International Organizations' in Dinstein (ed.), *International Law at the Time of Perplexity* (1989) 855–868.

²⁸ GA resolution of 1 September 1965 adopting a draft declaration elaborated within the special committee for the operations relating to the maintenance of peace. GAOR, 19th sess., Pl. meet., 1331st meet.

²⁹ See Sloan, *supra* note 25, at 17. See also GA Res. A/47/277, 17 June 1992, paras. 69 ff., reprinted in *ILM* (1992) 972 f.

³⁰ 'The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its power or criteria for its judgment.' Advisory Opinion on *Admission of a State to the UN*, ICJ Reports (1948) 64.

apportioned under Article 17 ‘... shall be borne by the Members’ only to the extent that they relate to activities *legitimately* undertaken by the Security Council, the General Assembly or other organs of the UN. This principle is inherent to the general obligation incumbent upon UN organs to respect the Charter. It is consistent with the express limits that the Charter places on the discretionary power of the organs to modify the Charter by way of evolutive interpretation (i.e. Articles 108 and 109 on the procedure for amendment and modification). It is implied in the recognition that the Member States’ duty to accept and carry out the decisions of the Security Council (Article 25) and to cooperate with all UN organs in the pursuit of their goals (Article 2 para. 5) is contingent upon such decisions and activities being undertaken ‘in accordance with the present Charter’ (*ibid.*). The application of this principle to some of the most well-known cases of financial withholdings would lead us to conclude that, for instance, the refusal to pay was clearly illegal in the *cause célèbre* of ONUC in 1962³¹ as well as in the case of the unilateral across the board 20 per cent reduction decided by the United States Congress in 1985 with the Kassebaum amendment.³² Conversely, it was justified in the case of the UNEF, because of the General Assembly’s lack of competence in matters of maintenance of peace,³³ and in the case of the United States’ refusal to pay for the Law of the Sea Preparatory Commission, an institution specific to an international convention and not part of, nor accountable to, the UN.³⁴

Naturally, in the absence of a centralized mechanism of judicial review of UN acts, the practical implementation of the principle of legality may be problematic when one is faced with a divergence of views with respect to a specific decision. We shall return to this problem in section 6 of this paper. But first we need to see what further criteria may play a normative role in legitimizing the *exercise* of every member’s right to challenge the legality of assessed contributions.

5 Limits to Unilateral Withholdings

If the right to withhold is linked to the principle of legality, as we have suggested in the foregoing analysis, it is clear that it cannot be treated as an unfettered power that Member States may exercise at their own discretion. Limits must exist to the *exercise* of this right; and these limits must be construed in legal terms consistently with the idea also that the assessing power of the General Assembly is subject to the rule of law. The UN legal order does not provide explicit rules or principles governing the exercise of every member’s right to challenge the legality of UN acts.³⁵ However, it is our view that certain normative criteria can be inferred from the general context of the UN system and, more specifically, can be construed as corollaries of the principle of legality.

³¹ See Conforti, *supra* note 5, at 271.

³² *Ibid.* at 272; see also Zoller, *supra* note 26, at 633.

³³ See Conforti, *supra* note 5, at 271.

³⁴ *Ibid.* at 267.

³⁵ This is a problem with all norms of international law which are much more concerned with jurisdictional allocation of power than with the actual regulation of the exercise of that power.

The first of such principles is what we may call the principle of *specific necessity*. By this expression we mean that a challenge to the legality of a UN assessment must be necessitated by and related to a specific violation of the law of the Charter or of international law arising from the UN activity whose financing is contested. This principle excludes withholdings motivated by national interests or based on a generic complaint of illegality or on a breach unrelated to the activity whose financing is disputed. In this respect, the right to withhold is to be distinguished from remedies available under the law of treaties (suspension because of ‘material breach’ or because of ‘fundamental change’) in that it constitutes a specific remedy inherent to the legal order of the UN and to its fundamental requirement that all organs must conform to the Charter and to international law as applicable.³⁶

Under this construction, a state would not be able to withhold payments assessed for peace enforcement operations because of its dissatisfaction with an arguably illegal decision which is totally unrelated to the peace operations. Such would be the case if a member decided to proceed with unilateral withholding as a countermeasure for an allegedly illegal decision to expel another member from the organization or to suspend that member from participating in the work of the General Assembly.³⁷

The second principle may be called the principle of *integrity* and it entails two distinct levels of operation. On the subjective level, it entails that the Member State asserting a right to withhold does so in the genuine belief that the challenged decision constitutes a breach of the law and does not act in the pursuit of outcomes that are extraneous or ulterior to the breach or to the situation that has resulted from the breach. In this sense, subjective integrity largely coincides with good faith. But, unlike the elusive concept of good faith, this criterion has the advantage of being linked to an external referent, the *prima facie* breach in relation to which the challenge to withhold has to be evaluated. Under this criterion, the challenging state must at a minimum provide a plausible case to sustain the claim of illegality in order to reverse the general presumption in favour of the legality and validity of UN acts.

On an objective level, this principle entails a teleological dimension in that it requires that the result to be achieved by the unilateral challenge must be the protection of the integrity of the Charter system against possible abuses by the majority.³⁸ Thus understood, this condition precludes not only withholdings aimed at

³⁶ A similar conclusion is reached by Zoller, *supra* note 26, at 625 and 630, although she relies on different arguments, notably, that the ‘vertical’ system of the United Nations is not compatible with ‘contractual’ remedies based on treaty law and that the right to withhold must be seen as a remedy of the minority to protect itself against the ‘tyranny of the majority’.

³⁷ In 1983 the United States threatened contingent withholding of its assessed contribution in the event of suspension of Israel’s membership in the General Assembly. See Pub. L. No. 98–164, §115(a), 97 Stat. 1017 (1983). As amended in 1985, this legislation transformed the ‘contingent’ withholding into a permanent financial sanction to remain in force as a punitive measure in relation to any period of suspension from membership. See Alvarez, *supra* note 16, at 241 and n. 51.

³⁸ See Osieke, ‘The Legal Validity of Ultra Vires Decisions of International Organizations’, *AJIL* (1983) 240 ff.; Zoller, *supra* note 26, at 630 ff. See also the dissenting opinion of Judge Bustamante, in the cited case concerning UN expenses, that supports a broad extension of the right to challenge: ‘when, in the opinion of one of the Member States, a mistake of interpretation has been made or there has even been an infringement of the Charter, there is a right to challenge the resolution in which the error has been noted’.

advancing national interests; but also withholdings justified as countermeasures for other members' failure to fulfil obligation to pay assessed contributions. Reciprocity has no place in determining the scope of the duty under Article 17.³⁹ A contrary view would result in the possibility of a fragmentation of the multilateral system for the maintenance of peace into a myriad special bilateral regimes fundamentally incompatible with the overall concept of 'collective security' and of 'collective financial responsibility'. More fundamentally, it would be inconsistent with the concept of integrity, which postulates that states resorting to withholdings act as agents of the community of Member States by taking into their hands the defence of its long-term interest in promoting the observance of the law. In this role they act *uti universi* rather than *uti singuli*.

Finally, let us consider the principle of *consistency*. By this term we mean an attitude of the withholding state that is not contradicted over a period of time by positions that are incompatible with previous interpretations of the law or with previous objections to other members' views of the law. Since the problem of à la carte has in itself the potential to destroy the unity of the UN multilateral system by transforming it from an impartial institution into a container to accommodate national policies, it is hardly necessary to stress the importance of this test. In the life of the Organization legal objections to the duty to contribute have often failed to satisfy this test. With few exceptions, such as the legal objections by France and the Soviet Union to UNEF, and the United States' objection to expenditures for the Sea Bed Preparatory Commission, which are consistent with positions of principle maintained over a long period of time,⁴⁰ the practice of withholding reveals lack of consistency and legal coherence. Suffice it to mention that the United States' position at the time of the 1962 Expenses case was that of the staunchest defender of the General Assembly budget-making powers and of the binding nature of Article 17 in the field of both peace keeping and

for the purpose of determining whether or not it departed from the Charter', ICJ Reports (1962) 304. Of great relevance also is the opinion manifested in the same case by the President of the Court, Judge Winiarsky, who believed that 'a refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid . . .', *ibid.* at 232.

³⁹ This conclusion is coherent with the international treaty nature of the United Nations Charter; it is well known, in fact, that the suspension of the fulfilment of obligations derived from a multilateral treaty, for the reason of a previous violation of the treaty by another part, is possible, *from a general point of view*, only in the relationships with that part, without injuring any other member of the agreement. It is clear that, in the UN system, unilateral withholdings of assessed contributions, damaging the entire Organization, does not belong to the field of reciprocity. See also Art. 60(2)(a) of the 1969 Vienna Convention of the Law of Treaties.

⁴⁰ *Contra*, Alvarez, *supra* note 16, at 297 who relies on the established General Assembly practice of funding organs attached to specific UN conventions through the regular budget. However the examples he gives us, i.e. those of the many human rights committees created under two human rights treaties are not convincing. First, because human rights figure prominently among the purposes of the UN (Art. 1 para. 3, as well as 55 and 56); secondly, because the financing of these organs rests on substantial agreement among UN members as expressed in the resolutions adopted by the General Assembly or ECOSOC to create such organs.

peace enforcement operations.⁴¹ Later, this position was modified by the Goldberg reservation, purporting to make this obligation contingent upon other members' compliance with their financial obligations.⁴² Consistency was further eroded by the 1980s ideological drift toward the extreme and untenable position that no payments are due when they do not serve specific national interest.⁴³

6 Legal Consequences and Remedies

Even though the foregoing analysis has shown that the right to withhold is to be narrowly construed and exercised within a set of guiding principles, the question remains of who is the ultimate judge of the applicability of such principles as well as of the legality of the UN acts and of the consequential withholdings.

Under the present law of the Charter, although the ICJ is the 'principal judicial organ of the United Nations',⁴⁴ no centralized mechanism exists for reviewing the legality of Council or Assembly decisions. In this regard the Charter system is far less advanced than the centralized system of judicial review contemplated by, let us say, the European Community with the Court of Justice and the Tribunal of First Instance. Absent such system of judicial review, there are only two ways in which the ICJ may pass judgment on the legality of a decision adopted by a UN organ: (i) Article 96 procedure for advisory opinions, and (ii) contentious procedure brought before the Court by two or more states.

A view has emerged in legal literature that these two procedures should be used as preconditions for the admissibility of unilateral withholdings.⁴⁵ In principle one cannot but share the desirability of third-party review of contested UN acts. However there are legal and practical obstacles to the applicability of this approach to the specific question of unilateral withholdings. First, according to Article 96, only the

⁴¹ The US delegation supported the opinion that the General Assembly had an absolutely discretionary power, to which Member States were bound, to decide and apportion every kind of expense inherent in the aims of the United Nations: 'Member States . . . find their protection . . . in the political requirement of a two-thirds majority in the General Assembly both to initiate the action and to make the necessary financial agreements. If these majorities can be mustered; if the activities engaged in are immediately related to the express purposes of the United Nations; if they are approved in due course according to the regular procedures of one of its organs having competence over the subject matter; if they do not contravene any prohibition of the Charter nor invade the sovereign powers of individual States — if conditions such as these are satisfied, [there are] no reasons why the United Nations should be prohibited from levying assessments to pay for goods and services needed for those activities. The good and services may be furnished by member States . . . by private agencies or individuals . . . [in every case] the Organization [has the] power to raise money by assessments to pay for them. . . The distinction between administrative and operational expenses . . . is unwarranted in the language or history of the Charter and would be unworkable in practice'. ICJ Pleadings (1962) 424.

⁴² See documents reprinted in 60 *AJIL* (1966) 104 ff.

⁴³ This position is clearly implicit in the above cited Kassebaum amendment (see note 2).

⁴⁴ Charter, Article 92.

⁴⁵ Alvarez, *supra* note 16, at 17 ff. This author recognizes that the duty to pay does not extend to actions that constitute a breach of the Charter but adds 'that a legal duty to pay may not ultimately exist for such actions does not license a member to withhold payment unilaterally. The issue must be initially determined by an entity which is not a judge in its own cause'.

General Assembly or the Security Council 'may', but are under no obligation to, request advisory opinions on the legality of certain acts. So, the initiative of requesting a legal opinion rests on the very organ the legality of whose acts should be the object of judicial review. Anyone can see how, in this situation, the UN organs may be reluctant to take the required initiative. Secondly, even if an advisory opinion is requested and rendered, such opinion would not be binding in point of law and it could also be disregarded in point of fact. As a matter of record, *it was disregarded* exactly in the aftermath of the 1962 critical case of UN Expenses with the General Assembly's decision not to insist on the imposition of assessed contributions upon recalcitrant states.⁴⁶

If we look at the ICJ's contentious jurisdiction as a possible avenue to obtain a preliminary ruling on the legality of the UN act, the problems seem to be even more unsurmountable. Since Article 34 of the ICJ Statute allows only states to be parties in contentious proceedings before the Court, short of an amendment of the Statute, this avenue would work only in proceedings between two or more states in the context of which the issue of the legality of UN action would be presented as a preliminary or incidental question. This is possible of course. But it seems odd to defer to a future and uncertain event, i.e. the decision to commence contentious proceedings before the Court by third parties, the settlement of a legal dispute between the UN and a member over the refusal to finance certain acts on grounds of their alleged illegality. Besides, even if the circumstances were to favour the materialization of such event, recent experience shows how thin are the chances of effective judicial review of the legality of UN acts. In the Genocide case brought by Bosnia-Herzegovina against Serbia, the issue of the compatibility of the Security Council arms embargo with the inherent right of self defence under Article 51 of the Charter and under customary international law, was carefully shunned by the Court⁴⁷ and interim measures requested by the applicant were not granted.

Similarly, in the much discussed Lockerbie case, brought by Libya against the United States and the United Kingdom, the ICJ refused to accord interim measures requested by Libya based on the double argument that (i) Security Council decisions enjoy a *prima facie* presumption of legality, and (ii) that obligations arising for Member States from such decisions take precedence over other treaty obligations.⁴⁸

The inherent limits of the ICJ role we have just outlined, do not entail that third-party determination of disputes arising from a member's refusals to pay for allegedly illegal acts should be discouraged. On the contrary. Whenever a political or jurisdictional basis exists, it is consistent with our construction of the UN, as an organization based on the rule of law, to encourage and facilitate such type of third-party determination.

However, absent a compulsory or even a predictable mechanism of judicial review,

⁴⁶ See *supra*, section 4.

⁴⁷ Case concerning the *Application of the Convention of the Prevention and Punishment of the Crime of Genocide*, order of 13 September 1993, ICJ Reports (1993) 344 ff.

⁴⁸ See case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, ICJ Reports (1992) 126.

it would be unrealistic and politically unwise to require the prior exhaustion of such an uncertain remedy as a precondition of legal challenges to UN acts and their relative expenditures. The UN legal order permits more flexible and more effective means of settlement of this type of dispute. One is the preventive reciprocal control that Member States exercise at a political level during deliberations for the adoption of a given act. If a state is concerned with the illegal or *ultra vires* character of a certain activity, which it will be bound to finance, that state has the opportunity and the duty to formulate its objections and to state the reasons of law justifying its disassociation with the deliberation.⁴⁹ This may mobilize opposition to the proposed activity and perhaps succeed in preventing the adoption of the relative act. In the field of maintenance of peace, involving the responsibility of the Security Council, the problem does not even present itself when the objecting member is the United States or any permanent member. In this case the right of veto will prevent the adoption of the controversial act.

But even when the dissenting member fails to prevent the approval of an activity it considers illegal, its continued opposition, including the refusal to provide financial support, may help disclose the flaws, the strain or the lack of legitimacy of a UN act and, in the long run, may lead to corrective measures or to the repeal of an act adopted by an ill-inspired majority.⁵⁰

7 Conclusions

In a legal system endowed with a centralized authority competent to interpret the law with binding effect on community members normally there would be no justification for unilateral action. The paradox of the United Nations is that, while all its organs, including the General Assembly, are bound to conform to the Charter in their deliberations, no obligatory mechanism exists to review the legality of their acts, nor final authority vested on them to interpret the Charter with binding effects on Member States.

For this reason, I have reached the conclusion that while the General Assembly is bound to respect the principle of legality in the implementation of Article 17, Member States retain the right to resist assessed contributions when they have a *bona fide* claim that the act or the operation to be financed entails a violation of the Charter or of international law.

This decentralized system for ensuring compliance with the law may not be the ideal model, since in the end it is based on a self-judging determination of the withholding state. Certainly, it is not consistent with the ideal model embraced by those who look at the United Nations as a world constitution. However, it is the only

⁴⁹ This conclusion constitutes a logical consequence of the lack of a binding power of interpretation of the Charter by United Nations organs; see Conforti, *supra* note 5, at 292 ff. See also Art. 2, para. 5, which imposes on 'all Members [to] give the United Nations every assistance in any action it takes', but only to the actions taken 'in accordance with the present Charter'.

⁵⁰ A case in point is the notorious General Assembly resolution 33/79 of November 1975 equating Zionism to racism.

system that is compatible with the reality of the Charter as a treaty and with the consensual character of the underlying relations.

This does not entail that financial withholding may be used as means of unilateral and unjustifiable pressure to bend United Nations policies to national goals and interests of individual Member States, no matter how powerful they may be. Lobbying and the use of the vote are the lawful forms of national influence on United Nations decisions. Nor is unilateral withholding a remedy of first instance to be used whenever there is the slightest presumption of an *ultra vires* act. Member States who challenge the legality of an act by the Organization have a duty to state the reasons of law for their opposition and must provide the opportunity for the Organization to correct its course of action.

Thus understood, withholding of payments to the United Nations budget is only a remedy of last resort and, as the foregoing analysis has shown, its exercise should remain limited by the three criteria that I have identified in the principles of (i) specific necessity, (ii) integrity, and (iii) consistency. It is my modest submission in the current debate on the virtues and evils of unilateralism that the correct application of these criteria could prevent or minimize abuses and arbitrary invocations of the *ultra vires* argument to refuse payment of assessed dues to the United Nations budget.