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Case Concerning Financial Obligations of the United Nations, Belgium, United Arab Republic, United States, 1962.

Best Written Statement

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THE INTERNATIONAL COURT OF JUSTICE

Statement by the Government of
the United States of America

-on-

The Question of Certain Expenditures Authorized

by the General Assembly of the United Nations

Agents for the United States of America,

Frederic Freilicher
Don Cotesworth Gellers

Of Counsel,

Manuel Medina Ortega
Stanley T. Pardo
Robert E. Stein
David Suratgar

Errata List for the Memorial for the U.S.A. (Columbia Law School)

Page	Line	
1	9	Delete comma after "requested".
3	18	Insert comma after "organs".
	22	Change "midifications" to "modifications".
4	4	Should read: "... is given a volonté propre".
	8	Delete quotes and underline "jurisprudence".
	19	Change period after "sovereignty" to comma.
5	8	Change "Organization" to "Organisation".
	14	Delete comma
	25	Change "Organization" to "Organisation".
	26	Change "cannon" to "canon".
6	9	Delete colon.
	29	Change "Labor Organization" to "Labour Organisation".
7	4	Change parentheses to brackets.
	17	Delete "that".
8	4	Delete quotes and underline "vincula juris".
	15	Change "meme,,, etre" to "même ... être".
9	2	Should read: "faith (uberimma fides),...".
	11	Change "effectivity" to "effectiveness".
	20	Change "judicial" to "juridical".
10	3	Should read: "... the words 'expenditures' and 'Authorized',...".
	9	Should read: " ... going so far ...".
11	9	Delete comma.
12	1	Should read: " ... 'ut res magis valeat quam pereat' (- it is
and	2	preferable ... than not)".
	6	Delete comma.
	7	Change "be" to "by".
	25	Should read: " ... [t]he General Assembly ...".
13	5	Delete "other".
	21	Underline "pacta sunt servanda".
	23	Underline "pacta dant legem contractui".
16	7	Should read: "... to this, and to the".
	8	Should read: " ... the notion has also been ...".
	15	Change "members" to Members".
	19	Delete semicolon.
18	9 & 10	Should read: " ... to the func - / tions ...".
	15	Delete comma after "report".
19	20	Delete comma.
20	3	Should read: " ... ne peut évidemment répondre
	4	... que par la négative. Des lors ... en présence
and	6	... aucune démarche ...".
	8	Change "occassions" to "occasions".
	12	Change "expeditioning" to "expedition".
	17	Should read: "... 'ut res magis valeat quam pereat,' ...".
	23	Change "signatories" to "Signatories".
21	5	Change "required" to "requires".
	17	Change "occassions" to "occasions".
22	15	Underline "supra" and change "conbatant" to "combatant".
	21	Should read: " ... force as UNEF, ...".
23	2 & 3	Should read: " ... need not necessarily have acted ...".
	10	Underline "supra".
	21	Change "it" to "its".
24	17	Underline "supra".
	24	Change "accredation" to "accreditation"; delete comma.
25	8	Should read: "evidentiary type of ...possibly disputed events occasioning".

Page	Line	
25	18 & 19	Change "international" to "internal".
	20	Change comma to period.
	25	Delete apostrophe.
26	1	Delete comma after "Congo".
	6	Change "article" to "Article".
	7	Should read: " ... operation of the Article ...".

FOOTNOTES

Number	
6	Should read: "Jenks, op. cit; ... (1961), Introduction."
7	Underline "op. cit"
8	Should read: "Reuter, op. cit., ... London (1958)., Chapters ...".
9	Should read (last line): "obscuritas pacti nocet ei qui opertius loqui potuit."
11	Close parentheses after "p. 70".
15	Underline "op. cit." (twice); delete "supra"; insert comma after second "op. cit.".
18	Underline "Ibid.".
20	Delete colon; line 5 should read: " ...and integrity ../,c/apacity ...".
21	Underline "op. cit."; delete "supra".
22	Should read: ICJ Reports, 1951, p. 24.
23	Should read: ICJ Reports, 1950, pp. 143-144.
24	Change period after "(1955)" to comma.
25	Underline "op. cit."
27	Change semicolon in second line to colon.
29	Change period after "UNEF" to comma.
31	Should read: "Vide, generally, ...Conference, UN Conf. Int. Org., Documents XVII., p.244 ff.".
33	Should read: "Reuter, op cit., ... (M)ême l'organisation ... administration intérieure; elle ... adopte un budget, et par la fait naître à la charge des états ...".
35-38	Underline "Ibid.".
40	Underline "loc. cit." and delete "supra".
41 & 42	Underline "Ibid".
43	Insert period after "Ibid" and underline.
44	Insert comma after "Documents VIII.".
46	Should read: "Cf., Expose of M. Kaeckenbeck, Rep. of the Government of Belgium before the International Court of Justice. Reparation For Injuries Suffered In The Service of the United Nations, Pleadings, etc., ICJ Reports, 1949, p. 99."
47	Change periods after "France" and "Tribunal" to commas and insert comma after "etc.".
49	Underline "Vide" and "supra".
50	Underline "Vide".
52	Should read: "Vide n. 27, supra.".
53	Should read: "Vide text at n. 29.".
54	Insert comma after "Defense".
56	Insert comma after "Cf.".

I. INTRODUCTION

The present Advisory Opinion proceeding originates with a Resolution adopted by the General Assembly of the United Nations on December 21, 1961,[1] pursuant to the report of its Fifth Committee.[2]

By this Resolution, the General Assembly exercised its privilege under Article 96(1) of the Charter of the United Nations to request the International Court of Justice to give an Advisory Opinion upon a legal question with which the Assembly was concerned. Pursuant to Article 65 of the Statute of the International Court of Justice, the General Assembly has placed before the Court an exact statement of the Question upon which an Opinion is requested, and has accompanied this statement with all documents likely to throw light upon the question.

This Question has been formulated in the Resolution of December 21, 1961, as follows:

> "Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 1/ 22 July 2/ and 9 August 1960 3/ and 21 February 4/ and 24 November 1961, 5/ and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 100 (ES-I) of 5 November 1956, 1101 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November...

1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?

"1/ Official Records of the Security Council, Fifteenth Year, Supplement for July, August and September 1960, document S/4387.
2/ Ibid., document S/4405.
3/ Ibid., document S/4406.
4/ Ibid., Sixteenth Year, Supplement for January, February and March 1961, document S/4741.
5/ Ibid., document S/5002." (Previous five footnotes by General Assembly.)

The Government of the United States, in support of an affirmative answer to the above legal Question, avails itself of the opportunity under Article 66 of the Statute of the International Court of Justice to submit a statement thereon.

The submission of this statement is occasioned by a deep apprehension for the very continued existence of the United Nations Organization. This concern is based upon the axiomatic proposition that any organization which fails to meet its financial obligations cannot long endure.

The current Question before the Court was drafted by the General Assembly under the attendant circumstance of an anticipated year-end deficit of $150 million, nearly all of which was incurred as a result of defaults and arrears in assessments for the cost of the United Nations Emergency Force (UNEF) and the United Nations Operations in the Congo (ONUC).[3] The deficit continues to grow and the seeming inability of the Organization to solve the dilemma of its approaching bankruptcy can only redound to the most tragic discredit of the peaceful hopes of all mankind. The simple eloquence of the late Secretary-General served most succinctly to delineate the inevitable

ultimatum facing the world body:

> "Will this organization face the economic consequences of its own actions and how will it be done? Further, if it is not willing to face the financial consequences of its own decisions, is it then prepared to change its substantive policies? There is no third alternative.'
>
> . . . .
>
> "The Secretariat finds itself in a difficult position. On the one hand, it has to pursue 'vigorously' the policy decided upon by the General Assembly and the Security Council. On the other hand, it is continuously fighting against the financial difficulties with which these decisions under present circumstances face the Organization. Of course, the Organization cannot have it both ways."[4]

II. GENERAL CONSIDERATIONS

The Court is here faced with the rather complicated task of interpreting an Article of the Charter, and of deciding the extent of the General Assembly's competence under that article. The Court may also find it difficult to avoid investigating whether the U.N. itself, and its organs exceeded their competency in the Suez and Congo crises. What techniques and canons of interpretation ought the Court to follow in deciding these constitutional issues?

In general, the customary canons for the interpretation of treaties are applicable, with those midifications that have been authoritatively recognized as necessary because of the peculiar character of the present document, the Charter, which creates an International Organization.[5] It is clear that the constitution of such an Organization is distinguishable from an ordinary multilateral treaty (which usually tries merely to coordinate the policies, activities and laws of party states), in these ways:

a. It involves the <u>transfer</u> of certain rights of states to the new institution, as well as a self-limitation by States on some of the

powers which they exercised at their own volition in the past.

b. It institutionalizes in the International Organization certain powers and functions, for the common interest and common good of all member states. As a result the organization is given a "volonte propre" distinct from its member states.[6]

These considerations are perhaps basic to an understanding of the approach which the Permanent Court and the International Court of Justice have adopted in cases involving the competence of International Organizations. "Jurisprudence" and the writers have in recent years singled out some very important canons of interpretation for international multilateral treaties.[7] However, it is safe to say, in general, that the main attentions of both national and international tribunals are directed towards discovering the common intention of the contracting parties. Thus the International Courts have concerned themselves with the overriding principles of interpretation in accordance with the notions of uberimma fides and the need for ensuring the effectivity of treaties.[8] It has been traditionally argued before municipal tribunals that in cases of doubt, a principle found in most of the major legal systems, "verba ambigua accipiuntur contra proferentem," applies.[9] International law, in accordance with its notions of sovereignty evolved a similar concept, holding that in cases of treaty ambiguity, relinquishments of sovereignty should not be presumed.[10]

This latter principle has however found little favor in the eyes of the International Tribunals of the Twentieth Century, and this was especially true in those cases in which they have been called upon to interpret the constitutional documents of International Organizations. In such cases the principle

of effectiveness has been the paramount canon of interpretation, especially in issues involving the competence of such Organizations. The Organizations themselves have taken an identical course when interpreting articles of these texts. Ofttimes, these articles were originally intended to limit their competence.[11]

This concept was emphatically enunciated in the Advisory Opinions of the Permanent Court in the cases involving the competence of the International Labour Organization. Thus the Court ruled that the Organization was competent to regulate conditions of work in agriculture (rejecting suggestions that the word "industry" be given a restricted meaning), on the grounds that failure to consider agricultural conditions would largely frustrate the purposes of the Treaty of Versailles, Part XIII.[12] Similar reasoning was adopted by the Court in subsequent Advisory Opinions, such as those concerning the Regulation of Employer's Work,[13] and the Convention of 1901 on the Employment of Women at Night.[14] In stressing the principle of effectiveness, the Court rejected contentions which would have attached a limiting purport to the Convention. One learned commentator remarks that this Opinion is:

> ". . . expressive of the general principle which the Permanent Court followed with respect to international institutions created by treaty namely that in the absence of express indications to the contrary, the court will favour an interpretation permitting a wider rather than a more restricted display of activity in order to make more effective the general purpose of the Organization."[15]

The cannon of effective interpretation was likewise stressed in the Advisory Opinion on the Interpretation of the Treaty of Lausanne, where the effectiveness of the Covenant as an instrument for pacific settlement of disputes was upheld by the application of the maxim requiring that no man be

judge in his own cause.[16]

The principle of effective interpretation was strongly reaffirmed in the cases in which the International Court of Justice has been called upon to interpret the Charter of the United Nations. The affirmation was so marked that, in the Opinion on the Reparations for Injuries Suffered in the Service of the United Nations, the Court held that when interpreting the constitutive document of an Organization such as the United Nations, certain powers must be implied in the Charter as being essential to the effectiveness of the Organization. The Court said that the:

> ". . . supreme type of international organization . . . could not carry out the intention of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged." (emphasis supplied)[17]

> "The functions of the organization are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices. . . ."[18]

> "Under international law the Organization must be deemed to have those powers which though not expressly provided for in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[19]

Thus the test of functional effectiveness was set forth, and indeed, the Court referred specifically to the Opinions of the Permanent Court of International Justice in the International Labor Organization cases. Identical language was used by the Court in its Advisory Opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, where the Court held that the United Nations had the power to establish a tribunal to

decide disputes between the Organization and members of its staff. The Court quoted from its Opinion in the Reparations Case, and stressed again the concept of implied powers and the need for assuring functional effectiveness.[20] In commenting upon this Opinion, Judge Lauterpacht has said that, "(t)he governing consideration was that the General Assembly after a mature deliberation, had decided to set up a tribunal empowered to render judgments which were to be final and without appeal."[21]

In other cases, the Court has reemphasized the principle of effectiveness. The main stress, therefore, in its Opinion on the Reservations to the Genocide Convention, was placed upon the problem of determining the compatability of a Reservation to the object and purpose of the Convention, the ultimate effectiveness of the Convention being regarded as the primary guide.[22] In the Advisory Opinion on the International Status of South-West Africa, the Court's principle concern was to interpret the Mandate, the Covenant, and Article 80(1) of the United Nations Charter, most nearly in accordance with the object (namely the effectiveness) of the Mandate System.[23] It has been said of this Opinion that:

> "While as a rule the devolution of rights and competencies is governed either by the constituent instruments of the organization in question, or by special agreement or decisions of their organs, the requirement of continuity of international life demands that succession should be assumed to operate in all cases where that is consistent with or indicated by the reasonably assumed intention of the parties as interpreted in the light of the purpose of the organization in question."[24]

It is submitted that this importing of the rules of succession, by the Court, to problems involving International Organizations is no more than a legitimate application of the doctrine of calling for effectiveness of basic

international instruments. In effect, these cited examples demonstrate that the Court applies the law in a constructive spirit, fully mindful of the practical necessities of international life, and of the need to ensure the efficacy of "vincula juris" by which Governments profess to have bound themselves. International law is thereby professing the ageless principle laid down in the famous case of McCulloch v. Maryland, 4 Wheaton 316 (1819), where Chief Justice Marshall declared that a constitution should never "partake of the prolixity of a legal code."[25]

It was precisely indicated by the Permanent Court of International Justice in its Advisory Opinion in the case of the River Oder Commission that a restrictive interpretive approach to documents like the Charter of the United Nations would be given little application, unless required by the principle of good faith, or because any other interpretation would clearly be contrary to the common intention of the parties. The Court, in noting the import of the restrictive theory, stated: "Cet argument juste en lui meme ne doit etre employé qu'avec la plus grande prudence."[26]

One is thus led to conclude that, under international law, the interpretation of the language of the Charter, involving, as it does, a consideration as to the nature and extent of the Organization's competency, must be made in accordance with the aim of securing the effective functioning of the Organization in pursuance of its general aims and purposes.

The Government of the United States submits that a broad view of the Charter as a living instrument should be taken in order to ensure that the Organization will be able to fulfill its functions, as well as the duties and responsibilities assigned to it by its Members. It should further take a

position which will ensure that, in accordance with the principles of good faith ("uberimma fides"), Members are deterred from advancing restrictive interpretations, either of the competency of the Organization or of their obligations under the Charter, as well as restrictive interpretations of the Resolutions of the Organization, especially when such Members have been party to its activities and voted for the Resolutions in question. Such an assertion does not depend solely on the maxim "modus et conventio vincunt legem," but also upon the reasonings of equity and practical necessity, especially when such interpretations are buttressed by the subsequent behavior of the member states.[27]

Therefore, the principle of effectivity should be regarded as the controlling canon of interpretation, and in accordance with Article 38, paragraph 1(c) of the Statute of the International Court of Justice one may conclude that "ubi eadem ratio, ibi eadem ius."

III. ANALYSIS HEREIN

The initial consideration before the Court is an inquiry concerning the scope of the Question currently before it. This entails a selection of the proper analytical level of evaluation to be used in arriving at a final determination. In the view of the Government of the United States, a careful distinction must be made among the three possible modes of judicial solution employable in the Court's consideration of this case.

At the first level, a reading of the Question presented reveals that there may be an inquiry directed to the issue of whether the "expenditures authorized" in the cited General Assembly financial Resolutions constitute "'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter," -as opposed to any possible other types of organizational expenses. This

order of approach applies a test of conclusive presumption in favor of constitutional validity, and would then parenthetically insert a word such as "properly" between the words "expenditures authorized," as they appear in the General Assembly's Request, when asking whether the costs undertaken by the various Resolutions now have the effect of giving rise to the operation of Article 17, paragraph 2.

A second level of analysis, on the other hand, would make no presumption as to the legality of the Resolutions, except that it would, however, refrain from going so far as to delve into considerations touching upon the verity of the factual inferences contained within these enactments. This procedure inspects constitutional validity primarily by means of Charter and Resolution words alone, while declining investigation into the actual existence of any state of affairs impliedly claimed by the language employed in the Resolutions.

Lastly, the third method of deliberation goes further, and entails a full evidentiary type of examination, both as to verity and relative weight, of all possibly disputed events which may have occasioned the passage of the Resolutions.

Aside from the merits of analytical clarity, the preceding division becomes necessary, in order to permit a comparison of, and some selection from, the differing standards. They need not, however, always be mutually exclusive standards. Adoption of the second or third one ought, ideally, to be made only after the prior unsuccessful implementation of the one, or two, before it.

A judicial determination undertaken within the purview of the initial category, after approval of the legal reasons why the financial judgment of the General Assembly should not be disturbed, proceeds to deal only with the

remaining question of whether the named expenditures are within the meaning of Article 17, paragraph 2, or whether they constitute one or another of the suggested different kinds of United Nations expenses. The proposition that the General Assembly might have utilized a less positive phrase in its Request than "expenditures authorized," had it been requesting a very narrow legal scrutiny of those very expenditures, lends a great measure of support for an urging of the usage of this first approach. Commencing with the second manner of analysis can be negatively contrasted also because of its failure to thus take cognizance of what can be termed, the full equities of the situation. Should the Court, however, come to this next approach, an important distinction is to be made between Resolutions constitutional on their face, and those which could conceivably be proven improper by a demonstration of the falsity or paucity of the information upon which the Resolutions purportedly are based. The Government of the United States would believe that a factual showing of this kind is not here appropriate. Article 96 of the United Nations Charter provides only that the General Assembly may request an Advisory Opinion from the Court upon a "legal question"; no allowance is made for factual disputes. The notion itself of a judicial advisory proceeding is traditionally non-amenable to concrete findings of fact.[28] Presumably, the General Assembly was fully aware of this feature in drafting the Question under advisement. For these reasons, it is offered that the Court be guided by the principles of the first level of analysis.

IV. THE EXPENDITURES AUTHORIZED IN THE CITED RESOLUTIONS CONSTITUTE "EXPENSES OF THE ORGANIZATION" WITHIN THE MEANING OF ARTICLE 17, PARAGRAPH 2, OF THE CHARTER.

Perhaps the single legal maxim which permeates this case most completely

is, "ut res magis valeat quam pereat" -it is preferable that things be interpreted as having effect rather than not. In keeping with the wisdom of this adage, if the expenditures of an organization are justifiable in terms of the purposes and principles of the organization, then these expenditures constitute bona fide expenses of that organization. It is uncontested that the avowed purpose of the United Nations, in engaging in the UNEF and ONUC operations, was, to maintain international peace and security be means of collective measures for the prevention and removal of threats to the peace, to suppress breaches of the peace, and to bring about the adjustment of situations which might lead to a breach of the peace. This paraphrases a good portion of the first section of Article I of the United Nations Charter. Additionally, the second section of this Article, which enumerates the purposes of the United Nations, dedicates the Organization, generally, "to take other appropriate measures to strengthen universal peace." Regardless of the precise fitting of the UNEF and ONUC endeavors under the aegis of this or that particular enabling Article, no opportunity is perceived for a denial that these activities took place within the fullest consonance of the purposes for which the United Nations was created.

The General Assembly financial Resolutions which are cited in the Question before the Court were all passed by the General Assembly with the concurrence of two-thirds of the voting members. All of them called for the appropriation of funds to sustain activities of the Organization and, therefore, were budgetary questions, contemplating apportionment.

Article 17 of the Charter of the United Nations vests the General Assembly with full financial powers for the Organization. The Article reads that, "the General Assembly shall consider and approve the budget of the Organization," and that, "/t/he expenses of the Organization shall be borne by the Members as

apportioned by the General Assembly." Article 18 directs that budgetary questions are to be decided by a two-thirds majority of the Members present and voting in the General Assembly. There are no other Articles of the Charter dealing with financial arrangements. In this manner, the economic life of the United Nations is fully regulated, and there can legally be no other types of expenses other than the "expenses of the Organization," of Article 17, paragraph 2.

Every Member, upon signing the Charter, has pledged itself to an adherence to the terms of Articles 17 and 18. As a result, unlike the Covenant of the League of Nations, unanimity is not required for binding financial decisions. Therefore, unless the words of Articles 17 and 18 are to be rendered meaningless, when the Assembly carries a budgetary measure by the two-thirds majority, a dissident Party cannot later be permitted to impeach an adopted measure upon the theory that the measure merely constitutes a non-binding recommendation or, further, that the proposal fell outside of the constitutional scope of the Assembly's authority, the Assembly having authoritatively pronounced upon the constitutional validity of its appropriations by force of the fact that the measure has passed that Body within the pre-ratified two-thirds majority requirement. By token, then, of standard principles of international law relating to the binding nature of treaty obligations, as derived from the phrase "pacta sunt servanda," the Assembly's passage of a budgetary matter forms, eo instante, an effective adjudication upon the constitutional validity of the measure, under the specific proposition of "pacta dant legem contractui" (-the stipulations of parties constitute the law of the treaty).

In the light of this rationale, it would appear extremely difficult to

maintain the existence of a fine distinction between different accounting procedures. Furthermore, reference to the exigencies at the time of the emergencies involved fully discloses the reasons for the setting up of separate financial accounts. It is well known that swift action in each instance was crucial, and that there was a correlative necessity for the Secretary-General to have large sums of money at his immediate disposal.[29]

Indeed, this was not the first time that a special account, for operational purposes, had been created. In 1946 the General Assembly established a Working Capital Fund for the Secretary-General's convenience in meeting divers pressing expenses.[30] It was only on account of the financial magnitude of the UNEF and ONUC operations that the Working Capital Fund could not be employed, and separate respective other accounts were opened. Finally, Article 17 does not disclose that the General Assembly is committed to any particular kind of actuarial procedure, the Framers of the Charter having decided to give the Assembly as much flexibility as possible in this regard.[31]

In the opinion of the Government of the United States, it would seem clear that the phrase "by the Members," in Article 17, paragraph 2, was intended to mean that the expenses of the Organization are to be borne by all the Members. But assuming, ad arguendo, that the General Assembly might have competence to exclude any number of Members, totally, from payment responsibility, it should suffice to point out that no such apportionment was in fact made. The binding nature of its decisions in this realm renders the Assembly's course of action conclusive.

Nor can the failure of the General Assembly to exempt the so-called "non-aggressor" States, the "victim" States, and/or all others than the

Permanent Members of the Security Council, be deemed an abuse of right on the Assembly's part.

It was proposed during the deliberations at the San Francisco Conference that the Organization seek to promote apportionment aiming at the most equitable distribution of expenses resulting from peace-keeping operations. This view prevailed over the opposition of those who would have had the burden singly placed upon the guilty state.[32]

It must, of course, be acknowledged that the question of culpability is still shrouded with a degree of unclarity in the facts surrounding the two incidents. Should the United Nations eventually decide to seek reimbursement for the costs upon standards of misconduct, this would then have to await the outcome of a fact-finding investigation. While the Government of the United States might then wish to express its views upon the legality of whatever means might be utilized to determine and collect these damages, this Government would not, in principle, be opposed to a monetary recovery by the Organization.

In connection with certain extra-legal objections to the idea of having the "victim" States share in the General Assembly assessments, it is neither morally nor logically unfounded to allow a State which has been the subject of an international wrong to contribute to the costs of its rescue and rehabilitation. Peace, like war, is an expensive proposition. Unlike war, however, it is a universally-desired commodity. It is, therefore, not unfair to ask those wishing to share in it to contribute towards it.[33] Their contributions are thus insurance premiums, so to speak, against the possibility of a shattering of the world's peace. And, as with insurance, it is in no wise unethical to expect an insured who has just suffered an unprovoked casualty to continue in the payment of his premiums, or to share in the payment of a further assess-

ment being collected specifically for his benefit, and generally, for the benefit of a world in which all Nations and Peoples share in an uncertain, and interdependent, common fate.

Two more non-Charter devices have also been advanced concerning means of determining international responsibility for the costs of UNEF and ONUC. It has been suggested that the expenses be borne primarily by the five Permanent Members of the Security Council. In addition, as an adjunct to this, and the "aggressor must pay" type of proposal, the notion has been raised of voluntary contributions for sustaining the projects. It is the considered view of the Government of the United States that such courses as these would effect severe harm to the spirit of the Charter of the United Nations, as well as to the principle of collective security. It would be extremely imprudent, moreover, for the interests of the Organization to make it so dependent upon the financial contributions of fewer than half-a-dozen of over one hundred members, or upon the complete unpredictability of voluntary contributions.

Outside of the obvious intendment of Article 17, paragraph 2, that the expenses of the Organization be supported by every Member, other Charter provisions, as well, speak to this principle. Specifically, these are Articles 2 (paragraphs 1, 2 and 5), 25, and 49. These Articles, respectively, confirm; the idea of equality of all the Members, their individual promises to fulfill in good faith the obligations assumed by them in accordance with the Charter, their joint pledge to give the United Nations every assistance in all actions taken under the Charter, their agreement to accept and carry out the decisions of the Security Council, and their promise to join in affording mutual assistance in carrying out such measures. (In connection with the ONUC

endeavor, Articles 25 and 49 were even expressly cited by the Security Council resolutions of 9 August 1960[34] and 21 February 1961.[35]).

It can be seen, then, that the Framers of the Charter conceived of a collective responsibility on the part of all the Members. It is all the Members who "pledge," "promise," and act together. Any plan of payment setting any individual Members apart from the rest runs contrary to this view.

V. THE RESOLUTIONS CITED IN THE QUESTION BEFORE THE COURT ARE VALID ACCORDING TO ALL THE PROVISIONS OF THE CHARTER.

Prior to the discussion of constitutionality here, a fairly brief descriptive tracing of some of the pertinent legal means taken by the Organization in its creation of the UNEF and ONUC contingents, may be helpful:

> On October 29, 1956 the Government of the United States informed the Security Council by letter that hostile foreign armed forces had penetrated deeply into Egyptian territory. The Council immediately took up consideration of the question. Approximately forty-eight hours later, it was informed that two more Powers had dispatched troops of an unfriendly nature to the area. Having failed to agree upon any proposed Resolution, due to negative votes by two Permanent Members, these Members being the two Powers that had sent the troops, the Council on October 31 adopted a procedural Resolution,[36] as provided for in the General Assembly's "Uniting For Peace" Resolution, 377(v) of November 3, 1950. This procedural Resolution recited that the Security Council, taking into account that the lack of unanimity of its Permanent Members had prevented it from exercising its primary responsibility for the maintenance of international peace and security, decided to call an emergency special session of the General Assembly to deal with the matter. The Resolution was carried, over the negative votes of only the same two Permanent Members that had earlier exercised their powers of veto, all of the other Permanent Members, plus four other Members, voting in favor of it.
>
> The special session of the General Assembly thereupon convened and, on November 2, 1956, adopted a Resolution[37] which, inter alia, requested an immediate cease-fire. Two days afterwards, a Resolution was passed requesting the

Secretary-General to submit a plan to the Assembly to set up an emergency international United Nations force for securing and supervising the cease-fire, to be obtained in accordance with the Resolution of November 2. At the meeting of the Assembly on November 7, the Secretary-General presented a full report. He noted that, in the recent Resolution, the Assembly had decided that a force be set up on the basis of principles reflected in the fundamental law of the United Nations itself. As to the functions of UNEF, he stated that, in accordance with the Assembly Resolution of November 2, the force would not enter the area until after the effecting of a cease-fire. It was to be a buffer unit, with certain police duties, "not a force with military objectives."[39] From the date of the Secretary-General's report, to the present time, there has not been advanced from any quarter a claim that the force has deviated, in the slightest, from its originally planned character.

The salient legal facts surrounding the formation of the ONUC operation began to unfold upon receipt, by the Secretary-General, of a cable dated July 12, 1960, from the President and the Prime Minister of the Government of the Rebublic of the Congo. This cable requested "urgent dispatch by the United Nations of military assistance... to protect the national territory of the Congo against the present external aggression which is a threat to international peace."[40] Upon apprisal of this communication by the Secretary-General, the Security Council met, and passed its Resolution of July 14, 1960, which called for the withdrawal of foreign troops from the territory and also authorized the Secretary-General "to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary" until their own forces, through the technical assistance of the United Nations, would be able to cope with their duties.[41]

The Secretary-General, pursuant to this mandate, issued a report to the Security Council approximately one week later. His report confirmed that the United Nations forces sent to the area were under careful instructions never to employ force, unless as a clear matter of self-defense if attacked with arms. In conformity with the Resolution, the activities were referred to as, "a stop-gap arrangement," carried out by a "temporary security force."[42] In its Resolution of July 22, the Security Council confirmed the principles outlined in the report and,

> once again, called for the removal of the foreign troops and authorized the Secretary-General "to take all necessary action."[43] In all, there have been five Security Council enabling Resolutions. They were each enacted without a negative vote and with very few abstentions.

In each of the above instances of the formation of the operations, it will be observed, there was never a mention made of any specific Charter Article under which the General Assembly, or the Security Council, presumed to act. This, of course, cannot be dismissed as a mere unintentional oversight. It was indicative, rather, of the desire to bring these activities within the broad general purview of the peace-keeping duties for which these Organs share full responsibility.[44] In their own right, then, these decisions represent adjudications upon the constitutionality of the measures undertaken by the Assembly and the Council. The Government of the United States is of the firm persuasion that the Organization is bound by these determinations, and, as a matter of law, cannot avoid the financial consequences of them. The opinion of this Court in the United Nations Administrative Tribunal Case would be in complete harmony with this position. The majority opinion there stated that, inasmuch as, "... some part of that expenditure [the United Nations budget] arises out of obligations already incurred by the Organization, ... to this extent the General Assembly has no alternative but to honour these engagements."[45] Indeed, it would be very strange to allow the Organization power to incur obligations, while coupling this power with what only could be envisaged as an irresponsible privilege to deny the validity of these engagements.[46] In the words of another Government:

> "... /Une/ question est de savoir si l'Assemblée est competente pour annuler les dettes de l'Organisation des Nations Unies; à cette question on ne peut evidemment repondre que par la negative. Des lors, un point est clair, en presence de dettes liquides et exigibles de l'Organisation des Nations Unies, aucune demarche, aucune decision de l'Assemblée des Nations Unies ne peut porter atteinte à ces droits."[47]

Nevertheless, should the Court prefer to re-examine the occassions of these expenditures, it is readily apparent that the operations in question are fully justifiable within the constitutional competence of the Organs concerned.

Both the UNEF and ONUC operations involved the expeditioning of military personnel acting under the banner of the United Nations. The question to be next weighed in this section of the statement by the Government of the United States is whether these troop engagements can find their constitutional validity within the separate shadow of particular Articles of the Charter. Here again, the principle of "Ut res magis valeat quam pereat," is of the utmost significance; the benefit of any doubt raised as to applicability of an Article should be resolved in favor of legality.

An objection has lately been raised upon the issue of the operativeness of Article 43 of the Charter. This Article provides for the concluding of special agreements between, the Security Council and Members, or groups of Members. The Member-signatories would agree to keep contingents of armed forces on the standing call of the Council for the purpose of maintaining international peace and security. However, no such agreements have, as yet, been made. Does this then mean that the Organization is, as a result, powerless to engage in any military-like activities? In the view of the Government of the United States, there are two basic reasons why this would not be so.

First, neither Article 43, nor any other Article, would inhibit the Organization from accepting the offer of contingents and supplies on an ad hoc, crisis-to-crisis, volunteer, basis. This idea, in fact, is virtually explicit in a number of other Articles. For example, Article 106 refers to arrangements being made, "as occasion required," pending the coming into force of the special agreements. Article 49 pledges Members to join in "affording mutual assistance" to carry out the measures decided upon by the Security Council; its language need only have read that the Members shall abide by their special agreements, if such agreements had been thought of as the exclusive means of effecting implementation of the Council's peace and security decisions. Article 2 underlines this distinction even more clearly. Its second paragraph does commit the Members to, "fulfill in good faith the obligations assumed by them in accordance with the present Charter." Nevertheless, the fifth paragraph sees fit to stipulate, generally, that they shall give the Organization, "every assistance in any action it takes in accordance with the present Charter."

As a matter of practice, there have been numerous past occassions when military contingents of Member States have been committed to troubled global spots where the peace and security of the international community seemed threatened. The United Nations Truce Supervision Organization (UNTSO), the United Nations Observer Group (UNOG), and the Spinelli Mission, all provide examples of military personnel placed in the field by the Organization, in contingents of various sizes, without any mention of a need for special agreements of the type envisaged by Article 43.

In the vein of lack of objection, due significance can be taken of the failure on the part of any Member State to direct the attention of either the

General Assembly or the Security Council to some claimed infraction of Article 43 at the times of the respective creations of UNEF and ONUC. As particularly regards the latter, according to the late Secretary-General, "Not a single Member who took part in the debates in the Security Council or the General Assembly on this subject stated, or even intimated, that the Council had acted on the basis of Article 43."[48] In the opinion of the Government of the United States, it would be a matter of legal unseemliness to honor such exceptions taken long after full and apparent good-faith participation in the fact.[49]

The second basic reason, offered in explanation of the proposition that the absence of special agreements concluded under Article 43 does not paralyze the United Nations from every sort of military peace-keeping activity, goes to the actual nature of the action here taken.

The formation of UNEF was accompanied by the declaration, mentioned supra, that this force was not to engage in any activities of a conbatant nature; the need for self-defense, even, was avoided by providing that UNEF was not to enter the territory until a complete cease-fire had been obtained. In this manner, the question as to whether the General Assembly might create a military organization was rendered moot. Article 22 of the Charter vests the General Assembly with authority to create such subsidiary organs as it deems necessary for the performance of its duties. A police force, UNEF, with its intended semi-permanent nature, most closely fits the description of a subsidiary organ, as may also be said of the UNTSO organization in this regard.

As to ONUC, should it be considered that any action taken by the Security Council pursuant to Article 42 would presume the existance of the special

agreements mentioned in the following Article, an examination into the founding of this instrumentality would disclose that the Council need not have necessarily acted under the provisions of Article 42, which provides for full-scale military operations whenever action of a lesser sort may be inadequate. Provisional measures are at the disposal of the Council, as outlined in Article 40, which measures, according to the Framers of the Charter, need not have the effect of bringing Article 43 into operation.[50] Article 40 allows for action to be taken falling short of a militarily contentious situation, these measures being, "without prejudice to the rights, claims or position of the parties concerned," As explained, supra, the Security Council Resolutions, along with the Secretary-General's report, regarded the whole operation as an entirely interim, or provisional measure; it was only to last until the regular armed forces of the State, by means of the technical military assistance of the Security Council, had been placed in the position of being able to cope with their proper duties. The United Nations troops sent to the area were never intended to play an actively aggressive or contentious role. It can also be noted that the form of Article 40 was complied with in the sense that there was a "call upon" the foreign troops, whose presence was deemed deleterious to the internal security of the Republic of the Congo, to withdraw from the region.

Finally, in the event of it being advanced that the subsequent ONUC appropriation authorizations made by the General Assembly constituted some sort of "action-taking" in disregard of the Security Council's primary responsibility in this sphere, it should suffice to point out that the Charter makes it quite clear that ultimate budgetary authority lies with the General Assembly. Any other contention would have the effect of extending the

unanimity principle of the Permanent Members of the Security Council to matters of finance. This would be thoroughly out of rapport with the present Charter. [51]

The Government of the United States is, likewise, unaware of any convincing opposition to the view that the General Assembly acted in full accord with the provisions of Article 11, paragraph 2, of the Charter of the United Nations in taking up deliberation of the matter concerning the territorial integrity of the former Republic of Egypt, and in then creating the UNEF endeavor.

Article 10 of the Charter grounds the Assembly, quite distinctly, with a jurisdiction coterminous with that of the whole Organization. Article 11, paragraph 2 requires that all questions relating to the maintenance of international peace and security must be referred to the Security Council, "either before or after discussion" if action is necessary on such questions.

Assuming for the moment that the founding of UNEF constituted "action" and was not, according to Article 22, the creation of a subsidiary organ by the Assembly, then, as was shown in the historical sketch, supra, it is to be pointed out that the General Assembly took up the question only after the Security Council had unsuccessfully concluded its discussion. As was also shown, the only Permanent Members failing to support the Resolution in the Security Council, which called for the General Assembly to become seized of the matter, were those which had become actively involved in the dispute. Once again, it would be a matter of the greatest inequity to give accredation to impeaching viewpoints on any question concerning, the propriety of this Security Council Resolution which might now be tendered by any then-proponent of the Resolution. [52]

In the light of these reflections, the ventures embarked upon by the Organization enjoy the fullest legal confidences of the Government of the United States.

VI. A REVIEW OF THE FACTS UNDERLYING THE OPERATIONS WOULD NOT LEND SUPPORT TO A DENIAL OF THE EXPENDITURES' VALIDITY.

A third level of analysis involves, as has been discussed,[53] a full evidentiary-type examination of all possibly-disputed events occassioning passage of the Resolutions. In the view of the Government of the United States, such an examination would mean the Court would be taking an excessive view of its jurisdiction, since there is no room in an advisory opinion for this kind of factual determination. However, it shall be assumed, at this juncture, that some kind of review of the underlying facts is justifiable.

It has been suggested, inter alia, that the ONUC activity impinged upon the territorial sovereignty of the Republic of the Congo, in contravention of the prohibitions of Article 2, paragraph 7 of the United Nations Charter. This interpretation would attempt to explain that the chaos and hostilities in the area was strictly a matter of domestic politics and international revolt and that it was, therefore, not the concern of the United Nations, The ONUC forces would thus have been interfering in a purely local matter. However, the very circumstances giving impetus to the Security Council action indicate that this crisis could be considered almost anything but a matter of wholly domestic concern. The problem was first called to the attention of the Security Council upon receipt of the cable from the Government of the Republic of the Congo requesting United Nations' assistance to protect that State from a "present external aggression which is a threat to international peace."[54] It was not the United Nations, then, that first expressed the thought of "external aggression" threatening the peace and

security of the world, but the Government of the Republic of the Congo, itself. Of course, the Security Council consequently gave credence to this fact of "external aggression," upon its calling for the withdrawal of foreign troops.[55]

It can be noted here that the domestic jurisdiction prohibition of article 2, paragraph 7 of the Charter, is explicitly qualified by additional words stressing that the operation of of the Article "shall not prejudice the application of enforcement measures under Chapter VII." Resort to the statements made at the sessions of the United Nations Conference on International Organization lends support to the view that this qualification was intended to allow the Security Council to act whenever strife within a State might threaten the international peace and security, despite the fact that at the time of Security Council action the hostilities were wholly within the borders of one Country.[56] Thus, when there is a clear and immediate danger that an armed conflagration may quickly spread to other areas, and when such a conflict has implications far beyond a particular confined locality, the Security Council ought not to be so restricted as to be forced to delay the application of a remedy until the conflict has widened to such a degree that it shall perhaps have become wholly unmanageable.

The consideration by the Security Council of the Indonesian question may be seen as analogous to the situation of the United Nations in the Republic of the Congo. When the Indonesian question was placed on the Agenda, it was contended that consideration of the question ran contrary to Article 2, paragraph 7 of the Charter. It was said that the dispute was completely an internal matter and not within the scope of the Security Council's effective legal concern. However, the Security Council found that the conflict represented a breach of the peace under Chapter VII of the

Charter and passed a Resolution directed to the Parties involved.

Although a similar claim of "internal" dispute may perchance be raised in regard to the ONUC action, the interests of restoring and maintaining an international peace can be seen to be paramount. Thus Article 2, paragraph 7 was not applicable so as to bar the action of the United Nations.

For all of the foregoing reasons, the Government of the United States is of the considered opinion that the Question submitted by the General Assembly in its Resolution of December 20, 1961, be answered, "Yes."

NOTES

1. UN Gen. Ass. Off. Rec., Gen. Ass. Res. 1731 (XVI), 21 December 1961.

2. UN Gen. Ass. Off. Rec., 5th Comm. (A/5062).

3. UN Doc. No. St/Adm//Ser. B/150, 4 October 1961; UN Gen. Ass. Off. Rec., 5th Comm. (A/879), 28 September 1961.

4. UN Gen. Ass. Off. Rec. 5th Comm. (A/843), 21 November 1960, pp. 1, 8.

5. Cf. Jenks, "Some Constitutional Problems of International Organizations," 22 BRIT. YB. INT'L. L. 10 (1945); Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 26 BRIT. YB. INT'L. L. 48 (1949); Reuter, Institutions Internationales. (Paris, 1955). pp. 293-316.

6. Jenks, op. cit; Annual Report of the Secretary General of the UN (1961). Introduction.

7. Lauterpacht, op. cit.

8. Reuter, op. cit. pp. 293-297; Lauterpacht, The Development of International Law by the International Court, London (1958). Chapter 17, 18, 19.

9. The Anglo-American concept usually places the burden of proof on the grantor: "no man must derogate from his grant." Article 1137 of the French Civil Code allows the grantor the benefit of the doubt, following the principle: "obscuritas pacti uscet ci qui opertius loqui potuit."

10. The S.S. Wimbledon case, PCIJ Series A, No. 1, p. 25; Free Zones of Upper Savoy and the District of Gex (Second Phase), PCIJ Series A, No. 24, p. 12.

11. E.g., Article 15, paragraph 8 of the Covenant of the League of Nations (cf. The Tunis and Morroco Nationality Decrees, PCIJ Series B, No. 4, pp. 24-27); Article 2, paragraph 7 of the UN Charter (cf. Peace Treaties case, ICJ Reports, 1950, p. 70.

12. PCIJ Series B, No. 2, p. 25.

13. PCIJ Series B, No. 13, p. 18.

14. PCIJ Series A/B, No. 50, p. 374.

15. Lauterpacht, op. cit. supra, n. 8. p. 269. Cf. also Reuter, op. cit. pp. 314-318.

16. PCIJ Series B, No. 12, p. 29. In that case, the Court relied upon the principle of effective interpretation to assert and justify the general rule of decision by qualified unanimity (i.e. unanimity of Member States not including the parties to the dispute). "Only if the decisions of the Council have the support of the unanimous consent of the Powers composing it, will they possess the degree of authority which they must have." The

Court pointed to the serious consequences which might arise if decisions were taken in any contrary fashion.

17. ICJ Reports, 1949, pp. 174, 179.

18. Ibid., p. 180; it is noteworthy that the Court was unanimous in applying the principle of effectiveness in affirming the international personality of the UN to enable it to bring an international claim in respect of damages to itself. The majority opinion, in relying upon the principle of implied powers, held further that organization had the capacity to claim on behalf of its agents.

19. Ibid., p. 182.

20. Thus it held that since the establishment of the tribunal in question:
> "... was essential to ensure the efficient working of the Secretariat and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this /establish a tribunal/ arises by necessary intendment out of the Charter. ICJ Reports, 1954, p. 47, 57.

21. Lauterpacht, op. cit. supra, n. 8. p. 277.

22. ICS Reports, 1951. p. 24.

23. ICS Reports, 1950. pp. 143-144.

24. Oppenheim, International Law, 8th ed. (1955). Vol. I, p. 168.

25. Cf. Holmes, J. in Missouri v. Holland, 252 U.S. 416 (1920); also, Jenks, op. cit.; "The Future Development of the Constitution and Practice of the International Labor Organization," OFFICIAL BULLETIN OF THE INTERNATIONAL LABOR OFFICE, Vol. XXVII; James Bryce, "Flexible and Rigid Constitutions," I Studies in History and Jurisprudence pp. 145-252. (Oxford, 1901).

26. PCIJ Series A, No. 23, p. 42.

27. The Permanent Court of International Justice had occasion to underline these considerations in two cases; the Question of Jaworzina, PCIJ Series B, No. 8, p. 30, and in itsAdvisory Opinion in the Railway Traffic Between Lithuania and Poland, Series A/B, No. 42, p. 116.

28. The Eastern Carelia case, PCIJ Series B, No. 8, pp. 28, 29.

29. Report of the Secretary-General on Administrative and Financial Arrangements for the UNEF. UN Doc. No. A/3383, 21 November 1956.

30. UN Gen. Ass. Off. Rec., Gen. Ass. Res. 14H(I).

31. See generally, discussions concerning Article 17, paragraph 2, at the San Francisco Conference. UN Conf. Int. Org. Documents XVII. p. 244 ff.

32. UN Conf. Int. Org., loci cit. p. 244.

33. Reuter, op. cit., p. 301. "...(M)eme l'organisation la plus modeste exerce des pouvoirs juridiques pour son administration interieu; elle adopte un bujet, et par la fait naitre a la charge des etats membres une dette liquide et exigible."

34. UN Sec. Coun. Off. Rec., 15th year, Supplement for July, August, September 1960, Doc. No. S/4387.

35. Ibid., Doc. No. S/4405.

36. UN Sec. Coun. Off. Rec., 115h year, Doc. No. S/3719.

37. UN Gen. Ass. Off. Rec., Gen. Ass. Res. 997 (ES-I).

38. Ibid., Res. 999 (ES-I).

39. Report of the Secretary-General to the General Assembly. UN Doc. No. A/3289.

40. UN Sec. Coun. Off. Rec. loc. cit supra, n. 35, Doc. No. S/4382.

41. Ibid., Doc. No. S/4387.

42. Ibid., Doc. No. S/4389.

43. Ibid, Doc. No. S/4405.

44. While the Security Council is assigned the primary duty for maintaining international peace and security under Article 24, paragraph 1 and Article 39, it was made clear at the United Nations Conference on International Organization that the full powers of the General Assembly were not to be limited by particular enumeration. At the fourth meeting of CommissionIII, it was stated that the power of the Assembly was as wide as the Charter itself. UN Conf. Int. Org. Documents VIII. pp. 208, 209.

45. ICJ Reports, 1954, pp. 47, 59.

46. Cf. Expose of M. Kaeckenback, Rep. of the Government of Belgium before the International Court of Justice. Pleadings, etc., Reparation For Injuries Suffered In The Service of the United Nations. ICJ Reports, 1949, p. 99.

47. Expose of the Government of France. Effects of Awards of Compensation Made By The United Nations Administrative Tribunal. Pleadings, etc. ICJ Reports, 1954, pp. 25, 41.

48. UN Gen. Ass. Off. Rec., 5th Comm. (A/864).

49. Vide n. 27, supra, and text thereat.

50. Vide, UN Gen. Ass. Off. Rec., Annexes, Agenda items 49/50 (A/860) 27 March 1961; UN Doc. A/PV 997, 5 Apr. 1961 p. 11.

51. UN Conf. Int. Org. Docs. XII pp. 334, 335, 507.

5 . Vide supra n. 27.

53. See text a ft. nt. 29.

54. Cable of 1 July 1960 from Joseph Kasavubu, President of The Republic and Supreme Commander of The National Army, and Patrice Lumumba, Prime Minister and Minister of National Defense UN Doc. S/4382.

55. UN Security Council Resolution of 14 July 1960 (S/4387).

56. Cf. UN Conf. Int. Org. Documents 488.