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LEGAL REMEDIES AND THE UNITED NATIONS' À LA CARTE PROBLEM

Jose E. Alvarez*

Never have so many argued so much about so little money as in the United Nations.


Despite “kinder, gentler” rhetoric and a renewed willingness to employ multilateral forums,¹ the United States’ policy towards the United Nations remains mired in a perennial war between the extremes of “legalism” and “realism.”² Although the UN is back in fashion, Uncle Sam remains “Uncle Deadbeat,”³ the UN’s biggest debtor, the member which has since the 1980s most threatened the organization with bankruptcy by failing to pay on time its annual assessed contributions to the UN regular budget.⁴ Although the Execu-

* Associate Professor, George Washington University, National Law Center. The author expresses his appreciation to the Council of Foreign Relations, the Carnegie Endowment for International Peace, the National Law Center’s summer grant program, colleague Thomas Buergerthal, Frederic L. Kirgis, Kahbo Chieu, Susan Damplo and Patricia Mellor.


³ Goshko, United Nations Finds Itself ‘Back in Fashion,’ Wash. Post, Sept. 25, 1988, at A31, col. 1. The author acknowledges those unknown journalists who coined this colorful phrase, as well as the “à la carte” description of UN payments. The United States itself has so categorized defaulting members in the past. Thus, Ambassador Henry Cabot Lodge said of the Soviets in 1959: “To refuse to pay one’s share — and by that I mean deliberately and as a matter of conscious policy — is to welsh. Now, that is a blunt word but it is an accurate word. I trust that the Soviet Union will see the light and will live up to its international obligations.” Welshing at the U.N., New York Times, May 26, 1972, at 43, col. 2.

⁴ These consist of contributions assessed by the General Assembly under article 17 as part of the regular budget and do not include “voluntary” contributions for either special programs or peacekeeping. As of February 1990, the United States owed the United Nations $517.8 million,
tive has pledged to restore "full" funding and payment of arrears, payment of UN assessments remains essentially a realist foreign policy tool rather than a debt legally due.

Neither the U.S. Congress nor the Executive has renounced the à la carte approach to UN financing which began in the 1980s, involving selective withholding of U.S. contributions for UN activities deemed inconsistent with U.S. "national interests" and the use of a financial veto in an attempt to counter the organization's "fiscal irresponsibility." The Executive's promise of "full" funding and arrears is now justified as necessary to maintain U.S. "leverage" over the UN, the "carrot" needed to reward the organization for budgetary restraint and contingent on continuation of budgetary reforms. Neither the promise of "full" current funding nor of arrears includes payment for certain UN programs; future payment of arrears is further conditioned on the use of such payments only for U.S.-approved activities.

In apparent contrast to recent U.S. practice, legalists usually assert that the United States, like all member States, owes a legal duty to pay contributions assessed by the General Assembly under the UN Charter. The legalists inadvertently legitimize recent U.S. withholdings, however, due to a troubling ambiguity in the obligation to pay which echoes long-unresolved disputes about the proper interpretation of the

of which $365.1 million consisted of unpaid contributions to the regular budget. The rest ($152.7 million) was due for peacekeeping operations. At that time, the UN's second and third largest debtors were South Africa ($37 million) and Iran ($12 million). Lewis, Bush Would Pay Off UN Debt Over 5 Years, N.Y. Times, Feb. 3, 1990, at A5, col. 1; see also UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, FINANCING THE UNITED NATIONS (1990) [hereinafter UNA-USA FACT SHEET]. Most of these arrearages have arisen since 1985. Hearings on Foreign Affairs, supra note 1, at 70 (testimony of Secretary of State James A. Baker III). Annex A, from a recent Congressional hearing, summarizes U.S. contributions to the UN regular budget from 1981 through 1989. By the close of calendar year 1990, however, the United States paid the UN $225.7 million to the regular budget, approximately $8 million short of the annual assessed contributions to the budget payable as of January 1, 1990. Pub. L. 101-515, 104 Stat. 2101 (1990); Secretary General's Report on the Status of Contributions as at 31 October 1990, U.N. Doc. ST/ADM/SER.B/342 (1990) [hereinafter Secretary General's 1990 Report] (indicating current assessments and arrearages). This was the first time in years that the United States had paid nearly its full assessment in the year owed. UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, WASHINGTON WEEKLY REPORT (No. XVII-1) 2 (Jan. 11, 1991). The shortfall in 1990 payments results from remaining statutory or executive withholdings which were never encompassed by the Bush Administration's pledge to restore "full funding" to the UN and to pay arrearages. See generally Part I(A), infra, and see infra note 92 and accompanying text.

5. See infra notes 92-96.

6. Id.

Charter and the proper balance between "auto-interpretation" and institutional "law-making." Unanimity, both among scholars and members of the World Court, breaks down over the effects attributable to *ultra vires* actions by the UN, as well as the nature of the payment obligation in such instances. According to recent scholarship, since no effective remedy exists for breach, and, as confirmed by the Expenses Case and its untidy aftermath, it would be politically impossible and unwise to attempt to create a remedy requiring a member State to pay for an act to which it objects, international law permits unilateral withholding by member States when, in the judgment of these members, the UN has acted illegally. Other analyses of particular U.S. withholdings come to varying conclusions about their legality without challenging the underlying assumption that unilateral withholdings, without more, may in certain instances be legal because they are politically inevitable.

This article reexamines recent U.S. withholdings of its assessed regular contributions to the UN, as well as the premises and assumptions underlying the theory that a UN member may legally and unilaterally withhold payments for *ultra vires* acts by the organization. The issue is of considerable consequence since, despite recent rhetoric, the number of members financially supporting the UN through timely payments of regular contributions number only about half the membership, while many members selectively withhold portions of their

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9. Compare the varying views of the majority and the individual opinions or dissents of Spender, Fitzmaurice, Morelli, Moreno Quintana and Bustamante Rivero in Certain Expenses of the United Nations (article 17, paragraph 2, of the Charter), 1962 I.C.J. 151 (Advisory Opinion of July 20) [hereinafter Expenses Case]. See infra notes 205-15, 224 and accompanying text.


11. See infra notes 103-09.

payments. These practices undermine the basic doctrine of “collective financial responsibility” and threaten the survival of international organizations. Reexamination is timely since the lessening of ideological divisions at the UN may facilitate adoption of legal remedies to the à la carte payment problem.

Part I of this article surveys recent U.S. withholdings in the context of U.S. policy goals. Parts II(A) and (B) criticize the “tyranny of the majority” justification for unilateral withholdings in the case of alleged *ultra vires* acts, an approach whose dangers are reflected in the United States’ à la carte approach towards the UN. Part II(C) proposes an alternative approach to the *ultra vires* problem less susceptible to self-serving unilateral financial withholdings by member States. Part III briefly canvasses possible legal remedies, assuming assessed UN contributions are considered debts legally owing.

I. RECENT UNITED STATES’ WITHHOLDINGS

A. History of Uncle Deadbeat

Throughout its history, the UN has faced a collection of payments problem. For most of that history, however, the organization avoided financial crisis thanks to timely payments by major contributors, particularly the United States. In contrast, over the past dec-

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14. Institutional law-making rests on acquiescence by members and if the refusal of members to pay assessed contributions becomes more than an “isolated” phenomenon, the problem becomes one of “the survival of organizations.” Morgenstern, *Legality in International Organizations*, 48 BRIT. Y.B. INT’L L. 241, 256 (1976-77). The threat is particularly great in the case of arrears by major contributors, as both the U.S. Congress and the Executive have recognized. See, e.g., United Nations Financial Situation: Background and Consequences of the Article 19 Controversy Over the Financing of U.N. Peacekeeping Operations: Hearings Before Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs, 89th Cong., 2d Sess. 33 (1966) [hereinafter Fascell Report] (report of Dante B. Fascell, Chairman of the Subcommittee on International Organizations and Movements) (collecting on financial obligations “involves the future capacity of the United Nations as an effective institution”); U.S. Dep’t of State, The United States and the United Nations 11 (1976) [hereinafter State Department Discussion Paper] (“It requires no vivid imagination to see that if we drastically reduced our support for the U.N. system, its very existence would be placed at risk”).
16. There is some discrepancy, however, in accounts of U.S. practice prior to 1980. Accord-
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ade the UN has faced a constant financial crisis distinguished by various facts: (1) the amounts owed by delinquent members are greater than ever before; (2) States engaged in tardy or selective payments number over half the membership and (3) for the first time since the 1962 Expenses Case, a major contributor, the United States, has questioned the legal obligation to pay for certain portions of the regular budget. As a result, throughout much of the 1980s the UN tottered on the brink of bankruptcy. The financial picture facing the UN at the end of 1985 was grim:

As of 31 December 1985 18 Member States had withheld part or all of their assessed contributions for prior years; in addition, 72 Members were in arrears with their contributions to the regular budget for 1985 and earlier. The US assessment for 1985 was $197.9 million, out of which the US had by 31 December 1985 paid $123.9 million, leaving a shortfall of $74 million; in 1986 it paid a further $44.9 million. The remaining US shortfall for 1985 is $29.1 million... 17

By autumn of the following year, thanks in large part to U.S. threats to withhold significant amounts, the organization's contingency funds were exhausted and there were doubts whether it could even meet its payroll. 18 At the end of 1989, although spared bankruptcy through the delayed and partial payments of the United States and others, the overall status of contributions to the regular budget had not improved. By the end of 1989, 86 members (over half the

17. Fleischhauer memo, supra note 13, at 6.
membership) owed more than $461 million in arrears; the United States owed almost two-thirds of that sum.\textsuperscript{19} Moreover, unlike prior periods during which the collection problem was largely confined to tardy payments, in the 1980s the defaulting States included several asserting a "legal" right selectively to withhold portions of their assessed contributions.\textsuperscript{20}

Starting in 1979, the United States either withheld or threatened to withhold portions of its assessed contributions to the UN regular budget. These withholdings were of various types: selective or targeted, contingent or across the board non-contingent cuts.\textsuperscript{21}

First, the United States imposed "selective" withholdings targeted at specific UN programs included in the UN's regular budget. The United States has withheld that portion of its assessed contributions which it calculated was attributable to the U.S. portion of funds: for "projects whose purpose is to provide benefits to the Palestine Liberation Organization ("PLO") or entities associated with it;"\textsuperscript{22} for programs for the South West Africa's People's Organization

\textsuperscript{19} Secretary General's Biannual Report, supra note 13.

\textsuperscript{20} Fleischhauer memo, supra note 13, at 9.

\textsuperscript{21} The various categories of withholdings enumerated here — "selective" or "targeted," "contingent" and "across-the-board"—were first enunciated by Nelson, supra note 10. Selective withholding of U.S. payments to "tainted" or "politicized" UN programs, although alien to U.S. practice prior to the 1980s, see infra note 59, had been advocated by some observers for some time. See Ad Hoc Group on U.S. Policy Toward the United Nations, A New United States Policy Toward the United Nations 7-8 (April 1976).

\textsuperscript{22} The United States originally withheld, under this provision, approximately $185,000 to cover that portion of U.S. contributions budgeted for the Committee on the Exercise of the Inalienable Rights of the Palestinian People and the Special Unit on Palestinian Rights. Department of State Authorization Act, FY 1980 and 1981, Pub. L. No. 96-60, 93 Stat. 395 (1979). That original withholding, limited to these two entities of the UN “and any similar successor entity[ies],” was expanded in later years. By 1982, Congress was prohibiting not only these payments but also that portion of U.S. payments to the UN or any specialized agency of the UN used for “projects whose primary purpose is to provide political benefits to the Palestine Liberation Organization or entities associated with it.” Department of State Authorization Act, FY 1982 and 1983, Pub. L. No. 97-241, § 104(a)-(b), 96 Stat. 273, 274 (1982). The President was directed to "annually review the budgets of the United Nations and its specialized agencies to determine which projects have the primary purpose of providing political benefit to the Palestine Liberation Organization." Id. at § 104(c). U.S. contributions for projects "whose primary purpose is to provide humanitarian, educational, developmental, and other nonpolitical benefits to the Palestinian people" were exempt from withholding. Id. at § 104(d). In 1987, Congress added an additional withholding for that portion of U.S. assessments budgeted for the "Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories (or similar successor entity)." Foreign Relations Authorization Act, FY 1988 and 1989, Pub. L. No. 100-204, § 705(3), 101 Stat. 1331, 1390 (1987). Current legislation provides that the U.S. proportionate share of its assessed contributions shall not be available "for any programs for the Palestine Liberation Organization (or for projects whose purpose is to provide benefits to the Palestine Liberation Organization or entities associated with it)." Foreign Operations, Export Financing and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, § 526(a), 103 Stat. 1195, 1222 (1989). It is not clear whether this withholding extends to those "humanitarian...nonpolitical" programs formerly exempt from withholding.
("SWAPO");\(^\text{23}\) and for programs "for... Libya, Iran, Cuba"\(^\text{24}\) or "at the discretion of the President, Communist countries identified in section 620(f) of the Foreign Assistance Act of 1961."\(^\text{25}\) Congress also denied U.S. contributions for UN funds budgeted for the Second Decade to Combat Racism and Racial Discrimination and for implementation of General Assembly Res. 3379 (XXX) (the "Zionism is racism" resolution);\(^\text{26}\) for the construction of a $73,500,000 conference center in Addis Adaba, Ethiopia for the Economic Commission for Africa;\(^\text{27}\) for the UN's "post adjustment allowance" for employees;\(^\text{28}\)

\(^{23}\) As originally passed in the Foreign Relations Authorization Act, FY 1984 and 1985, Pub. L. No. 98-164, § 114(a), 97 Stat. 1017, 1020 (1983), this limitation was cast in terms of projects whose "primary" purpose was to benefit SWAPO. As with the PLO, discussed supra note 22, Congress also requested that the President annually review the relevant budgets to determine which projects had the "primary purpose" of benefiting SWAPO and specified that this limitation was not to be construed as limiting contributions for projects whose "primary purpose is to provide humanitarian, education, developmental, and other nonpolitical" benefits. Pub. L. No. 98-164, § 114(c)-(d), 97 Stat. 1017 (1983). Under current law, SWAPO is merely listed, along with the PLO, in Pub. L. No. 101-167, 103 Stat. 1195 (1989). The Executive is therefore precluded from paying the U.S. proportionate share of any funds provided for international organizations and programs for "any programs... whose purpose is to provide benefits to" SWAPO. Pub. L. No. 101-167, § 526(a), 103 Stat. 1195 (1989).


and for the "biased" Department of Public Information. The Executive, for its part, has withheld U.S. contributions for the Preparatory Commission implementing the 1982 Law of the Sea and for alleged "inadequacies" in the UN's system to equalize the effect of U.S. income taxation on UN staff salaries. These specific cuts saved the United States relatively little money on average, resulting in withholdings of about $11 million in U.S. annual assessments to the UN, although their proportionate impact on the UN budget, especially in terms of the example set for other contributors, is probably great.

Second, Congress, with the somewhat reluctant concurrence of the Executive, imposed several types of contingent withholdings,

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28. Originally enacted in Pub. L. No. 98-473, § 137, 98 Stat. 1837 (1973). As described by Senator Kasten, this provision was meant to protest the "9.6 percent 'post adjustment allowance' " approved at the UN for staff based in New York City, which, according to Senator Kasten, amounted to an 8% "back-door" salary increase done without the need for General Assembly approval. Senator Kasten found this increase "outrageous" and argued that "it is time for this Congress to very frankly hit these people over the head with a 2 by 4 instead of using the gentle persuasion, and admonition, and report language that we have tried over the last several years." 130 CONG. REC. 29,065 (1984). Presumably because Congress' concerns were lessened due to subsequent UN budgetary reforms, see infra notes 41-46 and accompanying text, this withholding no longer appears in the current law.


32. Interview with Department of International Organizations, U.S. Department of State (July 1990); Gramm-Rudman Hearing, supra note 31, at 4. At present the United States is withholding about $8 million annually from its assessed contributions to the regular budget. See supra note 4. Congress' intent has been apparently to withhold these amounts permanently. Thus, the most recent version of the PLO, Iran, Libya and "Communist countries" withholdings permits funds excluded to be reprogrammed "to other international Organizations and Programs Accounts." See Conference Report, interpreting § 526(a) of Pub. L. No. 101-246, H.R. Rep. No. 165, 101st Cong., 1st Sess., at 131, 139 (1989).

33. See, e.g., Nelson, supra note 10, at 975; infra notes 72-80 and accompanying text (Kirkpatrick's testimony). Despite its initial opposition to the Kassebaum Amendment, the Ad-
designed to take effect should certain events occur. The well-known “Kassebaum Amendment,” passed in 1985, originally required the Secretary of State to seek the adoption of weighted voting on budgetary matters in the UN and the specialized agencies and reduced the U.S. share of assessed contributions from 25 to 20 percent beginning with fiscal year 1987 until this condition was satisfied.34 Grounded in a Congressional finding that the UN and the specialized agencies “have not paid sufficient attention in the development of their budgets to the views of the member governments who are major financial contributors,”35 the Kassebaum Amendment appeared to seek nothing less than formal revision of the Charter, widely regarded as an “impossible” goal.36 Subsequent developments, and the resulting U.S. “Kassebaum” withholdings, are well known.37 In December 1986, the 41st
General Assembly approved Resolution 41/213 on the Review of the Efficiency of the Administrative and Financial Functioning of the United Nations. Although this resolution did not constitute formal amendment of the UN Charter, it contained, from the U.S. perspective, four essential elements: (1) a budget ceiling; (2) an indication of program priorities; (3) provision for a limited contingency fund limiting the possibility of add-ons to the budget and (4) a consensus-based decision-making process.

UN budgetary reforms sufficiently satisfied Congress and the Executive; in 1987 the State Department proposed a modification of the Kassebaum Amendment. As revised, the law now conditioned prospective U.S. payments to the UN upon a presidential determination of the status of three on-going reforms: (1) implementation of a 15% reduction in UN Secretariat staff; (2) progress in achieving a 50% limitation for nationals of any member State "seconded" to the UN Secretariat; and (3) implementation of Resolution 41/213, U.N. Doc. A/44/222, at 3-5 (1989) [hereinafter Final Report of the Secretary-General on the Implementation of Resolution 41/213; Statement by Ambassador Thomas Pickering, U.S. Representative to the United Nations, before House Foreign Affairs Committee, Press Release USUN 27-(89) (Mar. 16, 1989); Gramm-Rudman Hearing, supra note 31. In 1985 the General Assembly had called for the establishment of a group of high level intergovernmental experts to identify measures for improving the administrative and financial functioning of the UN. G.A. Res. 40/237, 40 U.N. GAOR Supp. (No. 53) at 60, U.N. Doc. A/RES/40/237 (1985). Despite formation of this intergovernmental committee of experts (the Group of 18) and immediate cost-savings measures put into effect by the Secretary-General on his personal administrative authority (see Nelson, supra note 10, at 975-76 n.10), the Reagan Administration did not attempt to delay implementation of Kassebaum. Gramm-Rudman Hearing, supra note 31, at 8.


39. See Zoller, supra note 12, at 634, for a discussion of the legal effect of Resolution 41/213 in which she concludes is no more than a "gentlemen's agreement" among the members of the organization not to take decisions on budgetary matters against the will of major contributors and does not change UN budgetary law under article 18. Compare Jenks, Some Legal Aspects of the Financing of International Institutions, 28 TRANSACTIONS GROTIUS SOC'Y 87, 102 (1943) (discussing a similar arrangement in the League of Nations).


41. Thus, Senator Kassebaum herself stated that the UN had met "the intent" of her amendment. Omang, U.S. Plans to Restore U.N. Funds; Steps Toward Reform Deemed Satisfactory, Wash. Post, Mar. 20. 1987, at A27, col. 1, and in Zoller, supra note 12, at 634.

42. See Pub. L. No. 100-204, § 702, 101 Stat. 1331 (1987). The change was premised on a Congressional finding that the "consensus based decision-making procedure established by the General Assembly Resolution 41/213 is a significant step toward complying with the intent of [the original Kassebaum Amendment]." Id. at § 702(a). The House Report credits the State Department for proposing the change. House Comm. on Foreign Affairs, Foreign Relations Authorization Act, FY 1988 and 1989, H.R. Rep. No. 34, 100th Cong., 1st Sess. 12, (1987).
tariat and (3) implementation of the consensus-based budget reform procedure. Although on July 15, 1988, President Reagan indicated to the UN Secretary General the need for further progress on reforms in order to meet Congressional concerns, successful implementation of Resolution 41/213 convinced the Administration to make the required certifications, thereby permitting release of $44 million.

Congress also imposed, in the Sundquist Amendment, another contingent withholding. This amendment, as well as the underlying concerns it represents, has also received considerable attention and re-

43. See infra note 48.

44. Pub. L. No. 100-204, § 702, 101 Stat. 1331 (1987). The President was authorized to pay 40% of U.S. assessed contributions for calendar year 1987 beginning on October 1 of that year. A further 40% payment could be made once the President certifies to Congress that the UN had made the requisite progress vis-à-vis the three factors identified in the text. The remaining 20% could only be paid 30 days after the Congress received the President’s report, unless within that period Congress enacts a “joint resolution prohibiting the payment of the remaining 20 percent of such funds.” Id. at § 702(b). Current law continues to provide Presidential discretion to withhold 20% of UN assessed contributions unless the President certifies continued progress vis-à-vis the three factors. Foreign Relations Authorization Act, FY 1990 and 1991, Pub. L. No. 101-246, § 405, 104 Stat. 15, 65-66 (1990). That section also requires the President to consult with Congress when making these certifications. Id. at § 405(c)(2). As of January 1991, the 102nd Congress was considering whether to include the modified Kassebaum Amendment in new legislation to authorize U.S. participation in the UN system for fiscal years 1992-93.

45. Statement submitted to the Senate Foreign Relations Committee on July 29, 1988 by Dennis C. Goodman, Acting Assistant Secretary for International Organization Affairs, U.S. Department of State, reported in 88 DEP’T ST. BULL. 70-71 (Oct. 1988). Goodman’s statement was only one of a series of statements which reflected the intense pressure on the UN during the 1986-88 period. Administration spokespersons repeatedly warned that Congress could not be convinced to pay regular contributions unless the budget process adopted in Resolution 41/213 was fully implemented. See, e.g., Statement by Ambassador Vernon A. Walters, U.S. Representative to the General Assembly, in the Fifth Committee, Press Release USUN 128-(87) (Dec. 11, 1987). One of the many ironies was that the UN, for its part, was claiming that the financial crisis was making implementation of the reforms called for in Resolution 41/213 difficult. See, e.g., Final Report of the Secretary-General on the Implementation of Resolution 41/213, supra note 37, at 5.

46. White House Statement, Sept. 13, 1988, reported in 88 DEP’T ST. BULL. 5 (Nov. 1988). That Statement notes that “[t]he United Nations has made progress toward a consensus budget process, limitations on secondment of staff to the Secretariat, and Secretariat staff reductions.” It also noted that in addition, the “United Nations is directly serving important, long-term objectives of this Administration to end regional conflicts and advance peace and freedom around the world.” Id. At least one prominent observer, Alan Keyes, former Assistant Secretary of State for International Organization Affairs, criticized this determination as a “complete surrender” of the recent gains made by the United States on reform in the UN. Keyes noted that “[d]iscriminating use of U.S. funds to support international organizations favorable to U.S. interests has lapsed.” Among other things, Keyes argued that restoration of the $44 million withheld funds was not justified since the United States “took its worst beating in years in the 42nd General Assembly.” Keyes, America’s U.N. Policy: Lapse or Collapse? Wash. Post, Jan. 21, 1988, at A23, col. 1. Keyes was probably referring to the extent to which other members of the General Assembly voted against the United States when resolutions are put to a vote instead of being adopted by consensus. (Congress had requested annual reports, known as Kasten Reports, on voting practices at the UN for some time. See, e.g., Pub. L. No. 101-246, § 406, 104 Stat. 15 (1990).)
quires only short summary here. As originally passed in 1985, this provision directed the Secretary of State to report to Congress on whether any international civil servants "seconded" to the UN by member governments were "required to return all or part of their salaries to their respective governments." Congress also granted the Secretary discretion to reduce U.S. annually assessed contributions to the UN by the amount corresponding to the U.S. proportionate share of any salaries returned to member governments. Intended to force members to terminate these alleged "kickbacks" and also to curtail the practice of seconding nationals to serve on the UN Secretariat for a limited period of time, the Sundquist Amendment led to Congressionally-mandated withholdings in 1987.

47. Nelson, supra note 10, at 976-77; Franck, supra note 36, at 336.
50. The $15 million figure was plainly a Congressional estimate of the dimensions of the alleged kickbacks. 132 CONG. REC. 16,925-26 (1986) (statement of Rep. Sundquist). A Select Committee on Intelligence's report, entitled Soviet Presence in the UN Secretariat, had suggested the dimensions of the secondment problem and had estimated that about $20 million were "kickbacked" to member governments. Report reprinted in 132 CONG. REC. 26,930-36 (1986). Representative Rudd amended H.R. 2965, 99th Cong., 1st Sess., 131 CONG. REC. 19,403, 19,439 (1985), to withhold the $20 million in 1985. However, as the Senate had not agreed to withhold the money, the conference agreement reached a compromise between the two bills and appropriated $2.765 million more than the House version. H.R. Rep. No. 414, 99th Cong., 1st Sess., at 29 (1985), enacted as Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, FY 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1150 (1985). Provision for withholding for these alleged kickbacks is no longer contained in current law. Appar-
A third contingent withholding threatened U.S. suspension of participation in the General Assembly or any specialized UN agency as well as total withholding of all payments of assessed contributions to the UN or its specialized agencies should the General Assembly or any of its specialized agencies "illegally" expel, suspend or deny the credentials of Israel. Finally, in response to the PLO's 1989 announcement that it intended to seek membership for the "state of Palestine" in the World Health Organization ("WHO"), the Executive threatened to "make no further contributions — voluntary or assessed — to any international organization which makes any change in the PLO's present status as an observer organization." (Reacting in

ently Congress has been placated by Soviet promises to reconsider its secondment policy and gradually permit at least some Soviet nationals in the UN secretariat to transfer to regular "career" status. See Hearings on H.R. 1487, supra note 31 (statement by Amb. Thomas Pickering).

51. As originally enacted, Pub. L. No. 98-164, § 115(a), 97 Stat. 1017 (1983), provided that since the UN Charter permitted suspension of membership by the General Assembly only "upon the recommendation of the Security Council" (quoting article 5 of the Charter); "any move by the General Assembly that would illegally deny Israel its credentials in the Assembly would be a direct violation of these provisions of the Charter." Section 115 provided that the United States would suspend its participation "in the General Assembly or such specialized agency until the illegal action is reversed" and in the meantime, would "withhold payment of its assessed contribution" during the period of suspension. This Congressional provision was subsequently toughened. As amended in 1985, the reduction in U.S. contributions during the period of suspension was not to be a mere "withholding" subject to repayment once the action was reversed but would be a permanent penalty to the UN or specialized agency for every month during which the United States suspends its participation. Foreign Relations Authorization Act, FY 1986 and 1987, Pub. L. No. 99-93, § 142, 100 Stat. 405, 424 (1985). In 1987, reacting to attempts to deny Israel participation in an ECOSOC regional commission, see, e.g., Senate Comm. on Foreign Relations, Foreign Relations Authorization Act, FY 1988, S. Rep. No. 75, 100th Cong., 1st Sess., at 7 (1987), Congress expanded this contingent withholding to include "illegal" expulsion, denial of credentials or any other manner of denial of participation "in any principal or subsidiary organ or in any specialized, technical, or other agency of the United Nations." Foreign Relations Authorization Act, Pub. L. No. 100-204, § 704, 101 Stat. 1331, 1389-90 (1987). All these actions were taken in response to an annual ritual at the beginning of each General Assembly consisting of an Arab motion that the recommendations of the Credentials Committee be accepted except for those regarding the Delegation of Israel. This motion has repeatedly been deferred, and the number of States voting against the Arab motion has increased in recent years. See, e.g., Kirkpatrick, The U.N. Vote on Israel, Wash. Post, Oct. 23, 1989, at A15, col. 1. Presumably reacting to these more recent developments, current law omits this provision. In late 1990, Arab States announced that they would no longer challenge Israeli credentials at the General Assembly but would challenge Israel's right to represent the occupied territories. Arab Nations Drop Annual Battle Over U.N. Credentials for Israel, Wash. Post, Nov. 20, 1990, at A15, col. 4.


53. Secretary's Statement, May 1, 1989, Press Release 75, reported in 89 DEP'T ST. BULL. 65 (July 1989). According to Sandra L. Vogelgesang, Deputy Assistant Secretary for International Organization Affairs, Department of State, Statement before the Subcommittee on Foreign Operations of the Senate Appropriations Committee on May 4, 1989, id., the State Department was reacting to the PLO's interest in joining WHO and other UN agencies. She argued that the U.S. threat was justified because:

- The self-declared Palestinian "state," which the United States does not recognize, does not satisfy the generally accepted criteria for statehood and thus does not qualify for membership in UN agencies.
large part to U.S. threats, the WHO's Assembly voted to defer consideration of the PLO's application for a year.54) 

The final type of Congressionally mandated withholding, unilateral, non-specific across the board cuts, is neither targeted nor contingent. The most prominent of these were justified by the Gramm-Rudman-Hollings Act.55 As noted by Nelson, UN-assessed contributions are not "protected" budget items under that Act and the "immediate effect of the law was the retroactive withholding in December 1985 of $19.9 million from the assessed U.S. contribution to the United Nations."56 Although Gramm-Rudman-Hollings sequestrations have not occurred since 1986, Congress has since authorized or appropriated fewer funds for payment of U.S. contributions to the UN's regular budget than the Executive has requested. These annual shortfalls in U.S. payments of its assessed contributions — unilateral withholdings rationalized in terms of U.S. fiscal constraints—go beyond any mandated withholding.57

B. The United States' Rationales

While these withholdings — selective, contingent and across the board — do not mark the first time the United States has refused to pay portions of its regular assessments, the few prior isolated instances usually involved attempts to reduce the percentage level of U.S. assessed contribution and had been quickly settled.58 Prior to the 1980s,


57. These shortfalls would be eventually paid under the Bush Administration's five year plan for paying arrearages. See infra notes 91-92 and accompanying text.

58. Two prior occasions reflected attempts by Congress to seek a reduction in the U.S. assessment as apportioned by the General Assembly's Committee on Contributions. Thus, in 1952, Congress reduced the U.S. contribution to 33 1/3% of the UN's budget, despite a determination
the United States officially opposed unilateral withholding of any portion of assessed contributions for the regular UN budget. Unlike most prior instances of U.S. withholdings, the 1980s withholdings were not accompanied by any serious attempt by the United States to change the U.S. proportionate assessment in the Committee of Contributions. Nor were most of these withholdings accompanied by pub-

by that Committee that the United States should pay 36.9%, and despite vigorous arguments by members of the House of Representatives that this violated a treaty "entered into by the United States and ratified by the United States Senate." 98 CONG. REC. 3,514-16 (1952). On that occasion, however, the United States was engaged in on-going negotiations within the Committee on Contributions to get the Committee to finally agree to its own recommendations that it would be unwise to have the organization dependent on any one member and that under "normal circumstances" no member would ever pay more than 33 1/3% of the budget. That recommendation, first articulated in 1946, had been the subject of exceptions for 5 years until the Congress forced the reduction in 1952. Id. at 3,515-19; see also L.M. GOODRICH & E. HAMBO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 184-85 (1949). In 1972, Congress again instigated a further reduction in the U.S. proportionate share, reducing the percentage of U.S. contributions from 33 1/3% to 25%. See 129 CONG. REC. 25,320 (1983). A third withholding by the United States occurred in 1954 when Congress balked at paying for compensation to U.S. nationals formerly on the UN payroll who had invoked their Fifth Amendment rights in the face of a Congressional investigation. After the International Court of Justice ("ICJ") rendered its Advisory Opinion upholding the UN Administrative Tribunal's determination that those employees were in fact owed monies, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47 (Advisory Opinion of July 13) [hereinafter Effect of Awards Case], the United States voted with a General Assembly majority to accept the views of the Court. See Fascell Report, supra note 14, at 36.

59. The United States justified this on both legal and policy grounds. Thus, according to a 1962 opinion by the State Department's Legal Adviser:

Contributions are assessed against Members in a total amount; the assessment is not subdivided according to the items in the budget of the Organization. It would not be permissible, under established budgetary practices of the United Nations, for a Member state not paying all of its assessed contributions to identify the area of the budget to which its default shall be attributed. Since it is not possible for a Member to earmark a partial nonpayment of its assessed contributions, the effect of such partial nonpayment would merely be a shortfall in the contributions for that year, the shortfall not being attributable to any specific section of the budget of the Organization.


60. Indeed, in passing the Kassebaum Amendment, Congress specifically declared its intention to "promote meaningful reform" in UN budget procedures and directed that the reduction in U.S. funding "not be used simply as a way to reduce the U.S. assessed contribution." H.R. CONF. REP. NO. 99-240, 99th Cong., 1st Sess. 70, reprinted in 1985 U.S. CODE CONG. & ADMIN. NEWS 357, 370 (Joint Explanatory Statement of the Committee of Conference). See also Statement by John Fox, U.S. Representative to the Fifth Committee, on Item 129, Scale of Assessments in Conference Room 3, Press Release USUN 121-(89) (Oct. 26, 1989) (stating that despite U.S. dissatisfactions with the apportionment formula used for UN assessments, the United States
lic memoranda purporting to explain their legality under international law or any attempt to secure World Court consideration of the issue.61

The legislative history to the withholdings of the 1980s reveals relatively few references by either the Congress or the Executive to the legality of the withholdings under international law. On those occasions when the issue of legality was perfunctorily raised, the Executive or the individual members of Congress argued that withholdings were needed to counteract threatened or actual violations of the Charter or international law. Withholdings were, in short, asserted to be appropriate responses to threatened or actual ultra vires actions by the UN. On rare occasions, the text of the Congressionally-mandated withholding itself asserted this justification, as in the threats to withhold should Israeli credentials be denied or if the PLO’s status was upgraded.62

At other times, such arguments arose during Congressional deliberations. Thus, Senator Moynihan, the main proponent of the first contingent withholding, targeting UN activities of "benefit" to the PLO, acknowledged that the United States had insisted “over the years” that it “does not withhold appropriations, does not seek to avoid its responsibilities and the payment of its agreed-upon share of the cost of various United Nations activities, simply because we disapprove of this or that policy or activity.”63 He argued, however, that there are situations where that general and correct rule does not apply, and it is my strongly held view that it does not apply in this situation, inasmuch as I hold, and responsible persons have held with me, that the activities of the United Nations with respect to these Palestinian committees violate the Charter of the United Nations.64

Moynihan further noted that the General Assembly created the Committee on the Exercise of the Inalienable Rights of the Palestinian Peo-

opposes changes to the formula for assessments). Reducing the U.S. contribution below 25% would be, of course, legal under the Charter which leaves the formula for apportionments and scale of assessments for later determination, anticipating the need for changes over time. See infra note 309 and accompanying text. An exception to the “capacity to pay” formula in favor of the United States would hardly have been unusual since the United States had secured, from the earliest days of the UN, an exception to the normal capacity to pay formula which applies to all other member States. Under that formula in 1946 the United States would have been slated to pay 50% of the UN budget. Both the United States and the UN had agreed that such undue reliance on any one member State was unwise. L.M. Goodrich & E. Hambro, supra note 58, at 184; see also infra note 299 and accompanying text.

61. Compare the third prior instance of U.S. withholding, in 1954, involving compensation for U.S. nationals within the UN Secretariat, discussed supra note 58.

62. See supra notes 51, 53. Apart from the perceived violation of Charter procedures for “suspension” of membership rights, such action was considered to violate the Charter “principle of universality.” See, e.g., Shultz, The United Nations After 40 Years: Idealism and Realism, 85 Dep’t St. Bull. 18-19 (Aug. 1985) (address before the UN Association by the Secretary of State).

63. 125 CONG. REC. 10,434 (1979).

64. Id.
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ple on the same date (November 10, 1975) that Resolution 33/79 ("Zionism is racism") passed and that since that time the Committee had demonstrated that it was "a destructive and irresponsible voice within the United Nations Secretariat, devoted to the destruction of a member of the United Nations." 65 Although the Carter Administration did not address Moynihan's argument that UN actions with respect to the PLO "violated the Charter" and were therefore ultra vires, it argued that unilateral withholdings were illegal but ultimately yielded to this first Congressionally-mandated UN withholding. 66

Later Congressional actions tracked the same ultra vires path by different routes. By 1981, when a later Congress reexamined the PLO withholdings, proponents argued that "failure to continue our opposition to these PLO fronts by resuming our full financial support would lend legitimacy to the PLO. It would damage the peace process and put us in the position of once again having the American taxpayer foot the bill for the PLO's worldwide public relations propaganda campaign." 67 By 1983, when Congress considered expanding withholdings to cover programs which benefit certain countries as well as SWAPO, some members of Congress recharacterized the rationale for the original PLO withholding as an "anti-terrorism" measure, designed to assure that no U.S. tax dollars supported groups which

65. Id. Moynihan also raised the possibility of other withholdings directed at alleged ultra vires actions by the UN. Thus, he suggested that "more and more the United Nations Charter is being violated by the totalitarians, and in particular by the Soviet Union." He argued that Soviet secondment practices violated article 100 (requiring an independent international civil service) and raised the possibility of withholding U.S. contributions in retaliation. Id. at 10,434-35; see supra note 48.

66. Charles W. Maynes, Assistant Secretary, Bureau for International Organizations Affairs, U.S. Department of State had argued against the PLO withholding:

The U.S. Government's position has been that we ought to meet our assessed contribution to the U.N. The impact of the House prohibition will simply be to lower our contribution to the U.N. It will not affect the activities of this Committee because contributions made to the U.N. go into a general fund. They are not earmarked for specific use. The financial regulations of the U.N. provides that a payment made by a member state be credited against its obligations in the order in which the member was assessed. In accordance with this regulation all subsequent contributions by a member state which has upheld a portion of its legal assessments will be automatically applied to reduce its earlier arrearages. Foreign Relations Authorization Act Fiscal Years 1980 and 1981: Hearings on S. 586 Before the Senate Comm. on Foreign Relations, 96th Cong., 1st Sess. 44 (1979). This clearly echoed the Department's 1962 position, supra note 59.

67. Authorizing Appropriations for Fiscal Years 1982 and 1983 for the Department of State, the International Communication Agency, the Board for International Broadcasting, and the Inter-American Foundation: Hearings and Markup on H.R. 3518 Before the House Comm. on Foreign Affairs and its Subcomm. on International Operations, 97th Cong., 1st Sess. 516 (1981) (statement of Rep. Gilman). But Representative Derwinski expressed discomfort about playing the "same game" as the Soviets by withholding funds, contrary to prior U.S. policy, and unsuccessfully attempted to secure some language in the appropriations bill which would urge the State Department to seek to pressure the UN "to continue to work for the withdrawal of the support of these entities so that we would not find it necessary to be selectively withholding funds." Id. at 517.
"either directly or indirectly support terrorism as a means to affect political change."68 Plainly terrorism was regarded as inconsistent with the Charter. Cutting off "UN-funded terrorism" was therefore the expressed Congressional motivation for termination of assistance to SWAPO, which was "carrying on a campaign to seize control of Namibia, and drag it behind the Soviet Iron Curtain."69

The President's 1982 statement announcing the withholding of the U.S. portion of funds for the Preparatory Commission on the Law of the Sea Convention also contained an ultra vires legal justification. The President argued that such UN financing:

is not a proper expense of the United Nations within the meaning of its own Charter, as the Law of the Sea Preparatory Commission is legally independent of and distinct from the UN. It is not a UN subsidiary organ and not answerable to that body. Membership in the UN does not obligate a member to finance or otherwise support this Law of the Sea organization. . . . [This] is an improper assessment under the UN Charter that is not legally binding upon members. It is also adverse to the interests of the United States. While the United States normally pays 25 percent of the regular UN budget, the United States is opposed to improper assessments and is determined to resist such abuses of the UN budget.70

Similarly, when Congress considered withholding to deal with alleged salary kickbacks by seconded nationals employed in the UN secretariat, members of Congress argued that such kickbacks violated articles 100 and 101 of the UN Charter.71

These sometimes threadbare but well-worn ultra vires rationales

69. Id. See also America, The Unreliable, Wash. Times, May 19, 1988, inserted into 134 CONG. REC. H4,319 (daily ed. June 15, 1988) (contending that SWAPO is a terrorist organization). Representative Swindall also argued that UN funding for SWAPO was illegal under the Charter because it constituted intervention in matters "essentially in the domestic jurisdiction" of a member, contrary to article II(7) of the Charter. 134 CONG. REC. H4,318-19 (daily ed. June 15, 1988). Finally, Senator Goldwater also argued that Namibia, "which has the largest uranium mine in the world and vast resources of other strategic minerals as well as Atlantic Coast ports," was vital to U.S. national security given the U.S. "dependence on imported minerals." He argued that the UN funding cut-off was therefore required given the Soviet Union's "mineral resource war to cripple the U.S. industrial and national defense base by denying us access to the strategic minerals which are the very heart of our technological civilization." 129 CONG. REC. at 28,896-97.
70. Law of the Sea Statement, supra note 30. The President's Statement also gave a less legalistic, foreign policy rationale. The President noted that the UN funds:
are destined to finance the very aspects of the Law of the Sea treaty that are unacceptable to the United States and that have resulted in our decision, as I announced on July 9, 1982, not to sign that treaty. The Preparatory Commission is called upon to develop rules and regulations for the seabed mining regime under the treaty. It has no authority to change the damaging provisions and precedents in that part of the treaty. For that reason, the United States is not participating in the Commission.
Id.
71. See supra notes 48, 65.
for select withholdings were eclipsed by a more general "legal" theory which came to justify the United States' "line-item" veto approach to UN funding. This more all-encompassing approach was initially voiced by Jeane Kirkpatrick, then U.S. Ambassador to the UN. At a 1983 Congressional hearing held to consider the Kassebaum Amendment, Kirkpatrick contended that she did not believe that "the U.S. treaty obligation to contribute 25 percent of the assessed budget is absolute." Instead, she argued, "it exists as part of a web of obligations, some of which are vested in other members, and some in the organization. It is integrally linked to understandings about the functions of this organization and the purposes to which the contributions will be devoted." Kirkpatrick noted that "30 countries" withhold as a matter of policy and "incur no penalties," and that the United States should not assume that "any expense apportioned by the General Assembly is automatically valid." Kirkpatrick asserted that to create "collective obligations to pay, the expense must be legitimate" and that under the Goldberg Reservation the United States had reserved the right to withhold assessments which, "in [the United States'] opinion, do not serve our national purpose." Kirkpatrick urged the Congress "to exercise greater control over U.S. contributions and expenditures, to distinguish between UN operations and programs which U.S. taxpayers support and those they do not." The United States, she asserted, should "favor programs which are consistent with our values," and "penalize" those which have "strayed from their legitimate purposes and tasks." Although Congress could begin with voluntary contributions, if this proves ineffective, thereafter Congress should move to assessed contributions. Since Kirkpatrick seemed to object to the Kassebaum Amendment not on legal grounds or on principle but on the grounds that it was ill-timed, her testimony did little to prevent enactment of the Kassebaum Amendment two years later.

Kirkpatrick's pseudo-legal perspective on the duty to pay, grounded in realpolitik, eventually proved "irresistible" in the context

72. 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) [hereinafter Hearings on the U.S. Role]. Kirkpatrick has since contended that all Charter obligations, including those governing the use of force, are based on reciprocity and are part of the same "web." Kirkpatrick, Law and Reciprocity, 80 PROC. AM. SOC'Y INT'L L. 59-68 (1986); Kirkpatrick & Gerson, The Reagan Doctrine, Human Rights, and International Law, in RIGHT v. MIGHT 31 (Henkin, ed. 1989). Compare Zoller's arguments on material breach, infra note 102 and accompanying text.

73. Hearings on the U.S. Role, supra note 72, at 54.

74. Kirkpatrick claimed that Justice Goldberg himself had so interpreted his famous corollary in response to her inquiry. Id. at 55.

75. Id. at 56.
of continuing U.S. frustrations with the UN. Kirkpatrick played upon politically charged themes: (1) that the UN Charter does not license a tyranny of the majority over the wishes of major contributors and that the only legitimate budgetary decisions were those achieved through consensus; (2) that the principle of collective financial responsibility was, given the absence of sanctions for failure to pay, more dream than reality and (3) that the United States should not be a "patsy" but should reciprocally withhold if others did so with impunity. These themes would reemerge throughout Congressional deliberations over UN funding during the rest of the decade, as well as in reports written by such influential groups as the Heritage Foundation. The Reagan Administration eventually embraced the Kassebaum Amendment and, through it, Kirkpatrick's policy of using the U.S. financial stick as a foreign policy tool on behalf of U.S. "national interests." To U.S. officials, withholding became primarily, if

76. As Assistant Secretary for International Organization Affairs, Alan L. Keyes noted: From an American viewpoint, the [UN] crisis had two distinct but related aspects. The hostility to free democratic values, principles, and policies expressed with increasing frequency in UN resolutions aroused resentment and indignation among the American public and in the U.S. Congress. Added to this was a growing perception of waste, mismanage- ment, and inefficiency . . . . The first dramatically eroded the tolerance traditionally accorded the second. As the U.S. Government's general budgetary crisis intensified, pressure to cut back the American contribution to the United Nations became virtually irresistible. Keyes, FY 1988 Assistance Requests for Organizations and Programs, 87 DEP'T ST. BULL. 88-89 (June 1987). To same effect, see Williamson, Advancing U.S. Objectives in the United Nations, 88 DEP'T ST. BULL. 67 (Sept. 1988) [hereinafter Williamson, Advancing U.S. Objectives] (Amb. Williamson is Assistant Secretary for International Organization Affairs); Goodman, supra note 27, at 112.

77. Kirkpatrick has expanded on these themes in other contexts. See, e.g., J. KIRKPATRICK, THE REAGAN PHENOMENON 79-105 (1983). The "tyranny of the majority" theme which resonates strongly not only in Kirkpatrick's approach but in the rationale for ultra vires withholdings generally (see infra Part II(A)) did not, of course, originate with Kirkpatrick. Senator Moynihan has traced the argument to warnings directed at the UN by then President Gerald Ford and Ambassador John A. Scali. Moynihan, Joining the Jackals, COMMENTARY 23, 25 (Feb. 1981).


79. See supra note 33.

80. Licensed by Kirkpatrick, members of Congress explicitly argued that the United States should only fund those UN activities compatible with "American interests" or those that were "within the larger democratic tradition," or those which were not "anti-American." See, e.g., 134 CONG. REC. H4,314-15 (daily ed. June 15, 1988), (remarks by Rep. Swindall); id. at H4,317 (remarks by Rep. Dellums). The most transparent attempt to enact this policy into law was Senator Pressler's unsuccessful attempt to amend the Department of State Authorization Act, FY 1984 and 1985. Senator Pressler's provision would have permitted withholding of all funds for any program, project, or activity carried out by or under the United Nations or any of its specialized agencies on or after the enactment of this Act if the President certifies [to] both Houses of Congress that such program, project, or activity poses a threat to the national security or vital economic interests of the United States. 129 CONG. REC. 28,748 (1983). Senator Pressler justified this à la carte approach on the grounds
not exclusively, a political tool in the service of a specific U.S. agenda in international organizations, calling for, among other things, budgetary reforms, decreases in expenditures and consensus decision-making designed to increase the influence of major donors.\(^{81}\)

The Kassebaum Amendment, the clearest Congressional manifestation of Kirkpatrick's three themes, became the centerpiece of the United States' new-found political weapon. As originally enacted, that law threatened the exercise of a U.S. financial veto; the U.S. decision earlier, in 1983, to give United Nations Educational, Scientific, and Cultural Organization ("UNESCO") the required one year notice of intention to withdraw, explicitly motivated by that organization's alleged lack of "fiscal integrity," and the United States' 1984 decision to withdraw from UNESCO made the threat credible.\(^{82}\) The Kassebaum

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\(^{81}\) That policy agenda was reflected in announced goals to seek "consensus" in budgetary decisions, "major donor" participation in all key budgetary processes, budgetary ceilings and item-by-item review, insistence on budgetary priorities and revaluation of existing and proposed programs. Statement by Ambassador Richard S. Williamson, Assistant Secretary for International Organizations Affairs, U.S. Department of State, *UN Agencies and the Budget*, 88 DEP'T ST. BULL. 81, 83-84 (Apr. 1988) [hereinafter Williamson Statement]. This agenda was reflected not only in specific U.S. withholdings, but also came to reflect the agenda of the Geneva Group, members of which represent over 70% of the contributions to assessed budgets. See, e.g., Bolton, *The Concept of the 'Unitary UN,*' 89 DEP'T ST. BULL. 74 (Oct. 1989) (Address by John R. Bolton, Assistant Secretary for International Organization Affairs of the U.S. State Department, before the Geneva Group Consultative-Level Meeting on June 29, 1989 summarizing a Joint Policy Statement by the Geneva Group calling for zero real growth, maximum absorption of nondiscretionary cost increases and requiring that new program initiatives be financed within existing resource levels). See also Newell, *FY 1986 Assistance Requests for Organizations and Programs*, 85 DEP'T ST. BULL. 78-79 (June 1985) (statement before the Subcommittee on International Operations of the House Foreign Affairs Committee on March 12, 1985, by Gregory J. Newell, Assistant Secretary for International Organization Affairs) (summarizing Joint Policy Statement). The Gramm-Rudman-Hollings law also facilitated these goals, since they led the Executive to "rationalize" its funding decisions among competing international organizations, permitting policy preferences to dictate allocation of "scarce" government resources. See *Gramm-Rudman Hearing, supra* note 31, at 2, 9-11, 18-19, 24 (including statements by members of Congress that they were using Gramm-Rudman-Hollings to express frustration at the UN); Williamson Statement, supra, at 84. See also H.R. Rep. No. 498, 100th Cong., 1st Sess., 496 (1987) (factors identified by Congress for allocating funds between international organizations).

Amendment became the principal means to achieve the "most sweeping fiscal and administrative reform in the history of the United Nations," thereby reducing "waste and raising efficiency" and adding "the element of consensus to a budgetary process that had become increasingly divisive and controversial." According to Administration officials, subsequent UN reforms addressed Kirkpatrick's "tyranny of the majority" threat, i.e., "the fundamental concern of the Congress about the imbalance between the major-contributor minority and the voting majority by assuring that budgetary decisions cannot be made in simple disregard of the views of major donor states." The Kassebaum Amendment reflected the United States' new-found tenet that the "consensus method of work is the only one that can produce results which it is plausible to expect states to honor." Finally, it

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83. United Nations General Assembly Review: 1986, Press Release USUN 187-(86) (Dec. 31, 1986); UN General Assembly Review for 1986, 87 DEP'T ST. BULL. 52 (Mar. 1987). Senator Kassebaum had explained that her amendment was designed to force the UN to reduce its budget. 129 CONG. REC. 25,319-20 (1983). Ironically, Senator Kassebaum was trying to "control" a budget that showed signs of having already been brought under control. See Appendix A to Amb. Kirkpatrick's testimony, Hearings on the U.S. Role, supra note 72, at 60 (citing various management and budgetary reforms and a budget with "real growth" of 0.7 percent). Other supporters of the amendment did so to "send a message that could perhaps show that the United States is going to exert itself and that we no longer are going to be the doormat for every Third World country and every Communist country that wants to come in here and scuff our floor." 129 CONG. REC. 25,321 (1983) (statement of Sen. Symms).


85. Statement by Robert B. Rosenstock, U.S. Representative to the Sixth (Legal) Committee, Press Release USUN 66-(87) (Oct. 20, 1987). The need for UN decision-making to proceed by consensus, with obvious connections to fears of majority rule, has been a persistent theme for U.S. officials. See, e.g., Keyes, FY 1988 Assistance Requests for Organizations and Programs, 87 DEP'T ST. BULL. 88-89 (June 1987) (statement by Alan Keyes before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the House Appropriations Committee on April 1, 1987):

While not quite the same as unanimous consent, consensus means that decisions are taken without a vote . . . . It simply means that negotiations have reached the point at which no state or group of states feels strongly enough to bear the political cost of calling for a vote and being identified as the cause of a disruptive failure. The establishment of a consensus
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affirmed, in the strongest possible fashion, the United States' determination to enforce reciprocity by refusing to be a "patsy." Thus, when passage of the original Kassebaum Amendment drew charges by other UN members that U.S. budgetary pressures constituted "financial diktat and blackmail," the United States noted that a majority of UN members had not yet paid their assessments for the prior year. The resulting financial crisis was therefore "not the responsibility of one member State, but [was] the result of years of withholdings and late payments by a majority of countries." Some members of Congress questioned whether a legal duty to pay UN obligations even existed, in light of reciprocity and the failure of other members to pay. Other members of Congress regarded the achievement of reciprocity as so important that they proposed changes to U.S. assessments designed to reflect this principle.

Despite rhetoric which sometimes suggests a fresh approach to the organization, existing U.S. policies continue to reflect the legacy of the based budget decisionmaking process has the effect of reducing the ability of the numerical majority to dictate decisions about the size and use of UN resources. If the resort to majority power cannot simply be assumed, real compromise becomes essential.


86. Walters, UN Financial Crisis, 86 DEP'T ST. BULL. 63-64 (Oct. 1986).
87. Id. See also Statement by Ambassador Walters, Press Release USUN 128-(87) (Dec. 11, 1987) (noting that "[d]ifferent countries have different reasons for their inability to pay; at present, almost sixty percent of the members have such reasons"); Statement by Ambassador Wilkinson, Press Release USUN 189-(89) (Dec. 15, 1989) (alternate U.S. Representative to the General Assembly made almost exactly the same statement before the Fifth Committee).
88. Walters, supra note 86, at 64. Invocation of reciprocity as a justification prompted the UN Legal Adviser to a refutation; reciprocity, he wrote, applies only to bilateral relations — where State A can do to State B what the latter has done to it — and not in the relations that either State has to an organization of which they are both members. A withholding by a "reacting" State in no way "punishes" another State that had withheld earlier and thus the direct juxtaposition of offender and offended which is presupposed by the reciprocity principle does not exist. Fleischhauer memo, supra note 13, at 9. See also Opinion of Ernest A. Gross, Legal Adviser of the Department of State, reprinted in F. Kirgis, INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 72-73 (1977) (to same effect).
89. See, e.g., Letter by Representative Swindall to Secretary of State George Shultz (Mar. 5, 1987), reprinted in 133 CONG. REC. E2,830 (daily ed. July 9 1987).
90. Thus, Representative Parris offered an amendment to the relevant appropriations bill for FY 1987 to reduce the U.S. contribution to the level of the Soviet Union's. 132 CONG. REC. 16,924 (1986). Senator Wallop had made a similar proposal the year before. 131 CONG. REC. 35,349-51 (1985). Representative Eldon Rudd sought to achieve a different kind of reciprocity by reducing U.S. contributions to a "level not more than equal to the percentage of American nationals employed as professional staff in the Secretariats of the United Nations and its various agencies." 131 CONG. REC. 7,241 (1985).
91. Thus, Assistant Secretary of State, John R. Bolton, testified to the Human Rights and International Organizations Subcommittee and the International Operations Subcommittee of the House Committee on Foreign Affairs that:
We must reestablish America's image as a credible, reliable participant in international organizations. To do so we must fully meet our financial obligations when they are due. Unless we do so, our participation in the U.N. and other international organizations will lack
the Reagan years in essential respects. Although the Bush Administration has asked Congress for "full funding" for the UN, as well as payment of U.S. arrears over a five year period, neither request is unconditional. The President's request for "full funding" does not include U.S. "traditional withholdings as mandated by legislative or policy considerations."192 The President's UN representative has also reassured Congress that the UN would not be free to use U.S. arrears freely. Although he stated that payment of arrears constituted "legal obligations and need to be paid," Ambassador Pickering informed the

credibility, and our ability to attract support for our positions at the U.N. will be greatly impaired.

United Nations Association of the United States of America, Washington Weekly Report (No. XVI-15) 2-3 (Apr. 27, 1990). Representative Gus Yatron, by contrast, noting that the United States had still not paid its 1989 regular contributions, blamed the Bush Administration for not pushing the appropriators in Congress hard enough. Id. at 3. The Bush Administration's rhetoric has been influenced by recent Soviet actions. As Administration spokespeople are fond of reminding Congress, the Soviets have recently begun paying their arrearages for both regular contributions and peacekeeping. As of March 1990, Bolton stated to Congress that the U.S. share of total arrears to the UN regular budget was 79.2% while Soviet arrearages were 0.1%. United Nations Association of the United States of America, Washington Weekly Report (No. XVI-11) 1 (Mar. 23, 1990) [hereinafter Washington Weekly Report XVI-11]. See also 135 Cong. Rec. S14,609 (daily ed. Oct. 31, 1989). On the other hand, the Bush Administration has repeatedly praised the Reagan Administration's policies towards the UN, crediting Kirkpatrick for taking "the 'kick me' sign off the United States" and the Administration's "firm, uncompromising yet nonconfrontational" policies for bringing "some sanity to the reckless, spendthrift manner in which the United Nations had been operating." Williamson, The United Nations: Progress in the 1980s, 89 Dep't St. Bull. 68-69 (Feb. 1989) (address by Richard S. Williamson, Assistant Secretary for International Organization Affairs, U.S. Department of State, before a series on "Adapting American Diplomacy to the Demands of the 1990s"). The Administration has further suggested that continued progress at the UN requires the "firm, persistent leadership of the United States. This means using all resources available — political, moral, rhetorical and financial — to advance U.S. interests and to fight those actions that profoundly offend our moral and political values." Id. at 71.

92. Statement by Ambassador Thomas R. Pickering, U.S. Permanent Representative to the United Nations, before the House Foreign Affairs Committee, Press Release USUN 27-(89) (Mar. 16, 1989) [hereinafter Pickering Statement]. Ambassador Pickering stated that "the administration's request of $205.5 million represents a return to essentially full funding of our regular budget contribution to the United Nations less the usual statutory and policy withholdings, based on the progress of the administrative and budgetary reforms for which the United States has worked so hard over the past several years." Id. at 2 (emphasis added); see also Authorization Request for Foreign Assistance, the Department of State, and USIA for Fiscal Years 1990-91 (Part 1): Hearings Before the House Comm. on Foreign Affairs, 101st Cong., 2d Sess. 38 (1990) [hereinafter Hearings on DOS Request 1990-91] (testimony of Secretary of State James A. Baker III) (to same effect). Most of U.S. withholdings put in place during the 1980s — whether targeted, contingent, or across the board — remain in effect. Id. Withholdings which began in the 1980s thus became "traditional" and "usual" by 1990. Neither does reference to "traditional" imply that there would not be additional withholdings; as discussed supra note 53 and accompanying text, the Bush Administration threatened to withhold all U.S. payments to the UN if the PLO's status were "changed." Thus, according to the State Department, the President's request for arrears does not include about $68.7 million in amounts owed to the organization, including past withholdings for tax equalization, the PLO, SWAPO, Law of the Sea Preparatory Commission, a 1984 Conference on South Africa and Israel, the Department of Public Information, the post-adjustment allowance and alleged "kickbacks" by seconded nationals. Interview with Office of International Organization Affairs (July 12, 1990). See also Hearings on H.R. 1487, supra note 31, at 331 (statement by Amb. Pickering) (discussing a figure of $62 million).
Congress that "[t]hese funds will be directed toward special activities that are mutually agreed upon by the United States and the United Nations, and their payment will be conditional upon such agreement."93 Further, Ambassador Pickering suggested the need for new law permitting the President to "sequester" U.S. funds to the UN if the President felt the need to "bring pressure" on the UN.94 Pickering also argued for U.S. payments as a tit-for-tat to reward the UN's commitment to reform.95 The corollary message from the Executive to Congress and from both to the UN is clear: the United States continues to assert unilaterally its right to withhold funds for programs deemed adverse to the U.S. national interest, and should the UN in the future displease the United States by failing to undertake budgetary or management reforms quickly enough or in the form urged by the United States, across-the-board cuts may be reinstated and payment of arrears halted, notwithstanding any "legal commitments."96

93. Pickering Statement, supra note 92, at 3. Pickering also promised that the Administration would consult with Congress as to the "kinds of special activities" which the U.S. arrears payments would fund. Hearings on H.R. 1487, supra note 31, at 310. These positions reflect the Administration's current dilemma. For years, with some Executive urging, the Congress was acting on the premise that U.S. arrears provided needed "leverage" to convince the UN to reform. The Executive now appears to be trying to convince Congress (without much success to date) that having achieved those reforms, not having arrears would now best increase the United States' effectiveness within the organization. Thus, when Assistant Secretary for International Affairs John Bolton attempted the latter argument before a subcommittee of the House Appropriations Committee, Representative Neal Smith challenged him: "You said arrears provided leverage; if you didn't have arrears, you wouldn't have leverage." Washington Weekly Report XVI-11, supra note 91, at 1.

94. Hearings on H.R. 1487, supra note 31, at 309, 327. Under existing law, the President either notifies Congress that UN reforms are on track and requests appropriation of funds or he can refuse to make the required notification, thereby triggering an automatic 20% diminution in U.S. contributions. See supra note 44. The Pickering proposal would permit the President to sequester funds notwithstanding a positive Presidential assessment on UN reforms, thereby providing the President with additional à la carte flexibility to employ the financial weapon. To date, the Administration has not proposed such additional legislation.

95. See Pickering Statement, supra note 92 at 2. According to Pickering, "[f]ailure to honor our commitments in this area could call into question our commitment to reform and jeopardize the progress made to date as well as future progress." Id. at 3. Pickering's statement was presumably motivated not only by the need to placate Congress, long accustomed to the use of the U.S. financial stick, see, e.g., Statement by Ambassador Vernon A. Walters, supra note 84, at 7, but also by the continuing inability of the United States to resolve its budgetary problems.

96. Thus, Secretary of State Baker requested appropriations for payment of UN arrears to be "phased in over a five-year period, as reforms continue." Hearings on DOS Request 1990-91, supra note 92, at 38 (emphasis added); see also Hearings on H.R. 1487, supra note 31, at 150, 299, 300, 309, 323-31. That these are not idle threats is suggested by U.S. Statements to the General Assembly during the consensus adoption of the 1990-91 program budget. In that context, the United States expressed its reservations as to budget level, staff reductions, reductions in the numbers of meetings and documentation and funding of "a number of activities which are objectionable to the United States." See Statement by Ambassador Alexander F. Watson, Press Release USUN 202-(89) (Dec. 21, 1989) [hereinafter Watson Statement]; Statement by Ambassador M. James Wilkinson, U.S. Alternate Representative to the General Assembly, in the Fifth Committee, Press Release USUN 101-(89) (Oct. 16, 1989) [hereinafter Wilkinson Statement]. Watson suggested that the United States "in the spirit of fostering consensus," did not vote against
Finally, through a “unitary UN concept,” the Bush Administration is apparently continuing the Reagan Era austerity approach which had been applicable to all multilateral institutions. Thus, the Administration urges major donors to go beyond the Reagan Administration goal of “zero real growth” in individual UN system “components” and attempt to deal with the UN “comprehensively.” Although the elements of the “unitary UN” concept remain vague, one of its stated virtues is that it enables the United States and other donors “to deal coherently with the UN system on both budgetary and policy grounds,” enabling the principal donors, for example, to explore the interconnections between support for voluntary UN programs regarded as favorable to U.S. foreign policy interests and assessed regular contributions.97

For its part, Congress has to date eliminated only some of the mandated withholdings98 and it is not yet clear whether it will comply with the President’s request for phased payment of arrears.99

II. THE ULTRA VIRES DOCTRINE AND ITS DISCONTENTS

A. The Policy Problems

In a recent article, Elisabeth Zoller reaffirms the conclusions of various former Legal Advisers to the Department of State100 as well as

appropriations for these specific “objectionable” programs. Watson Statement, supra, at 2. Wilkinson warned, in addition, that the Group of 18’s three-year deadline for implementation of reforms was fast approaching “with many reforms only partially implemented and no action taken on others.” Wilkinson Statement, supra, at 6. See also 654 HERITAGE FOUND. BACKGROUNDER 11-12 (June 2, 1988) (continuing criticism of UN budgets).

97. Bolton, supra note 81, at 74-75.

98. See supra notes 22-57, 92. Some withholdings, such as those for the Decade on Racism and growing out of the Zionism is Racism Resolution, are not contained in current legislation only because the current UN budget does not include funding for such activities. Nothing in recent Congressional activity indicates less willingness on the part of members of Congress to reactivate selective withholdings in future appropriation bills should the UN engage in “objectionable” activity.

99. Although by the end of 1990, Congress had provided for a 20% down payment toward payment of outstanding arrearages to international organizations over a five-year period, see Pub. L. No. 101-515, supra note 4, by the end of January 1991, difficulties had arisen which could result in delays or reductions in planned arrearage payments for fiscal 1991. See UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA, WASHINGTON WEEKLY REPORT (Nos. XVII-1, 3) (Jan. 11 and Jan 25, 1991). Absent external pressure, Congress is not likely to give up its attempt to control the UN through its purse-strings power. Exercise of that power in foreign affairs is only more likely after the Iran-Contra debacle, see, e.g., Stith, Congress’ Power of the Purse, 97 YALE L.J. 1343 (1988), and increased Congressional activity in foreign affairs generally. See, e.g., L. HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 30-31 (1990). The bureaucratically-complex appropriations process which leads Congressional committees to impose policy constraints in an effort to be more than mere “accountants” may also be partly responsible. See 135 CONG. REC. S14,408 (daily ed. Oct. 31, 1989) (statements by Sen. Moynihan).

100. See Zoller, supra note 12; U.S. DEP’T OF STATE, 1975 DIGEST OF UNITED STATES
the vast majority of legal scholars: article 17 of the UN Charter upholds a fundamental principle of "collective financial responsibility" and imposes a legal obligation on members to pay the amount assessed by the General Assembly.\footnote{101} Zoller first directs her inquiry to whether withholding, "a unilateral suspension of an obligation embodied in a multilateral treaty," is ever justified under accepted treaty law. Zoller's emphatic answer is that, notwithstanding the United States' Goldberg Reservation, it is not.\footnote{102} Zoller comes to a different conclusion, however, under international institutional law: a member State may unilaterally withhold payments where in its view it is "com-

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\footnote{102} Zoller argues that withholding cannot be justified based on "tolerance developed over time," "material breach," or the \textit{rebus sic stantibus} doctrines. Zoller, \textit{supra} note 12, at 614-29. Some of Zoller's treaty arguments are echoed in abbreviated fashion in Goodman, \textit{supra} note 27, and Fleischhauer memo, \textit{supra} note 13. For a somewhat different view of applicable treaty law, see Kirgis, \textit{Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties}, 22 CORNELL INT'L L.J. 549 (1989) [hereinafter Kirgis, \textit{Article 60}] who contends, for example, that suspension by one party to a multilateral treaty in response to either a prior minor (nonmaterial) treaty breach or prior material breach of a nonseparable treaty clause might be justifiable provided it complies with the requisites for a nonforcible reprisal. \textit{Id.} at 569-72. Zoller's doubts about the legal validity of the United States' Goldberg corollary or reservation, Zoller, \textit{supra} note 12, at 616-17, do not necessarily depart from the official views of the U.S. government. The U.S. State Department once acknowledged that the original validity of that corollary had never been determined. Letter from J. Edward Fox, Asst. Secretary of Legislative and Intergovernmental Affairs, to Hon. Patrick L. Swindall, House of Representatives (June 5, 1987) \textit{quoted in 133 CONG. REC. E2,830} (daily ed. July 9, 1987). It also asserted that even after the Goldberg corollary, the article 19 sanction still applied to instances of withholding on the regular budget. State Department Discussion Paper, \textit{supra} note 14, at 11. Whether or not the corollary is more of a political statement than a legal reservation, however, by its own terms, it did not purport to permanently change the United States' legal position on the duty to pay but was an interim measure explicitly stated to last only for so long as others made an exception to the principle of "collective financial responsibility." See \textit{U.S. Statement on U.N. Financing and Votng Rights}, 4 I.L.M. 1000, 1001-02 (1965) (statement by Ambassador Arthur J. Goldberg, Aug. 16, 1965) [hereinafter Goldberg reservation].
ulled" to do so to defend itself against the "corporate will" or tyranny of the majority.

Zoller argues that the Charter scheme's affirmance that the General Assembly is not a law-making body, anticipates that the General Assembly cannot ride roughshod over the rights of the minority and require payment for illegal acts. Withholding that targets ultra vires acts taken by international organizations has been "necessitated through the need" to keep the Organization from turning into a "a super-State." Absent an impartial third body to give conclusive rulings on such possible deviations, the power to withhold payment is a necessary and proper power of each member state. That power is necessarily implied by the legal order of the Organization because its rejection would be to verticalize a system that was meant to be, and to remain, horizontal. In short, the power to withhold is an inherent right of UN membership.103

Zoller suggests that ultra vires acts, especially actions taken by General Assembly majorities in derogation of the rights of dissenting minorities, are void ab initio, since a member State is under no obligation to pay for the action and may therefore unilaterally decide that an action is ultra vires and withhold payment. She argues that withholding is to assessed payments what reservations are in regard to lawmaking by the General Assembly; they provide the minority with its only protection against majority lawmaking.104 Further, since "bad faith cannot be presumed," it must be "assumed that contributions are never withheld by any member state without 'compelling reasons.'"105 Presumably, under this view, the burden is on the organization to show the act is intra vires. In any case, the burden of proof appears to be irrelevant since, according to Zoller, no "conclusive" judicial forum exists with the power to resolve a dispute on withholding and members have no duty to submit the issue to impartial third party determination.

Although Zoller states that members cannot have "indefinite and practically unlimited power of discretion in their exercise of the right to withhold" and that "compelling" reasons must exist to withhold, she merely affirms, with little analysis, that these preconditions are "necessarily implied by the UN legal order."106 Zoller does not propose that any legal remedy exists, apart from the article 19 sanction, should a State withhold for less than compelling reasons. In fact, she

103. Zoller, supra note 12, at 631-32 (citations omitted).
104. Id. at 631.
105. Id.
106. Id. at 632. Thereby agreeing, ironically enough, with the statement made by Ambassador Goldberg upon which Kirkpatrick relies. See supra note 74.
concludes that any judicial remedies which might be considered to make withholding “unnecessary” would require revision of the Charter and, given present “ideological divisions,” are “unrealistic” and “unwise.” 107 Thus, although she asserts that “it is not legal to exercise a ‘necessary’ power for reasons of political expediency,” 108 Zoller posits no solution to the resulting dilemma: although it is apparently 109 not legal to withhold unilaterally for less than compelling reasons, no effective remedy for this breach exists and indeed refusing to pay is a legitimate and may be the only effective way for a member to protect itself against the “tyranny of the majority.”

Zoller is far from alone in this view. Realists obviously agree with Zoller’s ultimate conclusion because they see the financial issue as “in reality, a political problem.” 110 For them, lawyers take an “unrealistically narrow legal” view of the issue and have little to contribute. 111 On the other hand, legalists, who affirm that a legal duty to pay generally exists, also accept Zoller’s conclusion. 112 The *ultra vires* exception

107. Id. at 634.
108. Id. at 632.
109. Zoller suggests this qualification when she suggests that it is only “doubtful” that a member State has the right to withhold payments which in its opinion “do not serve [its] national purpose.” Id. (quoting Kirkpatrick).
110. See, e.g., J.G. STOESSINGER, supra note 101, at 3.
111. See Russell, United Nations Financing and The Law of the Charter,” 5 COLUM. J. TRANSNAT’L L. 68, 90 (1966). Not surprisingly, this view is especially popular among non-lawyers. Russell is critical of the original U.S. position taken before and during the ICJ proceedings in the Expenses Case. She contends that the legal duty to pay, which the United States contended existed and which required the Soviets and the French to pay for peacekeeping expenses, was “ambiguous,” that the resulting decision not to apply the article 19 loss of vote sanction in that instance was “legal enough” and that the legalistic position which the United States had taken in that case led to a “political dead end.” Russell, supra, at 92, 95. Dennis C. Goodman, Deputy Assistant Secretary, Bureau of International Organization Affairs, U.S. Department of State, echoed Russell’s words during the height of the UN’s financial crisis when in response to criticism that U.S. withholdings were illegal under the Charter he argued that “[a] purely legalistic criterion misses the point.” Goodman, supra note 27, at 119. This phenomenon is nothing new. As C. Wilfred Jenks noted in 1942, international lawyers themselves:

have regarded the finances and financing of the institutions of their legal system as a political and financing question lying outside their purview and presenting no questions of law for their consideration. This attitude bears some of the responsibility for the extraordinary paucity and frequent inappropriateness of the few legal conceptions and rules regarding the finances of international institutions which were evolved during the inter-war period.

Jenks, supra note 39, at 89.

112. Thus, the Special ASIL Working Committee on UN Relations’ Report acknowledges that there is an argument that “there is a right inherent in the law of international institutions for any state to withhold dues to avoid being party to an *ultra vires* expenditure authorized by an untamed majority of the organization’s members.” ASIL NEWSL., supra note 101, at 4 (emphasis added). The Report merely notes that the Kassebaum Amendment “is not based on any alleged *ultra vires* act of the General Assembly.” Id. See also Franck, supra note 36 (criticizing various U.S. withholdings but finding the *ultra vires* doctrine “plausible”); Committee on International Law, supra note 101, at 726 n.7 (to same effect, citing without disagreement Zoller’s article). Similarly, Kirgis assumes that a legal duty to pay UN assessments exists in his article dealing with the legality of U.S. threats to withhold payments should “Palestine” be admitted as a member of a UN specialized agency. While he is critical of Zoller’s “inherent power to with-
to the duty to pay, rationalized on the grounds of preventing the tyranny of the majority, has thus won general, if sometimes grudging, acceptance.

In light of U.S. withholdings and the underlying policies which the United States is urging upon other UN members, this *ultra vires* exception to the duty to pay should be reexamined since, as currently construed by Zoller and others, it has clear and disturbing policy implications. The premise — that the only remedy permissible against a defaulting member is the article 19 loss of vote sanction in the General Assembly, a remedy which is too unwieldy ever to be effectively used against a major contributor to the organization — is essentially an admission that international law provides no remedy for breach. Moreover, the conclusion — that the supposed duty to pay is subject to a self-judging exception that members need not pay in "exceptional" or "compelling" instances — is, to those who regard law from an Austinian perspective, tantamount to an admission that there is no law to apply, no treaty breach to discuss. A "duty to pay" which

hold" argument, Kirgis nonetheless assumes such a power exists but contends that the U.S. threat to withhold all assessments (25% of these agencies' budgets) would be illegally disproportional under international law. Kirgis, *Admission of "Palestine,"* supra note 12, at 229. Compare comments by Allan Gerson, Dennis Goodman and Richard Gardner (suggesting that unilateral withholding may be justified in response to illegal actions by the UN or as a "reciprocal act in view of a material breach of the Charter") to those of Jean Ripert, Director-General for Development and International Economic Co-operation at the UN (arguing that unilateral withholding is impermissible), Goodman, supra note 27, at 117, 119-20.

113. Zoller, supra note 12, at 621. Most have assumed, like Zoller, that apart from the unlikely possibility of suspension or expulsion, article 19 is the only possible sanction for failure to pay absent Charter amendment. See, e.g., Goodman, supra note 27, at 119, 123; Fleischhauer memo, supra note 13, at 9. Even if the sanction were to be applied to major contributors, it would scarcely be effective. The loss of vote threat, which can be taken care of by token payment sufficient to bring the defaulting member just under the triggering amount, is more of a nuisance than a real sanction. States in danger of losing their vote need pay only a minimal amount to put their arrearages just above the two-year trigger for article 19. Thus, the sanction promotes neither full nor timely payment and does not ameliorate the permanent financial crisis of the organization. See id. at 2; J.D. Singer, supra note 15, at 140. Thus, various members of Congress suggested in 1986 that since at the current withholding rate the United States would not lose its General Assembly vote for five to seven years, the United States could continue to keep the organization "one step ahead of bankruptcy" by paying "as little as we can without losing our standing." Gramm-Rudman Hearing, supra note 31, at 28.

114. Cf. Jenks, supra note 39, at 101 (affirming traditional rule that "a legal obligation is a legal obligation, even though the procedure for enforcement may be defective"); Schwebel at 672 (discussing *lex imperfecta*). The "Austinian" dangers are evident in an influential Heritage Foundation *Backgrounder* of September 26, 1986 which purports to present "The Legal Case for Cutting U.S. Funding for the United Nations." Dewey, supra note 78. That *Backgrounder*, which was inserted into the Congressional record (133 Cong. Rec. E2,829 (daily ed. July 9, 1987)) influenced at least one Congressman's views of the law on point. See Remarks by Rep. Swindall, 133 Cong. Rec. E2,829 (daily ed. July 9, 1987); Letter from Rep. Swindall to Secretary of State Shultz (Mar. 5, 1987), contained in id. See also supra note 78 (arguments by Representative Swindall on reciprocity). The *Backgrounder* enumerates recent Congressional withholdings, which it categorizes as designed to "(1) withhold money to protest specific U.N. activities; (2) withhold money as part of a U.S. federal deficit reduction effort and (3) mandate across-the-board withholdings unless the U.N. changes its budget process and shows greater
can be disregarded at will with scarcely a worry of sanction is, at least to the uninitiated in international law, not "law" at all. Thus, according to one State Department official, recent U.S. withholdings, whatever their rationale, are not "illegal":

The Charter makes certain provisions as to what should happen if a country does withhold its contributions, and this is worth remembering. A country more than two years in arrears on its assessed contribution loses its vote. The Charter specifies how the process should work. Therefore it seems to me that we are not "breaking the law;" we are in fact operating within the provisions of the Charter. If we carry it to the point where we exceed the two-year limit, we know what the penalty will be.

In support, that official quoted from Secretary Shultz's Congressional testimony, including the following:

Questions have been raised, however, as to the nature and extent of this obligation [to pay assessed contributions]. Withholdings from the U.N. budget must be seen in context, both legal and political. Article 19 of the Charter provides a specific penalty for arrearages. Where a member's arrearages do not equal its assessment for the preceding two years, the penalty does not apply. A member therefore can withhold from its contribution, provided that the member is prepared to suffer the eventual loss of its General Assembly vote. The limited nature of the sanction for arrearages does indicate that withholding should not be considered a breach of Charter obligations threatening the member's overall relationship with the United Nations.115

fiscal responsibility." Dewey, supra note 78, at 3. The Heritage Foundation found none of these withholdings objectionable on the grounds of policy or international law. Although the author acknowledges that only the first type of withholdings is justified as reacting to ultra vires actions by the UN, his legal justifications for all U.S. withholdings rely on assumptions which are similar to Zoller's and echoes themes voiced by Kirkpatrick (see supra notes 73-78 and accompanying text). Apart from justifications based on "material breach" and desuetude with which Zoller would undoubtedly disagree, the Heritage Foundation contends that a "strictly legal perspective" ignores the "highly political process" which is involved in assessments and that it "has not been established convincingly that any nation has an absolute obligation under international law to pay an assessed contribution to the United Nations." Dewey, supra note 78 at 2-3, 6. The failure of members to pay over the years constitutes "state practice" demonstrative that "there is not even the minimum degree of consensus about financing the U.N. required to create a clear legal obligation." Id. at 8. Moreover, such an obligation would, given the tyranny of General Assembly majorities, create a "potentially dangerous situation." Id. at 10 (citing, among other things, Judge Fitzmaurice's separate opinion in the Expenses Case). The Backgrounder dismisses the Expenses Case Advisory Opinion as not "equivalent to international law," especially given the failure to apply article 19 sanctions in the wake of that Opinion which shows that the obligation to pay is "almost entirely theoretical" and that the General Assembly itself "has validated the right of nations to withhold contributions." Id. at 6-8.

115. Goodman, supra note 27, at 123-24. Senator Nancy Kassebaum apparently held similar views when she originally proposed her amendment. As originally proposed, the Kassebaum Amendment reduced U.S. contributions and insisted that such payments be made only if the organization accepted these reduced payments "as payment in full." 129 CONG. REC. 25,319 (1983). Senator Kassebaum explained that this would not put us in violation of our obligations. . . . It seems to me either you say you are in violation of the treaty or you just ignore your full assessed contribution and nothing really happens. That to me is a little troubling. It depends on how and who wants to determine it.
Freed from its moorings as a binding legal obligation, payment of UN dues requires a policy rationale. Thus, according to recent comments by the Executive, payment is justified only insofar as, and for as long as, it is compatible with other foreign policy goals. Since the question of what constitutes an ultra vires act has never been incontrovertibly answered, the proposed limits on invocation of the doctrine ("exceptional" or "compelling" circumstances) remain vague, and the applicability of these vague standards is in any case self-judging, Zoller's theory gives even responsible policy-makers eager to abide by the law no guidance. A vague, self-judging standard — unilateral withholdings can be undertaken when "necessary" to carry out the "original intent" of the Charter — not surprisingly prompts vague policies. As U.S. constitutional scholars are well aware, "original intent" arguments are notoriously slippery even within the context of a national constitution; they are especially malleable within the context of that most political of documents, the UN Charter. Thus, violation of the "intent" of the Charter or "illegal" UN action has been repeatedly invoked to justify U.S. withholdings, even with regard to withholdings which Zoller would not regard as responsive to ultra vires acts, such as the Kassebaum Amendment.

116. See Part I(B).

117. Ultra vires acts on the part of an international organization may be either procedural (a violation of its internal rules of enactment such as a violation of the requisite voting majority or enactment by an unauthorized organ) or substantive (such as enactment of a provision not authorized by the purposes of the organization's constitutive instrument or violative of a norm of international law). Expenses Case, 1962 I.C.J. 151, 168 (Advisory Opinion of July 20). According to the majority in the Expenses Case, the effect of procedurally defective acts, especially as regards third parties, may not be the same as for those which are substantively defective. Id. Another judge on that court, Morelli, would distinguish violations of the Charter which are "essential" in character, such as a resolution which has nothing to do with the purposes of the Charter, from those Charter rules "governing competence." Only the former could be regarded as void. Id. at 223-24 (Morelli, J., separate opinion); see also id. at 198 (Fitzmaurice, J., separate opinion). See generally, Osieke, The Legal Validity of Ultra Vires Decisions of International Organizations, 77 AM. J. INT'L L. 239 (1983) [hereinafter Osieke, Legal Validity]; Osieke, The Exercise of the Judicial Function with Respect to the International Labour Organization, 47 BRIT. Y.B. INT'L L. 315 (1974-75); Osieke, "Ultra Vires" Acts in International Organizations — The Experience of the International Labour Organization, 48 BRIT. Y.B. INT'L L. 259 (1976-77) [hereinafter Osieke, Ultra Vires Acts]; Osieke, Unconstitutional Acts in International Organizations: The Law and Practice of the ICAO, 28 INT'L & COMP. L.Q. 1 (1979) [hereinafter Osieke, Unconstitutional Acts]; Fawcett, Detournement de Pouvoir by International Organizations, 33 BRIT. Y.B. INT'L L. 311 (1937); Conforti, The Legal Effect of Non-Compliance with Rules of Procedure in the U.N. General Assembly and Security Council, 63 AM. J. INT'L L. 479 (1969); Morgenstern, supra note 14.

118. See supra note 106 and accompanying text.


120. See, e.g., Goodman, supra note 27, at 119; supra notes 62-71 and accompanying text. An "original intent" criterion is especially vague in the context of the UN Charter given the mix
Beyond its use to justify prior U.S. withholdings, the unilateralist solution to the ultra vires problem lends itself to the legitimation of the current Bush Administration goals to achieve "full funding" for the UN, minus selective withholdings and including conditional payment of arrears.\(^1\) It implies that this is the best the UN can expect from the United States, or indeed from any member State.\(^2\)

Moreover, the "tyranny of the majority" rationale for unilateral withholding only heightens the potential for its misuse. Although Zoller argues that the original Kassebaum Amendment "is not compatible with the original intent of the Charter, which was to establish an organization based upon ‘the principle of the sovereign equality of all its Members,’" this does not convincingly demonstrate that the original Kassebaum Amendment, much less the current version which makes appropriations contingent on a Presidential determination of continued progress on UN reforms,\(^1\) is illegal under Zoller's own rationale of what may constitute ultra vires action. On the contrary, the theory that the unilateral power to withhold for ultra vires acts is "necessarily implied by the legal order of the Organization because its rejection would be to verticalize a system that was meant to be, and to remain, horizontal"\(^2\) was also the linchpin for the original Kassebaum Amendment which called for weighted voting on budgetary matters precisely to prevent continued "verticalization" of the UN system. It is not clear why case-by-case unilateral withholding to protest against the tyranny of the majority is "implicit" to the UN legal order, while a threat to withhold unless the UN adopts a general solution, such as weighted voting or consensus budget adoption, is not. After all, the general solution so far adopted, consensus adoption of

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\(^1\) See supra notes 92-96 and accompanying text.

\(^2\) As was concluded by the Stanley Foundation, UN BUDGETARY AND FINANCIAL IMPASSE: REPORT OF THE SEVENTEENTH UNITED NATIONS ISSUES CONFERENCE (1986), U.S. payments continue to be justified primarily on policy grounds. Thus, Secretary Baker seeks payments in order to maintain the U.S. leverage over budget reform, Hearings on DOS Request 1990-91, supra note 92, at 39; Ambassador Pickering suggests U.S. payments are needed to "reward" the UN and demonstrate to the organization that it is in its interests to pursue U.S. interests. See supra note 95 and accompanying text. By the same token, failure to continue withholdings is seen as a "change of policy" requiring justification. See supra note 67 and accompanying text (making argument in context of PLO). Not surprisingly, those advocating payment of UN dues also stress policy reasons. See, e.g., The United Nations Agencies: A Case for Emergency Treatment, ECONOMIST, Dec. 2, 1989, at 23 (suggesting that the UN has not been "flush with cash" for some time and needs management reform not mere belt-tightening); The Stanley Foundation, supra (to same effect).

\(^3\) See supra note 44 and accompanying text.

\(^4\) Zoller, supra note 12, at 631-32.
budgets, makes unilateral withholding less necessary. Consensus adoption of the budget is arguably less destructive to the organization and to the principle of collective financial responsibility than Zoller's suggested alternative: a general license which permits States unilaterally to determine when payments to the organization are appropriate.\footnote{125}

The "tyranny of the majority" approach also implies that one subsidiary U.S. policy goal — achieving reciprocity by considering other States' withholdings of their respective contributions — is a legitimate consideration. Thus, Zoller grounds her "tyranny of the majority" theory in part on other UN Members' behavior, specifically their "consistent" rejection of the majority's "corporate will."\footnote{126} Yet, once the legal duty to pay hinges on State practice, whether or not that practice is backed by \textit{opinio juris}, the duty is necessarily undermined since it suggests to policy-makers that other States' repeated failures to pay, even for less than "compelling" reasons, are also relevant to the determination of the "nature and extent" of the legal duty owed to the organization. Finally, and perhaps most significantly, invoking the "tyranny of the majority" undermines respect for all legally binding UN obligations except those achieved by consensus. It is, after all, difficult to see why a "horizontal" system can legitimately "legislate" other than by consensus. The "tyranny of the majority" approach therefore legitimizes yet another U.S. goal which surfaced during the 1980s: insistence on consensus for UN General Assembly resolutions, particularly but not exclusively those with financial implications.\footnote{127} Thus, even though Zoller begins by attempting to disapprove Kirkpatrick's treaty-based rationales for withholding, her conclusion ultimately buttresses under \textit{international institutional law} all of Kirkpatrick's politically charged rationales for withholding.\footnote{128}

\begin{itemize}
\item 125. As one member of Congress argued in 1952 when the possibility of U.S. withholding was first raised, such withholdings by one State license mirror action by other members and "the net result would be chaos, disruption, uncertainty, and a complete collapse of the budgetary system of the United Nations." 98 CONG. REC. 3,513 (1952)(remarks by Rep. Williams, quoting Rep. Preston).
\item 126. \textit{See, e.g.}, Zoller, \textit{supra} note 12, at 630: "The record of over 30 years reveals ample evidence that member states have occasionally, but consistently, rejected automatic compliance with the 'corporate will' of the Organization as determined by the majority."
\item 127. Consensus effectively gives the United States, or any other member State with enough interest in the outcome to risk the political fallout, a de facto veto in the General Assembly, contrary to Charter provisions providing for majority and 2/3 voting in that body. For other than budgetary resolutions, consensus eliminates the danger of adoption of certain types of meaningless resolutions, such as New International Economic Order resolutions not acceptable to those wealthy States in a position to put them in effect, but it does not prevent all meaningless resolutions. In fact, consensus is often achieved by replacing precise language with generalities acceptable to all since amendable to various interpretations.
\item 128. \textit{See supra} note 77 and accompanying text.
\end{itemize}
B. The Problems under International Law

The "tyranny of the majority" approach is disturbing on more than policy grounds. The conclusion that unilateral withholding is a lawful response to *ultra vires* acts, as well as the "tyranny of the majority" rationale, are based on three erroneous premises: (1) that the doctrine of "necessity" only applies to the rights of individual members in the UN and not to the organization as a whole; (2) that withholding is "necessary" because there is no other recourse and (3) that the UN or, more specifically, the General Assembly, cannot permissibly act like a "super-state."

The authorities on which Zoller relies for these premises, rather than supporting her arguments, cast doubt on them. For example, Zoller derives her "necessitated through the need" test from Judge Gros's opinion in the *Namibia Case*. Judge Gros had noted that 24 UN members had "in one way, or another, expressed opposition, reservations, or doubt" concerning General Assembly Resolution 2145 (XXI) which purported to terminate South Africa's mandate over Namibia. He argued that these States' reservations were "necessitated through the need to provide States wishing to dissociate themselves from a course of action with a means of making their attitude manifest . . . ." He contended that "rejection of this practice and its effects" would be to "treat the political organs of the United Nations as organs of decisions similar to those of a State or of a super-State" which the UN was not. Similarly, Judge Gros argued that the Security Council, in affirming and implementing Resolution 2145 (XXI) (which it did in a series of later resolutions in 1969 and 1970) should not ignore these reservations. To do so would deprive the UN of the flexibility made possible by reservations and abstentions, ride roughshod over the rights of the "minority of States which are not in agreement with a proposed decision" and turn the General Assembly into a "federal parliament."

Judge Gros, however, was in dissent. The majority of the Court, in a widely praised opinion, did exactly what Gros warned against. The *Namibia Court's* Advisory Opinion affirmed the effect of General As-

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131. *Id.*

132. The Security Council resolutions are identified at 1971 I.C.J. at 51.

133. *Id.* at 334.
sembly Resolution 2145(XXI), notwithstanding member States’ reservations. The Court majority confirmed that the resolution had legal effect: the termination of South Africa’s mandate.\textsuperscript{134} The Court found that the General Assembly exercised “the right to terminate a relationship in case of a deliberate and persistent violation of obligations which destroys the very object and purpose of that relationship.”\textsuperscript{135} The Court ignored the issue of reservations. It simply found that the General Assembly, under the scheme for mandates inherited from the League of Nations, had the inherent power to terminate this mandate and that the General Assembly could do so by less than a unanimous vote. Moreover, the Court affirmed this right even though no such General Assembly power is expressly stated in the Charter. The Court also affirmed the legality of Security Council 276 (1970)’s “reaffirm[ation]” and “espous[al]” of General Assembly Resolution 2145(XXI), which had declared that the “continued presence of the South African authorities in Namibia is illegal,” and had called upon States to “refrain from any dealings with the Government of South Africa” inconsistent with the termination of its mandate.\textsuperscript{136} The Court concluded that the decisions made in that Security Council resolution were “binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out.”\textsuperscript{137}

Thus, the prevailing opinion in the \textit{Namibia Case} casts doubt on all three of the premises underlying the “tyranny of the majority” approach. First, the Court found, as have many of its own and its predecessor’s opinions before and since, that the “principle of effectiveness” or “necessity” may require construing treaties, particularly constitutive instruments, in order to enhance the effectiveness of international institutions and “to limit, \textit{pro tanto}, the freedom of states bound by the clauses in question.”\textsuperscript{138} In that instance, there was a need for some entity to be capable of terminating mandates, and since the law abhors

\textsuperscript{134} The Court by 13 to 2 found the continued presence of South Africa in Namibia illegal; by 11 to 4, it also found that all UN member States were under an obligation to recognize the illegality of South Africa’s presence and that it was “incumbent” upon all non-member States to render assistance. \textit{Id.} at 58. Judge Gros dissented from all three of these findings. \textit{Id.} at 323.

\textsuperscript{135} \textit{Id.} at 47.

\textsuperscript{136} \textit{Id.} at 51-54. The Court quoted the operative parts of Security Council Resolution 276 (1970). \textit{Id.} at 51.

\textsuperscript{137} \textit{Id.} at 53.

\textsuperscript{138} Lauterpacht, \textit{Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties}, 26 \textit{BRIT. Y.B. INT’L L.} 48, 68 (1949) [hereinafter Lauterpacht, \textit{Restrictive Interpretation}]. Lauterpacht critiques “restrictive interpretation” as a general canon of treaty interpretation and argues for the very different “principle of effectiveness” as a “general principle of law and a cogent requirement of good faith.” \textit{Id.} at 83. In suggesting that “necessity” requires a restrictive interpretation of the General Assembly’s budgetary power, Zoller would appear to be turning Lauterpacht’s argument on its head.
a vacuum, the only candidate capable of terminating the mandate, the General Assembly, was deemed to have the power to do so by necessity, in order to promote the effectiveness of the UN scheme for mandates and avoid frustration of its purpose. Second, the Court concluded that although the Charter provides no binding recourse when a member asserts illegal action by the organization, its Advisory Opinion can serve that function. Finally, the Court found that far from being a purely recommendatory body, the General Assembly can, even when not expressly empowered to do so, legally bind members in certain instances, even members which "reserve" or dissent.

The *Reparations Case* also suggests that neither the doctrine of functional necessity nor the Court's famous dictum that the UN is not a "super-State" provides support for the tyranny of the majority approach to *ultra vires* acts. Although the *Reparations Case* did not create the doctrine of functional necessity in the context of international organizations, that case applied the doctrine for the first time to the UN. In that Advisory Opinion, the Court stated that "[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." Functional necessity led the Court to find that the UN had the legal capacity and personality to enable it, should a UN agent be hurt through the action of a State, to bring a claim against the responsible government for damage caused either to the UN, the victim, or to persons entitled through the victim. The Court found that the UN Charter envisioned "a large measure of international personality," and the UN, while not a State or "a super-State," whatever that expression may mean," had been entrusted with certain functions and

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139. Insistence that only a binding judicial mechanism could settle the debate under international law would have been clearly destructive of the international order in the *Namibia Case*. Yet, if States which had reserved on G.A. Resolution 2145 (XXI) had refused to comply with a later General Assembly budget resolution allocating funds to enforce termination of the mandate, these withholdings would, under Zoller's view, be legal. After all, the Charter does not provide the General Assembly with any specific law-making power in connection with the termination of mandates and the dissenting minority would only be protecting their rights. Moreover, under Zoller's view the only actor capable of deciding whether the General Assembly had acted *ultra vires* would be the dissenting member State. Any subsequent World Court Advisory Opinion(s) legitimating the binding action by the General Assembly majorities would, since not "conclusive" under the Charter remain advisory. International law would in short provide no solution to the conflict; any resolution would remain political. This is of course directly contrary to the Court's finding in that case and the Court in effect authorized States to "enforce" its decision, see *infra* note 136 and accompanying text.


was thereby "clothed... with the competence required to enable those functions to be effectively discharged." Pursuant to the Court's Advisory Opinion in that case, the General Assembly gave the Secretary General the power to take the procedural steps required to bring these claims against responsible States, including the power to determine the level of damages. As a result of the Reparations Case and subsequent UN practice, it is now reasonably clear that individual States cannot "opt out" of this scheme, which the Court found inherent to the Charter legal order, by reserving on the bringing of a particular claim or by reserving on the general scheme giving the Secretary General discretion to bring claims.

The Reparations Case illustrates the willingness of the Court to find the concept of "super-State" meaningless under post-Charter institutional international law. The Court found that an international organization such as the UN was neither the equivalent in all respects of a State nor superior to it, but rather possessed those characteristics of sovereign States derived from "necessary" intendment of its constituent instrument. To infer from the Court's "super-State" dictum that the Charter creates a "horizontal" as opposed to a "vertical" scheme in terms of the ability to bind members, or that members retain the unilateral right to withhold payments, is to turn the Court's dictum on its head: the purpose of the Court's statement was to move beyond such gross simplicities and toward recognition that international organizations may possess some powers of their own, including powers implied by the existence of legal personality, which can be asserted even against non-member States.

142. Id. at 179.
144. In fact, the Court found that even non-members of the UN, who obviously never had an opportunity to vote on the matter, were obliged to recognize the capacity of the organization to bring a claim against them. Reparations Case, 1949 I.C.J. at 184-85.
145. At most, the ICJ's statement suggests what the UN is not, as opposed to what it is. Thus, Schwarzenberger has suggested that since "super-state" has "no technical meaning" but "conveys the picture of a State which is superimposed on other States and has a jurisdiction overriding that of its component States," what the Court actually found was "that the United Nations was not, nor intended to be, a world State." 3 G. SCHWARZENBERGER, supra note 120, at 14. Others have noted that the comparable term, "supranational," when applied to an international organization, "does not have any clear meaning." H.G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW 28 (1980). For similar reasons D.W. Bowett resists using the term "supranational" for international institutions, suggesting that the power to bind member States is often the characteristic of particular organs, rather than the institution as a whole. D.W. BOWETT, THE LAW OF INTERNATIONAL INSTITUTIONS 12 (1982).
146. Compare Zoller, supra note 12, at 631-32.
147. That some scholars have rejected the misleading horizontal/vertical or supranational
The Court's willingness to find a compromise between the competing needs of the organization and State sovereignty to give effect to Charter norms is clear in the Reparations Court's handling of the possible competing claims by the UN and by the UN agent's State. The Court's well-known solution to that dilemma, a finding that neither the States' nor the UN's claims were precluded but required coordination by both parties, while perhaps inelegant as a matter of legal theory, was practical and took account of both the UN's and the states' competing rights and has not led to insurmountable difficulties.

The argument that the General Assembly cannot be permitted to act like a "super-State," assuming that the term is limited to an entity with the ability to "legislate" by majority vote over dissenting member States' objections, is misleading at best. Certainly, if what is meant is that the Charter limits the General Assembly's and the UN's law-making powers to Charter purposes and is subject to the organiza-

labels, see supra note 145, has not dimmed its influence. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 223 comment a (1987):

Unlike states, moreover, they [international organizations] do not exercise powers implied in statehood and state sovereignty: they do not levy taxes, confer nationality, or exercise other powers of government. Where, as in the case of the European Economic Community, the organization has some of these powers, e.g., the authority to tax, it assumes some of the qualities of a federal state. Compare U.S. arguments in the Expenses Case, analogizing the UN's power to assess contributions to a State's power to tax, Certain Expenses of the United Nations (U.N. CHARTER art. 17, para. 2), 1962 I.C.J. Pleadings 425 (Advisory Opinion of July 20) [hereinafter Expenses Case Pleadings].

148. In answering the question of whether the UN could bring a claim "in respect of the damage caused . . . the victim or to persons entitled through him," the Court recognized the traditional rule that the state of which the victim is a national normally exercises diplomatic protection. Reparations Case, 1949 I.C.J. 174, 181 (Advisory Opinion of Apr. 11). The Court straightforwardly acknowledged that the Charter had created a "new situation" and proceeded to enquire whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, imply for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances. Id. at 182. Stating that under international law the UN "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties," the Court answered affirmatively, finding that the capacity of the UN to exercise "a measure of functional protection" of its agents arose by "necessary intention" from the Charter. Id. at 182-84. The Court recognized that its conclusion led to the possibility of competing inconsistent claims by the UN and the UN agent's State and admitted that there was "no rule of law which assigns priority" between these claims. Id. at 185. Significantly, the Court did not find that the "superior" State's claim would take precedence over the UN's claim on behalf of its agent. Instead, the Court directed the parties to "find solutions inspired by goodwill and common sense" and, for claims involving the UN and member States, noted members' duty, under article 2(5) of the Charter, to render the organization "every assistance." Id. at 186. More specifically, the Court noted that the risk of competing claims could be reduced or eliminated by "a general convention or by agreements entered into in each particular case" and expressed its satisfaction that "in due course a practice will be developed." Id.
tion's established procedures, this assumption hardly takes one very far. There is little dispute that the powers of the UN or of a particular UN organ must be tested by the purposes of the organization as enumerated in its Charter. Few would argue that all acts undertaken by the UN, no matter how manifestly contrary to the Charter's purpose or how irregular in procedure, are valid and binding, or that individual members do not have the right to challenge the legality of UN action. The truly difficult questions are what consequences flow from allegedly invalid acts and the possibility of challenge, whether the organization's acts are void ab initio or voidable, and whether presumptions apply which can ameliorate the difficulties.

If something more is meant, namely that the General Assembly cannot legally bind member States but is limited to issuing non-binding recommendations under article 10 of the Charter, this is plainly wrong. Although the General Assembly usually issues non-binding

149. This is suggested by Zoller's statement that the implied power to withhold "can therefore be exercised only when it is indispensable to ensuring strict observance of these undertakings, i.e., to carrying out the original intent of the Charter." Zoller, supra note 12, at 632.

150. Thus, in the Expenses Case, the Court stated that expenses "must be tested by their relationship to the purposes of the United Nations in the sense that if an expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an 'expense of the Organization.'" Expenses Case, 1962 I.C.J. 151, 167 (Advisory Opinion of July 20). Commentators have echoed this view. See, e.g., 3 G. Schwarzenberger, supra note 120, at 134; Conforti, supra note 117, at 479; Rama-Montaldo, International Legal Personality and Implied Powers of International Organizations, 44 Brit. Y.B. Int'l L. 111, 141 (1970).

151. Even the United States, which took the most adamant position in the Expenses Case in favor of the absolute power of the General Assembly to bind members to a budget, acknowledged an exception for "manifest" ultra vires acts. See infra note 215 and accompanying text. But see infra notes 181-184 and accompanying text (Morelli's views).

152. See, e.g., Osieke, Legal Validity, supra note 117, at 240 and citations therein.

153. See, e.g., Jennings, Nullity and Effectiveness in International Law and Lauterpacht, The Legal Effect of Illegal Acts of International Organizations, [hereinafter Lauterpacht, Legal Effect] in Cambridge Essays in International Law 64, 88 (1965); 5 Encyclopedia of Public International Law 144 (1983); Osieke, Unconstitutional Acts, supra note 117, at 20-21; Osieke, Ultra Vires Acts, supra note 117, at 261. Zoller's approach apparently seeks to provide an answer to these issues; since member States can, in their discretion, determine for themselves whether UN action is ultra vire, these must be voidable at the discretion of the State which can decide that no financial obligation was ever due for the objectionable action and that it was void ab initio.

154. A narrow perspective on the General Assembly's law-making powers is suggested by Zoller's claim that her approach is based, at least in part, on "over 30 years" of "ample evidence" that members have "occasionally, but consistently, rejected automatic compliance with the 'corporate will' of the Organization as determined by the majority." Zoller, supra note 12, at 630. Zoller is clearly assuming that there have been abundant instances of ultra vires acts by the UN which have justified unilateral withholding. Yet just what are these instances, if one limits ultra vires to actions so "manifestly" contrary to the Charter that members are "compelled" to act? The peacekeeping actions which triggered Soviet and French withholdings were, at least in the view of a majority of judges on the ICJ, as well as a majority of members voting in the General Assembly, not manifestly contrary to the Charter. That Zoller believes the Soviet and French withholdings are a legitimate instance of withholdings for "compelling" reasons suggests a narrow view of the role of institutional practice in law-making.
recommendations under article 10 and cannot generally legislate for member States, there are distinct areas under the institutional law of the Charter in which General Assembly action does result in directly binding legal obligations for both members of the organization and even, in some cases, non-members.\textsuperscript{155} As confirmed by Advisory Opinions of the Court,\textsuperscript{156} as well as the practice of the organization,\textsuperscript{157}

\textsuperscript{155} Scholars have used different typologies to categorize the various powers of the General Assembly. Compare, for example, Goodrich and Hambro, who divide these functions into “deliberative, supervisory, financial, elective and constituent,” with Schwarzenberger, (“peacekeeping,” “budgetary,” “apportionment,” “supervisory,” “organizational” and “implied”). L.M. Goodrich & E. Hambro, supra note 58, at 25-28; 3 G. Schwarzenberger, supra note 120, at 277-326. As the United States has acknowledged, legally binding actions can arise in these areas. See Expenses Case Pleadings, 1962 I.C.J. Pleadings 180; see also U.S. DEPARTMENT OF STATE, 3 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 85 (1975) (statement of Deputy Legal Advisor (now Judge) Stephen Schwebel); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, supra note 147, § 102, comment g and § 103, comment c (distinguishing “declaratory” resolutions of international organizations from those “special ‘law-making’ resolutions that, under the constitution of an organization, are legally binding on its members”). Zoller acknowledges that the Assembly’s approval of the budget creates a legal obligation to pay under article 17 of the Charter, but she contends this capacity to bind member States is somehow limited because the General Assembly may not otherwise bind members. Yet article 17 is only one of a number of provisions relating to the “internal working” of the organization. D.W. Bowett, supra note 145, at 46 and cites therein. See also H.G. Schermers, supra note 145, at 585-97; Vallat, supra note 140, at 226-29; Seyersted, Jurisdiction Over Organs and Officials of States, the Holy See and Intergovernmental Organizations, 14 INT’L & COMP. L.Q. 31, 57-59, 61, 69 (1965). The General Assembly is granted express power to, among other things, “initiate studies and make recommendations” leading to the “progressive development of international law” (article 13); to approve (and terminate) trusteeship agreements in non-strategic areas (article 16); to establish subsidiary organs (article 22); to approve, together with the Security Council, new members (article 4); to receive reports from other organs (article 15); to undertake actions related to peacekeeping when the Security Council fails to act (articles 11, 12, 14); to take “decisions” on “important questions” by a 2/3 vote (article 18); to suspend or expel members (articles 5, 6); and to impose (or waive) the loss of vote sanction for failure to pay arrears (article 19). Even when it acts in its purely recommendatory role under article 10, the constitutive role of General Assembly action is considerable. General Assembly resolutions as either the embodiment of opinio juris or as evidence of State practice, thereby leading to the creation or revision of international norms between States have been, of course, a perennially controversial topic among scholars as well as the Court. See, e.g., infra note 169; D.W. Bowett, supra note 145, at 46-47; F. Kirgis, supra note 88, at 250-89; H.G. Schermers, supra note 145, at 599-600; Vallat, supra note 140, at 230-31; Schreuer, Recommendations and the Traditional Sources of International Law, 20 GERMAN Y.B. INT’L L. 103 (1977); Arangio-Ruiz, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, 137 RECUEIL DES COURS 419 (1972).

\textsuperscript{156} Thus, the ICJ found, in the Effect of Awards Case, 1954 I.C.J. 47 (Advisory Opinion of July 13), that the Assembly, by establishing the UN Administrative Tribunal as an independent and truly judicial body for deciding employee cases, had established an entity “with authority to make decisions binding on the General Assembly itself.” Id. at 58. The Court found that the General Assembly had authority to create such a tribunal, notwithstanding the absence of express provision in the Charter, because such capacity “arises by necessary intentment out of the Charter.” Id. at 56-57 (citing the Reparations Case, 1949 I.C.J. 174, 182 (Advisory Opinion of Apr. 11)). Accordingly, the Court found, contrary to the arguments of the United States, (see Effect of Awards Case, 1954 I.C.J. Pleadings 131 (Written Statement of the United States)) that the General Assembly could not fail to give effect to an award of the Tribunal through exercise of its budgetary authority. Effect of Awards Case, 1954 I.C.J. at 59. In thus giving binding effect to the Assembly’s article 22 power, the Court even invited comparisons between the General Assembly and national legislatures when it noted that the latter commonly create courts with the capacity to render decisions legally binding on the legislatures which brought them into being.
when the General Assembly acts in certain areas, especially when acting within its internal institutional role,\textsuperscript{158} it acts in a way analogous to "a federal parliament."\textsuperscript{159} Unilateral withholding cannot be justified on the general (and erroneous) premise that since General Assembly resolutions are not binding, it is self-evident that members have no legal obligation to pay for any actions so authorized.\textsuperscript{160}

Furthermore, any analogy between unilateral withholding and the practice of "reserving" on certain General Assembly resolutions is inapt. The latter is an unexceptional adaptation, within the UN context, of the treaty law practice of making reservations when first entering into an international obligation. The practice responds to legitimate fears on the part of members that even when exercising its article 10 recommendatory powers, the General Assembly may be creating evidence of \textit{opinio juris} or state practice to influence the formation of new customary international law and that failure to take exception when these new norms are first enunciated may be taken as acquiescence.\textsuperscript{161} Usually, such resolutions do not involve expenditure of funds or the withholding of payments. Even assuming that a case arose in which

\textsuperscript{158} Id. at 61. Articles 11, 12, and 14, as well as the power of the General Assembly to take "decisions" on article 18 with binding effect were discussed in the \textit{Expenses Case}, 1962 I.C.J. 151, 163-65 (Advisory Opinion of July 20).

\textsuperscript{159} As Schwarzenberger has noted, practices "accepted as lawful over a prolonged period by all or most of the members of an international institution" may create estoppels by which members can "no longer challenge the transformation which has taken place in the character of the institution." 3 G. SCHWARZENBERGER, \textit{supra} note 120, at 149, 156. \textit{But see infra} note 277.

\textsuperscript{160} Nor, of course, is the General Assembly the only UN body capable of dispositive "internal" decisions. For example, in the Court's recent Advisory Opinion on the Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177 (Advisory Opinion of Dec. 15), \textit{reprinted in} 29 I.L.M. 98 (1990), the Court determined that a special rapporteur for the Sub-Commission of the Commission of Human Rights, Mr. Mazilu of Romania, was a UN "expert" subject to the protections of the General Convention on Privileges and Immunities. In doing so, the Court obviously gave dispositive legal effect to the practice of the Sub-Commission in appointing such rapporteurs and, indirectly, to the power of the Economic and Social Council which had initially created the Commission of Human Rights. \textit{Id.} at 179-80, 196-97.

\textsuperscript{161} \textit{Cf.} Gros's comment in the \textit{Namibia Case}, 1971 I.C.J. 4, 334 (Gros, J., dissenting). The same holds true perforce for the Security Council:

Thus while it is the Security Council which exclusively may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with "decisions" of the General Assembly "on important questions." These "decisions" do indeed include certain recommendations, but others have dispositive force and effect.

\textit{Expenses Case}, 1962 I.C.J. 151, 163 (Advisory Opinion of July 20); thereby agreeing with the U.S. arguments to the Court, \textit{see Expenses Case} Pleadings, 1962 I.C.J. Pleadings at 207.

\textsuperscript{160} Compare Gross, \textit{Expenses of the United Nations for Peace-Keeping Operations: the Advisory Opinion of the International Court of Justice}, 17 INT'L ORG. 1, 23 (1963) (distinguishing non-binding resolutions from "expenses included in the regular budget" and finding a legal obligation to pay in case of the latter).

\textsuperscript{161} \textit{See generally} F. KIRGIS, \textit{supra} note 88, at 250-89.
such a "norm"-creating resolution involved the expenditure of funds, a member could take exception to such proposed norms by voting against or refusing to participate in any activities authorized. It need not withhold payments corresponding to such resolutions to preserve its position with respect to emerging customary international law. Except at the political level, unilateral withholding has little to do with preserving a State's position regarding international legal norms.

If treaty law analogies must be found, unilateral withholding bears a closer resemblance to an untimely reservation to the duty to pay. Even assuming that a member would be entitled to make a reservation to the UN Charter, under established treaty law such reservations must be timely, accepted by the competent organ of the organization and compatible with the object and purpose of the constituent instrument. A claim by a member reserving the unilateral right to determine for itself that a particular expense is inconsistent with the "original intent" of the Charter is not likely to fulfill any of these requirements, much less all three. As Zoller's own arguments sug-

162. A member can also, as the United States did in the 1970's, refuse to participate in objectionable activities. Thus, long before the United States withheld funds for activities relating to the UN Decade for Action to Combat Racism and Racial Discrimination (launched in 1973), the United States decided not to participate in those activities, a decision which sometimes proved effective from the U.S. perspective. See Lewis, The U.S. Role in the United Nations, 11 DEP'T ST. CURRENT POL'Y SERIES, Mar. 1976, at 8-9 (Statement of Samuel W. Lewis, Assistant Secretary of State for International Organization Affairs, before the Senate Foreign Relations Committee).

163. Withholding of payments in such an instance might be justified only if no other opportunity for reserving on the law-making consequences of an activity had arisen as where the objectionable action appears only in the annual budget resolution. Even if this were to occur today, the United States could register its disapproval by refusing to join consensus on the budget, thereby preventing its adoption.

164. Mendelson argues that reservations to "living organisms" such as the constituent instrument of an international organization can only be allowed in exceptional cases lest the "whole system . . . collapse in chaos." Mendelson, Reservations to the Constitutions of International Organizations, 45 BRIT. Y.B. INT'L L. 137, 148 (1971). He also argues that such reservations are inconsistent with the sovereign equality of members. Id. at 146-47; see also D.W. BOWETT, supra note 145, at 384-85 (suggesting that there is a presumption against permitting reservations). Mendelson also argues that a reservation as to financial contributions would impermissibly create a "two-fold inequality: not only would other members be unable to reciprocate, but their own obligations would be increased proportionately." Mendelson, supra, at 147, n.4. (Neither U.S. nor other members' withholdings have to date had this effect.) Even assuming that reservations to the Charter were generally permissible, the duty to pay UN assessments may arise not only from article 17 of the Charter but from customary international law. See infra note 210 and accompanying text. If so, an attempt to reserve on the duty to pay after it has arisen as a matter of customary international law would not be permissible. Mendelson, supra, at 156.


166. Indeed, unilateral and conflicting reservations raise the greatest dangers to international organizations. See Mendelson, supra note 164, at 151-52.
gest, to be legal, unilateral withholdings of UN payments must be legal under institutional international law, not through inapt analogies drawn from reservations practice in treaty law.

Further, in the exceptional instance where withholding is taken as a last resort because the institution has exceeded its powers under its constituent instrument, it is misleading to focus on majoritarian voting as the justification. The mere fact that the General Assembly, or another UN organ engaged in internal rule making, acts by a bare two-thirds or majority vote does not in and of itself render its actions ultra vires. The true issue, as Zoller appears to acknowledge, is whether the action goes beyond the purposes or otherwise violates the Charter or perhaps general international law. If, for example, the General Assembly attempted to initiate peacekeeping operations in violation of article 2(7), the action would be ultra vires because of the underlying violation of the Charter, not the "tyranny of the majority." 169

Emphasis on majoritarian tyranny also focuses on the relationship between members and the organization at the expense of considering the organization's obligations to third parties. 170 UN action usually involves some payments to third parties, whether employees, contractors, private or state enterprises, or other international organizations. Challenges to UN action, and subsequent unilateral withholding, often arise after the UN undertakes some liability to third parties, even if only the purchase of supplies. 171 Although a withholding member State may be concerned solely about its relations with the organization, all members as well as the organization itself generally have a

167. See Zoller, supra note 12, at 632 (suggesting that the implied power to unilaterally withhold be tested by the "original intent of the Charter").

168. There is less agreement on whether international organizations need comply with "generally accepted principles of law." Morgenstern, supra note 14, at 253.

169. Alternatively, that a General Assembly resolution is adopted by consensus does not, of itself, render it legally binding. The binding effect of a General Assembly resolution turns on the nature of the resolution, see supra note 155 (on types of resolutions), not whether it was adopted by consensus. The vote on a General Assembly resolution is indirectly relevant only when determining whether it reflects State practice or opinio juris. But see Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 101-02, 106-08 (Merits of June 27) [hereinafter Nicaragua Case] (use of General Assembly resolutions arguably without adequate inquiry as to underlying support in state practice and opinio juris); see, e.g., Kirgis, Custom on a Sliding Scale, 81 Am. J. Int'l L. 146 (1987).

170. Most discussions of ultra vires questions raise the question of the UN's obligation to third parties. See, e.g., Expenses Case, 1962 I.C.J. 151, 168 (Advisory opinion of July 20); Osieke, Legal Validity, supra note 117, at 245-47. Osieke argues that there is a need to distinguish procedurally defective from substantively defective acts in order to protect third parties. Id. Even critics of the Expenses Case Advisory Opinion have acknowledged the need to protect the legitimate expectations of third parties and the "good faith and credit" of the UN. Gross, supra note 160, at 34. See also Lauterpacht, Legal Effect, supra note 153, at 111.

171. Thus, the United States only decided to begin some withholdings, including those related to the PLO, years after the UN had initiated the activities in question.
stake in upholding legitimate expectations. Unilateral withholding which causes the organization to default on payments due third parties, even when these parties are members, has broader consequences: it casts doubt on the organization's capacity, inherent in its legal personality, to enter into obligations with other entities which are entitled to fulfillment of their legitimate contractual or treaty expectations. The General Assembly has not only the power but also the duty to approve expenditures incurred by the organization and legally owing to these persons. As the ICJ noted in the Effect of Awards Case, when the General Assembly considers obligations already incurred by the organization, it "has no alternative but to honour these engagements."\footnote{Effect of Awards Case, 1954 I.C.J. 47, 59 (Advisory Opinion of July 13); 3 G. SCHWARZENBERGER, supra note 120, at 295.} A member's refusal to pay for such an obligation merely because that State was outvoted in the General Assembly and regards the withholding as "compelling" undermines the very premise of the Reparations Case: that "fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone . . . ."\footnote{Reparations Case, 1949 I.C.J. 174, 185 (Advisory Opinion of Apr. 11). The potential international legal responsibility or liability of the UN is concomitant with the organization's capacity to bring an international claim, the subject of the Reparations Case. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 223 (1987); D.W. BOWETT, supra note 145, at 362-77.}

Treaty law likewise reaffirms the rights of third parties. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations confirms the rule that third parties are normally entitled to assume that treaties entered into with an international organization are valid and binding, notwithstanding ultra vires claims.\footnote{The Vienna Convention on Treaties between International Organizations was adopted by consensus, except for provisions dealing with dispute settlement. Vienna Convention on Treaties between International Organizations, supra note 165. Many of its provisions, especially those which parallel the Vienna Convention on the Law of Treaties, presumably reflect customary international law even though many States, including the United States, have not ratified it or the Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331.} Thus, an international organization "may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance."\footnote{Vienna Convention on Treaties between International Organizations, supra note 165, at art. 46(2) (emphasis added).} The Convention adds that "manifest" means a violation
“objectively evident” to any third party acting with due regard with “normal practice” and in “good faith.” International organizations are on the same plane as States in terms of the legitimate expectations of third parties. Third parties need only to exercise reasonable care; they need not become intimately familiar with the internal rules of either the state with which it is dealing or the international organization. Restoring the “buyer beware” sign to treaty making with international organizations threatens the stability of international law.

Zoller’s argument that “[a]bsent an impartial third body to give conclusive rulings on such possible deviations [from the Charter], the power to withhold payment is a necessary and proper power of each member state” is also problematic. As Judge Morelli’s separate concurrence in the Expenses Case demonstrates, Zoller’s conclusion does not necessarily follow from her premise. Arguing that the validity of legal acts requires that they conform to legal rules for enactment and that they be certain and not be open to challenge, Morelli, like Zoller, argued that in the UN “there is nothing comparable to the remedies existing in domestic law in connection with administrative acts” in order to determine the absolute nullity of an act. To Morelli, however, the absence of such a scheme, coupled with the need for certainty, necessitated “a very strict construction” on an ultra vires determination, and he therefore concluded that “each organ of the United Nations is the judge of its own competence.” Thus, Morelli upheld the validity of the peacekeeping expenses at issue and con-

176. Id. at art. 46(3).
177. Bowett concurs with this approach, suggesting that it would have been “extraordinary” if in the Expenses Case the Court would have found the peacekeeping expenses ultra vires and contracts with third parties for supplies and services would have been regarded as illegal and unenforceable as against the UN. He argues that the “correct rule is probably that third parties are never to be penalised as a result of an ultra vires act of an organisation unless they knew of the illegality.” D.W. Bowett, supra note 145, at 365.
178. Zoller, supra note 12, at 631. The obvious reference is to article 94(1) of the Charter which provides that members must comply with decisions of the Court “in any case to which it is a party.” Advisory opinions of the Court, to which States are not “parties,” are not binding on states under the Charter. As is further suggested below, this does not prevent an Advisory Opinion’s determinative effect on a particular dispute between members and an international organization. Further, like General Assembly resolutions, Advisory Opinions may, through formal “acceptance” by an international organization and its members, become accepted as part of customary international law. Compare infra note 190 (French admission on effect of “acceptance”).
179. But Zoller may not be alone in this view. See, e.g., 3 G. Schwarzenberger, supra note 120, at 61 (“In the absence of organs... automatically entitled to deal with assertions of excess of jurisdiction... all concerned are parties and judges in their own causes. The position is reduced to that of international law in unorganised society”).
181. Id. at 222.
182. Id. at 224.
cluded that it was not possible to say that the General Assembly's approval of the budget was:

dependent both on conformity of the resolution with the provisions of the Charter and on the correctness of the Assembly's ascertainment of situations of fact or of law . . . . In my view it is not possible to suppose that the Charter leaves it open to any State Member to claim at any time that an Assembly resolution authorizing a particular expense has never had any legal effect whatever, on the ground that the resolution is based on a wrong interpretation of the Charter or an incorrect ascertainment of situations of fact or of law. It must on the contrary be supposed that the Charter confers finality on the Assembly's resolution irrespective of the reasons, whether they are correct or not, on which the resolution is based; and this must be so even in a field in which the Assembly does not have true discretionary power. 183

The absolutist conclusions of Zoller (ultra vires acts are, at the discretion of a member, void ab initio) or Morelli (ultra vires acts are valid)184 are based on a faulty premise. As Lauterpacht long ago sug-

183. Id. Judge Sir Percy Spender, in his separate concurrence, came to a similar conclusion. He argued that since the "budget" which the General Assembly was solely authorized to approve was not limited in any way, it was for the General Assembly "and for it alone" to determine the legal payment obligations of members. Id. at 182 (Spender, J., separate opinion). For Sir Percy, that determination could not be legally challenged by a member State whether or not "in conformity with the Charter," it would be anarchic of any interpretation of the Charter were each Member State [to be] its own interpreter of whether this or that particular expense was an expense of the Organization, within the meaning of Article 17(2), and could, by its own interpretation, be free to refuse to comply with the decision of the General Assembly.

Id. at 183. The Court adhered to a similar view that the absence of a judicial remedy precludes a finding of nullity in its Advisory Opinion in the Effect of Awards Case. In that case, the Court suggested that the General Assembly could not refuse to give effect to awards rendered by the UN Administrative Tribunal even where the Tribunal had rendered awards "in excess of the Tribunal's competence" or which were otherwise defective. The Court refused to view this situation as comparable to a recognition that an arbitral award is a nullity if vitiated by a fundamental defect, arguing that "[i]n order that the judgments pronounced [in] such a judicial tribunal could be subjected to review by any body other than the tribunal itself" express provision for such review should have been provided. Effect of Awards Case, 1954 I.C.J. 47, 55-56 (Advisory Opinion of July 13). In a separate concurrence, Judge Winiarski took exception to this, arguing that it was a "general principle existing in all law" that "any act is incapable of producing legal effects if it is legally null and void." Id. at 65 (Winiarski, J., separate opinion). According to Winiarski, the Court's suggestion that institutional action is null and void only where some procedure for review exists is wrong: "the absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it." Id. Accordingly, Judge Winiarski concurred with the Advisory Opinion of the Court in this case only on the assumption that the Administrative Tribunal had been properly constituted, and was acting within the limits of its competence and in accordance with its procedural rules. Id. at 64.

184. In another part of his opinion, Morelli qualified his "absolute validity" view by distinguishing violations of the rules of "competence" from violations of certain "essential" rules, suggesting that violations of the latter might result in void acts:

It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by a manifest excès de pouvoir (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization).
gested, "it does not follow that the existence of review machinery must be equated with the compulsory character of such machinery." Judge Morelli assumed that since no compulsory machinery exists for judicial review of allegedly ultra vires acts, UN actions could only be valid or void ab initio, but never voidable. Starting from the same premise, Zoller concludes that members can determine for themselves which acts are void ab initio. Lauterpacht, however, notes that there can be "review machinery of a non-compulsory character." He cites the ICJ's Advisory Opinion in the IMCO Case as a demonstration that "the procedure of the advisory opinion can constitute a sufficient mode of review to give rise to a situation in which the subsequent conduct of the organisation can really be regarded only as the act of making void the pre-existing measure of the organisation." Neither is that Advisory Opinion the only instance in which the Court's ruling effectively settled a dispute under international institutional law. Indeed, given the nature of international law and its perennial quixotic quest for effective remedies, it is unrealistic to take an Austinian view that no remedies exist in the absence of formally binding judicial settlement. Both Morelli and Zoller ignore the oft-repeated point that,}

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Expenses Case, 1962 I.C.J. 151, 223 (Morelli, J., separate opinion). This qualification is more apparent than real. Given the breadth of the stated and unstated purposes of the UN, Morelli's view "amounts to the exclusion, for all practical purposes, of the possibilities of nullity ...." 3 G. Schwarzeneberger, supra note 120, at 298.


186. Id.

187. Id. As Lauterpacht notes, the majority of international organizations, with prominent exceptions such as the European Community, contain no specific provisions to regulate ultra vires acts. He relies on the ICJ's Advisory Opinion in the IMCO Case, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (Advisory Opinion of June 8), to illustrate an instance in which the Court's finding, albeit advisory only, that an act was ultra vires resolved the issue to the satisfaction of the IMCO membership. Lauterpacht argues that the Court's conclusion in that case that the Maritime Safety Committee of IMCO had not been constituted in accordance with the IMCO Convention, followed by the IMCO Assembly's decision (by majority vote) to accept the Court's advisory decision and dissolve the illegally constituted Committee, although it did not resolve doctrinal issues such as whether the ultra vires act was void ab initio or voidable, provides an illustration of an organization's acceptance of an advisory opinion as authoritative and acceptance that a determination of illegality has direct consequences. Lauterpacht, Legal Effect, supra note 153, at 100-06.

188. Indeed, most of the Court's Advisory Opinions concerning interpretation of the Charter evince a teleological approach to Charter interpretation which has contributed to the smooth operation of the UN and a slowly evolving body of Charter norms. They often effectively settled the underlying disputes. See, e.g., Butcher, The Consonance of U.S. Positions with the International Court's Advisory Opinions, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSROADS 423 (L. Damrosch ed. 1987). See also Lauterpacht, Restrictive Interpretation, supra note 138; 3 G. Schwarzeneberger, supra note 120, at 136-38. But see Watson, supra note 8, who argues against such a teleological interpretative approach in the context of interpretation of article 2(7).

189. Indeed, it has been persuasively demonstrated, in the context of the International Civil Aviation Organization, that formally non-compulsory approaches may constitute, in the context
by any measure, no real difference exists between resort to the Court's advisory, as opposed to contentious, jurisdiction.\textsuperscript{190} Advisory Opinions often provide the "authoritative legal element" to UN actions.\textsuperscript{191} As Felice Morgenstern once noted, the chief problem is not the absence of a binding tribunal empowered to set aside illegal acts, but finding a third party capable of clarifying the law.\textsuperscript{192}

of international organizations, the more effective "law-making" scheme. See T. BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 1, 119-22 (1969). In addition, the practical difference between "binding" ICJ judgments in contentious cases subject to enforcement under article 94(2) and merely advisory opinions is, given the exercise of the veto in the Security Council, nil as the United States' actions subsequent to the Court's judgment in the Nicaragua Case demonstrate. International law's methods of enforcement, including the mobilization of shame and proportionate countermeasures by other states, have been equally applicable to the ICJ's Advisory Opinions, at times even with the Court's blessing. Thus, in its Namibia Advisory Opinion, the Court not only endorsed States' non-recognition of South Africa's wrongful acts but indicated that states owed a legal duty to take countermeasures against a State in violation of an erga omnes obligation. Namibia Case, 1971 I.C.J. 3, 55-56 (Advisory Opinion of Jun. 26); see also O. Schachter, International Law in Theory and Practice, General Course in Public International Law, 178 RECUEIL DES COURS 184 (1982). At the time, the United States agreed with the Court's conclusions in the Namibia Case that South Africa's mandate was terminated and UN members were "obliged" "to refrain from any acts or dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, its presence and control over Namibia." U.S. DEPARTMENT OF STATE, 4 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 89 (1976) (quoting from Justice Department letter).

190. See, e.g., H.G. SChERmers, supra note 145, at 675-76; S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 100 (1985). Neither national courts nor governments consider an advisory opinion of the Court less authoritative than its judgments. See, e.g., Jenks, supra note 39, at 756 (discussing English courts); S. ROSENNE, supra, at 747. See also U.S. efforts to comply with the Court's adverse decision in the UN Administrative Tribunals Case, described in Fascell Report, supra note 14, at 36. But see France's statement shortly after the ICJ rendered its opinion in the Expenses Case:

Since an advisory opinion by definition had no binding force, the question of whether or not it should be "accepted" was not a legal one. The crux of the matter was that the General Assembly had no authority under the Charter to oblige Member States to contribute towards the expenses in question, and the Court could not confer on the Assembly a legal power which it lacked in the first place. For if the Assembly "accepted" the Court's interpretation of the Charter, and if that interpretation thereby became legally binding on all Member States, including those which had voted against accepting the Court's opinion, the jurisdiction of the Court would be admitted as binding in a matter in which its competence had been expressly denied by the drafters of the United Nations Charter.

13 M. WHITEMAN, supra note 10, at 320-27. Even in that case, many other States which shared French or Soviet objections opted to pay for the peacekeeping expenses out of "respect for the International Court of Justice and the rule of law." Fascell Report, supra note 14, at 35.

191. As the United States stated, "[the ICJ's 1971 Namibia Advisory Opinion] adds a significant and authoritative legal element to the effort of the international community to make it possible for the people of the territory to enjoy their right to self-determination." U.S. DEPARTMENT OF STATE, 3 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 90 (1975) (quoting U.S. Statement at Security Council Meeting of Oct. 20, 1971). The United States opined in that case, however, that UN resolutions were not "necessary" to produce the termination of South Africa's mandate in that case and consequent obligations to other states since these obligations "flowed directly from the Charter, particularly Article 2, paragraph 5 which requires all states to assist the United Nations in any action it takes in accordance with the Charter." Id. at 89 (quoting U.S. Department of Justice statement in pending domestic court case).

192. Morgenstern, supra note 14, at 241, 254. As she has argued, the history of international organizations demonstrates few instances of "patent illegality;" in most cases there will be more or less plausible arguments as to whether an action was properly taken under the Charter. On
The "tyranny of the majority"/unilateralist approach also raises questions under the international law doctrines of acquiescence, estoppel/unclean hands, severability and lapse of time *ex tempore*. A solution that legitimates unilateral State action without providing a remedy for abuse by States (indeed, is premised on there being no other recourse), undermines these long-established limitations on State action. These difficulties are only compounded by disagreements between the organization and the member as to the actual amounts that can be allocated to objectionable programs.

C. An Alternative: Adherence to the Expenses Case

The "tyranny of the majority" argument owes more to the rejected those occasions when the ICJ has been given the opportunity, it has helped to clarify the law, and there has been "little indication of an intention to disregard, within the Organizations, the advice of the Court." *Id.* at 254.


194. There are several examples of potential conflicts between these doctrines and recent U.S. withholdings. The United States’ delay in withholding funds for UN activities allegedly of benefit to the PLO, SWAPO or certain enemy countries raises some of these equitable issues. (Presumably, in answer to an accusation that it acquiesced or waived its rights with respect to these benefits, the United States would argue, as Senator Moynihan’s statement before Congress suggests, *supra* note 64-65 and accompanying text, that the United States was waiting to see whether the UN programs at issue would in fact benefit these “terrorist” entities.) Similarly, U.S. action either voting in favor or merely abstaining on approval of UN budgets containing expenses to which it later objects raises potential estoppel issues. (Thus, the United States joined consensus on the 1990-91 UN budget, yet is apparently intending to continue withholding certain sums under that budget, *see supra* notes 22-57, 92 and accompanying text). Although the United States has in the past argued against withholding on the grounds that UN assessments were not severable, *see supra* note 59 and 66 and accompanying text, more recently the United States has withheld portions of its assessments, apparently on the grounds of prior “material breach” by the organization, even though these have not been earmarked as attributable to the objectionable program. (Compare the views of Zoller and Kirgis on the relevance of severability and the applicability of “material breach,” *supra* note 102.) Since member States must be “presumed” to act in good faith and any withholdings must be presumed to have done for “compelling reasons,” apparently it must also be presumed that members have examined the legality of their action under these equitable doctrines and found them inapplicable or satisfied in the circumstances. In the context of recent U.S. withholdings, this premise seems peculiarly farfetched.

195. The difficulties are both theoretical and practical. How far should the parties go, for example, in determining whether particular UN activity is of “benefit” to the objectionable entity since in theory, all UN activity benefits indirectly a permanent observer group such as the PLO? *See*, e.g., 20 Heritage Found. Executive Memorandum (Apr. 19, 1983) (questioning UN supplied figures on funds of benefit to the PLO). Must we “presume” the correctness of members’ unilateral determinations of the precise financial amounts affected by *ultra vires* actions? Yet the amounts at issue are not always clear, even to withholding States. Thus, U.S. Representatives argued that estimates given by the UN as to the costs of a series of regional seminars by the UN Special Unit on Palestinian Rights underestimated the true costs which they argued had to be withheld since the U.S. legislation required the withholding of any “indirect costs allocated to the PLO units.” 129 CONG. REC. 15,108 (1983). In addition, just what is *ultra vires* apparently changes over time. Thus, although for a number of years, “humanitarian” assistance to Palestinians was specifically excluded from withholding, that exception no longer appears in current U.S. law, see *supra* note 22. Possibly, under present U.S. law, the U.S. State Department is given discretion to determine that even such assistance can be withheld as *ultra vires*. 
French and Soviet arguments in the *Expenses Case*, as well as some of the dissenting opinions by individual judges in that case, than to either the United States' position at that time or the Court's majority opinion. In light of the attention given this case over the years, the relevant positions of the parties and judges require only short summary here.196

When the first serious legal challenge to the applicability of articles 17 and 19 of the UN Charter arose, the United States forcefully argued for the binding nature of the General Assembly's budget-making power. Analyzing the mandatory language and negotiating history of article 17, the United States concluded that the provision contains a "clear statement of the obligation of Members to meet the expenses of the Organization."197 The United States, at the time the foremost defender of the duty to pay, posited that "the United Nations can pay for what it is empowered to do" and "what the United Nations can do, it can pay for."198

The Soviets and French argued the other extreme. France argued that the budget-making powers of the General Assembly did not make that institution a world legislature, that neither it nor the Charter had unlimited competence and that the UN was not a "super-state."199 France acknowledged that while members in 1945 had given the General Assembly the capacity to impose on member States the legal obligation to pay for the "administrative" expenses of the organization, the peacekeeping expenses at issue were not "expenses" that the Gen-

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197. *Expenses Case* Pleadings, 1962 I.C.J. Pleadings 193-94. The United States noted that the same words of legal obligation had been used in the Covenant of the League of Nations which had been interpreted, at the League's request, by a Sub-Committee of Jurists, to state a "general principle . . . applicable to all associations, that legally incurred expenses of an association must be borne by all its members in common." *Id.* at 195. It further noted that the Charter language had been adopted precisely to avoid the flaw of the original League Covenant which had failed to assign expressly the budget authority to a particular organ. Thus, the United States argued that both the terms of the Charter and the subsequent practice demonstrate the "exclusive character of the fiscal authority of the General Assembly." *Id.* at 196-97. Further, the power of the General Assembly to create "legally binding financial obligations" is not limited to "administrative" expenses, but the principle of "effectiveness" required including peacekeeping operations since any other interpretation would extend the veto of the Security Council to these activities and "hobble and undercut enterprises already authorized and undertaken by the Organization." *Id.* at 202-03.

198. *Id.* at 424; see also Gross, supra note 160, at 8.

199. France's February 15, 1962, letter to the Court stated in relevant part: La Charte est un traité par lequel les États n'ont aliéné leur compétence que dans la stricte mesure où ils y ont consenti. . . . Toute autre interprétation du rôle budgétaire de l'Assemblée générale conduirait à instituer un pouvoir législatif mondial. La Cour internationale de Justice a décidé dans son avis du 11 avril 1949, page 179, "que l'Organisation n'est certainement pas un État, que ses droits n'étaient pas les mêmes que ceux d'un État et encore moins que l'organisation ne pouvait être un super-État." *Expenses Case* Pleadings, 1962 I.C.J. Pleadings 133-34.
eral Assembly could impose under article 17.200 Similarly, the Soviets argued that article 17 expenses were "different in their nature from the expenses under Article 43 . . . ."201 Expenses for peacekeeping actions could "be determined only on the basis of special agreements to be concluded by the Security Council and the Member States of the Organization;"202 in any case:

[T]he resolutions of the UN General Assembly, as it is stipulated in Article 10 of the Charter, are of the nature of recommendations and are not binding upon States. The UN Member States themselves determine their attitude to these resolutions. All measures that follow from the General Assembly resolutions are also of only recommendary nature and cannot establish legal obligations for the Member States of the Organization.203

The United States' response to these qualms about the tyranny of the majority was as follows:

Member States do not find their protection against such action — if protection is needed — in legal strictures of the Charter, but in the political requirement of a two-thirds majority in the General Assembly both to initiate action and to make the necessary financial arrangements. 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, I can perceive no reason why the United Nations should be prohibited from levying assessments to pay for goods and services needed for those activities.204

The ICJ's majority Advisory Opinion essentially affirmed the United States' position on the legally binding nature of General Assembly budgetary resolutions adopted by a two-thirds vote. Although the opinion did not define "expenses of the organization" for purposes of article 17, it stated that "such expenditures must be tested by their relationship to the purposes of the United Nations in the sense that if the expenditure were made for a purpose which is not one of the purposes of the United Nations, it could not be considered an 'expense of the Organization.' "205 The Court noted:

200. France's letter to the Court, id. at 133, stated: "Les États Membres des Nations Unies n'ont pas accepté autre chose en 1945 que de permettre à l'Assemblée générale de'autoriser et d'évaluer raisonnablement toutes les dépenses dont le principe était posé par la Charte comme une obligation juridique pour les États, c'est-à-dire les dépenses administratives des Nations Unies."

201. Id. at 273 (Soviet Pleadings).

202. Id.

203. Id.

204. Id. at 424.

[The Charter] purposes are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action. But when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.\footnote{\textit{Id.} at 168.}

As Leo Gross noted, the Court, to enhance the "institutional effectiveness" of the UN, in effect modified its position in the \textit{Lotus Case}, wherein the Court had stated that the "rules of law binding upon States . . . emanate from their own free will" and "restrictions upon the independence of States cannot therefore be presumed."\footnote{Gross, \textit{supra} note 160, at 5 (quoting P.C.I.J. (ser. A) No. 10, at 18).} The Court found that the UN Charter does make it possible to presume certain limitations on the sovereignty of States.

Judge Fitzmaurice, in his separate concurring opinion, specifically considered and rejected the "tyranny of the majority" arguments, noting that the framers clearly intended to "impose a definite financial obligation on Member States" and deliberately broke away from the fundamental voting rule of the former League of Nations [of unanimity] and they adopted for the United Nations a majority voting rule. In an Organization which has never numbered much less than 50-60 Member States, and now numbers over 100, no other rule than a majority one would be practicable.\footnote{\textit{Expenses Case}, 1962 I.C.J. at 211 (Fitzmaurice, J., separate opinion). The Court's majority also suggested what the United States learned in the 1980s: that what was at stake was who would "control" the organization. \textit{Id.} at 162. The Court recognized that a contrary requirement of unanimity would vest control of the organization in those with the greatest financial stake.}

To the Court, articles 10 and 17 of the Charter did not conflict. As Fitzmaurice pointed out, notwithstanding the general rule that General Assembly resolutions are recommendary, the rule \textit{generalia specialibus non derogant} applies and "the special obligation to contribute to the expenses incurred in carrying them out prevails, and applies even to Member States voting against."\footnote{\textit{Id.} at 212 (Fitzmaurice, J., separate opinion).} Indeed, to Fitzmaurice, article 17(2) only specified which UN organ had the right of apportionment; he argued that even in the absence of article 17 the duty to contribute to the regular expenses would have arisen as a matter of inherent necessity. An Organization such as the United Nations cannot function without funds, and there is no other quarter from which, \textit{as a matter of obligation} (and nothing short of obligation suffices) funds could come, except from the Member States themselves. Without finance, the Organization could not perform its duties. Therefore, even in the absence of Article 17, paragraph 2, a general obligation

\begin{itemize}
\item \footnote{\textit{Id. at 168.}}
\item \footnote{Gross, \textit{supra} note 160, at 5 (quoting P.C.I.J. (ser. A) No. 10, at 18).}
\item \footnote{\textit{Expenses Case}, 1962 I.C.J. at 211 (Fitzmaurice, J., separate opinion). The Court's majority also suggested what the United States learned in the 1980s: that what was at stake was who would "control" the organization. \textit{Id.} at 162. The Court recognized that a contrary requirement of unanimity would vest control of the organization in those with the greatest financial stake.}
\item \footnote{\textit{Id.} at 212 (Fitzmaurice, J., separate opinion).}
\end{itemize}
for Member States collectively to finance the Organization would have to be read into the Charter, on the basis of the same principle as the Court applied in [the Reparations Case], namely, "by necessary implication as being essential to the performance of its [i.e. the Organization’s] duties."
... Joining the Organization, in short, means accepting the burden and the obligation of contributing to financing it.210

The purpose of article 17(2) "is to indicate the organ, namely the General Assembly, which is to decide on the apportionment of the expenses as between the Member States, and also to make it clear that these States must accept the apportionment so determined."211

Today, with the Soviet Union paying arrearages on peace-keeping operations to which it has long objected, the majority and concurring opinions rendered in the Expenses Case seem even more authoritative and persuasive. As Leo Gross noted, the Court proceeded in the direction the French and the Soviets feared at the time: "in the direction of a sort of world government."212

Although Zoller is faithful to the Court’s advisory opinion in starting from the premise that action taken by the UN must be tested against the Charter and might be ultra vires, her position comes closest to Judge Winiarski’s dissent.213 Other than dissenting opinions, the only support for Zoller’s position seems to come from suggestions in the majority opinion, Judge Fitzmaurice’s separate concurrence and the pleadings of even the most adamant supporters of the legal duty to pay that there may not be power to apportion expenses arising out of certain kinds of ultra vires actions, that is, those involving “manifest” violations of the Charter. The Court was sensitive to arguments that the General Assembly’s financial power could not be limitless, lest it usurp residual powers reserved by members which they never intended to concede to the organization. This is implicit in the Court’s determination that the UN’s powers are not “unlimited”214 as well as in United States and United Kingdom pleadings and oral arguments proposing limitations for “manifestly” illegal acts.215 Commentators have

210. Id. at 208 (emphasis in original).
211. Id. at 209.
212. Gross, supra note 160, at 4. The Soviet Union announced that it would begin paying arrearages due the organization including $197 million for peace-keeping operations to which it had long objected, in October 1987. These debts do not include those which were the subject of the Expenses Case, which had long been written off by the organization. Lewis, Soviet In Switch, Says it is Paying U.N. All it Owes, N.Y. Times,-Oct. 16, 1987, at A1, col. 6.
213. Judge Winiarski made nearly identical arguments, based on the need to protect the minority from the tyranny of the majority and the need for the UN not to act as a “super-State.” Expenses Case, 1962 I.C.J. at 232-34 (Winiarski, J., dissenting).
214. Id. at 168.
215. Thus, the United Kingdom argued:
[I]t is not the case that by means of a mere financial resolution the General Assembly can
also generally agreed that the duty to pay does not extend to actions “patently” or “manifestly” outside the Charter.216

That a legal duty to pay may not ultimately exist for such actions does not license a member to withhold payment unilaterally, however. Rather, the issue must be initially determined by an entity which is not a judge in its own cause. The statements by the Court and in the pleadings in the Expenses Case about the possibility of “manifest” Charter violations were obviously in the context of the Court’s, not members’ unilateral, consideration of the issue: Although some members had, both prior to that case and since, withheld portions of their UN assessments, the appropriateness of their response was not before the Court.217

The Expenses Case does suggest an answer to the question regarding members’ ability to withhold unilaterally. The Court, as well as most of the judges whether in the majority or dissent, found that with respect both to acts which do not fall within the purposes of the organization and to those which, while within its overall competence, are procedurally defective (as where promulgated by the wrong UN organ), the need for institutional effectiveness requires the application of presumptions of validity.218 While the Court discussed ultra vires acts

create an obligation on Member States to make contributions in respect of expenses incurred in furtherance of a manifestly invalid resolution; for instance, a resolution recommending a contravention of a prohibition in the Charter. Expenses Case Pleadings, 1962 I.C.J. Pleadings 337. Similarly, the United States argued that persons are entitled to regard General Assembly resolutions as valid “in the absence of an important irregularity in the procedure by which they were adopted or a substantive invalidity so patent as to amount to a manifest usurpation.” Id. at 416. See also Lauterpacht, Legal Effect, supra note 153, at 107-08. Judge Fitzmaurice, in his separate concurring opinion, went further and argued that no financial obligation arises not only when the organization “acts outside the ambit of the Charter,” but also where the General Assembly resolution action “consists solely of provision for making payment” or requires sums for “merely permissive” activities such as economic and social activities. Expenses Case, 1962 I.C.J. at 213-14 (Fitzmaurice, J., concurring). Fitzmaurice’s distinctions for purely financial resolutions or for those involving economic or social expenditures have not been generally accepted and are regarded as impracticable. They have been criticized as unsupported by the Charter which, if anything, imposes more preconditions on expenditures which Fitzmaurice would regard as non-permissive, namely peacekeeping expenditures. See, e.g., Gross, supra note 160, at 25. These difficulties forced Sir Percy Spender to conclude that no such distinctions could be made. Expenses Case, 1962 I.C.J. at 182 (Spender, J., separate opinion).

216. See, e.g., Schwarzenberger who questions the legality of an expenditure outside “any of the Purposes of the United Nations or incurred by a ‘patent’ encroachment of the General Assembly on the exclusive preserve of the Security Council.” 3 G. SCHWARZENBERGER, supra note 120, at 296. This is presumably what Zoller means when she suggests that the implied power to withhold can be exercised only “when it is indispensable to ensuring strict observance of [Charter] undertakings . . . .” Zoller, supra note 12, at 632. But see Osieke, Legal Validity, supra note 117, at 249 (questioning whether even “manifestly” ultra vires acts are ever invalid).

217. Thus, according to the Court, it was concerned only with the meaning of the phrase “expenses of the organization” and not with “apportionment” and issues subsequent to apportionment. Expenses Case, 1962 I.C.J. at 157-58.

218. As to the first presumption, see supra note 206; as to the second, the Court stated:
both in terms of type (substantively or procedurally defective) as well as in terms of effect (qua members versus qua third parties), the Court did not conclude at any time that *ultra vires* acts of either type were void *ab initio* at the discretion of member States. As Lauterpacht has argued, on the contrary:

The Court was distinguishing between these two classes of illegal acts by reference not to their consequences, but to the force of the presumption operating in favour of the legality of each class of act. While the Court did not in terms distinguish between the differing weights of presumption in the two classes, it seems to have been prepared to acknowledge that if an action (whether "external" or "internal") could be *truly established* as *ultra vires*, it would be without legal force as a basis for further action by the organisation, its organs or its staff.219

Assuming a member is free, without more, to withhold payments to the UN unilaterally gives no weight to these presumptions and shifts the burden of establishing that action is not *ultra vires* onto the UN. Yet, according to Fitzmaurice's separate opinion, unilateral withholding is only a "right of last resort," since:

an unlimited right on the part of Member States to withhold contributions at will, on the basis of a mere claim that in their view the expenditures concerned had been improperly incurred, not only could speedily cause serious disruption, but would also give those Member States which, on the basis of the normal scales of apportionment, are major contributors, a degree of control and veto over the affairs of the United Nations which, equally, can never have been intended in the framing of the Charter to be exercised by these means, or article 17, paragraph 2, would not be there.220

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As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute "expenses of the Organization."

*Expenses Case*, 1962 I.C.J. at 168. Judges Sir Percy Spender and Morelli would apply essentially a conclusive presumption, see id. (Spender & Morelli, JJ., separate opinions); Fitzmaurice would apply a "strong *prima facie* presumption," see infra note 224 and accompanying text; dissenting Judge Bustamante would also apply a "legal presumption" which a member has "a right to challenge," *Expenses Case*, 1962 I.C.J. at 304 (Bustamante, J., dissenting). Dissenting Judges Moreno Quintana and Koretsky confine their opinions to the issue at hand — "abnormal" peacekeeping expenditures which go beyond the operating expenses of the organization — suggesting that "normal" expenditures would present a different case. Id. at 260, 267, 287 (Koretsky, J., dissenting), 248-49 (Quintana, J., dissenting). Judge Basdevant, who dissented on procedural grounds, did not address the point. See id. at 235-38. The only Judge who would clearly not apply such a presumption of validity in connection with any budgetary resolution is Winiarski who takes the position that since General Assembly resolutions are merely recommendatory they are not legally valid. Id. at 227 (Winiarski, J., dissent). See also *Namibia Case*, 1971 I.C.J. 22 (Advisory Opinion of June 21)(applying procedural presumption of validity).


220. *Expenses Case*, 1962 I.C.J. 151, 204 (Fitzmaurice, J., separate opinion). Judges Morelli and Spender echoed this conclusion in their separate opinions. Id. at 182-87, 216-26 (Morelli & Spender, JJ., separate opinions). A leading commentator on *ultra vires* acts, Ebere Osieke, has called this a "right of last resort," as have others. Osieke, *Legal Validity*, *supra* note 117, at 254
(As might be expected, Judge Winiarski, in dissent, disagreed.) Commentators have also differed on whether members of international organizations have, as a right of last resort, the right to reject actions they consider to be ultra vires. It is not necessary to resolve here whether members ultimately have this power; whether, as Reisman has suggested recently, nullity is truly the ultimate and legally legitimate sanction of international law. At issue is a narrower question: whether in the context of the UN duty to pay, procedural preconditions apply to exercising this alleged right of last resort which dramatically reduce if not eliminate as a practical matter the necessity of determining whether that ultimate right of last resort truly exists.

An affirmative response to this question is implicit to the Expenses Court’s use of presumptions of validity in favor of UN action. Fitzmaurice had also agreed in his separate opinion that a “strong prima

n.46; Osieke, Unconstitutional Acts, supra note 117, at 25-26; Simmonds, supra note 15, at 877. For more on this right and its origins, see D. Ciobanu, Preliminary Objections Related to the Jurisdiction of the United States Political Organs 174-79 (1975). Ciobanu details various instances where dissenting members have declined to comply with decisions of UN organs on the basis “of their own interpretation of the Charter.” Id. at 174. Ciobanu justifies some of these refusals and asserts that “there are no pre-established means, procedures and conditions for the exercise by States of the right of last resort except its conformity with the rules of general international law and (in the large majority of cases) the obligations undertaken under the Charter.” Id. at 175.

221. According to Judge Winiarski, since there is no tribunal competent to make a finding of nullity, each member is entitled to make for itself such a finding:

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.

Expenses Case, 1962 I.C.J. 151, 232 (Winiarski, J., dissenting). See also Judge Gros’s separate opinion in Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. 73 (Advisory Opinion of Dec. 20), where he stated:

A decision of the WHO which is contrary to international law does not become lawful because a majority of States has voted in favour of it. The WHO and, in particular, its Assembly were created by the member States in order to carry out that which they had decided to do together, and that alone; member States are not bound to implement an unlawful act if that is what they hold it to be, and the practice of international organizations has shown that recourse is had in such circumstances to a refusal to carry out such act. Consequently nothing is settled by a decision taken by a majority of member States in matters in which a specialized agency over-steps its competence. Numbers cannot cure a lack of constitutional competence.

Id. at 104.

222. See, for example, Osieke, who after surveying the various views of scholars, concludes that “[t]he right of member states to reject decisions they consider unconstitutional in the absence of a legal determination by a review body to that effect has not been generally accepted by international lawyers.” Osieke, Legal Validity, supra note 117, at 254. Osieke cites Pollux who castigates auto-interpretation of the Charter as the “easiest, the most primitive, and the most unsatisfactory solution,” as well as Professor Quincy Wright, who warned that such a solution “would tend toward nullification and a hopeless incapacity of the United Nations to function.” Id. at 255. But see Gross who argues for the right of auto-interpretation as inevitably resulting from the “organizational insufficiency of international law.” Id. at 254.

facie presumption that these expenditures are valid and proper" arises and must continue to exist "unless and until it is rebutted and the contrary position is established, by whatever means it may be practicable to have recourse to — any consequential financial adjustments being effected later." As this restatement of the presumptions applied by the majority suggests, a presumption operates in the context of a judicial or arbitral forum. At a minimum, a presumption shifts the burden of initially going forward with evidence to the moving party which is disturbing the status quo.

The International Court of Justice exists to apply these presumptions. If one accepts the presumptions of the Expenses Case and the premise that the Advisory Jurisdiction of the ICJ can provide a remedy, under institutional international law allegedly ultra vires acts by the UN are neither void ab initio nor invariably valid but potentially voidable if the member State challenging the act establishes a prima facie case for invalidity and seeks judicial resolution of the question. As regards member States like the United States, which are not parties to the Court's compulsory jurisdiction, this requires

224. Expenses Case, 1962 I.C.J. 151, 204 (Fitzmaurice, J., separate opinion).

225. The ICJ has repeatedly and effectively applied such shifting burdens of going forward with evidence, implicit in its use of evidentiary inferences, admissions and determinations of lack of evidence, in other contexts. See generally, Highet, Evidence, the Court, and the Nicaragua Case, 81 AM. J. INT'L L. 1 (1987). Existence of a judicial forum and shifting of the burden of production of evidence are obviously inherent to legal presumptions under the rules of evidence in common law jurisdictions. Under the United States Federal Rules of Evidence, for example, a presumption in civil cases imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of persuasion, which remains throughout the trial upon the party on whom it was originally cast.

226. See also supra notes 185-192 and accompanying text.

227. This differs from Osieke's conclusion that UN acts are voidable solely upon judicial determination. Osieke, Legal Validity, supra note 117, at 256; Osieke, Ultra Vires Acts, supra note 117, at 276-77. Osieke's approach depends upon establishment of binding dispute settlement for determination of ultra vires acts (see, e.g., id. at 280; Osieke, Legal Validity, supra note 117, at 255-56), an unlikely outcome. The preconditions advocated here presuppose continuation of the status quo, i.e., advisory opinions on this subject. The procedural prerequisites suggested here do not foreclose the possibility that after the rendering of an advisory opinion (which may or may not be accepted by the appropriate UN organ) or outright refusal to request an advisory opinion by the organization, a member State would be entitled to consider unilateral withholding. At that point, however, such withholding would truly be a last and not a first resort. Moreover, the institutional mobilization of shame implicit in the preconditions would eliminate most withholdings and assure that withholding would be reserved for truly "compelling" instances.

228. With regard to other defaulting members which are parties to the Court's article 36(2) jurisdiction, Schachter has opined that it is reasonable to assume that another member of the UN "would have a legal interest sufficient to sustain standing" to seek redress for a Charter breach even when that violation "involves no material injury to that State and does not affect its nationals" and could bring a case to the Court against another member that has accepted the Court's jurisdiction under the same terms. He distinguishes the ICJ's disparagement of actio popularis.
a public presentation of the member’s *prima facie* case for invalidity to
the appropriate UN organ, together with a request to the UN body to
request an Advisory Opinion of the ICJ or for alternative third party
consideration of the matter. As the majority of the Court in the *Ex-
penses Case* found, a *prima facie* case should be presented, in the first
instance, to the UN organ whose action is being challenged.229 As
with the doctrines of prior demand for redress as a condition for law-
ful counter-measures230 or exhaustion of local remedies for claims by
nationals,231 this permits the challenger to raise its concerns and ac-
cords the organization the opportunity to take corrective action. The
need to go to the organization could conceivably be excused, as with
the doctrine of exhaustion, upon a demonstration that confrontation
would be futile. But neither the need for a demonstration of futility
nor the need for the member to rebut the presumption of validity can
be dispensed with without risk to the legal order established by the
Charter.

Members’ acquiescence in this scheme is necessarily implied by ac-
cceptance of membership. The nature of the presumption of validity of
UN action may differ depending on whether the underlying action is
alleged to be substantively or procedurally defective, as well as
whether it is being alleged to be defective as against third parties; these
factors may affect the type of *prima facie* burden on the member which
alleges invalidity or the type of burden of rebuttal imposed on the UN.
These factors do not affect the need for the member State to present a
*prima facie* case and attempt judicial or arbitral settlement.

That states are presumed to act in good faith232 does not mean that
they need not establish a *prima facie* case of *ultra vires* action. Should
such a case be established, the burden of going forward with evidence
that action is properly *intra vires* is on the organization, which cannot
rely on any presumption that the member is acting in bad faith. The
force of the presumption of validity of UN action as well as the con-
comitant burden on the member to establish a *prima facie* case may be
less where, on its face, the UN action is outside the scope of Charter
purposes or the violation of the Charter is otherwise “manifest.” In

Schachter, supra note 189, at 197-98. (Compare Zoller’s argument on “material breach,” supra
note 12, at 622-23 (suggesting a need to show specific injury)). Jenks had made similar proposals
to Schachter’s in connection with enforcement of the payment obligation. Jenks, supra note 39,
at 113.


230. See infra notes 235-36 and accompanying text.

231. See e.g., Restatement (Third) of the Foreign Relations Law of the United
States § 902 comment k (1987).

such cases, the need for the member to establish a *prima facie* case of invalidity may be minimal but the requirement to seek judicial or third party determination remains. The presumption in favor of the State, however, cannot be turned into a conclusive presumption in its favor at the expense of the rights of the organization. Although distinctions between types of General Assembly resolutions are difficult to apply in practice, if the consequence of such distinctions is not to delimit inflexibly the General Assembly’s budgetary powers but merely to alter the burden of proof imposed on the complaining States, the possibility of such distinctions can be left to be decided on a case-by-case basis without prejudice to either the rights of members or the institutional effectiveness of the organization.

These preconditions are not unprecedented and both are required by institutional effectiveness. If a member State is obliged to provide reasons for disregarding the usual recommendatory General Assembly resolution, it is all the more necessary that it establish a *prima facie* case prior to disregarding a binding General Assembly disposition on the budget. Moreover, the requirement that the *prima facie* case be presented to a third party for resolution is consistent with the Charter, namely articles 33 (pacific settlement of disputes) and 2(3) (same), and is required by article 2(5) (obliging members to give the organization “every assistance”).

These preconditions are also not surprising if withholding is in any respect analogous to an act of reprisal. Reprisals may be lawful only if directed in good faith to “obtaining redress for the wrong committed”; not directed at “producing an outcome extraneous to the violation and the situation created by that illegal act”; follow “prior notification” and are not “mean[t] to avoid third-party settlement.”


234. See, e.g., Schreuer, supra note 155, at 118 (arguing that action contrary to General Assembly recommendations can shift the burden of proof against the State violating them).

235. This assumes that the underlying UN action which the withholding State is protesting is presumptively valid until proven otherwise. Actions which ignore the legal payment obligation which arises would therefore be comparable to reprisals and not retorsions. See also Kirgis, Admission of “Palestine,” supra note 12, and Kirgis, Article 60, supra note 102 (both in support of the view that suspension of treaty rights requires fulfillment of prerequisites of reprisals).

236. Schachter, supra note 189, at 170-71. On the need for prior demand for redress as a precondition to lawful countermeasures, see the thorough discussion in O.Y. Elagab, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW 64-79 (1988). Elagab criticizes Zoller for suggesting that lawful counter-measures which are equivalent to the prior breach are not subject to prior demand. Id. at 66. He concludes that since lawful counter-measures seek to achieve an effective remedy, they “must always be preceded by an unfulfilled demand,” the content of the demand must be “decisively expressed as to impress upon a delinquent state the seriousness of the legal implications involved,” and, absent special circumstances requiring hasty action, the defaulting party should be “allowed sufficient opportunity to make redress.”

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Both the Arbitral Decision in the Dispute Between the U.S. and France concerning the Air Transport Services Agreement and the ICJ's judgment in the Iran Hostages Case support these preconditions. Although both cases affirmed U.S. arguments that self-help measures, including reprisals, could be taken prior to resort to judicial settlement, the cases merely upheld such measures where necessary to preserve the respective rights of the parties and where the measures encourage resort to judicial settlement. Reprisals are illegal when they frustrate the judicial process or "are designed to bring about the termination of the conflict" without regard to judicial settlement. By this criterion, unilateral withholdings of UN payments, even pending judicial consideration of the issue, are inappropriate unless the protesting State can demonstrate that they are absolutely necessary to maintain its rights and are needed to induce a reluctant UN to request an Advisory Opinion or otherwise enter into dispute settlement procedures. They are illegal unless accompanied by a good faith demonstration that the State merely seeks redress for a breach of international law, duly notified to the UN, which the State intends to see resolved by the ICJ or other appropriate third party settlement. They are also arguably illegal if, as with several recent U.S. withholdings, they are meant to result in the permanent suspension of U.S. duties under the Charter.

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239. Schachter, supra note 189, at 173-74.
240. Id. at 174 (quoting Stein, Contempt, Crisis and the Court, 76 AM. J. INT'L L. 512 (1982), as to self-help measures once judicial proceedings are underway).
241. Unless the protesting State can demonstrate irrevocable harm arising from the UN's act for which payment is refused, as where, for example the UN funds an unauthorized peacekeeping action or where the organization cannot return the money if the action were ruled illegal ab initio, withholding monies pending judicial resolution would not be justified. Even if the ICJ were to ultimately opine that the action was void ab initio, members' rights would be adequately preserved by a return of the money paid with interest. Denying the money to the organization during third party resolution could, on the other hand, chill legitimate action by the organization and undermine its good credit with third parties.
242. For views that States do not have the right to unilaterally terminate their duties under a bilateral treaty in response to alleged non-performance, see Garner & Jobst, The Unilateral Denunciation of Treaties by One Party Because of Alleged Non-Performance by Another Party or Parties, 29 AM. J. INT'L L. 569 (1935) (contending that only temporary suspension pending either agreement between the parties or submission to competent authority), and Kirgis, Article 60, supra note 102 (contending that legitimate suspensions are interim in nature, not terminations clothed as suspensions). Whether even unilateral suspension is permissible in the multilateral context is debatable. See supra note 102 (noting differences between Zoller's and Kirgis's views on application of these doctrines in context of multilateral treaties).
These preconditions arise also from other precedents in international institutional law which uphold that the doctrine of "necessity" does not apply solely or even primarily to States; organizations may also act as "necessitated by the need."243 The UN needs to uphold the principle of collective financial responsibility and has a practical need to collect assessments promptly. UN members need assurance that the organization is adhering to the Charter and international law. As the ICJ has repeatedly found, when States' and the organization's competing "needs" conflict, State concerns do not invariably prevail.244 Advocates of unilateral withholding ignore the possibility of compromise (however inelegant) between the competing needs of State sovereignty and of international organizations as demonstrated in the Court's conclusions in the Reparations and Namibia cases.

D. Objections

Unilateral withholding advocates may oppose these preconditions on the grounds that they arise from a "teleological" approach to Charter interpretation with no basis in political reality, thereby producing a legal rule which is bound to be disregarded to the detriment of "credibility for international law at all levels."245 Such "monist idealism" has been criticized in other contexts for ignoring the fact that international law is a "nascent legal system" which can only go as far as State consent permits.246 But the preconditions urged here do not constitute attempts to reinterpret a vague Charter provision to exclude State sovereignty or to turn a political commitment into a legal one;

243. See supra notes 134-143, 210 and accompanying text.
244. See, e.g., Reparations Case, 1949 I.C.J. 174, 182 (Advisory Opinion of Apr. 11). On the contrary, as Judge Sir Percy Spender put it in the Expenses Case:
Interpretation of the Charter should be directed to giving effect to that purpose, not to frustrate it. If two interpretations are possible in relation to any particular provision of it, that which is favourable to the accomplishment of purpose and not restrictive of it must be preferred.
Expenses Case, 1962 I.C.J. 151, 186 (Spender, J., separate opinion). Given the "anarchic" consequences of not applying these presumptions, id., it can hardly be otherwise.
245. Compare Watson, supra note 8, at 60-61.
246. Id. at 68, 83.
247. Compare Watson's discussion of attempts to give article 2(7) a legal content and provide for "supranational" jurisdiction in its interpretation, id., to Damrosch, Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs, 83 AM. J. INT'L L. 1 (1989). Watson's arguments have been echoed, however, in the context of UN financing. Writing in the wake of Soviet and French refusals to comply with the Advisory Opinion in the Expenses Case, John G. Stoessinger argued from the perspective of realpolitik what Elisabeth Zoller has argued from the perspective of international law, namely that unilateral withholding "is for every state a political hedge against the possibility that the United Nations may come under the domination of the "wrong" elements of the international community. For the great powers, it is a reserve capacity to exercise a veto over operational policies objectionable to themselves." J.G. STOESSINGER, supra note 101, at 29. To Stoessinger, the UN's dependence on the voluntary financial support of members weakens its "executive effectiveness, but enhances its political meaningful-
contrary, they arise from an explicit legal duty which all members accepted when they joined the organization. Far from overriding State sovereignty, the preconditions insure that good-faith objections to allegedly *ultra vires* acts are aired. These preconditions insure that the substance of protestants' arguments get an impartial hearing, thereby strengthening members' rights to ultimately withhold as a last resort. They also do not affect the rights of large contributors to reduce the percentage amount of their total assessments to the UN by seeking adjustments in the formula done in the Committee of Contributions. Adjustment to this percentage prior to assessment in the political context of the Committee, rather than à la carte withholding of assessed contributions, is what the Charter anticipates.

The preconditions are politically viable. Much has changed since the recent publication of Zoller's article. Given the lessening of ideological divisions at the UN, not just between East and West, but also to some extent between North and South, this alternative approach to *ultra vires* actions is neither politically "unrealistic" nor "unwise." Indeed, given recent Soviet overtures on dispute settlement, as well as Soviet willingness to pay long overdue assessments for peacekeeping actions at odds with Soviet policy, it appears that at least one of the main antagonists in the *Expenses Case* would be willing to have the ICJ decide the next instance of an allegedly *ultra vires* action. If such a case arose, the United States would not be able to excuse its...
own lack of willingness to submit the issue to the Court on the political grounds that other major contributors would ignore the decision. Under the circumstances, the bringing of an Expenses-like Advisory Opinion in the World Court has become a viable alternative to unilateral withholding. Certainly, as the result in the Expenses Case suggests, it need not be against the long term interest of the UN to request such advisory opinions, although it may alienate its most significant contributor in the short term.

Now, as always, it remains doubtful whether members are ready to live up to the Charter obligations. It may be that the UN can only expect the prospect the United States offers — funding subject to the whims of the financially powerful. This realpolitik assessment does not, however, license questionable legal approaches that promote withholdings which are, by anyone's standard, illegal and which fail to interpret Charter norms as written, in light of the current needs of the treaty commitments should it withhold. Sciolino, Allies in U.N. Protest on Budget, N.Y. Times, Mar. 18, 1986, at A10, col. 1.

251. This was one of the explicit justifications for the Goldberg reservation, supra note 102. Other States' failures to submit to the compulsory jurisdiction of the Court have similarly been cited by the United States as an excuse for termination of its own submission to compulsory jurisdiction. More recently, however, the United States has responded positively to Soviet proposals to strengthen Charter norms through binding dispute settlement. See, e.g., Statement by Robert B. Rosenstock, U.S. Representative to the Sixth Committee, Press Release USUN 98-(89), at 4 (Oct. 9, 1989) (welcoming "widening recognition of the role of the [World] Court and of third party dispute settlement in general" since these are "intimately connected with preventive diplomacy"); to same effect, Statement by Ambassador Thomas R. Pickering, U.S. Representative to the General Assembly, Press Release USUN 154-(89) (Nov. 17, 1989). See also Foreign Relations Authorization Act, FY 1990 and 1991, Pub. L. No. 101-246, § 411, 104 Stat. 15 (1990) (expressing sense of Congress in favor of broadening "where appropriate" the ICJ's compulsory jurisdiction and enhancing the Court's "effectiveness").

252. Although in theory one UN organ could determine whether another UN organ was acting ultra vires, and such determinations need not be made by a judicial body such as the ICJ, this presupposes that these organs can consider the arguments of interested parties, appraise the evidence, establish the facts and declare applicable law even when the UN itself is an interested party. The Court wisely deemed this inappropriate in the Effect of Awards Case, 1954 I.C.J. 56, 61 (Advisory Opinion of July 13). As the Court suggested in that context, the Charter did not envision, nor would it be realistic to expect, political organs to adjudicate impartially particular cases. Not every issue of alleged illegality need be brought to the Court, however. This risks serious stultification of the law. See Morgenstern, supra note 14, at 255. The protesting member should, of course, seek political reconsideration by the responsible UN organ prior to judicial review. See supra note 229 and accompanying text. Judicial review is only appropriate in those instances of alleged illegality so serious that the alternative to such review may be the withholding of funds.

253. One cannot estimate the degree to which the adverse Advisory Opinion of the World Court in 1962 eventually influenced the Soviets to repay other peacekeeping arrearages to which they objected. See supra note 212. Although the timing of the repayments was probably motivated by foreign policy concerns, the Expenses Case legitimized the UN's and other States' claims that failure to pay violated the law of the Charter. Having an unresolved opinion of the World Court at a minimum embarrassed the Soviets and undermined their efforts to advocate resort to dispute settlement. See supra note 250. It is hard to disagree with Chayes' assessment that the Expenses Case opinion altered "the form of the discourse." See Chayes, A Common Lawyer Looks at International Law, 78 HARV. L. REV. 1396, 1412 (1965).
organization and other developments in international law. International treaty obligations are functionally intertwined; to assert a unilateral exception to one threatens to unravel the entirety.254

A second objection might be that in the absence of specific agreement, no State is obliged to submit any dispute to third party resolution. This is a red herring grounded in the oft-cited but rarely invoked Eastern Carelia principle.255 On the contrary, international law sanctions action, including peaceful counter-measures, designed to encourage judicial settlement, even where the States have not previously consented to such settlement.256 The rendering of an advisory opinion is rarely regarded as the equivalent of a contentious case in terms of the need for consent to jurisdiction by the States involved.257 Requiring a State to request judicial resolution does not prejudice the State’s right ultimately to ignore the resulting opinion as a matter of last resort.258 It is unilateral withholding, not insistence on an attempt at peaceful settlement, which violates international law.259 That only the UN, not States, can request an advisory opinion is hardly a problem. A State willing to participate in such proceedings usually may do so through written pleadings or even possibly taking part in oral argument.260 The Court would hardly ignore any legitimate arguments raised by interested entities (whether by a member State, the secretariat or the organization) once an advisory opinion is requested.

Another objection — that the World Court as a part of the UN

254. See, e.g., Morgenstern, supra note 14, at 241 ("legality presupposes the existence of binding law").

255. Legal Status of Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5 (July 23) (upholding principle that Court should not exercise discretion to render an advisory opinion in circumstances where to do so would effectively settle an actual inter-State dispute).

256. See O.Y. ELAGAB, supra note 236, at 165-88 (legitimating counter-measures in the law of reprisal designed to nudge a recalcitrant state towards accepting third party settlement); Schachter, supra note 189, at 172 (to same effect).


258. See supra notes 227-242 and accompanying text.

259. Morelli’s and Sir Percy Spender’s solution — a conclusive presumption of validity (see supra note 183 and accompanying text) — would potentially oblige members to pay for activities not authorized by the Charter and with no basis in international law and is hardly likely to promote the peaceful purposes of the Charter. On the other hand, Zoller’s approach, which only encourages anarchic self-judging interpretations of the duty to pay, would reduce international law to the “unorganized international society.” Compare 3 G. SCHWARZENBERGER, supra note 120, at 61.

cannot be a judge of its own cause — is easily answered.\textsuperscript{261} The argument, were it true, would render the Court incapable of judgment over myriad issues in which the UN has a significant interest, such as, most recently, the privileges and immunities of UN experts.\textsuperscript{262} The Court retains sufficient autonomy, both in terms of its composition as well as due to the length of the judicial term, to adjudicate impartially. As a statistical study of the voting patterns of all ICJ judges in contentious cases between 1946-1986 suggests,\textsuperscript{263} those who would impugn the integrity and independence of ICJ judges have the burden of proof.\textsuperscript{264} Finally, the procedural prerequisites for withholding suggested here only require a good-faith attempt to seek resolution by a third party. While the ICJ is in many respects the ideal forum for this purpose, a member state may instead propose resolution by, for example, an ad hoc arbitration panel, as under the Arbitration and Conciliation Procedures established in the Annex to the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.\textsuperscript{265}

\textsuperscript{261} Schwarzenberger suggests this is the rationale for the Charter’s exclusion of the organization from the compulsory jurisdiction of the Court. 3 G. SCHWARZENBERGER, supra note 120, at 492. This may also be implicit in accusations that the Court, as a UN body, reflects UN biases against U.S. interests. See, e.g., Statement of A. Sofaer, Legal Adviser, U.S. Department of State, to Senate Foreign Relations Committee (Dec. 4, 1985). It is also suggested by proposals to protect the United States against the Court’s “political biases” through recourse to Chambers. See Leigh & Ramsey, \textit{Confidence in the Court: It Need Not be a “Hollow Chamber.”} in \textbf{THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS}, supra note 188, at 106-22.


\textsuperscript{263} Weiss, \textit{Judicial Independence and Impartiality: A Preliminary Inquiry}, in \textbf{THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS}, supra note 188, at 123. This study concludes that there were no “persistent” or “significant alignments, either on a regional, political, or economic basis.” \textit{Id.} at 134.

\textsuperscript{264} The amount of consonance between U.S. positions and ICJ Advisory Opinions, see Butcher, \textit{supra} note 188, also belie the suggestion of Court bias against U.S. interests.

\textsuperscript{265} Indeed, arbitral panels under this Convention would be an appropriate alternative to the ICJ for States which have a political problem with that body. These panels, after all, are charged with determining disputes arising from alleged treaty conflicts either with a peremptory norm of general international law or an emerging peremptory norm. Vienna Convention on Treaties between International Organizations, \textit{supra} note 165, at art. 66. Determining whether an act is \textit{ultra vires} the Charter would be within the expertise of the “qualified jurists” which are envisioned for these panels. \textit{Id.} at Annex (1). Chamber procedures under the Court’s advisory jurisdiction might be another alternative. The Court’s present statute does not preclude this possibility since it permits the Court to be “guided” by provisions applicable in contentious cases “to the extent to which it recognizes them to be applicable.” \textit{I.C.J. Statute} art. 68. See Jenks, \textit{supra} note 39, at 160. Other procedural mechanisms to facilitate requests for advisory opinions not requiring Charter amendment, including proposals for amending the Court statute to permit \textit{recours en annulation}, the grant of authority to the Secretary-General to request advisory opinions and the creation of a special General Assembly organ in charge of requesting advisory opinions in defined instances, have been proposed by many writers. See, e.g., \textit{id.} at 160, 161, 169, 195; Franck, \textit{Soviet Initiatives: U.S. Responses — New Opportunities for Reviving the United Nations System}, 83 \textit{Am. J. Int’l L.} 531, 542 (1989); Schwebel, \textit{Authorizing the Secretary-General of the
E. Preconditions and Recent U.S. Withholdings

Recent U.S. withholdings do not satisfy the procedural preconditions which arise from the presumptions articulated in the Expenses Case. Arguments in the U.S. Congress or statements by the Executive voice ultra vires rationales but fall far short of stating prima facie cases of ultra vires action by the UN. Moreover, in no instance has the United States sought consideration by the General Assembly or by an impartial third party.

If we examine more carefully the supposed ultra vires rationales for recent U.S. withholdings, it is difficult to make the case that any of these withholdings are grounded in established violations of the Charter. Upon inspection, most U.S. withholdings, and especially the underlying policies they were meant to fulfill, have little to do with a good-faith interpretation of the Charter or the ultra vires exception to the duty to pay. The Expenses Case, an application on the international level of the French administrative law doctrine of détournement de pouvoir, limited the discretionary powers of both the General Assembly and members, insisting that the purposes of the Charter were the appropriate yardstick to test the good faith of either.\(^\text{266}\) As Christine Chinkin has argued, “good faith limits the unfettered use of discretion.”\(^\text{267}\) While an “isolated incident of behavior” or an “apparent misuse of power” might be deemed to be within the parties’ discretion as a unique occurrence, a “consistent pattern of deviant behavior cannot be viewed as tolerantly.”\(^\text{268}\) Viewed as a whole and in context, recent U.S. withholdings thwart the legitimate expectations of other UN members, undermine the Charter, and leave all members with uncertain future expectations.\(^\text{269}\) Moreover, these withholdings, if not

\(^{266}\) See, e.g., Chinkin, Nonperformance of International Agreements, 17 TEX. INT’L L.J. 387, 412 (1982).

\(^{267}\) Id. at 413.

\(^{268}\) Id. Chinkin cites as an example the U.S. pleadings in the 1971 Namibia Case in which the United States argued that South Africa’s persistent disregard of over seventy General Assembly resolutions constituted clear evidence of lack of good faith. Id. (citing Namibia Case, 1971 I.C.J. (Advisory Opinion of June 21)).

\(^{269}\) Chinkin, supra note 266, at 393, 412. Chinkin argues for full recognition of the doctrine of abuse of rights:

Any deviation from the parties’ expectations should be presumed to constitute breach. Thus, when compliance by one state is within the literal wording of the agreement, but its actions undermine or destroy the expectations of the other parties or the world community, those actions should not be deemed acceptable performance of the agreement. Id. at 393. See also Vienna Convention on Treaties between International Organizations, supra
consistently challenged, could, like many delicts, amount to new claims of law.\textsuperscript{270}

Even the arguably strongest case for \textit{ultra vires} action suggested by U.S. withholdings, the expenses for the law of the sea preparatory conference, falls short of demonstrating a \textit{prima facie} case for a “manifest” violation of the Charter by the UN. A student-written note has attempted to articulate the United States’ \textit{prima facie} case: financing the Law of the Sea Preparatory Commission fails the “nexus” requirement arguably articulated in the \textit{Expenses Case} Advisory Opinion.\textsuperscript{271} According to this view, these expenses are neither “administrative” nor “operational” expenses of the organization, but are “subsidies used to finance the operation and administration of . . . an entity separate from the United Nations.”\textsuperscript{272} The Preparatory Commission is not a principal or subsidiary organ of the UN and, even if it were to become a specialized agency, subsidies to such agencies are not within the apportioning power of the General Assembly.\textsuperscript{273} Although the General Assembly can convene and fund negotiating conferences under article 50, that authority cannot extend to entities established to administer a treaty already concluded.\textsuperscript{274}

Were such arguments presented before an impartial tribunal, the UN’s rebuttal case would, on the other hand, affirm that expenditures


\textit{Auto-interpretation cannot be allowed to become a pretext for unilateral modification of the agreement justified by assertions of protecting the rights of secondary and tertiary parties. Community sanctions should be invoked to prevent this from happening. If such behavior is tolerated over a sustained period of time, it will become impossible to maintain any expectations about the outcome of the agreement, and the agreement will no longer form a reliable basis for further dealings by the interested parties.}

\textsuperscript{271}That Advisory Opinion stated:

\textit{The general purposes of Article 17 are the vesting of control over the finances of the Organization, and the levying of apportioned amounts of the expenses of the Organization in order to enable it to carry out the functions of the Organization as a whole acting through its principal organs and such subsidiary organs as may be established under the authority of Article 22 or Article 29.}

\textit{Expenses Case, 1962 I.C.J. 151, 162 (Advisory Opinion of July 20).}

\textsuperscript{272}Note, \textit{supra} note 12, at 489-90.

\textsuperscript{273}Id. at 498-99. This argument appears to rest on the proposition that such subsidies are not expenses “of the organization” under article 17. It also draws support from Fitzmaurice’s controversial distinction of two types of “expenses” which in his view did not give rise to a legal obligation to pay. \textit{See supra} note 215.

\textsuperscript{274}Note, \textit{supra} note 12, at 493-94.
for the Preparatory Commission help "achieve international co-operation in solving international problems of an economic . . . character" within the purposes of article 1(3) of the Charter. The UN could quite plausibly contend that this complies with the Court's determination in the Expenses Case that the initial test for article 17 authority is consistency with the purposes of the organization. To read into article 17 a limitation that only "administrative" or "operational" expenses of the principal and subsidiary organs of the UN are meant to be encompassed would, according to defenders of the UN expenses, be reminiscent of French arguments rejected in the Expenses Case. Defenders of the Preparatory Commission expenses could also draw support from institutional practice. Even if a "nexus" requirement could originally have been read into the Charter, this extrapolation is difficult at this late date, given well-established practice to the contrary. For years, the General Assembly has not hesitated in funding, through the regular budget, similar entities attached to conventions which have gained less than universal adherence; the Human Rights Committee established under the International Covenant on Civil and Political Rights is only one example.

275. See, e.g., id.

276. See supra note 200 and accompanying text.

277. The United States' law of the sea withholdings obviously raise unresolved questions as to the nature of institutional practice: does subsequent conduct by UN bodies, acquiesced in by members, convert what is initially illegal or procedurally dubious into valid action? International law on point is not clear. According to Judge Sir Percy Spender, UN majorities could never, by institutional practice, alter the Charter, and this practice has no "legal relevance." Expenses Case, 1962 I.C.J. 151, 196-97 (Spender, J., separate opinion). Compare the Court's determination that abstention is permissible in the Security Council, notwithstanding the requirement of a "concurring" vote in article 27(3) of the Charter due to the consistent and uniform UN practice, Namibia Case, 1971 I.C.J. 4, 16 (Advisory Opinion of Jan. 26), to Judge Dillard's separate opinion in that case (suggesting that institutional practice may become significant in the absence of a clear "prescription" in the Charter), id. at 153-54 (separate opinion). See also the statement in the Reparations Case that the rights and duties of the UN "must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." Reparations Case, 1949 I.C.J. 174, 180 (Advisory Opinion of Apr. 11). Although there is now little dispute that the practices of the "predominant number of members in the UN" is legally relevant to clarifying the legal powers of UN organs where there are lacunae in the Charter, the debate is whether such practice can "alter the Charter." 3 G. SCHWARZENBERGER, supra note 120, at 156. If institutional practice is legally relevant, even if UN financing of "independent" entities were not originally authorized by the Charter, the practice, including the United States' own acquiescence, of funding entities engaged in activity at the center of the UN purposes — such as human rights and the rights of States over the seabed — may make long past the point of effective challenge. See also supra note 158.

278. Thus, costs for the Human Rights Committee (HRC) which examines reports under the Optional Protocol of the International Covenant on Civil and Political Rights, established by G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), is borne by the entire UN membership, even though many States, including the United States, are not parties to either the Covenant or the Protocol. See id. at arts. 35-36. See also the ECOSOC Committee established under the Covenant on Economic, Social and Cultural Rights (see General Assembly resolution cited above); the Committee established under the International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068
It is therefore unclear whether the United States or the UN would prevail if the Preparatory Commission expenses question became the object of an advisory opinion. Nor, given possible policy consequences, would it be clear that the United States would press its legal case. The probable U.S. "nexus" arguments would undercut the current scheme for the funding of other UN activities, many of which the United States supports. If, for example, UN funding of the Human Rights Committee, arguably no more essential to UN purposes than the promotion of international cooperation on economic matters such as the mining of the seabed, is illegal and only those States which are parties to the human rights conventions are legally obliged to contribute to the operations of the Human Rights Committee, the impact on UN enforcement of those conventions could be devastating and deeply disturbing to U.S. foreign policy interests.

As this last example suggests, the procedural prerequisites urged here would force the United States and other defaulters to consider the likely precedential impact of particular withholdings. They would force States to regard the duty to pay as a legal duty with legal consequences for lack of compliance. In the case of the United States and law of the sea withholdings, it would demonstrate whether the United States' stated ultra vires rationale for its withholdings is really at issue or whether the United States' foreign policy rationale, its substantive disagreement with the law of the sea treaty resulting in its refusal to participate in the Preparatory Commission, is really at the core of U.S. objections. If U.S. withholdings are really not directed at concern about ultra vires UN action but are instead, as is possible, intended to produce "an outcome extraneous to the violation and the situation created by that illegal act" they are not justified by international law.

Insistence on compliance with procedural prerequisites would clearly establish the bona fides of the United States. Are these U.S. withholdings directed at correcting a principled violation of the "nexus" requirement, notwithstanding U.S. acquiescence in such "violations" in...
other contexts in the past, or are they directed at derailing the seabed provisions with which the United States substantively disagrees?

Other U.S. withholdings, viewed from the perspective of a third party arbiter and the *ultra vires* doctrine, appear even less legitimate. As Zoller herself suggests, those withholdings motivated by budgetary concerns, including the Kassebaum Amendment, the Ethiopian Conference Center, the post-adjustment allowance, across-the-board shortfalls or Gramm-Rudman cuts, present no plausible *prima facie* claims to legality. Profligacy, however undesirable from the perspective of the Protestant work ethic, simply does not violate international law. Even if admission of the PLO to full membership in the UN would violate the Charter, the requirements of article 4(2) (requiring a Security Council recommendation) ensure that no such action will occur without U.S. concurrence. Arguments that action short of this step, such as including the PLO in sections reserved for member States or affording it certain rights of participation, amount to a grant of full membership in violation of the Charter are scarcely credible. In any case, a threat to withhold all U.S. assessments should the PLO's status be “upgraded” or should Israeli credentials be denied at the General Assembly is scarcely proportional under international law. Withholdings to punish the UN for alleged kickbacks for

281. The analogy with reservations as to a multilateral treaty is here clearly inapt. The United States need not, and indeed likely will not, become a party to the Law of the Sea Convention. Whether the United States need adhere to any changes in customary international law indirectly wrought by that Convention does not turn on payment of the Preparatory Commission expenses. If the United States is entitled to maintain its persistent objector status, notwithstanding the Law of the Sea's “package deal,” it can do so by not adhering to the Convention. The Charter does not further license, however, failure to pay for that portion of the UN budget which corresponds to this activity merely because of objection to that activity.


283. As Kishore Mahbubani has noted, the General Assembly is entitled to “behave in as silly a fashion as parliaments do anywhere in the world.” Like representatives to the U.S. Congress, each UN ambassador “tends to respond to the needs of his country or constituency more than he does to the global interest. This is a continuing tension that will haunt every parliament of the world, including the United Nations, as long as we insist on democratic institutions, national and international.” Mahbubani, *Remarks*, 81 PROC. AM. SOC'Y INT'L L. 116 (1987).


285. Kirgis, *Admission of "Palestine,"* *supra* note 12, at 218, n.4. For these reasons, Kirgis limited his study to examining the issue in the UN specialized agencies. *Id.*

286. *Id.* at 226-27, 229. It is also not entirely clear that non-approval of credentials, a procedural matter that in the practice of the UN has been political, should be considered legally equivalent to suspension or expulsion under article 5, 6, or 19 of the Charter. Compare D.W.
seconded nationals\textsuperscript{287} raise questions of proof as well as of attribution of responsibility. As the United States has admitted, the actual dollar amounts involved have not been proven, nor has the UN's demonstrated ability to prevent such practices by members.\textsuperscript{288}

Other U.S. withholdings directed at UN actions of "benefit" to the PLO, SWAPO or "communist" countries also fail to present plausible \textit{prima facie} cases of "manifest" Charter or international law violations. That a General Assembly resolution is "improperly" motivated by political considerations or is "politically imbalanced" does not mean it is \textit{ultra vires}.\textsuperscript{289} As Osieke has noted, members can hardly complain about the intrusion of politics into an organization created for political reasons.\textsuperscript{290} Many of the most controversial resolutions are symbolic in character and are for that reason "self-executing," members are under no legal obligation to comply with the condemnation of a member State, which is often the purpose.\textsuperscript{291} Legally, the United States cannot fail to pay for a political forum it agreed to fund jointly — at least while it remains a member of that forum. For better or worse, the United States agreed over forty years ago to contribute its proportionate share to the costs involved in establishing a forum for letting off (or even causing) political steam. These U.S. withholdings are essentially political reactions to political resolutions.

U.S. arguments that UN "benefits" to the PLO or certain countries, such as Libya, violate the Charter are disingenuous and insubstantial. As the United States is well aware, the UN (as well as the United States itself) assists a number of countries which are human rights violators or which otherwise have violated the Charter. Absent

\textsuperscript{287} See \textit{supra} note 48 and accompanying text.

\textsuperscript{288} See \textit{Gramm-Rudman Hearing}, \textit{supra} note 31, at 33-34; see \textit{supra} note 48.

\textsuperscript{289} See \textit{supra} note 65 and accompanying text. The argument, even if accurately descriptive of UN efforts, confuses advocacy for action and targets only one easy target — the PLO — while leaving intact UN benefits to a number of countries which might be accused of harboring the same or similar desires, whether directed at Israel or some other State. Jeanne Kirkpatrick has argued that no Arab State "has said plainly that it accepts Israel's right to peace within secure borders (the central requirement of UN Res. 242) . . . " Kirkpatrick, \textit{The U.N. Vote on Israel}, Wash. Post, Oct. 23, 1989, at A15, col. 1. If true, UN programs of benefit to any of these Arab countries must also be, under this argument, illegal. As Osieke points out, \textit{ultra vires} objections to such resolutions might be proper, on the other hand, if these were adopted in violation of the prescribed rules of procedure. Osieke, \textit{Legal Validity}, \textit{supra} note 117, at 253. See also Gross, \textit{Voting in the Security Council and the PLO}, 70 AM. J. INT'L L. 470 (1976).

\textsuperscript{290} Osieke, \textit{Legal Validity}, \textit{supra} note 117, at 250-53.

\textsuperscript{291} Id. at 252.
the invocation of Charter sanctions, an international organization dedicated to serving all its members can scarcely do less. U.S. arguments that UN assistance indirectly supports "terrorist" activities by the PLO or these countries certainly misstates the type of assistance involved.\textsuperscript{292} The UN's support for pro-PLO "propaganda," however "one-sided" and "destructive" of the Middle East peace process, hardly makes these efforts, well within the Charter's concern for the self-determination of peoples, \textit{ultra vires}.\textsuperscript{293}

The broader Kirkpatrick arguments, suggesting that the United States is entitled to fund only those UN activities consistent with the United States' "national interests" as determined by the United States, totally misconstrues the purposes of the United Nations and its Charter. While the United States can deny bilateral assistance to recipients for reasons of foreign policy or because the recipient violates the Charter, the United States cannot impose unilaterally such preconditions on its proportion of UN assessed contributions. International institutional law does not entitle the United States to enforce Charter obligations unilaterally through an \textit{a la carte} approach to its budgetary obligations. Nor does that law permit the United States to turn the organization into the New York branch office of the U.S. Department of State.\textsuperscript{294}

\section*{III. Back to the Future}

The establishment of a firm financial base has been one of the most entrenched problems in the history of international organizations.\textsuperscript{295} Deliberate financial "starvation" of the League of Nations, prompted

\textsuperscript{292} The United States has not alleged that the UN entities involved, such as the Committee on the Exercise of the Inalienable Rights of the Palestinian People, is itself involved in terrorist activities. Indeed, in a recent Federal case, the United States conceded that it had no evidence that the PLO Mission to the UN had engaged in any covert actions in furtherance of terrorism. U.S. v. Palestine Liberation Organization, 695 F.Supp. 1458, 1470 (S.D.N.Y. 1988). Presumably its argument would be that UN assistance to this Committee frees up other monies in the PLO's treasury which can then be used for terrorist activities. Under this rationale, U.S. bilateral humanitarian assistance to certain countries, such as Iran during the 1990 earthquake, would also be illegal since it frees up Iranian government funds which might be used for terrorist acts. Compare U.S. arguments in UNRWA Hearing, Mar. 12, 1986, at 47.

\textsuperscript{293} It is difficult to make a principled case that the Charter sanctions only certain types of information activities in order to promote the self-determination of peoples. From one perspective, the United States, for its part, is similarly engaged in "censorship" of ideas; to many UN observers it is attempting, through the denial of these funds, to censor an idea: self-determination for a separate Palestinian State.

\textsuperscript{294} Compare Statement by Kishore Mahbubani, Permanent Representative of Singapore to the United Nations, who argues that if the "United Nations were indeed to become totally responsive to American or Soviet pressures, it would become a pointless institution." Mahbubani, \textit{supra} note 283, at 114.

\textsuperscript{295} As Jenks has stated, "A more adequate and more secure income for such bodies is one of the \textit{sine qua non} of more effective international organisation." Jenks, \textit{supra} note 39, at 130.
by lack of political support, helped promote the decline of that organization. On the eve of the creation of the United Nations, C. Wilfred Jenks, the British Legal Adviser of the International Labour Office ("ILO"), addressed these concerns in a speech before the Grotius Society in 1942. Jenks recommended putting the financial affairs of the new world organization on a sounder, more legal, less politicized, footing than the League. He argued that unless international organizations could rely on a sound method to collect assessments, they would remain a "precarious experiment."

Apart from suggesting alternate sources of revenue independent of members' contributions, Jenks' proposed general guidelines which were later reflected in the Charter: (1) that financing be strictly multinational and that the institution not be "solely or predominantly" beholden to one State; (2) that contributions be "in the fullest sense a legal obligation" and not ex gratia; (3) that some attempt be made to enforce obligations, since the League experience demonstrated members' tendency to regard failure to pay "as substantially less dishonorable than failure to pay a debt"; (4) that there be an explicit obligation by members to contribute to the budget as determined by a "majority vote," since effective operation "cannot be satisfactorily transacted on the basis of the principle of unanimity;" (5) that the obligation to pay assessments be established by a fixed date certain and (6) that there should be full publicity regarding all delayed pay-

296. Id. at 91. Budgetary difficulties in the national economies of major contributors, along with political differences with the organization, led to the League's perennial budgetary crises. The uncertainty of financial resources became a "leading preoccupation" of senior League officials, to the detriment of the resolution of major policy concerns. Id. at 91-92. Some of those who have supported U.S. withholdings of UN assessments over the years have also sought to financially starve the UN. See, e.g., 98 CONG. REC. 3,514 (1952) (Statement of Representative Wood proposing that Congress can "starve [the UN] to death" through its "control of the purse strings").


298. Jenks suggested as possible alternative sources of income, for example, profits from operations of international banks, airways, canals, or other "international controlled monopolies administered as world public services," fees for services rendered to member States, loans by public subscription, and contributions from non-governmental agencies. Id. at 92-94. Some of these are now authorized under the UN's Financial Regulations. See, e.g., Regulation 107.1-109.5, FINANCIAL REGULATIONS AND RULES OF THE UNITED NATIONS, supra note 16.


300. Id. at 100.

301. Id. at 100-01.

302. Id. at 101. Noting that the unanimity approach ultimately taken by the League "made it possible for various delegations to threaten at different times to challenge the convention unless they received satisfaction on matters in which they were interested," Jenks concluded that it was "intolerable that the existence of a liberum veto upon the budget, without the adoption of which no international institution can operate at all, should enable any one of the participating countries to veto work in which it has no interest or of which it disapproves." Id. at 101-02.

303. Id. at 104.
ments and arrearages. Jenks argued that it was essential that national governments not be able to pick and choose among the activities of an international organization; that the members of the UN should be entitled to dispose freely of their funds in the manner determined by the international authorities responsible for the formulation of their policy. The propriety of remitting funds to any particular place, or using them for any particular purpose, at any particular time, is one which only the appropriate authorities are in a position to determine. It should not be subject to question by national officials administering embargo or freezing orders framed without any reference to the position or requirements of international institutions. The practical effect of regarding national embargo or freezing orders as applicable is to make a decision taken on behalf of a number of governments subject to review by a specialised and sometimes subordinate official of one of them — a quite intolerable position completely inconsistent with the development of any effective international organisation.

Because he believed adverse publicity to be a necessary but not sufficient tool to secure payment, Jenks also proposed that any arrears not paid by a date certain should be charged interest subject to an established grace period. More boldly, he also argued for procedures to permit the recovery of sums due by legal process: (1) that default by one member in payment should constitute a legal injury to other States entitling them to redress before the then Permanent Court of Justice; (2) that the treasurer of any international institution be entitled to take proceedings in the courts of any State for the attachment of assets of the defaulting government, notwithstanding sovereign immunity; (3) that assets held on behalf of defaulting governments by international banks be made subject to attachment at the instance of the treasurer; (4) that international institutions be entitled to set off sums due to them by States in respect of contributions as against any sums payable to such States and (5) that assessments due international organizations be given a preferential claim upon the resources of a State. Jenks argued that the very existence of such rights would make it unnecessary to exercise them.

As Singer's history of the negotiation of the financial provisions of the Charter suggests, the UN framers were acutely aware of the

304. Id. at 108-09.
305. Id. at 121.
306. Id. at 106-32.
307. Id. at 114. Jenks rejected some sanctions for failure to pay, such as penalizing nationals from defaulting states or expulsion from membership, as unwise. The first, he argued, punished independent civil servants instead of the defaulting member States; the second undermined universality of membership. Id. at 109, 111.
League's financial troubles, and through the Charter rectified "three of the pitfalls which had so hamstrung the financial activities of the League: divided fiscal authority, an inflexible basis of apportionment and a requirement of unanimity on budgetary matters." In doing so, they followed, consciously or not, much of Jenks' advice. Articles 17 and 18 established that the General Assembly alone would set the budget, that in doing so it would act by a two-thirds vote of the full membership acting without weighted voting and that the Assembly would determine the exact basis for apportionment which, by not being specified, was left to be flexibly determined and subject to change over time. Article 19 established a loss of vote sanction, which, though defective, at least reconfirmed that the duty to pay was not ex gratia.

While the procedural preconditions to withholding proposed in Part II(C) protect the Charter's payment scheme, they are not self-enforcing: the UN must itself enforce these preconditions and "provide itself with the means of meeting its international obligations." The UN Secretariat has yet to regard the duty to pay assessments as truly a legal obligation under international law. The UN has wrongly assumed that loss of vote in the General Assembly is the only permissible sanction for failure to pay. But the notoriously ineffective article 19 loss of vote sanction is not an exclusive remedy, even though it is the only penalty specifically mentioned in the Charter. As Zoller

308. J.D. SINGER, supra note 15, at 8. For a history of the negotiations leading to article 17, see id. at 1-8. See also Fitzmaurice's separate opinion in the Expenses Case, 1962 I.C.J. 151, 209 n.8 (Fitzmaurice, J., separate opinion); L.M. GOODRICH & E. HAMBRO, supra note 58, at 183.

309. In leaving the rules of apportionment for flexible determination, the drafters followed League precedents. Id. at 184. The drafters of article 17 recognized the importance of the power being conferred on the General Assembly since "[t]he power to approve the budget carries with it, of course, the important power of reviewing the work of the Organization and of controlling its activities." Id. at 183.

310. As was vigorously argued by the United States during the 1962 financial crisis, this was confirmed by the "mandatory" nature of the loss of vote sanction since article 19 provides that defaulting states "shall" have no vote but giving the General Assembly discretion ("may nevertheless permit") not to apply the sanction if failure to pay "is due to conditions beyond the control of the member," U.N. CHARTER art. 19; see Office of the Legal Advisor, U.S. Department of State, ARTICLE 19 OF THE CHARTER OF THE UNITED NATIONS: MEMORANDUM OF LAW, 58 AM. J. INT'L L. 753 (1964) quoted in F. KIRGIS, supra note 88, at 493-94; see also 19 U.N. GAOR Annex 21 at 86-87, U.N. Doc. A/5916/Add.1 (1965) (statement by Arthur Goldberg, U.S. Representative to the UN). As is suggested by the language of article 19, the discretion not to apply the loss of vote sanction was meant to be applied in force majeure conditions, such as, according to Goodrich and Hambro, "natural disasters such as earthquakes or great floods, revolutions or economic depressions." L.M. GOODRICH & E. HAMBRO, supra note 58. But see supra note 113 (on inadequacy of article 19 and refusal to apply it in 1962).

311. Eagleton, supra note 143, at 402. This is also true to the extent that failure to have recourse to available remedies may be deemed acquiescence. Compare Kirgis, Article 60, supra note 102, at 558 (suggesting that the failure to react may set a precedent).

312. See supra note 113 and accompanying text.
herself acknowledges, article 19 does not constitute a "self-contained regime" since it is not "entirely efficacious." Other remedies, such as those proposed by Jenks, remain available and are arguably compelled by functional necessity.

Many of those remedies involve treating arrearages to the organization like legally owing commercial debts. While a thorough analysis of the possibility of such remedies, including examination of possibilities within the national judicial systems of all UN members, is outside the scope of this article, such remedies are now, given other developments in international law, arguably within reach without Charter revision. It is now open to the UN to seek, under international law, arrearages owed the organization under article 17 in domestic courts of member States. Such enforcement actions can be brought either


314. See supra note 306 and accompanying text. Although the San Francisco conference rejected any harsher stipulation than that contained in article 19, other alternatives were not seriously considered. J.D. Singer, supra note 15, at 140. They can therefore hardly be said to be precluded, particularly considering the care given to providing for flexibility in the determination of apportionments. In fact, the Executive Committee of the Preparatory Commission had recommended that the Committee on Contributions should "consider the question of making arrears a commercial debt." Id. Thus, Singer, writing in 1960, assumed that the UN could invoke other penalties for failure to make timely payments. Id. at 140 n.2.

315. International legal developments in 1960 had not advanced to the point where, for example, States could envision the possibility of securing international human rights through actions in local courts. This possibly explains Singer's pessimistic conclusion at that time that Jenks' bold suggestions were "unworkable" under the present Charter. Id. at 140 n.2. On the contrary, given developments in both the political and legal arena, some of these remedies may now arguably fall within the Secretary-General's powers as "chief administrative officer" under article 96. Nonetheless, for political reasons, the Secretary General would doubtless want to seek the prior approval of the General Assembly or, at least, the Administrative and Budgetary (Fifth) Committee, prior to taking some of the bolder moves suggested here.

316. That the UN has the legal capacity to bring such claims is scarcely open to doubt 40 years after the Reparations Case. See supra notes 140-48 and accompanying text. A claim for assessments due, no less than the claim at issue in the Reparations Case, would be "an international claim against one of its members which has caused injury to it by a breach of its international obligations towards it." Reparations Case, 1949 I.C.J. 174, 180 (Advisory Opinion of Apr. 11). It too would be "necessitated by the discharge of [the UN's] functions," id., and would arise under customary international law. See, e.g., Eagleton, supra note 143, at 405; Rama-Montaldo, supra note 150, at 117-19. As the United States told the Court in 1949, it is an "established principle of international law that any legal entity having legal capacity . . . may present claims against the government of the responsible State for reparation for losses or damages suffered as a consequence of acts deemed violative of principles of international law." Reparations Case, 1949 I.C.J. Pleadings 20. This grant of power is implicit in the Secretariat's duty to collect assessments. Compare 3 G. Schwarzenberger, supra note 120, at 60. The U.S. Department of State itself came to this conclusion, applying the "canon of effectiveness" to article 17 in light of the institution's needs and the drafting history of the Charter. Thus, the U.S. State Department Legal Adviser concludes that the General Assembly has "those implied powers necessary for the performance of its financial responsibilities, including the borrowing of funds and the issuing of bonds as evidence of the debt." U.S. Department of State, Supplement to Joint Committee Print of February 6, 1962: Information on the Operations and Financing of the United Nations 24-25 (1962) (Opinion of the Legal Advisor of the Department of
in the national courts of defaulting States or in other members’ national courts, provided the defaulting State has a presence, and preferably attachable assets, in that second state. Such cases are increasingly common, particularly in connection with the protection of human rights, but the underlying approach — use of a national court to enforce an international norm directly applicable within a domestic legal system — has yet to be attempted in the context of the legal duty to pay under the Charter. Given the preeminence of the Charter under international law, it is arguable that the article 17 duty approaches a norm of *jus cogens* which every member’s national court has a duty to enforce. Such a cause of action before a national court which directly applies international law as part of national law might be enforceable despite obstacles such as sovereign immunity. (Although such a cause of action, even assuming the UN were to get over jurisdictional hurdles, would likely encounter other insurmountable hurdles in a U.S. court such as the political question and self-executing treaty doctrines, such uniquely American judicially-created restraints on the enforcement of international law may not exist in other national court systems.)

Any such action need not be initially directed

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318. At a minimum, it would appear to be a duty under customary international law. See supra note 210 and accompanying text.

319. Although some federal U.S. courts have found jurisdiction to entertain suits by the UN or its agencies directly under the Charter or under 28 USC § 1331 (federal question), at least one court has questioned whether federal jurisdiction exists in the case of another international organization. Compare Balfour, Guthrie & Co. v. United States, 90 F.Supp. 831, 832 (N.D. Cal. 1950) (finding article 104 self-executing); International Refugee Org. v. Republic S.S. Co., 189 F.2d 858, 861 (4th Cir. 1951) (upholding federal question jurisdiction on the premise that the organization was created by a treaty); and Broadbent v. OAS, 628 F.2d 27, 30 (D.C. Cir. 1980) (refusing to rule on “difficult” jurisdictional issue). Federal question jurisdiction would presumably be easier if the UN were challenging a federal law precluding payment (but the later in time rule would vitiate such a suit) or were suing the federal government. State courts in the United States would always be available although they would scarcely be an appropriate forum. Under international law, exhaustion of local remedies would apparently not be required. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 302 comment k (1987). But see U.S. Letter in Reparations Case stating that there “may exist certain local remedies in the tribunals of a respondent state which it may be necessary to exhaust to obtain reparation.” Reparations Case, 1949 I.C.J. Pleadings 21.

at the primary debtor, the United States, but could be directed at any of a number of other debtors. Among the criteria for choosing the debtor, as well as forum State, may be whether attachable assets in the forum country exist under the doctrine of restrictive immunity, as well as attitudes in the forum State to implied waiver for sovereign immunity. But the likelihood of actual success in actually attaching government assets, need not deter an action primarily intended to mobilize shame against all defaulting States.\textsuperscript{321} As Jenks noted, it is not necessary that these kinds of confrontational remedies actually succeed — that the national court action be successful and assets formally attached — to achieve the desired effect.\textsuperscript{322}

UN enforcement action may parallel and assist the enforcement of the procedural preconditions on withholding which are urged here. A UN threat to take the matter to a national court for enforcement may provide the proper incentive for a State either to pay its debts or present a good faith \textit{prima facie} case of \textit{ultra vires} action for judicial resolution. If the threat does not work and a member State insists on withholding without making the required \textit{prima facie} case, the UN might need to take enforcement action in a national court in order to attempt to enforce its legal rights to payment.\textsuperscript{323}

\textsuperscript{(same). On the need for domestic authorization and appropriations legislative authority, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 comment i (1987) (stating traditional rule that treaty provisions for payment of money require Congressional appropriation and is not "self-executing"). \textit{But see id.}, Reporter's Note 6 (suggesting that for purposes of Article VI of the U.S. Constitution, "it might have been possible to conclude that the appropriation of funds "by law" has been made through an international agreement"). \textit{See also} Paust, Self-Executing Treaties, 82 AM. J. INT'L L. 760, 778 (1988) (contending that agreements providing for appropriation are not inherently non-self-executing). Such a cause of action would also raise difficult issues concerning the applicability of the self-executing treaty doctrine since the plaintiff, the UN, would be the direct beneficiary of a treaty right. Nonetheless, these hurdles are such that it is possible such a lawsuit would, in a U.S. federal court, be barred by Rule 11 of the Rules of Civil Procedure barring frivolous suits. Comparable legal bars to such a suit may not exist in other national courts, however, and particularly within the context of more monist approaches to international law, such suits may not be as easily dismissed.\textsuperscript{321} This has certainly not deterred transnational public law litigation in the human rights area. Indeed, it is quite possible that such lawsuits may present governments with an opportunity, at the diplomatic level, to pressure States on matters which were the subject of the suit even if damage awards are not ultimately recovered.\textsuperscript{322} Jenks, \textit{supra} note 39, at 114. For a recent reexamination of the possibility of enforcing ICJ judgments through actions in domestic courts, notwithstanding anticipated sovereign immunity defenses, see O'Connell, \textit{The Prospect of Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States}, 30 VA. J. INT'L L. 891, 913-927 (1990).

\textsuperscript{322} That the UN may attempt to bring an action to enforce a legal right of payment does not mean, of course, that the defaulting member state cannot defend such an action notwithstanding an adverse Advisory Opinion by the ICJ. The national court would be free to ignore the Advisory Opinion since it is not binding under the Charter. In such cases, were the UN to prevail, the national court would be enforcing the Charter or customary international law duty to pay, not the Advisory Opinion itself. Such national court enforcement actions would no more violate Charter norms against "binding" Advisory Opinions than any of a number of treaties
Alternatively, or at the same time as local court actions, the UN could deprive the member State of the benefits of withholding through a variety of mechanisms. Under its financial regulations or through separate agreements with affiliated agencies, the UN could attempt to secure that voluntary payments paid, for example, to the UN Development Programme be applied first to assessed arrearages legally due. This would remove one paramount option in the à la carte menu, although this might be expected to result in a legal challenge, ultimate vindication in favor of the UN, based on a functional necessity argument that the central UN organization first needs to secure its own financial viability, cannot be underestimated. Less radical but potentially effective, at least for the mobilization of shame, would be internal UN regulations to permit the assessment of user fees for participation in UN Conferences, access to UN documents, or other UN services for defaulting States. The UN could impose a moratorium on special UN conferences or other events within the borders of a defaulting State. In cases where the UN owes money for other reasons to States in default, the UN could justifiably claim, under international law, the right to set off sums due.

Most defensible of all would be new regulations (or a modification to existing financial regulations) to permit the collection of interest for any payments of assessed contributions not paid on January 1st of the current fiscal year or within 30 days after notification of assessments. Notwithstanding which give such opinions "binding" effect between the treaty parties or members' enforcement actions which the ICJ welcomed in the Namibia Case (see supra notes 136 and 139 and accompanying text). The existence of article 19 as a remedy is also no bar to such enforcement action. Unpaid assessments are no less legally owing even if they fall short of the two years' arrears which triggers article 19. Were such enforcement actions to be taken, the article 19 sanction could be seen as what it actually was intended to be, not an exclusive remedy but a remedy in extremis to be applied to scofflaws.

324. See supra note 16.

325. Such agreements, at least with regard to UN specialized agencies, would appear to be within the General Assembly's powers under Charter articles 17 and 57.

326. A recent precedent for adopting such regulations, pursuant to the UN's power to "make regulations, operative in the headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full exercise of its functions" (Section 8, Headquarters Agreement) is Regulation No. 4, adopted in G.A. Res. 41/210, 41 U.N. GAOR Supp. (No. 53) 250, U.N. Doc. A/C.5/Res/41/210 (1986), which limits tort damages against the organization in certain instances. Szasz, The United Nations Legislates to Limit Its Liability, 81 AM. J. INT'L L. 739 (1987). In that instance (as would be in the case at hand) the UN was exercising its own regulatory powers in order to prevent a threat to its economic viability. The Secretary-General is required under a 1950 General Assembly resolution to secure General Assembly approval of any such regulations but is empowered to give immediate effect to regulations when he considers this necessary. Id. at 741. Existing financial regulations are also premised on the organization's rights to acquire the funds necessary for its survival. See, e.g., Rule 7.2, 107.6, FINANCIAL REGULATIONS AND RULES OF THE UNITED NATIONS, supra note 16 (granting authority for accepting ex gratia payments).

327. See, e.g., Jenks' suggestions to this effect. Jenks, supra note 39, at 115.
the United States’ present policy of delayed payments, payments of assessed contributions remain due on that date and international law clearly requires the payment of interest for debts legally due.\textsuperscript{328} If the financial crisis were ever to result in a serious threat to peacekeeping operations, the Secretary General could call the attention of the Security Council to the situation on the grounds that failure to pay, no less than more traditional actions threatening use of force, constitutes a “threat to the peace.”\textsuperscript{329} As with many of these actions, the potential effect of such action may be, given the veto in the Security Council, “merely political,” but like actions by the Human Rights Commission or by the ILO, they may be no less effective because they “merely” mobilize shame. Finally, the Secretariat could raise in the Fifth Committee’s Committee of Assessments the possibility either of adjusting the capacity to pay formula generally or the particular percentage assessment for any particular debtor State. Although historically the U.S. assessment has only been lowered at the request of the United States, nothing legally compels the UN to accept the United States’ “offer” of twenty-five percent, especially when payment of the full twenty-five percent is not timely and the offer to pay twenty-five percent comes laden, as it has lately been, with threats to “control” the organization.\textsuperscript{330} Although at present the UN’s membership does not

\textsuperscript{328} See Regulation 5-4, \textit{Financial Regulations and Rules of the United Nations}, supra note 16. Even at the time Jenks was writing, in 1942, international law clearly permitted interest for debts due. \textit{See} Jenks, supra note 39, at 107; J.H. \textit{Ralston, The Law and Procedure of International Tribunals} 127-35 (1925). Although the League of Nations at times considered and rejected charging interest on arrearages, Jenks concluded that the League Assembly retained authority to implement regulations requiring the payment of interest on delayed contributions. \textit{Id.} at 108. The UN’s General Assembly is similarly given flexibility to determine the level of apportionments and would appear to have the same power. Certainly international law claims practice since 1942 has only reaffirmed the appropriateness of awarding interest. \textit{See}, \textit{e.g.}, 8 M. \textit{Whiteman, supra} note 10, at 1186-99; R. Lillich, \textit{Interest in the Law of International Claims}, in \textit{Essays in Honour of Voitto Saario} 51 (1983); McCollugh and Co. \textit{v. The Ministry of Post, Telegraph and Telephone, 11 Iran-U.S. C.T.R.} 3 (1986) (one of many Tribunal cases requiring interest under international law). The Iran-U.S. Claims Tribunal has generally awarded a “fair rate” of 10-12\% interest. \textit{See Memorial of United States at 163 n.52} (May 15, 1987), Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. \textit{v. Italy}), 1987 I.C.J. 185 (Order of Nov. 17). Entitlement to interest for failure to perform an obligation to pay a fixed sum is indeed so pervasive as a contractual remedy, \textit{see}, \textit{e.g.}, G. Treitel, \textit{Remedies for Breach of Contract}, in \textit{International Encyclopedia of Comparative Law} 88-89 (1976), that it would appear to be a general principle of law, inherent to the concept of just compensation.

\textsuperscript{329} Compare the statement of the Secretary-General in 1986 that the financial threat constitutes a “threat to viability and the very integrity of the Organization itself” sufficient to invoke his power, derived from article 99, to bring the matter to the attention of the General Assembly as the “main organ competent to take action.” U.N. Doc. A/40/PV. 124 at 3.

\textsuperscript{330} There have been some recent suggestions at the UN to this effect. \textit{See}, \textit{e.g.}, \textit{Hearings on H.R. 1487, supra note} 31, at 322. Since the United States’ present 25\% assessment already represents less than the amount the United States would owe under the existing “capacity to pay” formula, lowering the assessment further would not be a new departure from the capacity to pay formula. It would, of course, be contingent on other members’ willingness to pick up the difference.
appear inclined to change the relative assessments of members, that attitude might eventually change, especially in light of ideological realignments.

CONCLUSION

As U.S. withholdings of its UN assessments in the 1980s demonstrate, such withholdings threaten to become a right of first, not last, resort. Yet, unilateral “ultra vires” determinations are, as Osieke argues, “tantamount to making the members judges in their own causes — a situation that would be similar to the much-criticized principle of compétence de la compétence of international organizations.”

Under the prevailing view of the duty to pay, the UN is entitled to ask the World Court for an advisory opinion on the legality of the challenged action, but members need not seek such a judicial determination prior to taking action or articulate a prima facie case for invalid UN action. The result — unrestrained unilateral withholding — vitiates possible differences between the effects of procedurally defective compared to substantively defective acts, undermines the binding effect of commitments between the organization and third parties and renders the organization’s acts void ab initio, thereby undermining the concept of binding General Assembly action and the principle of collective financial responsibility. The argument against unilateral withholding is not merely that it gives major contributors disproportionate power.

Giving this power to members, whether major contributors or not, is inconsistent with the “legal order of the Organization.”

The theory that unilateral withholdings of UN assessed contributions in response to nothing more than alleged ultra vires actions are legal reflects political considerations, not the law of the Charter.

Procedural preconditions on invocation of the ultra vires doctrine, requiring statement of a prima facie case and willingness to submit the issue to judicial or arbitral determination, are ‘necessitated by the

331. Osieke, Legal Validity, supra note 117, at 255. Judge Fitzmaurice has defended the general legal principle of nemo debet esse judex in propria causa: [W]here the matter turns, and turns exclusively, on consideration of a legal character, a political organ, even if its it is competent to take any resulting action, is not itself competent to make the necessary legal determinations on which the justification for such action must rest. This can only be done by a legal organ competent to make such determinations.

Expenses Case, 1962 I.C.J. 151, 299 (Fitzmaurice, J., separate opinion), quoted in Osieke, Legal Validity, supra note 117, at 241. As Osieke notes, neither commentators nor the Court majority in the Expenses Case have accepted this proposition. Id. The Court majority found that each UN organ “must, in the first place at least, determine its own jurisdiction.” Expenses Case, 1962 I.C.J. at 168 (Advisory Opinion of July 20).


333. Compare Zoller, supra note 12, at 632.
needs' of the organization. Such preconditions also protect the rights of member States. Institutional effectiveness does not permit a State merely to cease payments and do nothing; it likewise suggests that the UN is free to do something other than lurch along like the League of Nations from one budgetary crisis to another.

Absent attempts by the UN to go beyond the strait jacket of the article 19 loss of vote sanction and make other attempts to enforce the duty to pay, there is no incentive on members to forego unilateral withholding. The UN may need to pursue remedies through internal mechanisms or, most boldly, through enforcement actions in national courts either to encourage states to present a *prima facie* case for third party consideration or in order to mobilize shame against States that withhold despite a third party arbitral or judicial opinion rejecting claims that the UN has acted *ultra vires*. Despite the position of the United States, developments in international law, as well as political conditions in the world generally, may now be conducive to greater compliance with the legal obligation to pay UN assessments.\(^3^3\)\(^4\) If member States and the UN were to take these steps, the *ultra vires* doctrine, the product of exorbitant academic attention, would become the exception it was always meant to be instead of the rule it now threatens to become.

\(^3^3\)\(^4\) Although the UN may have missed an opportunity to include as part of its recent adoption of a new consensus based budgetary procedure more effective mechanisms for the collection of arrears, the opportunity may still exist, especially given the world's recent reliance on UN mechanisms to keep the peace as well as under Chapter VII of the Charter. Certainly there may yet be room for a political agreement between the United States and the UN wherein the UN agrees to forgive some of the accrued arrearages in exchange for agreement to some of the concrete remedies suggested here, such as payment of interest where future payments are delayed.