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THE "CORPORATE WILL" OF THE UNITED NATIONS AND THE RIGHTS OF THE MINORITY

By Elisabeth Zoller*

In contrast to the withholding practices of certain member states in respect of part of their assessed contributions to the budget of the United Nations, United States withholding began rather recently. U.S. withholding started in 1980 and, until 1985, applied only to specific programs and decisions.¹ Previously, in 1978, the Legal Adviser of the Department of State had concluded in a memorandum of law that Article 17 of the UN Charter "impose[s] a legal obligation on members to pay the amount assessed to them by the General Assembly."² Referring to the U.S. written statement submitted to the International Court of Justice in *Certain Expenses of the United Nations*,³ he added: "Accordingly, the General Assembly's adoption and apportionment of the Organization's expenses create a binding international legal obligation on the part of State Members to pay their assessed shares."⁴ In his view, there was apparently no possible exception to this obligation.

These legal qualms have seemingly disappeared in the 1980s, as the United States has embraced, on various legal grounds, a withholding policy that culminated in 1985 with the Kassebaum-Solomon amendment.⁵ In 1982 President Reagan announced that the United States would not pay its assessed share of the expenses of the Law of the Sea Preparatory Commission.⁶ In 1983 Congress mandated a 25 percent withholding of the U.S. assessed contributions for programs involving the Committee on the Exercise of the Inalienable Rights of the Palestinian People and the Special Unit on Palestinian Rights, and for projects that would benefit the Palestine Liberation Organization or the South West Africa People's Organization.⁷ In 1985, a similar 25 percent withholding was enacted regarding the Second Decade

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¹ See C.-A. Fleischhauer, paper presented at the meeting held by the American Society of International Law on the UN financial crisis, *infra* note 15, para. 3 (June 12, 1986).

² Hansell, Memorandum of Aug. 7, 1978, 1979 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW [hereinafter 1979 U.S. DIGEST] 225, 226.

³ U.S. Written Statement, 1962 ICJ Pleadings (Certain Expenses of the United Nations) 180, 193 (February 1962).

⁴ Hansell, *supra* note 2, at 226 (quoting U.S. Statement, *id.*).

⁵ 22 U.S.C. §287e note (Supp. III 1985).

⁶ Statement of President Ronald W. Reagan, Dec. 30, 1982, [1982] 2 PUB. PAPERS 1652, reprinted in U.S. Mission to the United Nations, Press Release No. USUN 1-(85), Jan. 3, 1983. See Note, *United Nations Financing of the Law of the Sea Preparatory Commission: May the United States Withhold Payment?*, 6 FORDHAM INT'L L.J. 472, 473 nn.5 and 6 (1985).

⁷ Department of State Authorization Act, Fiscal Years 1984 and 1985, §114(a), Pub. L. No. 98-164, 97 Stat. 1017, 1020 (approved Nov. 22, 1983) (codified at 22 U.S.C. §287e note (Supp. III 1985)).

to Combat Racism and Racial Discrimination, the possible implementation of General Assembly Resolution "33/79" (*sic*)⁸ and the construction of the headquarters of the Economic Commission for Africa in Addis Ababa, Ethiopia.⁹ Finally, also in 1985, Congress adopted the Kassebaum-Solomon amendment,¹⁰ which cuts by 20 percent for 1987 and following years payment by the United States of its assessed contribution to the regular budget of the United Nations¹¹ until the Organization and its specialized agencies

⁸ Such is the reference in *Statutes at Large*, *infra* note 9, and in the *United States Code* as well (22 U.S.C. §287e note). Presumably, Congress meant Resolution 3379 (XXX) of Nov. 10, 1975, determining "that zionism is a form of racism and racial discrimination," 30 UN GAOR Supp. (No. 34) at 83, 84, UN Doc. A/10034 (1975), and not Resolution 33/79 on Revision of the lists of States eligible for membership in the Industrial Development Board, 33 UN GAOR Supp. (No. 45) at 83, UN Doc. A/33/45 (1978).

⁹ Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, §144, Pub. L. No. 99-93, 99 Stat. 405, 424-25 (approved Aug. 16, 1985) (codified at 22 U.S.C. §287e note (Supp. III 1985)).

¹⁰ *Id.* §143, 99 Stat. at 424 (codified at 22 U.S.C. §287e note (Supp. III 1985)). It took 2 years for the Kassebaum initiative to become law. Its original version (*see 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. 85 (1983) [hereinafter *1983 House Hearings*]) provided that U.S. assessed payments to the United Nations, UNESCO, the WHO, the FAO and the ILO for 1984

shall not exceed its assessed payments to each such organization for the calendar year 1980. Such payments to each such organization for the calendar years 1985, 1986, and 1987 shall be no more than 90 per centum, 80 per centum, and 70 per centum, respectively, of the amount of the assessments paid to each such organization for the calendar year 1980.

The original version further provided that payments to those organizations for the calendar years 1985, 1986, and 1987 would be withheld unless the specified reductions were "accepted by the respective organization as payment in full of the United States assessment towards the financial support of such organization."

In 1985 congressional political support for the United Nations foundered. On May 8, Congressman Jerry Solomon proposed a floor amendment aimed at cutting at least 15% of the U.S. assessment for FY 1987. *See* 131 CONG. REC. H2995 (daily ed. May 8, 1985). The amendment was agreed to without a vote (*id.* at H2997), "with only the briefest reference as to the legal implications," as Margaret E. Galey rightly noted (*see* Galey, Statement of June 12, 1986, in *Financial Crisis at the United Nations*, *infra* note 15). On the Senate side, Senator Kassebaum offered a new version of her initiative on June 7, 1985 that tied U.S. projected withholding to reform of budget procedures. 131 CONG. REC. S7793 (daily ed. June 7, 1985). On a roll-call vote, the amendment was adopted by 71 to 13, with 16 not voting. *Id.* at S7796. The issue of U.S. treaty commitments was raised but not solved, and Senator Pell summarized the problem well when he said:

This is the fourth time that such a floor amendment has been introduced reducing funding for the United Nations and affiliated organizations. I think many of us share the concerns, and are very upset and angered with the way we get kicked around in the United Nations and the problems we have there. But this is not the way to seek to resolve it in my view. I think it would have serious foreign policy implications. It is a matter that never has been considered in any depth by the Foreign Relations Committee, and it should.

Id. at S7794-95.

¹¹ Technically, the amendment limits U.S. contributions to 20% of the budgets of the United Nations and its specialized agencies; coincidentally, this amounts to a 20% cut in the UN regular budget.

grant to each member state voting rights proportionate to their contributions to their respective budgets. The impact of the Kassebaum amendment on the finances of the United Nations is considerable not only because the United States contributes 25 percent of the total UN budget, but also because of the additional impact of the Gramm-Rudman-Hollings Act,¹² which for fiscal year 1986 mandated a 4.3 percent sequestration of almost all federal appropriations, including those for international organizations. Moreover, the Sundquist amendment, which was also adopted in 1985,¹³ imposes a reduction in payment of the U.S. assessment corresponding to the U.S. share of the salaries of UN employees who are compelled to return a portion of their wages to their governments.

It is certainly not the first time that a member state of the United Nations has withheld part of its contribution to the budget.¹⁴ However, previous withholdings were mostly applied to special activities (viz., peacekeeping operations). The Kassebaum amendment marks the first time that a member state has withheld such a massive portion of its assessed contribution across the board (with the exception of South Africa, which has not paid its contribution since it was expelled from the General Assembly in 1974). As a result, the U.S. withholdings have been the subject of extensive legal analysis, especially in the larger context of the overall financial obligations of member states.¹⁵ Despite their varying views, foreign-policy makers, UN officials and international scholars do concur in recognizing that in withholding its as-

¹² Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified principally at 2 U.S.C. §901 (Supp. III 1985)), popularly known as the "Gramm-Rudman-Hollings Act," which is intended to eliminate the federal budget deficit by setting a maximum deficit amount for federal spending for each of the fiscal years 1986 through 1991 (progressively reducing the deficit amount to zero in 1991). The ruling of the Supreme Court in *Bowsher v. Synar*, 106 S.Ct. 318 (1986), had no impact on the appropriations for international organizations, which under the legislation are subject to a 4.3% sequestration for FY 1986. "The United Nations is not immune from these austerities." See *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1987: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 99th Cong., 2d Sess. 953 (1986) (Statement of Alan L. Keyes, Assistant Secretary of State for International Organization Affairs). See also *Impact of Gramm-Rudman-Hollings on U.S. Contributions to International Organizations: Hearing Before the Subcomm. on Human Rights and International Organizations and the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 49-57 (1986).

¹³ Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, §151, Pub. L. No. 99-93, 99 Stat. 405, 428 (approved Aug. 16, 1985) (codified at 22 U.S.C. §287e note (Supp. III 1985)).

¹⁴ See H. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* 494-95, §883 (1980).

¹⁵ In 1986 the American Society of International Law sponsored several meetings on the financial crisis at the United Nations. The proceedings are briefly summarized in *ASIL NEWSLETTER*, May-July 1986, at 1-3, and reprinted in *Financial Crisis at the United Nations: International Law and United States Withholding of Payments to International Organizations* (mimeo 1986). See also *HERITAGE FOUNDATION, BACKGROUNDER*, No. 536, Sept. 26, 1986 (on its United Nations Assessment Project Study, "The Legal Case for Cutting U.S. Funding for the United Nations"); Nelson, *International Law and U.S. Withholding of Payments to International Organizations*, 80 *AJIL* 973 (1986). The author would like to thank Paul C. Szasz for the outline of Legal Aspects of U.S. Non-Payment of Assessed Contributions to the UN, a talk delivered to Prof. George Sherry's seminar (Oct. 7, 1986).

sessed contribution to the regular budget of the United Nations, the United States is not complying with what would ordinarily be an international obligation. The differences of opinion focus on whether there are grounds that vitiate the obligation. This "unsettled issue," as Oscar Schachter has observed, "is still the question that was in the forefront of the San Francisco debates in 1945: to what extent will the Member States, especially those with great resources and military strength, be required to comply with the 'corporate will' of the organization as determined by a majority?"¹⁶ The purpose of this essay is to try to shed some light on this issue, which remains a matter of uncertainty¹⁷ and dispute.¹⁸

To some extent, the controversy is rooted in a complex argument over the meaning of the International Court's *Certain Expenses* opinion, which never actually addressed whether withholdings are legitimate responses to alleged illegitimate expenses.¹⁹ The 1962 advisory opinion is unequivocally conclusive on the obligation to contribute to legal expenditures, i.e., expenses of the Organization within the meaning of Article 17, paragraph 2 of the Charter, but rather ambiguous on the obligation to contribute to unlawful expenditures and, in particular, to an assessment to defray the cost of what is asserted to be an *ultra vires* act. At its boldest, the Court merely stated, with regard to an "action . . . by the wrong organ," that "this would not

¹⁶ Schachter, *Legal Problems*, 1963-1964 ANN. REV. UN AFF. 118, 121-22.

¹⁷ As Henry G. Schermers put it: "It is difficult to establish an obligation to contribute to illegal expenditure. It is equally hard to accept that each State may subjectively decide what will constitute illegal expenditure." H. SCHERMERS, *supra* note 14, at 495, §884.

¹⁸ See, e.g., ASIL NEWSLETTER, May-July 1986, at 1-3 (various views expressed at meetings of June 12 and 20). U.S. foreign-policy makers are embarrassed and perhaps confused about the legality of withholdings from the regular UN budget. See statement of Senator Pell, *supra* note 10. Margaret E. Galey hinted that during the course of the past few years, the administration has deliberately let confusion grow in Congress:

In the past the Administration used to come up to the Hill and fight amendments that would violate our legal obligations to the UN. They would work very hard, they would have teams of people up here working to put such amendments down, but we haven't seen that lately. In the last year the Administration has given us no clear signal as to whether they oppose, fundamentally, these amendments.

See Galey, Statement of June 12, 1986, *supra* note 10.

¹⁹ *Certain Expenses of the United Nations* (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151 (Advisory Opinion of July 20) [hereinafter *Certain Expenses*]. The Court clearly framed the scope of the question put to it, as follows:

Although the Court will examine Article 17 in itself and in its relation to the rest of the Charter, it should be noted that at least three separate questions might arise in the interpretation of paragraph 2 of this Article. One question is that of identifying what are "the expenses of the Organization"; a second question might concern apportionment by the General Assembly; while a third question might involve the interpretation of the phrase "shall be borne by the Members". It is the second and third questions which directly involve "the financial obligations of the Members", but it is *only the first question which is posed by the request for the advisory opinion*. The question put to the Court has to do with a moment logically anterior to apportionment, just as a question of apportionment would be anterior to a question of Members' obligation to pay.

Id. at 157-58 (emphasis added).

necessarily mean that the expense incurred [is] not an expense of the Organization."²⁰

There is thus a need to go beyond the 1962 opinion and specifically to examine whether the law of treaties as codified in the 1969 Vienna Convention—which applies to the Charter²¹—does or does not permit withholding of contributions. It is appropriate to begin with a legal definition of “withholding.” Withholding is a refusal to pay. In legal terms, however, withholding is a unilateral suspension of an obligation embodied in a multilateral treaty. Whenever a member state of the United Nations withholds its assessed contribution (in whole or in part) to the regular budget of the Organization, it departs from the principle of collective financial responsibility embodied in Article 17(2) of the Charter: “The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.” A withholding state acts as if there were some reason for it not to comply with the obligation to pay its assessed contribution. Treaty law provides many possibilities for a suspension of a treaty obligation to be legitimate beyond any shadow of a doubt.²² The core of the problem is to discover whether withholding may be one of them.

This methodological starting point will be the unifying thread of this essay. Part I will discuss whether withholding may be justified on the ground of a tolerance progressively developed over the years by the Organization. As no established practice can be proved in that respect, we will address in part II whether withholding is a legitimate response to breaches of the Charter. After reaching a negative conclusion, we will try to demonstrate in part III that withholding cannot even be justified by reference to the theory of fundamental change of circumstances. Finally, in part IV we look beyond the law of treaties and suggest possible ways of construing the alleged absolute obligation to pay so as to protect the rights of the minority against the tyranny of the majority.

I. WITHHOLDING BASED ON TOLERANCE DEVELOPED OVER TIME

The belief that withholding is consistent with the practice of other nations has been generally accepted by foreign-policy makers. The alleged failure of the United Nations to enforce Article 19 of the Charter (loss of voting rights) against withholders is often viewed as having established over the years a tolerance for breaches of Article 17(2). Continuous unpunished refusals to pay are purported to have set, as the U.S. Comptroller contended,

²⁰ *Id.* at 168.

²¹ Article 5 of the Vienna Convention provides: “The present Convention applies to any treaty which is the constituent instrument of an international organization . . . without prejudice to any relevant rules of the organization.” Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), *reprinted* in 63 AJIL 875 (1969), 8 ILM 679 (1969).

²² See E. ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 28–31 (1984) [hereinafter COUNTERMEASURES], and ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION 23–30 (1985).

"a new pattern for the membership, some of whom withhold assessments each year for items to which they object."²³ On October 3, 1983, Ambassador Jeane J. Kirkpatrick reminded congressmen that "30 countries withhold, as a matter of announced policy, portions of their assessed budgets and incur no penalties."²⁴ Two years later, she stated: "Selective withholding is . . . consistent with the practice of other nations."²⁵ The same argument was also made implicitly by Congressman Solomon in defending his amendment before the House:

Over the years at least 30 countries have withheld funds from the United Nations. The list includes most of the countries in the Soviet bloc as well as a number of others, including France, Portugal, Algeria, India, and even Saudi Arabia. . . . [T]he question is: Have any of these countries lost their voting rights? The answer is "No."²⁶

On its face, the argument is appealing. Tolerance of continuous and repeated disregard for a key provision in the enforcement of member states' financial obligations could pave the way to a waiver of these obligations.²⁷ A treaty obligation whose violation is never punished may lose its effectiveness and perhaps fall into desuetude,²⁸ or at least lead to a situation tantamount to a fundamental change of circumstances.²⁹ With respect to the constituent instruments of international organizations, Henry G. Schermers has even expressed the following view:

When a rule has been violated and the organization has tolerated the violation, it may have created the expectation that further similar violations will be tolerated as well. After some time and after many tolerated violations such expectation may become legitimate and the organization will have to tolerate similar violations by other Members unless it can demonstrate why it should not treat all Members equally. In fact the toleration of too many violations may lead to a tacit revision of the constitution.³⁰

As far as Article 19 of the Charter is concerned, Thomas M. Franck has traveled quite far along the same path. He sees the great crisis in the General Assembly, particularly during the 19th session, as strongly suggesting that

²³ U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS: ACTIONS RECOMMENDED TO ALLEVIATE SERIOUS FINANCIAL PROBLEMS FACING UNITED NATIONS 11 (1976) (emphasis added).

²⁴ 1983 House Hearings, *supra* note 10, at 54 (emphasis added).

²⁵ U.S. Policy in the United Nations: Hearings and Markup Before the House Comm. on Foreign Affairs and its Subcomms. on Human Rights and International Organizations, and on International Operations, 99th Cong., 1st Sess. 58 (1985) (emphasis added) [hereinafter 1985 House Hearings].

²⁶ 131 CONG. REC. H2813 (daily ed. May 2, 1985). In fairness, the only reason why these countries have not lost their vote is that their cumulative withholdings have not been sufficient for the Article 19 penalty to be applied.

²⁷ See H. SCHERMERS, *supra* note 14, at 88, §133.

²⁸ See C. DE VISSCHER, LES EFFECTIVITÉS DU DROIT INTERNATIONAL PUBLIC 74 (1967); I C. ROUSSEAU, DROIT INTERNATIONAL PUBLIC 217-18, para. 193 (1970).

²⁹ See Brierly, *Some Considerations on the Obsolescence of Treaties*, 11 GROTIUS SOC'Y TRANSACTIONS 11-20, especially at 15 (1925); and *infra* pt. III.

³⁰ H. SCHERMERS, *supra* note 14, at 88, §133 (footnotes omitted).

"the theoretical 'obligation to pay' died on the floor of the Assembly in 1965."³¹ The thrust of his argument is that financial obligations under the Charter have been so seriously impaired from 1965 on, that the daunting problem arises as to whether "the norm fell into desuetude."³² Although one may hesitate in this case to allude to desuetude since the Vienna Convention did not codify this ground for terminating treaty obligations, the practice of the Organization in the enforcement of Article 19 has certainly called into question the effectiveness of the financial provisions of the Charter. Admittedly controversial, enforcement of Article 19 raises two intertwined problems: (1) have member states won the right not to pay?³³ and (2) has the Organization lost its right to be paid?

The all-too-common belief that practice may have modified the obligation to pay set forth in Article 17(2) of the Charter cannot be justified under present-day international law; a treaty may not be modified by subsequent practice in applying the treaty, even if that practice should establish the agreement of the parties to modify the provisions of the treaty. Provision for such modification was made in the International Law Commission's text of 1966³⁴ but expressly rejected by the Vienna Conference by 53 votes (including that of the United States) to 15, with 26 abstentions.³⁵ Subsequent practice in applying a treaty may only be "taken into account" when interpreting the treaty (Article 31(3)(b) of the Vienna Convention). As a result, the practice of some members regarding their financial obligations far from confers a right on other members not to pay. As a matter of law, to infer the existence of such a right is out of the question, for it would necessitate a modification, i.e., a revision, of the Charter. Interpretation of a treaty is one thing; its revision is another.³⁶ In short, member states are still legally bound to pay their assessed contributions.

The real question is whether a member state is entitled "to take into account" the practice of other members when fulfilling its own financial obligations. Such entitlement is doubtful because subsequent practice may be taken into account only if it establishes "the agreement of the parties" regarding interpretation of the treaty. Common sense compels one to recognize that UN members have never agreed on the exact scope of their financial obligations. True, the so-called Goldberg reservation retained the right for the United States to withhold assessments "if . . . strong and com-

³¹ T. FRANCK, *NATION AGAINST NATION—WHAT HAPPENED TO THE U.N. DREAM AND WHAT THE U.S. CAN DO ABOUT IT* 259 (1985).

³² *Id.*

³³ See, in particular, the cautious, but suggestive, reference made by Thomas M. Franck, *id.* at 86, to the possibility that in 1965 the Soviet Union may have won "an *effective* 'right' not to pay" (emphasis added).

³⁴ Art. 38, Draft articles on the law of treaties adopted by the International Law Commission at its eighteenth session, [1966] 2 Y.B. INT'L L. COMM'N 177, 182, UN Doc. A/CN.4/SER.A/1966/Add.1, reprinted in UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS, DOCUMENTS OF THE CONFERENCE, 7, 55, UN Doc. A/CONF.39/11/Add.2 (1971) [hereinafter VIENNA DOCUMENTS].

³⁵ See VIENNA DOCUMENTS, *supra* note 34, at 158.

³⁶ The distinction was made by the International Court of Justice in Interpretation of Peace Treaties (second phase), 1950 ICJ REP. 221, 229 (Advisory Opinion of July 18).

elling reasons exist for doing so."³⁷ But Ambassador Goldberg never approved the withholdings of other members; he never acquiesced in exceptions to the principle of collective financial responsibility; he merely reserved U.S. rights. On the whole, the United States has never ceased to support a rather strict interpretation of UN financial obligations.³⁸ U.S. disapproval of other members' arguments and withholdings has therefore prevented unpunished violations of the obligation to pay from achieving accepted status and from constituting subsequent practice in the application of the treaty.

It could be argued that the United States eventually expressed agreement with other member states by instituting a withholding policy in 1980. This is also doubtful because the United States has not grounded its withholdings on the practice of other members and its alleged tolerance by the Organization. In fact, even in the absence of any withholding by UN members since 1945, the United States presumably would have refused to pay for possible implementation of Resolution 3379 (XXX), which stated "that zionism is a form of racism and racial discrimination."

In any event, even if we suppose that the United States finally agreed with other members on a common interpretation of UN financial obligations, still some U.S. withholdings have not received the assent either of other members or, indeed, of another withholder (France). On March 14, 1986, the members of the European Community addressed a memorandum to Secretary of State Shultz conveying their concern over "the United States not fully meeting its financial obligation to the United Nations as contained in Article 17, paragraph 2, of the Charter."³⁹ When withholders do not even agree among themselves, lack of agreement more nearly resembles total confusion. As a result, the so-called practice of withholding has never become a legally meaningful subsequent practice in the interpretation of the Charter and unpunished withholdings are not accepted as law. The "practice" of withholding has never ceased to be what it was from the beginning: a sequence of departures from the Charter. This pattern of conduct has no legal force, value or status. A right to withhold cannot be based upon such shaky practice.

Absent a legally relevant practice of the parties, one may turn to the practice of the Organization itself and inquire whether it has lost its right

³⁷ See UN Doc. A/AC.121/PV.15, at 8-10 (1965), *reprinted in* 60 AJIL 106 (1966). See also UN Doc. A/5916/Add.1 (1965), 19 UN GAOR Annex 21, at 86.

³⁸ See, e.g., the oral statement of Abram Chayes in 1962 ICJ Pleadings (Certain Expenses of the United Nations) 414: "If the Assembly has power under Article 17 to impose binding financial obligations for all expenditures lawfully incurred," he said, "and if it is granted that the Assembly intended to exercise that power, then the only argument that remains against the binding character of the assessments is that they were not levied to cover expenditures lawfully incurred" (emphasis in the text); or *id.* at 424: "[T]he distinction between administrative and operational expenses . . . is unwarranted in the language or history of the Charter and would be unworkable in practice." See also the Department of State reference aid of January 1979, 1979 U.S. DIGEST, *supra* note 2, at 229: "The treaties make clear that each nation is obligated to make its payments in the entire amount of the assessments finally decided upon and without placing conditions on the use of that money."

³⁹ See 25 ILM 482 (1986).

to be paid because of failure to enforce Article 19. The position of the Organization is that enforcement of Article 19 against members objecting to activities funded by voluntary contributions (viz., certain peacekeeping operations) must be left aside because in such cases there is no obligation to pay and no right to be paid.⁴⁰ Leaving thus aside the case of special accounts, the Organization maintains that Article 19 is always strictly enforced against member states that are in arrears with respect to the regular budget.⁴¹ The Legal Counsel of the United Nations on two different occasions⁴² defined the legal position of the Organization on Article 19. The Soviet Union maintained that the article does not imply an automatic loss of vote, which should be subject to a decision of the General Assembly made by a two-thirds majority as with decisions on the suspension of the rights and privileges of membership (Article 18(2) of the Charter). The Legal Counsel squarely dismissed the Soviet Union's claim on the ground that the loss of the vote is "a mandatory penalty" that the General Assembly may not lift or waive at its discretion except in a specifically defined circumstance, i.e., if it is satisfied that the failure to pay is due to conditions beyond the member's control.⁴³ Moreover, the Legal Counsel emphasized that the effect of Article 19 is automatic.⁴⁴ Indeed, the practice during all votes (e.g., roll call, show of hands, recorded or nonrecorded electronic votes, secret ballots) is not to call out the name of any defaulting member state that meets the terms of Article 19. Except for the Soviet Union,⁴⁵ no member state has ever entered a formal protest against this established practice of the Organization, which is carried out if necessary at each session of the General Assembly.⁴⁶

Whereas the Organization takes advantage of the black-letter law, U.S. foreign-policy makers and international legal scholars invoke its spirit instead. They argue that neither the distinction between the regular budget and

⁴⁰ It must be borne in mind that Article 19 does not come into play with respect to the totality of the expenses of the Organization, and in particular the expense of certain peacekeeping operations since some of these expenses were separated from the normal budget of the Organization. Today, however, only UNFICYP is funded voluntarily. UNDOF and UNIFIL (and formerly UNEF II) are funded by assessed contributions under Article 17(2) of the Charter, though according to a different scale of assessment from that for the regular budget. See U.S. DEP'T OF STATE, PUB. NO. 9507, THIRTY-FOURTH REPORT TO THE CONGRESS ON UNITED STATES CONTRIBUTIONS TO INTERNATIONAL ORGANIZATIONS (F.Y. 1985), at 12-13, 16-17 (1986).

⁴¹ See REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS Supp. (No. 4), vol. 1 at 232-33, paras. 5-12 (UN Pub. No. E.80.V.13, 1982). See also Ciobanu, *Financial Obligations of States under Article 19 of the U.N. Charter*, 5 QUADERNI DELLA RIVISTA DI DIRITTO INTERNAZIONALE 47-75 (1973).

⁴² 1968 UN JURID. Y.B. 186; 1974 *id.* at 156.

⁴³ 1968 UN JURID. Y.B. at 187, para. 6.

⁴⁴ *Id.*, para. 10; 1974 UN JURID. Y.B. at 156, para. 1.

⁴⁵ See UN Doc. A/7237 (1968), 23 UN GAOR Supp. (No. 10A) at 6, UN Doc. A/7210/Add.1 (1969); UN Doc. A/C.5/33/SR.4-6, 8 and 10 (1978).

⁴⁶ See, e.g., for the 23d session of the General Assembly: UN Doc. A/7237, *supra* note 45; for the 28th session, UN Docs. A/9157 and Adds. 1-2, A/PV.2117 and A/PV.2131, paras. 68-70 (1973); for the 6th Special Session, UN Docs. A/9547 and A/PV.2207 (1974); for the 31st session, UN Docs. A/31/219 and A/31/PV.1, paras. 41-43 (1976); and for the 32d session, UN Docs. A/32/PV.1, paras. 16-18, and A/32/224/Add.1 (1977).

special accounts, nor the difference between regular expenses and other expenses is legally meaningful since both were formally rejected by the International Court of Justice in the *Certain Expenses* opinion.⁴⁷ The American approach to collective financial responsibility is that this principle was meant to be and should have remained indivisible. From this point of view, Article 19 obviously is not being fully enforced.

The positions of the Organization and the United States are irreconcilable, but, fortunately enough, there is no need to bring them into agreement. Our sole concern is to find out whether the Organization could have lost its right to be paid, i.e., whether this right may be considered to have fallen into desuetude following the ineffective enforcement of Article 19. Such an argument is legally untenable because, first, even if we assume that Article 19 has been improperly enforced, i.e., if the view most favorable to the American arguments is adopted,⁴⁸ it is impossible to pretend that Article 19 is not being enforced *at all*. And without a complete absence of enforcement, possibly buttressed by contrary usage, desuetude cannot operate. Moreover, desuetude is not recognized as a *legal* basis for the extinction of treaties; "while . . . desuetude may be a factual cause of the termination of a treaty, the legal basis of such termination, where it occurs, is *the consent of the parties to abandon the treaty*."⁴⁹ A treaty provision cannot fall into desuetude merely by virtue of incomplete enforcement. Unsatisfactory or insufficient enforcement of treaty provisions can only be encompassed by a fundamental change of circumstances in the application of the treaty, which applies as "a 'residual' ground of termination"⁵⁰ whenever there appears to be no other ground recognized by international law for terminating the treaty.

Second, the Organization could not have lost its right to be paid unless the General Assembly had unequivocally waived the financial obligations of the Soviet Union, France and several other states that refused to pay their share for UN peacekeeping activities. But the obligations of these states have never been explicitly "dispensed" with or "suspended," which is significant because both the "dispensing" and the "suspending" powers of international organizations are subject to specific procedures that always imply prior or subsequent approval.⁵¹ It would be far-fetched to suppose that subjects of international law could lose attributes of their international personality through presumption.

Third, if the Organization had lost its right to be paid, member states would have won a right not to pay, for a creditor's right to be paid entails

⁴⁷ 1962 ICJ REP. at 159 and 161.

⁴⁸ For a French view, see Schricke, *Article 19*, in LA CHARTE DES NATIONS UNIES 399, 405 (J. P. Cot & A. Pellet eds. 1985).

⁴⁹ Draft articles, *supra* note 34, [1966] 2 Y.B. INT'L L. COMM'N at 237 (emphasis added).

⁵⁰ A. VAMVOUKOS, *TERMINATION OF TREATIES IN INTERNATIONAL LAW: THE DOCTRINES OF REBUS SIC STANTIBUS AND DESUETUDE* 204 (1985). See also *infra* pt. III.

⁵¹ See J. GOLD, *The "Dispensing" and "Suspending" Powers of International Organizations*, 19 NETH. INT'L L. REV. 169, 189 (1972), reprinted in LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS 352, 375 (1979).

as a necessary corollary a debtor's obligation to pay. We have already demonstrated, however, that member states cannot purport to have gained a right not to pay.

In sum, no established practice can be considered as having resulted in a waiver of the obligation to pay. Therefore, the withholding of contributions to the budget of the United Nations finds no sound legal basis in an alleged tolerance that has never achieved legal status.

II. WITHHOLDING AS A RESPONSE TO BREACHES OF THE CHARTER

States generally attribute their refusals to pay their UN assessments to alleged violations of the Charter. Such was the case when several states, including the Soviet Union and France, denied that they were obliged to pay for the expenses, e.g., of the United Nations Operation in the Congo (ONUC)⁵² or the UN Memorial Cemetery in Korea.⁵³ The United States did not stray from this legal reasoning when it explained its refusal to contribute to the expenses of the Law of the Sea Preparatory Commission by asserting that the Commission was "not a subsidiary organ of the UN" and "not answerable to the United Nations."⁵⁴ Even the Kassebaum-Solomon amendment, which on its face is not a response to breaches of the UN Charter, was presented on one occasion as a response to various breaches deriving from "a perversion of the ideals found in the U.N. Charter."⁵⁵

Violations of the Charter⁵⁶ certainly are among the "compelling reasons" invoked by Ambassador Goldberg⁵⁷ as grounds that would permit the United States to depart from the principle of collective financial responsibility. Possible responses to breaches of multilateral treaties are contemplated in Article 60(2) of the Vienna Convention, which the Court considered "a codification of existing customary law on the subject."⁵⁸ Article 60(2) reads as follows:

A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

- (i) in the relations between themselves and the defaulting State,
- or
- (ii) as between all the parties;

⁵² See L. SOHN, *CASES ON UNITED NATIONS LAW* 799-807 (1967).

⁵³ See *Financial problems of the United Nations*, 1975 UN Y.B. 953.

⁵⁴ See Statement of President Reagan, *supra* note 6.

⁵⁵ See Statement of Senator Ford, 131 CONG. REC. S7794 (daily ed. June 7, 1985).

⁵⁶ See, e.g., for alleged departures from the law of the United Nations endorsed by the Secretariat, T. MERON, *THE UNITED NATIONS SECRETARIAT* 77 (1977); and by the General Assembly, Gross, *On the Degradation of the Constitutional Environment of the United Nations*, 77 AJIL 569 (1983).

⁵⁷ See *supra* note 37 and accompanying text.

⁵⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16, 47, para. 94 (Advisory Opinion of June 21) [hereinafter *Namibia*].

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.⁵⁹

First, it must be borne in mind that Article 60(2) is "without prejudice to any provision in the treaty applicable in the event of a breach." This caveat merely reserves the rights of the parties under any specific provisions applicable if there is a breach.⁶⁰ Before being "reserved," however, such rights must exist. With respect to the case at hand, the Charter provides for remedies whenever members do not comply with their financial obligations: the General Assembly must deprive delinquent debtors of their voting rights in its sessions. It could therefore be argued that the financial obligations of member states constitute a "self-contained régime"⁶¹ that precludes paid-up member states from taking unilateral steps against those in default. But this argument is weak, because to bar states from taking the law into their own hands, a self-contained regime must be "entirely efficacious,"⁶² a condition that obviously has not been fulfilled with respect to the enforcement of Article 19 over the years.

Second, Article 60(2) addresses a "material breach" of the treaty. This language implies that the operation of the treaty can only be suspended in part in the two cases provided for in Article 60(3), i.e., when there is "(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."

With regard to alleged violations of the UN Charter, the authority of member states to qualify the breach raises an intricate procedural problem: to what extent do member states of the United Nations have discretion to claim that their interpretation of the Charter is the correct one? True, in general international law, "each State establishes for itself its legal situation vis-à-vis other States."⁶³ This principle was upheld in both the *Lac Lanoux*⁶⁴ and the *Air Service Agreement* arbitrations.⁶⁵ However, in the latter decision

⁵⁹ Art. 60(2), Vienna Convention on the Law of Treaties, *supra* note 21.

⁶⁰ Draft articles, *supra* note 34, [1966] 2 Y.B. INT'L L. COMM'N at 255, para. 10.

⁶¹ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 40, para. 86 (Judgment of May 24). See also E. ZOLLER, COUNTERMEASURES, *supra* note 22, at 92; Simma, *Self-Contained Régimes*, 26 NETH. Y.B. INT'L L. 111 (1985).

⁶² 1980 ICJ REP. at 40, para. 86.

⁶³ Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France, 18 R. Int'l Arb. Awards 417, 443, para. 81 (1978) [hereinafter *Air Service Agreement*].

⁶⁴ *Affaire du Lac Lanoux* (Spain/Fr.), 12 R. Int'l Arb. Awards 285, 310, para. 16 (1957).

⁶⁵ *Air Service Agreement*, *supra* note 63, 18 R. Int'l Arb. Awards at 443, para. 81.

in particular, the tribunal made very clear that the right of auto-interpretation⁶⁶ existed "unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations."⁶⁷ This caveat makes sense for international organizations, such as the European Communities, whose constituent instruments vest jurisdiction to rule on the interpretation of the treaty in an impartial third body.⁶⁸ Under the law of the United Nations, however, things are very different. The International Court of Justice has no compulsory jurisdiction to rule on the interpretation of the Charter. It may only be requested to interpret it, but in any event its own interpretation will be no more than an advisory opinion. Furthermore, "[t]he Organization is based on the principle of the sovereign equality of all its Members" (Article 2(1) of the Charter) and the right of auto-interpretation is the quintessence of sovereignty. Under these circumstances, Dan Ciobanu is right in pointing out that

dissenting Member States may claim that their interpretation of the Charter (and generally of the law of the United Nations) is the correct one, and decline to comply with decisions made by the political organs on the basis of their own interpretation of the Charter. . . . States possess, under the law of the United Nations as it stands at present, the so-called "right of last resort."⁶⁹

It is thus doubtful that persuasive and conclusive arguments can be made on the "material" or "nonmaterial" character of the violations invoked by members for refusing to pay. This problem is less serious than it seems because the crux of the matter considered here is not the merits of the claim but the procedures available to enforce it.

It is a commonplace, at least in the United States, that withholding is a legitimate response to the numerous and continuous refusals to pay by those members that object to certain activities of the Organization. It is claimed that a member is entitled to withhold whenever other members do not pay and are not punished. Viewed in light of Article 60(2), this kind of justification opens two possibilities. On the one hand, if unpunished refusals to pay are looked upon as "nonmaterial breaches," they fall outside the scope of Article 60(2) and inside a classic mechanism of international responsibility. Within this mechanism, a contracting party may suspend the operation of a treaty provision of equal value or equal meaning (*inadimplenti non est adimplendum*), but only insofar as (1) that party is directly injured by the violation, and (2) the effects of the suspension are limited to that party's relation with the defaulting party.⁷⁰ None of these conditions are met when a member

⁶⁶ See L. GROSS, *States as Organs of International Law and the Problem of Autointerpretation*, in *LAW AND POLITICS IN THE WORLD COMMUNITY* 59 (G. A. Lipsky ed. 1953), reprinted in 1 *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 367 (1984).

⁶⁷ Air Service Agreement, *supra* note 63, 18 R. Int'l Arb. Awards at 443, para. 81.

⁶⁸ See, e.g., Arts. 164-188, Treaty Establishing the European Economic Community, Jan. 1, 1958, 298 UNTS 11.

⁶⁹ D. CIOBANU, *PRELIMINARY OBJECTIONS RELATED TO THE JURISDICTION OF THE UNITED NATIONS POLITICAL ORGANS* 174 (1975).

⁷⁰ See P. REUTER, *INTRODUCTION AU DROIT DES TRAITÉS* 160, para. 283 (1985).

state withholds in response to the refusals to pay of others; first, because refusals to pay do not injure the "responding" member more than the others (its own contribution is not raised in proportion to the nonpayment);⁷¹ and second, because its own withholding does not operate solely in relation to the defaulting member but affects the Organization as a whole.

On the other hand, if a member state's refusal to pay is considered a "material breach" of the Charter and is therefore subject to the provisions of Article 60(2), the alternatives are twofold. First, if we consider the Charter to be an unqualified multilateral treaty within the meaning of Article 60(2)(b), withholding is impermissible because the potential withholder is not "a party *specially affected*" for the same reason that was mentioned above. Second, if we believe that the Charter is "of such a character that a material breach of its provision by one party radically changes the position of every party with respect to the further performance of its obligation under the treaty" (Article 60(2)(c)),⁷² withholding is still illegitimate since refusals to pay have never led to a reassessment or a change in the scale that determines member states' contributions.⁷³ As a result, withholding as a possible response to breaches of the Charter by one member state is never lawful. But does the same conclusion apply when the breaches are attributable not to one member considered *ut singuli*, but to a group of states *ut pluri*, i.e., when they act together as the majority of the Organization?

This problem is extremely complex because, regardless of the type of multilateral treaty involved, Article 60(2) only deals with breaches "by *one* of the parties" and is mute on the possible responses against breaches of the constituent instrument of an international organization by the collective will of member states acting as a majority. This silence is disquieting because alleged fiscal irresponsibility or *ultra vires* acts always originate in decisions attributable to the majority, i.e., in acts in which the individual will of each member fades away and is incorporated in the general will of the Organization.

In 1957 Sir Gerald Fitzmaurice analyzed in depth for the International Law Commission the various possible consequences of breaches of multilateral treaties.⁷⁴ His analysis made clear that these consequences are different for different types of treaties. He did not, however, contemplate the problem of constituent instruments of international organizations. In 1963 Sir Humphrey Waldock proposed a text to the Commission that read as follows:

In the case of a material breach of a treaty which is the constituent instrument of an international organization, . . . any question of the

⁷¹ There is no item in the UN budget covering defaults in payment, and when there are gaps because of refusal to pay, the United Nations is compelled to solicit funds elsewhere.

⁷² The concept of "interdependent treaty" is also embodied in Article 41(1)(b)(ii) of the Vienna Convention, *supra* note 21, the effect of which is to preclude some parties to a multilateral treaty from modifying it by an agreement *inter se* where the modification in question is not prohibited by the treaty.

⁷³ See H. SCHERMERS, *supra* note 14, at 475-89, §§848-73.

⁷⁴ Second Report on the Law of Treaties by G. Fitzmaurice, UN Doc. A/CN.4/107 (1957), reprinted in [1957] 2 Y.B. INT'L L. COMM'N 16, 31 (Art. 19), and 54-55 (commentary), UN Doc. A/CN.4/SER.A/1957/Add.1.

termination or suspension of the rights or obligations of any party to the treaty shall be determined by decision of the competent organ of the organization concerned, in accordance with its applicable voting rules.⁷⁵

The last seven words of this draft article and the commentary annexed to it⁷⁶ clearly indicate that the article was addressed to default in its obligations by *one* member. The special rapporteur did not believe⁷⁷ there was a need for detailed consideration of constituent instruments of international organizations when dealing with the consequences of a fundamental breach, since it had not yet been decided whether the Convention on the Law of Treaties would apply to such instruments. It was finally decided that the Vienna Convention would apply to the constituent instruments of international organizations, but the language of Article 60(2) was not amended accordingly. That provision has never concerned breaches other than "by one of the parties."

The silence of the Vienna Convention on collective breaches of the constituent instrument by the majority of the organization probably does not mean that such breaches are inconceivable because, as Jean Jacques Rousseau once declared in an oft-quoted phrase: "The general will is always right and ever tends to the public advantage."⁷⁸ Rousseau himself acknowledged that coteries and cliques may capture the true expression of the general will. He indicated that "when one of these groups becomes so large as to swamp all the others . . . the prevailing opinion has no more validity than that of an individual man."⁷⁹

The silence of the Vienna Convention on violations of a multilateral treaty by states acting as the majority of an international organization seems to mean that the consequences of such violations are simply not covered by Article 60(2). Under treaty law, withholding to remedy alleged breaches of the Charter by the General Assembly is therefore impermissible. Such withholding does not fall within the possibilities contemplated by Article 60(2). This conclusion logically conforms with the institutional framework of the United Nations because the relations between the Organization and its members, unlike the relations between member states *inter se*, cannot be governed by treaty law.

True, the law of treaties may apply to a relationship between the Organization and a member state, but only insofar as this relationship takes place outside the institutional structure of the Organization and does not affect it. For example, the International Court characterized the mandate between South Africa and the League of Nations as follows: "The Mandate,

⁷⁵ Second Report on the Law of Treaties by Sir Humphrey Waldock, UN Doc. A/CN.4/156 and Adds. 1-3 (1963), *reprinted in* [1963] 2 Y.B. INT'L L. COMM'N 36, 73, UN Doc. A/CN.4/SER.A/1963/Add.1.

⁷⁶ *Id.* at 77, para. 19.

⁷⁷ [1963] 1 Y.B. INT'L L. COMM'N at 122, para. 2, UN Doc. A/CN.4/SER.A/1963.

⁷⁸ THE SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU 193 (intr. E. Barker 1947).

⁷⁹ *Id.* at 194.

in fact and in law, is an international agreement having the character of a treaty or convention."⁸⁰ As a result, in 1971 the Court correctly referred to, if not applied, the rules laid down by the Vienna Convention, and in particular Article 60, to the relationship between South Africa and the Organization.⁸¹ Furthermore, treaty law as codified in the Vienna Convention has been viewed as appropriate, save some minor adjustments, for application as a whole to treaties between states and international organizations.⁸²

Within the institutional structure of the United Nations, however, member states are not in a contractual position vis-à-vis the Organization. Each of them respectively maintains a relationship with the Organization that is not conventional, but rather institutional or constitutional in substance. As the Court indicated in the *Reparation* opinion, "The Charter . . . has defined the *position* of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5)."⁸³ The Court made clear that this position is not contractual by adding that "the Organization . . . occupies a position in certain respects in *detachment* from its Members."⁸⁴ This language is not that of the law of contracts.

In truth, the Organization is a subject of international law endowed with an international legal personality of its own. That is why the Organization is not a contracting party to its constituent instrument or even a third party to it.⁸⁵ As a result, the Vienna Convention, which has a bearing solely on states, cannot regulate the relations between the Organization and its members in the same manner that it regulates the relations among member states. Similar reasoning may actually be applied to the relations between a state and its citizens. Such relations are not regulated by the law of contracts even though the state originated in a social contract. A member state in its relations with the Organization is therefore precluded from resorting to a treaty law remedy (i.e., suspension in part of the treaty such as withholding) as long as the substance of the rules applicable to their relations is not that of treaty law. These rules are autonomous; they have characteristics of their own and are part of what is usually referred to as "international institutional law."⁸⁶

The foregoing analysis should not be construed as ruling out any possibility of finding remedies for violations of the Charter by an organ of the Or-

⁸⁰ South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Preliminary Objections, 1962 ICJ REP. 319, 330 (Judgment of Dec. 21).

⁸¹ Namibia, *supra* note 58, 1971 ICJ REP. at 47, paras. 94-95.

⁸² See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, done Mar. 21, 1986, UN Doc. A/CONF. 129/15, reprinted in 25 ILM 543 (1986).

⁸³ Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ REP. 174, 178 (Advisory Opinion of Apr. 11) (emphasis added) [hereinafter *Reparation*].

⁸⁴ *Id.* at 179 (emphasis added).

⁸⁵ See P. REUTER, *supra* note 70, at 96, para. 167.

⁸⁶ With respect to the diversity that exists among international organizations, the substance of "international institutional law" is probably not especially homogeneous. While aware of this problem, Henry G. Schermers nevertheless asserts:

ganization. But such remedies, if any, are not those provided by the Vienna Convention for violations of multilateral treaties.

III. WITHHOLDING AS A RESPONSE TO CHANGE OF CIRCUMSTANCES

Whereas member states usually justify withholding their contributions to the UN budget on the ground of violations of the Charter by an organ of the Organization, the United States was the first to withhold part of its contribution on grounds directly linked to the clause *rebus sic stantibus*. Although this doctrine has never been expressly invoked on Capitol Hill,⁸⁷ the Kassebaum amendment was mainly designed to cope with the new circumstances that now prevail in the United Nations. Allegations of violations of the Charter by the Organization have been made, but backstage more than in the limelight.

According to Congressmen Mica and Solomon, "The fundamental goal of the Kassebaum/Solomon Amendment is the establishment of UN agency decision-making procedures that would assure a more proportionate influence on the part of the major donors with respect to budgetary matters."⁸⁸ More precisely, the amendment aims at giving a greater say in budgetary matters to the United States, which since the early 1970s has been consistently outvoted by nations whose combined contributions do not exceed 2 percent of the total UN budget.

Admittedly, many things have changed at the United Nations since its inception.⁸⁹ It could be said that the UN system was "radically transformed" as early as 1948, when the emerging Cold War put an end to the political consensus among the Allied powers—a principal underpinning of the UN machinery for the maintenance of international peace and security. Other fundamental changes include the adoption in 1950 of the "Uniting for Peace" Resolution by the General Assembly,⁹⁰ the 1965 alteration of the principle of collective financial responsibility,⁹¹ and the Third World's cap-

[A]ll public international organizations have much in common. . . . Definitions in constitutional and procedural matters used by one organization will often be adopted by others. . . .

. . . Most of the general constitutional problems which the organizations meet outside their technical fields of operation are comparable and the solution found by one can often be fruitful for others. . . .

. . . It seems useful, therefore, to make a systematic study of the institutional problems which arise or may arise in all or most international organizations. The branch of law concentrating on such problems may be called "international institutional law".

H. SCHERMERS, *supra* note 14, at 1-2, §§1-2.

⁸⁷ See, in particular, 1983 House Hearings, *supra* note 10, and 1985 House Hearings, *supra* note 25, *passim*.

⁸⁸ See 1985 House Hearings, *supra* note 25, at 101.

⁸⁹ See *The United States and the United Nations: Hearings Before the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 1-332 (1975).

⁹⁰ GA Res. 377 (V), 5 UN GAOR Supp. (No. 20) at 10, UN Doc. A/1775 (1950).

⁹¹ See REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS Supp. (No. 3), vol. 1 at 371-81, especially paras. 61-65 (Art. 17(2)), and 396-99, especially paras. 15-19 and 22 (Art. 19) (UN Pub. No. E.72.V.2, 1972).

ture of a majority in the General Assembly in the late 1960s. In the present situation, save for the Security Council, the most important UN founding members have lost control over their own creation. Furthermore, this situation may worsen with the admission of smaller and smaller, and poorer and poorer states. In that respect, it is not surprising that the USSR agrees strongly, if privately, with the United States complaint about the current fiscal irresponsibility of the General Assembly.

To date, the possible application of the theory of fundamental change of circumstances to constituent instruments of international organizations, and in particular to the UN Charter, has not been considered in depth. Yet Article 62 of the Vienna Convention on the Law of Treaties,⁹² which the Court considered as having codified "existing customary law on the subject" of fundamental change of circumstances,⁹³ may govern the relations between the Organization as a whole and each member state.⁹⁴ For in contrast with Article 60(2), which refers to "a breach by one of the parties," Article 62 refrains from setting forth a definite condition with respect to the origin of the right to suspend the treaty. Article 62 addresses the change of circumstances as an objective fact "which has occurred with regard to [the circumstances] existing at the time of the conclusion of the treaty"—a distinction of great importance with respect to the UN Charter. It means that a fundamental change in the functioning of the Organization may be alleged without regard to whether the change is attributable to a member state (e.g., the abuse of the veto right), a group of states (e.g., refusal by some members to pay for the expenses of the United Nations Emergency Force [UNEF] and ONUC) or the Organization as a whole (e.g., expulsion of a member in violation of Article 6 of the Charter). Under such circumstances, there is little doubt that Article 62 pertains to international institutional law and

⁹² Article 62 of the Vienna Convention, *supra* note 21, provides:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

⁹³ Fisheries Jurisdiction (UK v. Ice.), Jurisdiction of the Court, 1973 ICJ REP. 3, 18, para. 36 (Judgment of Feb. 2).

⁹⁴ For similar views, see H. SCHERMERS, *supra* note 14, at 71, §105(a)(5).

may be taken into consideration when discussing the legality of withholding as a response to fundamental changes in the operation of the Organization.

This question gives rise to another: the permissible measures that contracting parties to a treaty may take following a fundamental change of circumstances. With regard to multilateral treaties, Article 62(1) of the Vienna Convention mainly offers only one option to a contracting party affected by a change in conditions: to withdraw from the treaty.⁹⁵ Article 62(3) subsidiarily provides that such a party may also choose to suspend the operation of the treaty between itself and the other contracting parties. In that case, however, the treaty would generally have to be suspended in whole, not in part. This conclusion derives from the legislative history of Article 62(3) and from related provisions of the Vienna Convention as well.

The ILC draft article (Article 59)⁹⁶ on fundamental change of circumstances did not foresee the possibility of suspending the operation of the treaty in the event of a change; it envisaged withdrawal as the sole option. The Commission had considered the alternative of suspension in such a case but finally rejected it on the ground that to allow it would amount to admitting that the change of circumstances need not be fundamental.⁹⁷ Finland revived the notion at the Vienna Conference by introducing an amendment⁹⁸ to add to the ILC draft the option of "suspending the operation of [the] treaty in whole or in part." Finland subsequently withdrew the words "in whole or in part"⁹⁹ after Sir Humphrey Waldock pointed out that the unambiguous intention of the Commission was to subject the draft article on fundamental change of circumstances to the draft article on the separability of treaty provisions.¹⁰⁰

Separability of treaty provisions thus applies in case of a fundamental change of circumstances. Accordingly, a change in conditions that affects only a particular set of provisions of an agreement entitles a contracting party to suspend in part the operation of the treaty in its relations with the other parties. The option of selective suspension does not, however, authorize "pick-and-choose" remedies; it must be carried out within the limits set forth by Article 44(3) of the Vienna Convention,¹⁰¹ that is, it may be invoked only with respect to the separable provisions affected by the change. In particular, Article 44(3) clearly provides that the principle of separability may operate solely with respect to those clauses where:

⁹⁵ See Draft articles, *supra* note 34, [1966] 2 Y.B. INT'L L. COMM'N at 259, para. 9.

⁹⁶ VIENNA DOCUMENTS, *supra* note 34, at 183, para. 538. See also Draft articles, *supra* note 34, [1966] 2 Y.B. INT'L L. COMM'N at 256-60.

⁹⁷ See UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS, FIRST SESSION 381, para. 29, UN Doc. A/CONF.39/11 (1969) (statement made by Sir Humphrey Waldock, May 11, 1968) [hereinafter VIENNA FIRST SESSION].

⁹⁸ UN Doc. A/CONF.39/C.1/L.333 (1968), in VIENNA DOCUMENTS, *supra* note 34, at 183, 184, para. 540.

⁹⁹ See VIENNA FIRST SESSION, *supra* note 97, at 382, para. 35. See also *id.* at 389, para. 29.

¹⁰⁰ See *id.* at 381, para. 30.

¹⁰¹ See, in particular, Capotorti, *L'extinction et la suspension des traités*, 134 RECUEIL DES COURS 417, 548 (1971 III).

- (a) the said clauses are separable from the remainder of the treaty with regard to their application;
- (b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
- (c) continued performance of the remainder of the treaty would not be unjust.¹⁰²

Since "these three conditions are cumulative,"¹⁰³ the principle of the integrity of the treaty overwhelmingly prevails in case of a fundamental change of circumstances.

When applied to the UN Charter, these considerations mean that unilateral suspension of Article 17(2) is permissible only if the three conditions laid down in Article 44(3) are cumulatively met. In the first place, it must be proved that UN financial clauses are separable from the remainder of the Charter. But one wonders how the Organization can continue to perform its functions if members withhold their contributions. There are "true expenses, which the Organization has no choice but to incur in order to carry out a duty, and an essential function which it is bound to perform."¹⁰⁴ Admittedly, selective withholdings, as distinguished from across-the-board ones, could meet this first prerequisite. Nevertheless, it must also be proved that the financial provisions were not an essential basis of the consent of the *other* members. In that respect, many poor countries could cogently argue that they entered the Organization because their own financial obligations were to be minimal, on the understanding that the expenses would be mainly borne by the wealthiest states in the international community. They could persuasively claim that in view of their poverty, they would have forgone admission to the United Nations, had they known that major contributors would not live up to their financial commitments. Finally, all members that do not withhold could complain that continued performance of their own obligations is bound to become unjust because the General Assembly will be forced in the long run to compensate for withholdings by reassessing and raising the level of contributions.

The foregoing analysis compels us to conclude that selective and a fortiori general withholding can scarcely be justified under the theory of fundamental change of circumstances as laid down in the Vienna Convention on the Law of Treaties. In fact, application of the spirit of Article 62 to the Charter leads to the conclusion that an alleged fundamental change of circumstances leaves UN member states with only two options: to accept the new circumstances or to withdraw from the Organization.

* * * *

If we return to the starting point of this essay, we now see that under the law of treaties the ultimate conclusion holds little promise for the rights of the minority. Indeed, the minority's sole means of countering the "corporate

¹⁰² Art. 44(3), Vienna Convention on the Law of Treaties, *supra* note 21.

¹⁰³ I. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 166 (1984).

¹⁰⁴ Certain Expenses, *supra* note 19, 1962 ICJ REP. at 213 (Fitzmaurice, J., sep. op.).

will" of the Organization is withdrawal.¹⁰⁵ Treaty law as codified in the Vienna Convention does not permit suspensions in part of Charter provisions through such actions as withholding. Such countermeasures are never legitimate remedies in treaty law to the "tyranny of the majority," no matter what forms this tyranny may take and what the source of the right to suspend the treaty (in particular, violations of the Charter or fundamental change of circumstances) may be.

This conclusion, however, is not all that the law has to say on the subject of withholding. It would not make political or common sense if the majority could always tell the minority to "take it or leave it." The minority would be forced into an unfair and enfeebled position. Furthermore, without a mechanism to protect the rights of the minority, the Organization would cease to be an "effective multilateral system."¹⁰⁶

IV. THE RIGHTS OF THE MINORITY IN THE UNITED NATIONS

Treaty law as codified in the 1969 Vienna Convention is an important, but incomplete, source of the law that applies to the United Nations. UN law is in the first place a particular exemplification of international institutional law, i.e., that branch of international law that applies to international organizations. True, institutional law draws on the law of treaties in many respects; but it cannot be identical in its entirety to the law of treaties *between states*, which is the exclusive subject of the 1969 Vienna Convention. The Organization is endowed with international legal personality, which would be obliterated if the UN legal order were equated with, and reduced to, the law of treaties between states. The Organization would be split into as many components as it has members, and the concept of international solidarity—the quintessence of international institutions—would eventually be jeopardized. In addition, treaty law is far from providing solutions to all the problems arising within the Organization. Consequently, institutional law has been and must be supplemented with "established practices" or "rules" tailored to the needs of the system. In particular, no matter what treaty law prescribes with regard to the withholding of contributions, the facts speak for themselves.

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. In withholding part of their contributions, the Soviet Union, France and now the United States, i.e., the most influential founding members, have not established a practice or adopted a practice followed by other member states.

¹⁰⁵ It must be borne in mind that, despite the absence of any withdrawal provision in the Charter, the San Francisco Conference eventually agreed that a member state must be free in the last resort, "because of exceptional circumstances," to withdraw from the Organization. See Docs. 1210, 1179 (1) and 1178 (2), 1 UNCIO Docs. 612, 619–20; 6 *id.* at 245, 249; and 7 *id.* at 324, 327–29, respectively (1945).

¹⁰⁶ Report of the Secretary-General on the Work of the Organization, UN Doc. A/41/1, at 3 (1986).

Precedent has not really been a determinative factor in the decision to withhold. Withholders, and especially the United States,¹⁰⁷ acted in the knowledge that they should abstain from withholding, but in the belief that they were obliged to do so in the circumstances. Since bad faith cannot be presumed,¹⁰⁸ we must assume that contributions are never withheld by any member state without "compelling reasons," to use Ambassador Goldberg's formulation.¹⁰⁹ As the United States representative never elaborated on them, suffice it to recall the self-evident truth stated in 1962 by Sir Gerald Fitzmaurice:

[F]or if the Assembly had the power automatically to validate any expenditure, . . . this would mean that, merely by deciding to spend money, the Assembly could, in practice, do almost anything, even something wholly outside its functions, or maybe those of the Organization as a whole. Member States would be bound to contribute, and accordingly a degree of power, if not unlimited, certainly much greater than was ever contemplated in the framing of the Charter, would be placed in the hands of the Assembly.¹¹⁰

Thus, the withholding of assessed payments is in regard to budgetary decisions what reservations to resolutions are in regard to lawmaking by the General Assembly. The system cannot reject them without repudiating itself. As Judge André Gros asserted in the *Namibia* opinion: "For if a minority of States which are not in agreement with a proposed decision are to be bound, however they vote, and whatever their reservations may be, the General Assembly would be a federal parliament."¹¹¹ This is not the place to discuss the controversial statement made by the Court in the *Nicaragua* case on "the effect of consent to the text" of certain General Assembly resolutions.¹¹² The Court never said, however, that reservations to such instruments had ceased to be legally meaningful.

The truth is that withholding, like reservations, has been "necessitated through the need"¹¹³ to keep the Organization from turning into "a super-State."¹¹⁴ Absent an impartial third body to give conclusive rulings on such possible deviations,¹¹⁵ the power to withhold payment is a necessary and proper power of each member state. That power is necessarily implied by

¹⁰⁷ See the interesting statement made by Jeane J. Kirkpatrick, U.S. Permanent Representative to the United Nations: "I do not suggest the United States should take lightly the obligation to pay its assessed share of the budget. This is a serious, but not, in my opinion, an absolute obligation." 1983 House Hearings, *supra* note 10, at 54 (Statement of Oct. 3).

¹⁰⁸ In the *Tacna-Arica Question (Chile v. Peru)*, President Coolidge held: "A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion." 2 R. Int'l Arb. Awards 921, 930 (1925).

¹⁰⁹ See *supra* note 37 and accompanying text.

¹¹⁰ Certain Expenses, *supra* note 19, 1962 ICJ REP. at 203 (Fitzmaurice, J., sep. op.).

¹¹¹ 1971 ICJ REP. at 334 (Gros, J., dissenting).

¹¹² Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 ICJ REP. 14, 100, para. 188 (Judgment of June 27).

¹¹³ This language is found in the translation of the dissenting opinion of Judge Gros in the *Namibia* opinion, *supra* note 58, 1971 ICJ REP. at 334. The French reads as follows: "rendue nécessaire par la nécessité."

¹¹⁴ Reparation, *supra* note 83, 1949 ICJ REP. at 179.

¹¹⁵ For such proposals, see, e.g., Sohn, *Due Process in the United Nations*, 69 AJIL 620 (1975).

the legal order of the Organization because its rejection would be to verticalize a system that was meant to be, and to remain, horizontal.¹¹⁶ In short, the power to withhold is an inherent right of UN membership. To be sure, that power is not equally shared by all UN members. Major contributors obviously are not in the same position as those states responsible for only 0.01 percent of the budget. As a matter of law, however, this discrepancy does not prejudice the right to withhold. Many rights are not equally distributed among states, chief among them the inherent right of self-defense. Nobody has ever claimed that such factual inequalities could affect the legal basis of these rights.

Not surprisingly, regulation of the power to withhold is a much more intricate problem than its justification or attribution because international law usually devotes more attention to the attribution than to the regulation of states' jurisdiction.¹¹⁷ Nevertheless, no right of a state can be conclusively regulated unless its legal basis has been properly asserted. In particular, if the power to withhold derives from, and is necessarily implied by, the UN legal order, the reasons for withholding cannot be left to unfettered discretion. They must be "compelling,"¹¹⁸ but "compelling" in the legal order of the Organization. Thus, it is not legal to exercise a "necessary" power for reasons of political expediency.

Obviously, the UN legal order cannot have conferred upon members an indefinite and practically unlimited power of discretion in their exercise of the right to withhold. The reason is that the power to withhold is a *necessary* power. The word "necessary" is the decisive controlling qualification in the same way that it is the decisive controlling qualification of the implied powers of the Organization. All implied powers derive from the various undertakings assumed by the members. In the *Reparation* opinion, the Court stated: "It must be noted that the effective working of the Organization . . . require[s] that these undertakings should be strictly observed."¹¹⁹ An implied power 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. Accordingly, it is doubtful that a member state has "the right to withhold assessments for U.N. activities which, in [its] opinion, do not serve [its] national purpose."¹²⁰ The original intent of the Charter was not

¹¹⁶ See Combacau, *Le Droit international: bric-à-brac ou système?*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 85, 90 (1986).

¹¹⁷ See Bourquin, *Règles générales du droit de la paix*, 35 RECUEIL DES COURS 101 (1931 I).

¹¹⁸ See *supra* note 37 and accompanying text.

¹¹⁹ 1949 ICJ REP. at 183.

¹²⁰ This language is that of the so-called Goldberg corollary, explained by Jeane J. Kirkpatrick as follows:

Justice Goldberg, in response to a recent inquiry from me—at the time, the Law of the Sea Preparatory Conference [Commission] was under consideration—wrote that it was his considered conclusion that:

. . . there can be no question that under the Goldberg Reservation the U.S. reserves the right to withhold assessments for U.N. activities which, in our opinion, do not serve our national purpose.

to establish an organization that would serve each member's national interest, nor was it to afford a group of states with leeway for enhancing prevailing but biased positions.

The foregoing analysis reveals, without serious question, that the 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" (Article 2(1) of the Charter). Even though the amendment calls for weighted voting only on budgetary matters, the principle "one state, one vote" inheres in the original intent of the Charter—so much so that weighted voting could not be applied in the Assembly without a revision of the Charter. Article 18(2) of the Charter expressly provides that "decisions" on "budgetary questions" "shall be made by a two-thirds majority of the members present and voting." This language even precludes adoption of the budget by consensus. Consensus can only be used in the organs that make budgetary recommendations to the Assembly. But this is already the custom in the Committee for Programme and Co-ordination. As a result, absent revision of the Charter, the only way that the Organization can fulfill the U.S. demand is by normalizing the practice of decision making by consensus in the committees that initially rule on the budget.

The UN membership actually chose the latter course on December 19, 1986, when it adopted Resolution 41/213 on the Review of the Efficiency of the Administrative and Financial Functioning of the United Nations.¹²¹ The operative part of this resolution (adopted without a vote) provides in particular:

The General Assembly,

5. *Reaffirms* that the decision-making process is governed by the provisions of the Charter of the United Nations and the rules of procedure of the General Assembly;

6. *Agrees* that, without prejudice to paragraph 5 above, the Committee for Programme and Co-ordination should continue its existing practice of reaching decisions by consensus; explanatory views, if any, shall be presented to the General Assembly;

7. *Considers it desirable* that the Fifth Committee, before submitting its recommendations on the outline of the programme budget to the

I may say that is a Goldberg corollary, not a Kirkpatrick corollary.

1983 House Hearings, *supra* note 10, at 55 (Statement of Oct. 3).

¹²¹ Resolution 41/213 mainly endorses recommendations made by an intergovernmental committee of experts (the Group of 18) that was created by Resolution 40/237 and has submitted 71 recommendations to improve the administrative and financial functioning of the Organization. See Report of the Group of High-Level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations, 41 UN GAOR Supp. (No. 49), UN Doc. A/41/49 (1986). Both Resolution 41/213 and the report are reprinted in 26 ILM 138, 145 (1987).

General Assembly in accordance with the provisions of the Charter and the rules of procedure of the Assembly, should continue to make all possible efforts with a view to establishing the broadest possible agreement.¹²²

It may well be that the United Nations has done "quite a fine job in meeting the intent"¹²³ of the Kassebaum amendment. Its basic demand, however, has not been fulfilled. The principle "one state, one vote" remains unchanged in budgetary matters. Moreover, Resolution 41/213 is supplemented by an important annex: a statement made by the President of the General Assembly on December 19, 1986.¹²⁴ This statement reproduces the opinion of the UN Legal Counsel on the effect that the three paragraphs quoted above will have on the UN budgetary process.¹²⁵ It reads as follows: "[T]hese . . . paragraphs read separately or together do not in any way prejudice the provisions of Article 18 of the Charter of the United Nations or of the relevant rules of procedure of the General Assembly giving effect to that Article." Furthermore, these paragraphs cannot be read without referring to Annex II because appended to each of them is a footnote that directs the reader to "[s]ee annex II to the present resolution." In short, paragraphs 5, 6 and 7 of Resolution 41/213 are not separable from the opinion of the Legal Counsel. Thus, the whole "new" system rests, as it were, on a gentlemen's agreement among all the members of the Organization. They have all tacitly agreed that decisions on budgetary matters will not be taken against the will of the major contributors; but UN budgetary law has not been changed.

At any rate, the 1986 budgetary arrangement is without prejudice to the right to withhold contributions within the limits previously defined. Whether or not this right will be exercised in the future by major contributors remains an open question.

* * * *

In conclusion, it is just as wrong to believe that the minority must always yield to the "corporate will" of the Organization as determined by the majority as to believe that the minority may freely impose its own interests through financial blackmail. The power to withhold is not a freedom, but an inherent right of members to remind the Organization, if need be, of certain obligations. It is certainly legitimate to consider introducing procedures such as judicial remedies that would make this power unnecessary. But two final remarks must be made in that regard. On the one hand, the adoption of such procedures would necessarily result in amending the Charter, and the legal order of the Organization would be transformed. On the other, the present-day ideological divisions in the international community make proposals for such procedures unrealistic and probably unwise.

¹²² Footnotes omitted.

¹²³ Statement of Sen. Nancy L. Kassebaum, Wash. Post, Mar. 20, 1987, at A27, col. 1. See also N.Y. Times, Jan. 1, 1987, at A1, cols. 4, 5.

¹²⁴ Statement made by the President of the General Assembly at the 102d plenary meeting, Ann. II to GA Res. 41/213, *supra* note 121.

¹²⁵ The legal opinion may also be found in UN Doc. A/41/PV.102, at 7-8 (1986).