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THE LEGAL CASE FOR CUTTING U.S. FUNDING FOR THE UNITED NATIONS

INTRODUCTION

The United States at last has found a way to get the United Nations' attention: Congress is threatening to cut as much as $148 million from the U.S. contribution to that organization. The reason for the congressional hardline is the U.N.'s well-documented record of irresponsibility. The congressional message is clear: Unless the U.N. reforms substantially, it can expect only decreasing levels of U.S. support.

The problems plaguing the U.N. have not emerged suddenly. A quarter century ago, Benjamin Cohen, a distinguished legal scholar and delegate to the 1944 Dumbarton Oaks Conference, which laid the groundwork for the United Nations, warned:

> Small and relatively weak states may influence the action of the more powerful states, but they cannot use their voting strength in the General Assembly to dictate. The irresponsible exercise of voting power by the small and relatively weak states may threaten the future of the United Nations quite as much as the irresponsible exercise of the veto or the irresponsible withholding of contributions by the Great Powers.[1]

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1. Benjamin Cohen, The United Nations: Constitutional Developments, Growth and Possibilities (Cambridge, Massachusetts: Harvard University Press, 1961), p. 94.

Indeed, it has been the more than 100 "small and relatively weak states," represented by the so-called Nonaligned Movement, which over the past fifteen years have used their overwhelming numerical majority in the General Assembly to exercise near-total control over the U.N.'s agenda, deliberations, and resolutions. They have made the U.N. the willing servant of a radical Third World ideology, which is obliquely pro-Soviet in its political views, emphatically redistributionist in its economic views, and profoundly hostile to the liberal democratic values of the U.N. founders.

Perhaps the most revealing example of the U.N. majority's "irresponsible exercise of voting power" is in budgetary matters. The nonaligned nations, many of whom pay only 0.01 percent of the U.N. budget, use their voting strength to approve ever expanding U.N. budgets and ever more programs, committees, and conferences, which generally accomplish very little and thus seriously damage the U.N.'s reputation.

The United States is the U.N.'s biggest financial backer. Of the approximately $4 billion spent by the U.N. bodies, the U.S. provides about $1.1 billion--some 25 percent. Washington continually protests U.N. budgetary growth. Yet U.S. concerns, shared by other major donors, have been largely ignored.

In response to U.N. profligacy, the U.S. Congress has enacted a series of laws reducing U.S. contributions to the U.N. This action predictably is being criticized by those who are determined to maintain the status quo at the U.N. They accuse the U.S., for example, of precipitating a "financial crisis" at the U.N., even though other nations, chiefly the Soviet Union, have withheld larger sums from the U.N. and U.N. officials admit that there is ample scope for saving money and rationalizing U.N. activities. Reflexive U.N. backers, such as Elliott Richardson, Chairman of the United Nations Association of the U.S., also complain that Congress has no right unilaterally to reduce U.S. contributions to the U.N. and that so doing would "throw our legal commitments to the winds."[2]

Such criticisms stand on shaky legal grounds. There is serious doubt whether the U.S., as a signatory of the U.N. Charter, is obliged to contribute whatever amount is "assessed" by the General Assembly--particularly as these assessments have been ignored by other countries in the past, which constitutes what jurists call a "material breach" of the Charter that changes the nature of the U.S. obligations. It is also unclear whether a strictly legal perspective is fully compelling, given the highly political process of financing the U.N. and that many U.N. activities are financed by voluntary

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2. E. L. Richardson, "...and Skirting the Law," Op-Ed, The Washington Post, May 20, 1986.

contributions. These considerations have been ignored by those condemning the actions of the U.S. Congress.

In the legal and historical context of U.S. membership in the U.N., the U.S. has a right to reduce its enormous financial contribution to the organization. In mandating such a reduction, not only is Congress making legally allowed policy, it is making sound policy.

U.S. WITHHOLDINGS

Every two years, the U.N. and its specialized agencies adopt budgets, which are largely financed by levying fixed assessments on all U.N. members: The budget of the U.N. in New York is roughly $1.68 billion for 1986-1987, of which the United States is assessed 25 percent, or $420 million. The budgets of U.N. agencies operating elsewhere total about $7 billion over two years, of which the U.S. also contributes in the aggregate 25 percent. The assessed contribution is supplemented by large voluntary contributions from the U.S. to U.N. economic development and humanitarian affairs programs, such as UNICEF and the United Nations Development Program.

Recently enacted U.S. laws affecting U.S. withholding from the assessed contribution are those that 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 fiscal responsibility.

The first type of withholding involves reductions based on the principle that certain U.N. activities are what legal scholars call ultra vires, or outside the authority, of proper U.N. actions. Example: the U.S. for years has reduced its assessed contribution by the amount the U.N. spends in support of the Palestine Liberation Organization.

The second type is intended to help the federal government comply with the deficit ceilings set by the Gramm-Rudman-Hollings legislation. Such cuts are only indirectly aimed at the U.N. and have been applied selectively; some U.N. agencies have been reduced more than others.

The third type is the most significant, involving not only large reductions in U.S. contributions, but also making resumption of that full payment contingent on concrete changes in U.N. practice. The Kassebaum-Solomon Amendment of 1985, introduced by Kansas Republican Senator Nancy Kassebaum and New York Republican Congressman Gerald Solomon, states that "No payment may be made for an assessed contribution to the United Nations or its specialized agencies in

excess of 20 percent of the total annual budget of the United Nations or its specialized agencies (respectively) for the United States Fiscal Year 1987 and following years" unless the U.N. grants voting rights "proportionate to the contribution of each such member state to the budget of the United Nations and its specialized agencies" on "matters of budgetary consequence."[3] Stated simply, this means that, if the U.S. pays 25 percent of the U.N. budget, it should have proportionate say (perhaps as much as 25 percent) on budgetary matters. Currently, every U.N. member casts one vote, except the Soviet Union which casts three.

The U.N. has not implemented the proportionate voting required by the Kassebaum-Solomon Amendment. Until it does so, Congress will withhold $79 million from its assessed contribution.

The legislative record of the Amendment makes it clear that its intent is "to foster greater financial responsibility in preparation of the budgets of the United Nations and its specialized agencies"[4]--not to reduce the share paid by the U.S. And although the Amendment calls for voting rights "proportionate to the contribution of each such member state to the budget of the United Nations,"[5] Members of Congress and Reagan Administration officials have indicated that measures short of the adoption of a rigid system of weighted voting could satisfy the intent. Explained Deputy Assistant Attorney General Allan Gerson: "The Kassebaum Amendment, if you read it carefully, calls for weighted voting on budgetary matters. That leaves a lot to be negotiated."[6] It seems, for example, that Congress could be satisfied by a change in the rules of procedure of the U.N. Fifth Committee, which deals with the budget, so that the Committee would operate by consensus.

Such steps would not necessarily conflict with Article 18 of the U.N. Charter, which establishes the principle of one-nation, one-vote in the General Assembly. Nor would the change require a Charter Amendment, vitiate the principle of "the sovereign equality of states" on which the U.N. Charter is based, or deprive any member state of its voice on budgetary issues.

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3. Section 143, Public Law 99-93 (99 Stat 424).

4. Ibid.

5. Ibid.

6. Statement of Allan Gerson, Deputy Assistant Attorney General, at the public hearing, "Financial Crisis of the United Nations: International Law and United States Withholding of Payments from International Organizations", June 12, 1986.

U.S. WITHHOLDINGS AND U.S. CONSTITUTIONAL DOCTRINE

Article VI of the U.S. Constitution states that "...all Treaties made...under the Authority of the United States, shall be the supreme Law of the Land." This phrase, known as the Supremacy Clause, makes international treaty obligations binding under domestic law. Since the U.N. Charter is considered a treaty and was ratified by the Senate, it is the law of the land. Violation of the terms of the Charter, in this case Article 17(2), which states that "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly," could be considered a violation not only of international law, but also of domestic law.

Such an interpretation, however, would be incorrect. It is well-established U.S. constitutional doctrine, flowing originally from common law principles, that obligations incurred through international instruments can be affected by subsequent domestic law. This was reaffirmed in principle in the 1957 case of Reid v. Covert and in 1973 in Diggs v. Shultz.

In Reid v. Covert, Justice Hugo Black, writing for the Court, reiterated in the strongest terms that, since international treaties are coequal with Acts of Congress, subsequent Acts of Congress may modify or even abrogate preexisting international obligations. Wrote Black:

> The Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is in full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.[7]

Since the legislation effecting the withholdings is subsequent in time to the U.S. accession to the U.N. Charter, that legislation, of course, has legal precedence over the supposedly conflicting Article of the Charter.

U.S. courts also have recognized that congressional sovereignty over U.S. international obligations extends to the U.N. In the case of Diggs v. Shultz, a number of prominent citizens sued then Secretary of the Treasury George Shultz to force Treasury to abide by a U.N. Security Council resolution embargoing all trade with Southern Rhodesia, despite the fact that Congress had passed legislation that effectively mandated the President to buy strategic minerals from that country. Ruling on the case, Judge Carl McGowan of the U.S. Court of

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7. Reid v. Covert, 354 US 1, L ed. 2d 1146, 77 S Ct. 1222, (1957).

Appeals, District of Columbia Circuit, strongly upheld the right of Congress to abrogate any aspect of the treaty obligation resulting from U.S. participation in the U.N. Wrote McGowan:

> Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it.[8]

The meaning of the various court rulings: Congressionally mandated cuts in the U.S. contribution to the U.N. are entirely constitutional under domestic law.

THE UNITED NATIONS BUDGET AND INTERNATIONAL LAW

Member states have battled since the U.N.'s founding over the proper method of financing the organization. Despite this 41 years of discussion and dispute, 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. Article 17(2) of the United Nations Charter states that "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." While the record makes it clear that the Article was intended as a statement of binding obligation,[9] the U.N.'s experience during its first fifteen years made it more clear that the "obligation to pay" assessed contributions was, in fact, almost entirely theoretical. By 1962, writes Brookings Institution scholar J. G. Stoessinger,

> ...over one-third of the member states of the United Nations regularly defaulted in part or in full on their assessments....most of the Latin American countries, regarded each Assembly resolution solely as a recommendation, not as a legal obligation. They posed the problem of legal principle.[10]

Other states, namely the Soviet bloc and Arab countries, have objected to paying for virtually any U.N. activity in the area of peace and security, claiming that those "responsible" for conflicts

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8. Diggs v. Shultz, 470 F. 2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973), p. 466. McGowan also reaffirmed the principle that a subsequent statute only renders the treaty null "to the extent of conflict"; U.S. violation of a Security Council resolution, therefore, does not necessitate U.S. withdrawal from the U.N.

9. See, for example, 8 U.N.C.I.O. 487, (1945).

10. J. G. Stoessinger, "Financing the United Nations System" (Washington, D.C.: The Brookings Institution, 1964), p. 110.

should cover the cost. Stoessinger continues, explaining "...and the Soviet bloc and the Arab countries, by stressing that 'the aggressors must pay,' raised the problem of legal obligation under the charter in its starkest form."[11]

In 1962, a World Court decision effectively held that virtually any expense authorized by the General Assembly was automatically legally binding. Yet World Court opinions are not widely accepted as equivalent to international law. Indeed, after the opinion was rendered, countries continued--and continued--to withhold contributions to the U.N. The Soviet bloc and France, for instance, simply refused to abide by the Court's decision as it affected assessments to pay for two U.N. peacekeeping operations. At one point, in fact, 66 states were in arrears on their contributions to these operations, arrearages that were only partially defrayed by voluntary contributions from the U.S. and a few other states.

Though Article 19 of the U.N. Charter withdraws from a nation its right to vote in the General Assembly if it is seriously in arrears, the General Assembly has often refused to apply this sanction and did not apply it to the Soviet Union or France, even after the World Court decision. They remain "delinquent."

The practice of withholding assessments has not been confined to the Soviet bloc and France. Former heads of the Nonaligned Movement, Cuba and India, as well as the current head, Zimbabwe, have withheld parts of their U.N. contribution; other major nonaligned states that have withheld money include Algeria and Syria. China, too, has withheld funds without being subjected to sanctions. In fact, as of March, twenty member states were in arrears on their U.N. payments because of withholding. The reality is that withholding assessed U.N. contributions is a longstanding and near universal practice since the founding of the U.N.

This is relevant because international law, as distinct from domestic law, recognizes the concept of "state practice"--that the behavior of states party to a treaty can affect subsequent interpretation of the treaty. The repeated violation of a domestic statute, for example, does not change its character. In international law, however, where the contracting parties are often states not subject to a supranational authority, the manner by which states interpret obligations can and frequently does modify the original terms of agreement. Writes legal scholar Louis Henkin:

> The society of nations has no effective law-making body or process. General law depends on consensus: ...old law

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11. Ibid.

cannot survive if enough states, or a few powerful and influential ones, reject it.[12]

Clearly, "state practice" has shown that there is not even the minimum degree of consensus about financing the U.N. required to create a clear legal obligation. Politically motivated withholdings of contributions are and will continue to be commonplace in a near universal organization. Although this fact may not justify total derogation of a state's financial responsibilities, it confirms that the legal obligation to pay is not absolute and mandatory under all circumstances.

Similarly, the fact that the General Assembly in 1964 failed to impose Article 19's sanctions on France and the Soviet Union strengthens this interpretation. This "lack of sanctions," especially in the unusual case where such sanctions are explicitly authorized and enforceable, supports the view that the General Assembly itself has validated the right of nations to withhold contributions.

It was precisely this lack of sanctions that led the U.S. to promulgate what is known as the "Goldberg Reservation."[13] In a 1965 speech at the U.N., Ambassador Arthur Goldberg announced, with the approval of Congress, that the U.S. reserves the right to withhold contributions selectively, since other nations have been doing so without suffering sanctions. Said Goldberg to the U.N.:

> ...if any member can insist on making an exception to the principle of collective financial responsibility with respect to certain activities of the organization, the United States reserves the same option to make exceptions to the principles of collective financial responsibility if, in our view, strong and compelling reasons exist for doing so. There can be no double standard among the members of the organization.[14]

Even the Vienna Convention on the Law of Treaties, the 1969 Treaty establishing the nature and boundaries of treaty obligations, defines circumstances whereby "material breach" of a treaty obligation may be invoked by a nation to justify its own decision not to fulfill some obligation. Thus when a number of member states over a number of

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12. L. J. Henkin, "Is it Law or Politics" in C. W. Kegley, Jr. and E. R. Wittkopf, eds., The Global Agenda: Issues and Perspectives (New York: Random House, 1984), p. 181.

13. For discussion of the legal basis of the Reservation, see the statement of Allan Genson, op. cit.

14. "United States Participation in the United Nations," Report by the President [Lyndon B. Johnson] to Congress, 1965, p. 108.

years withheld their contributions to the U.N., they "materially breached" their obligation to the organization. Under general legal practice, this is a fundamental breach, which "radically changes the position of every party."[15] The meaning: As stated in the Goldberg Reservation, the breach by other states gives the U.S. the reciprocal right to withhold if "strong and compelling reasons exist for doing so."

The changed nature of the financial obligation to the U.N. has been recognized by legal scholars as well. Jorge Castaneda, a Mexican diplomat and legal scholar, summarizing the 1962 World Court decision, states that "one can justly ask whether the Assembly still supports, in fact, the thesis of mandatory apportionment of expenses originating in recommendations."[16] Thomas Franck, a professor at New York University and former U.N. official, has likewise argued that:

> Although the International Court in 1962 opined that there was a legal obligation to pay, the norm fell into desuetude once the Assembly refused to discipline the defaulting Soviets....It may fairly be concluded that the theoretical 'obligation to pay' died on the floor of the Assembly in 1965.[17]

Although Franck views some specific U.S. withholdings as unjustifiable, he clearly recognizes that the nature of a multilateral obligation may be changed through contrary state practice.

VOTING POWER AND FINANCIAL RESPONSIBILITY

The Kassebaum-Solomon Amendment and similar congressional acts, which effect the largest part of U.S. funding reductions, are intended to eliminate a basic structural disjunction within the Organization. By calling for some form of weighted voting on budgetary matters, they attempt to alter the peculiar situation at the U.N., by which nations that pay the bills lack the votes to set budget levels, while those that have the votes to set the levels do not pay the bills.

Currently, the contributions of just fifteen of the U.N.'s 159 members--the U.S., the USSR, Japan, and the twelve European Community

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15. Articles 60(2) and 60(3), Vienna Convention on the Law of Treaties.

16. J. G. Castaneda, Legal Effects of United Nations Resolutions (New York and London: Columbia University Press, 1969), p. 48.

17. T. M. Franck, National Against Nation: What Happened to the U.N. Dream and What the U.S. Can Do About It (New York: Oxford University Press, 1985), p. 289.

nations--account for close to 80 percent of the U.N. budget. By contrast, 80 countries, a majority in the General Assembly, together contribute less than 1 percent of the budget. The "small and relatively weak states," therefore, have no incentive to economize and thus authorize virtually any expenditure they deem suitable.

The fact that such a situation could develop, with damaging consequences for the U.N., was recognized by the earliest U.N. scholars. Perhaps the most eloquent elaboration of this appears in the very 1962 World Court decision that is so frequently cited as evidence that all nations are obliged automatically to pay all U.N. assessments.

In a separate concurring opinion, Judge Sir Gerald Fitzmaurice of Great Britain explained that, since so many essential U.N. activities are funded voluntarily and since there is no conceptual division between activities financed "voluntarily" and those financed by assessments, the reality envisaged under Article 17(2)--fair sharing of all expenses--is vitiated.

More important, perhaps, Fitzmaurice argued that a U.N. expense is not necessarily legitimate simply because the General Assembly authorizes it. If this were the case, he reasoned, a potentially dangerous situation could arise:

> ...for 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.[18]

He added, in a point very relevant to Congress mandating a reduction in U.S. donations to the U.N., that:

> ...it would follow that, in theory at least, the Assembly could vote enormous expenditures, and thereby place a heavy financial burden even on dissenting States, and as a matter of obligation even in the case of non-essential activities.[19]

Fitzmaurice's analysis of this issue and his qualms about interpreting all assessments as "legitimate" and legally binding were prescient. From 1972 to 1982, the U.N. regular "assessed" budget

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18. "Certain Expenses of the United Nations (Article 71, Paragraph 2 of the Charter)," Advisory Opinion, I.C.J Reports, 1962, p. 201.

19. Ibid., p. 214.

increased by over 700 percent from roughly $220 million to $1.5 billion; the smaller states mandating these increases also tacked on over $172 million in budget "add-ons" between 1983 and 1986 alone--including the notorious $73 million for a U.N. "conference center" in Ethiopia, approved last year as the nation was reeling from a devastating famine.

The U.S. consistently opposed such unrestricted budgetary growth. In 1974, to take one example, the U.S. "vigorously opposed"[20] a series of large-scale salary increases for U.N. officials to no effect; by 1981, the U.S. representative in the Fifth Committee was protesting "improper expenses" in the U.N. budget and stating that "We will...neither condone nor excuse waste, excess, and disregard for the mounting financial burdens imposed upon the taxpayers of the world by self-serving public institutions."[21]

This harsh analysis of the U.N. budget process is shared by other member states. Since 1979, those contributors accounting for close to 80 percent of the U.N. budget have either abstained or voted against it, while in 1985 both the U.S. and the USSR voted against the budget resolution.

The Kassebaum-Solomon Amendment is an appropriate means of requiring the U.N. to make a serious effort to put its affairs in order and staunch its profligacy. In the context of the U.N.'s decade-long budgetary spree, U.S. withholdings are not only legitimate but necessary steps if the U.N. is going, in the words of the London Economist, "to avert the real threat to its existence--obesity."

CONCLUSION

The 41st regular session of the United Nations General Assembly convened last week. At this session, the U.S. can expect to be accused of violating international law because it is withholding some of its contributions; the U.S. may even hear that it is attempting to sabotage the U.N. It makes no difference that, even with all the cuts in contributions proposed by Congress, the U.S. still would be giving hundreds of millions of dollars to the U.N.

At the U.N., the U.S. delegation should rebut these charges forcefully. The U.S. should point to the long history of U.N. members

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20. "United States Participation in the United Nations," Report of the President [Gerald Ford] to Congress, 1974, p. 415.

21. "United States Participation in the United Nations," Report of the President [Ronald Reagan] to Congress, 1981, p. 342.

withholding their contributions and to the fact that the entire potential U.N. deficit would disappear if the Soviet Union fully paid its arrearages.

There is more than adequate precedent to make the case that there is no absolute legal obligation to pay U.N. assessments. The U.S. can base its argument on solid principle; it need not plead that it is withholding funds because of congressional concern about the U.S. budget deficit. Nor should the U.S. invoke its domestic law as a defense of the withholdings.

The U.S. delegation should insist repeatedly that the U.N. withholding and fiscal problems never would have arisen if the U.N. had paid attention to legitimate U.S. complaints about the runaway U.N. budgets. As such, the U.S. should push for the speedy execution of fundamental U.N. structural reforms--the only real solution to the U.N.'s financial crisis.

For over four decades, the U.S. has given its moral, political, and financial support to the U.N. with virtually no questions asked. During each past crisis, it was the U.S. and its Western allies that contributed the effort and, often, the money to enable the U.N. to survive, just as it is these countries that have created and sustained most of the U.N.'s voluntary programs. The question to be answered at the 41st General Assembly is whether the nations of the Nonaligned Movement have similar respect and affection for the organization they now control. If they do, they will take the steps to reform the organization in a way that will allow the U.S. to resume its full contributions to the U.N.

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