

ARTICLE 96

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ARTICLE 96

TEXT OF ARTICLE 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

INTRODUCTORY NOTE

1. In general, the structure of this study follows that of the corresponding study in *Repertory Supplement No. 2*. The original major headings of the study have been retained but subheadings dealing with individual cases or with matters on which there was no further development in the period under review have been omitted.
2. In this study, as in the previous study, the two paragraphs of Article 96 are dealt with separately in the Analytical Summary of Practice.

I. GENERAL SURVEY

A. Decisions bearing upon Article 96

3. During the period under review, the General Assembly adopted the following resolutions which bear upon Article 96 :

Resolution 1356 (XIV) of 17 November 1959. Petitions and communications relating to South West Africa;

Resolution 1358 (XIV) of 17 November 1959. Withdrawal of a passport from Mr. Hans Johannes Beukes;

Resolution 1359 (XIV) of 17 November 1959. Status of the Territory of South West Africa;

Resolution 1360 (XIV) of 17 November 1959. Question of South West Africa;

Resolution 1361 (XIV) of 17 November 1959. Legal action to ensure the fulfilment of the obligations assumed by the Union of South Africa in respect of the Territory of South West Africa;

Resolution 1563 (XV) of 18 December 1960. Petitions relating to the Territory of South West Africa;

Resolution 1568 (XV) of 18 December 1960. Question of South West Africa;

Resolution 1703 (XVI) of 19 December 1961. Petitions relating to the Territory of South West Africa;

Resolution 1804 (XVII) of 14 December 1962. Petitions and communications relating to the Territory of South West Africa;

Resolution 1594 (XV) of 27 March 1961. Agreement on the relationship between the United Nations and the International Development Association;

Resolution 1731 (XVI) of 20 December 1961. Administrative and budgetary procedures of the United Nations;

Resolutions 1854 A and B (XVII) of 19 December 1962. Administrative and budgetary procedures of the United Nations.

4. In its resolutions 1356 (XIV), 1358 (XIV), 1359 (XIV), 1360 (XIV), 1361 (XIV), 1563 (XV), 1568 (XV), 1703 (XVI) and 1804 (XVII), the General Assembly referred to its acceptance of the advisory opinion of 11 July 1950 of the International Court of Justice on the question of South West Africa.¹ In its resolution 1361 (XIV), the General Assembly also drew the attention of Member States to the conclusions of the special report of the Committee on South West Africa,² covering the possibility of a reference to the International Court of Justice for adjudication

¹ International status of South-West Africa, Advisory Opinion: ICJ, *Reports 1950*, p. 128.

² G A (XII), Supp. No. 12 A.

of any dispute with the Union of South Africa concerning the interpretation or application of the Mandate for South West Africa.

5. By its resolution 1594 (XV), the General Assembly approved the Agreement entered into on 22 December 1960 between the Economic and Social Council and the International Development Association (IDA). As a result of the Agreement, IDA is empowered to request advisory opinions from the International Court of Justice.³

6. In its resolution 1731 (XVI) the General Assembly decided to request the International Court of Justice for an advisory opinion on whether the expenditures authorized in certain General Assembly resolutions constituted "expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter of the United Nations". By its resolution 1854 A (XVII), the General Assembly accepted the opinion of the Court on the question submitted to it. And by resolution 1854 B (XVII), the General Assembly, taking into account the advisory opinion of the Court, set up a Working Group to study special methods for financing peace-keeping operations of the United Nations involving heavy expenditures.⁴

7. In addition to these resolutions of the General Assembly, there was a decision by the Security Council not to ask the Court for an advisory opinion which had been requested by Cuba on 8 March 1962.⁵

8. The Committee on Applications for Review of Administrative Tribunal Judgements examined an application to review Judgement No. 96 of 29 September 1965⁶ but did not ask the International Court of Justice for an advisory opinion.

9. On 19 January 1959, the Assembly of the Inter-Governmental Maritime Consultative Organization (IMCO) resolved to submit to the International Court of Justice a request for an advisory opinion on whether the Maritime Safety Committee was constituted in accordance with Article 28 (a) of the Convention for the establishment of the Organization.⁷ The Court rendered its advisory opinion on 8 June 1960 to the effect that the Maritime Safety Committee elected on 15 January 1959 by the Assembly of the Organization at its first session was not constituted in accordance with the Convention.⁸ The Assembly, at its second session, resolved that the Maritime Safety Committee elected on 15 January 1959 should be dissolved and decided to constitute a new Maritime Safety Committee in accordance with article 28 of the Convention as

³ As stated in the corresponding study in the *Repertory*, vol. V, under Article 96, para. 15, all the specialized agencies with the exception of the Universal Postal Union, had been authorized by the General Assembly under Article 96 (2) to request advisory opinions from the Court.

⁴ See also this *Supplement* under Article 17.

⁵ S C, 17th yr., 998th mtg., para. 158.

⁶ Judgements of the United Nations Administrative Tribunal numbers 87 to 113, 1963-1967, United Nations Sales publication E.68.X.1, p. 81.

⁷ Inter-Governmental Maritime Consultative Organization Assembly, First Session. Resolutions and Other Decisions, p. 5, Resolution A. 12 (I) of 19 January 1959.

⁸ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960: ICJ, *Reports 1960*, pp. 150, 151 and 171.

interpreted by the International Court of Justice in its advisory opinion.⁹

10. On 28 November 1966, the General Conference of United Nations Educational, Scientific and Cultural Organization (UNESCO) rejected a proposal by its Legal Committee to request, as suggested by Portugal, an advisory opinion of the International Court of Justice concerning the constitutional aspects of a decision by the Executive Board of UNESCO to withhold from Portugal any invitation to meetings convened by UNESCO. In its resolution,¹⁰ the General Conference reaffirmed its right, as the sovereign organ of UNESCO, to interpret the provisions of the Constitution, which gave the Executive Board authority to take all necessary measures for the execution of the programme in accordance with the decisions of the General Conference. The resolution also confirmed the decision taken by the Executive Board at its 70th session (70 EX/Decisions, 14) and rejected the request of the Government of Portugal (14 C/34, Annex 1) that the question be referred to the International Court of Justice.¹¹

11. During the period under review, the International Court of Justice delivered two advisory opinions: that entitled "Constitution of the Maritime Safety Committee of the Inter-Government Maritime Consultative Organization" on 8 June 1960,¹² and that entitled "Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)" on 20 July 1962.¹³

B. Procedural matters relating to requests for advisory opinions

1. THE FORWARDING OF THE REQUEST TO THE COURT

12. In its resolution 1731 (XVI) by which it requested the Court for an advisory opinion concerning certain expenses of the United Nations, the General Assembly asked the Secretary-General, in accordance with Article 65 of the Statute of the International Court of Justice, to transmit the resolution to the Court, "accompanied by all documents likely to throw light upon the question".¹⁴ The Acting Secretary-General transmitted to the Court a dossier of documents for that purpose, together with an Introductory Note and a note by the Controller on the budgetary and financial practices of the United Nations.¹⁵

13. The request of IMCO for an advisory opinion concerning the interpretation of article 28 (a) of the Convention for the establishing of the Organization instructed the Organization's Secretary-General to place at the disposal of the Court the relevant records

⁹ IMCO Assembly, Second Session, Resolutions and Other Decisions, Resolution A. 21 (II) of 6 April 1961.

¹⁰ UNESCO Records of the General Conference, Fourteenth Session, 1966, p. 106. Resolution 20, adopted at the 35th plenary meeting, 28 November 1966.

¹¹ *Ibid.*

¹² ICJ, *Reports 1960*, p. 150.

¹³ ICJ, *Reports 1962*, p. 151.

¹⁴ See also *Repertory*, vol. V, under Article 96, paras. 24-27.

¹⁵ ICJ, *Pleadings*, Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), pp. 4-120; and ICJ, *Reports 1962*, p. 152-154.

of the First Assembly of the Organization and its Committees. It also asked him in accordance with article IX of the Agreement between the Organization and the United Nations to inform the Economic and Social Council of the United Nations of the resolution requesting the advisory opinion. The Secretary-General of IMCO informed the Court of the request for an advisory opinion on 23 March 1959 and on 14 July 1959 transmitted to the Court the documents likely to throw light upon the question.¹⁶

2. WRITTEN AND ORAL STATEMENTS

14. In accordance with Article 66 (2) of its Statute, the Court received written statements and held oral proceedings in its consideration of the requests for advisory opinions concerning certain expenses of the United Nations and the interpretation of article 28 (a) of the Convention establishing IMCO.

15. In the proceedings relating to certain expenses of the United Nations, the Court considered that the Members of the United Nations were likely to be able to furnish information on the question and notified them that from 20 February 1962 the Court would be prepared to receive written statements from them. The following Member States submitted statements, notes or letters setting forth their views: Australia, Bulgaria, Byelorussian SSR, Canada, Czechoslovakia, Denmark, France, Ireland, Italy, Japan, Netherlands, Portugal, Romania, South Africa, Spain, Ukrainian SSR, USSR, United Kingdom, United States and Upper Volta. Copies of these communications were transmitted to all Members of the United Nations and to the Acting Secretary-General of the United Nations. Hearings were held from 14 to 19 May and on 21 May 1962, the Court being addressed on behalf of the following States in this order: Canada, Netherlands, Italy,

United Kingdom, Norway, Australia, Ireland, USSR and United States.¹⁷

16. States Members of IMCO and the Organization itself were informed by the Court on 5 August 1959 that they could submit written statements on the question relating to the constitution of the Maritime Safety Committee under article 28 (a) of the IMCO Convention. Written statements were received from the Governments of Belgium, China, Denmark, France, India, Italy, Liberia, Netherlands, Norway, Panama, Switzerland, United Kingdom and United States. These statements were communicated to IMCO and to its members. Public hearings were held on 26, 27, 28 and 29 April; and on 2, 3 and 4 May 1960, when the Court was addressed successively on behalf of Liberia, Panama, the United States, Italy, Netherlands, Norway and the United Kingdom.¹⁸

3. CONSIDERATION OF THE ADVISORY OPINION OF 20 JULY 1962 BY THE GENERAL ASSEMBLY

17. After the Court delivered its advisory opinion requested by the General Assembly in its resolution 1731 (XVI), that opinion was included in the agenda of the seventeenth session of the General Assembly under the item entitled "Obligations of Members, under the Charter of the United Nations, with regard to the financing of the United Nations Emergency Force and the Organization's operations in the Congo: advisory opinion of the International Court of Justice". The item was allocated to the Fifth Committee in which the request had originated. On the recommendation of the Fifth Committee, the General Assembly in its resolution 1854 A (XVII) accepted the advisory opinion given by the Court.¹⁹

¹⁷ ICJ, *Reports 1962*, pp. 153 and 154.

¹⁸ ICJ, *Reports 1960*, p. 152.

¹⁹ G A (XVII) Annexes, a.i. 64, Report of the Fifth Committee, A/5380, pp. 7-8. For the discussion, see G A (XVII), 5th Com. 961-969th and 971st-973rd mtgs.

¹⁶ Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization. Advisory Opinion of 8 June 1960: ICJ, *Reports 1960*, pp. 151 and 152.

II. ANALYTICAL SUMMARY OF PRACTICE

A. Practice bearing upon Article 96 (1)

1. CONSIDERATION OF THE QUESTION OF THE OBLIGATION TO SUBMIT LEGAL QUESTIONS TO THE INTERNATIONAL COURT OF JUSTICE

18. In a separate opinion in the case concerning certain expenses of the United Nations, it was stated that:²⁰

"... the important practical point involved is how the validity or invalidity of any given expenditures can be determined if controversy arises, seeing that, as the Court points out, the Assembly is under

no obligation to consult the Court, and, even if consulted, the Court can only render an opinion having a purely advisory character; and moreover, that there exists no other jurisdiction to which compulsory reference can be made and which can also render a binding decision."

2. CONSIDERATION OF THE NATURE AND TYPE OF QUESTIONS REFERRED TO IN ARTICLE 96 (1)

a. *The political or legal nature of the question*

i. *Case concerning certain expenses of the United Nations*

19. During the proceedings leading to the adoption of General Assembly resolution 1731 (XVI), some representatives thought that the proposed request for an advisory opinion of the Court on the assessments for peace-keeping operations in the Congo and in the

²⁰ Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: Separate Opinion of Judge Sir Gerald Fitzmaurice, ICJ, *Reports 1962*, pp. 202 and 203.

Middle East raised a legal question relating to Article 17 of the Charter on which various interpretations had been given by Member States. These representatives recognized that there were also political issues in this question but felt that the legal issues needed clarification by the Court. While the General Assembly would resolve the political issues, the Court would clarify the legal questions as the organ technically competent within the United Nations to deal with such matters. Some representatives questioned the usefulness of an advisory opinion for the solution of the problem and expressed concern that it might lead to difficulties instead. Others stressed the political character of the problem and viewed as inappropriate the intervention of the Court in a problem which, in their opinion, was settled in the Charter itself.²¹

20. In its preliminary remarks in the case concerning certain expenses of the United Nations, the Court stated that its competence to render advisory opinions, as derived from Article 65 of its Statute, was of a discretionary character although limited to legal questions:²²

"In exercising its discretion, the International Court of Justice like the Permanent Court of International Justice, has always been guided by the principle which the Permanent Court stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923: 'The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court' (P.C.I.J., Series B, No. 5, p. 29). Therefore, and in accordance with Article 65 of its Statute, the Court can give an advisory opinion only on a legal question. If a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested. But even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so. As this Court said in its Opinion of 30 March 1950, the permissive character of Article 65 'gives the Court the power to examine whether the circumstances of the case are of such character as should lead it to decline to answer the Request' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase). ICJ, Reports 1950, p. 72)."

21. The Court proceeded to state that merely because a legal issue was intertwined with political factors it did not cease to be a legal question:²³

"It has been argued that the question put to the Court is intertwined with political questions, and that for this reason the Court should refuse to give an opinion. It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially

judicial task, namely, the interpretation of a treaty provision.

"In the preamble to the resolution requesting this opinion, the General Assembly expressed its recognition of 'its need for authoritative legal guidance'. In its search for such guidance it has put to the Court a legal question — a question of the interpretation of Article 17, paragraph 2, of the Charter of the United Nations. In its opinion of 28 May 1948, the Court made it clear that as 'the principal judicial organ of the United Nations', it was entitled to exercise in regard to an article of the Charter 'a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers' (*Conditions of Admission of a State to Membership in the United Nations* (Article 4 of the Charter), ICJ Reports 1947-1948, p. 61).

"The Court, therefore, having been asked to give an advisory opinion upon a concrete legal question, will proceed to give its opinion."

ii. *Request by Cuba that the Security Council should ask the International Court of Justice for an advisory opinion*

22. On 8 March 1962,²⁴ Cuba requested a meeting of the Security Council in order to consider the Cuban proposal that the Council should ask the International Court of Justice for an advisory opinion with respect to certain legal questions related to the measures adopted by the Eighth Meeting of Consultation of Ministers for Foreign Affairs of the members of the Organization of American States, held at Punta del Este, Uruguay, in January 1962.²⁵

23. On 19 March 1962²⁶ the representative of Cuba submitted a draft resolution according to which the Security Council would decide to request the International Court of Justice to give an advisory opinion on the following questions:

"1. Is the Organization of American States, under the terms of its Charter, a regional agency within the meaning of Chapter VIII of the United Nations Charter and do its activities have to be compatible with the Purposes and Principles of the United Nations?

"2. Under the United Nations Charter, does the Organization of American States have the right as a regional agency to take the enforcement action provided in Article 53 of the United Nations Charter without the authorization of the Security Council?

"3. Can the expression enforcement action in Article 53 of the United Nations Charter be considered to include the measures provided for in Article 41 of the United Nations Charter? Is the list of these measures in Article 41 exhaustive?

"4. Does the Charter of the Organization of American States provide for any procedure for expelling a State member of the Organization, in particular because of its social system?

²¹ G A (XVI), 5th Com., 897th mtg.: India, para. 6; USSR, para. 7; 898th mtg.: Australia, para. 20; Brazil, para. 19; Ceylon, para. 13; Ireland, para. 15; Italy, para. 22; 899th mtg.: Australia, para. 3; Indonesia, para. 25; Nepal, para. 24.

²² ICJ, Reports 1962, p. 155.

²³ *Ibid.*, pp. 155 and 156, See also in the same case the dissenting opinion of Judge Moreno Quintana, *ibid.*, p. 250.

²⁴ S C, 17th yr., Suppl. for Jan.-March, p. 88, S/5086.

²⁵ *Ibid.*, S/5075, p. 63. (Letter dated 31 January 1962 from the Secretary-General of the Organization of American States to the Secretary-General of the United Nations, transmitting the Final Act of the Eighth Meeting of Consultation of Ministers of Foreign Affairs.)

²⁶ S C, 17th yr., Suppl. for Jan.-March, p. 96, S/5095.

"5. Can the provisions of the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance be considered to take precedence over the obligations of Member States under the United Nations Charter?"

"6. Is one of the main principles of the United Nations Charter that membership in the United Nations is open to States which meet the requirements of Article 4 of the Charter, irrespective of their system?"

"7. In the light of the replies to the foregoing questions are, or are not, the resolutions adopted at Punta del Este at the Eighth Meeting of Consultation of American Ministers of Foreign Affairs relating to the expulsion of a State member of the regional agency because of its social system and the taking of other enforcement action against it, without the authorization of the Security Council, consistent with the provisions of the United Nations Charter, the Charter of the Organization of American States and the Treaty of Rio de Janeiro?"

24. During the debate a number of representatives stated that the seven questions formulated by Cuba to be put to the Court were predominantly political questions whereas under Article 96 (1) of the Charter of the United Nations only legal questions could be put to the Court.²⁷

25. At the 998th meeting on 23 March 1962, the representative of the USSR requested that the Cuban draft resolution be put to the vote. The representative of Ghana requested a separate vote on operative paragraph 3 of the draft resolution. The paragraph was rejected by 7 votes to 4.²⁸

26. After the rejection of paragraph 3, the representative of Cuba sought to withdraw the remainder of the draft resolution. The United States representative, however, objected to this and the objection was upheld. The draft resolution as amended by the deletion of paragraph 3 was rejected by 7 votes to 2, with 1 abstention. Ghana did not participate in the vote.²⁹

**** b. Difficult and important points of law**

c. Interpretation of the United Nations Charter

27. In its resolution 1731 (XVI) of 20 December 1961, the General Assembly, recognizing its need for authoritative legal guidance, requested an advisory opinion from the International Court of Justice on the question whether the expenditure authorized by the General Assembly for the United Nations operations in the Congo and in the Middle East constituted "expenses of the Organization" within the meaning of Article 17 (2) of the Charter of the United Nations. The resolution read:

"The General Assembly,

"Recognizing its need for authoritative legal guidance as to obligations of Member States under

the Charter of the United Nations in the matter of financing the United Nations operations in the Congo and in the Middle East;

"1. *Decides* to submit the following question to the International Court of Justice for an advisory opinion:

"Do the expenditures authorized in General Assembly resolutions 1583 (XV) and 1590 (XV) of 20 December 1960, 1595 (XV) of 3 April 1961, 1619 (XV) of 21 April 1961 and 1633 (XVI) of 30 October 1961 relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960, and 21 February and 24 November 1961, and General Assembly resolutions 1474 (ES-IV) of 20 September 1960 and 1599 (XV), 1600 (XV) and 1601 (XV) of 15 April 1961, and the expenditures authorized in General Assembly resolutions 1122 (XI) of 26 November 1956, 1089 (XI) of 21 December 1956, 1090 (XI) of 27 February 1957, 1151 (XII) of 22 November 1957, 1204 (XII) of 13 December 1957, 1337 (XIII) of 13 December 1958, 1441 (XIV) of 5 December 1959 and 1575 (XV) of 20 December 1960 relating to the operations of the United Nations Emergency Force undertaken in pursuance of General Assembly resolutions 997 (ES-I) of 2 November 1956, 998 (ES-I) and 999 (ES-I) of 4 November 1956, 1000 (ES-I) of 5 November 1956, 1001 (ES-I) of 7 November 1956, 1121 (XI) of 24 November 1956 and 1263 (XIII) of 14 November 1958, constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?;

"2. *Requests* the Secretary-General in accordance with Article 65 of the Statute of the International Court of Justice, to transmit the present resolution to the Court, accompanied by all documents likely to throw light upon the question."

28. In its advisory opinion given on 20 July 1962, the Court held by nine votes to five, that the expenditures relating to the Congo and the Middle East "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations".³⁰

29. In this opinion the Court reiterated the statement in the opinion of 28 May 1948 that, as the principal judicial organ of the United Nations, it was entitled to exercise in regard to an Article of the Charter, "a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers."³¹

**** d. Interpretation of treaties**

3. THE FORMULATION OF LEGAL QUESTIONS

30. At the 1086th plenary meeting of the General Assembly on 20 December 1961, the representative of France submitted an amendment to the draft resolution requesting the advisory opinion of the Court

²⁷ S C, 17th yr., 995th mtg.: France, paras. 49-54; 996th mtg.: Ghana, paras. 73, 88 and 89; 997th mtg.: Cuba, paras. 45, 46 and 48-51; 998th mtg.: USSR, paras. 22-29 and 53-55.

²⁸ S C, 17th yr., 998th mtg., para. 113.

²⁹ S C, 17th yr., 998th mtg., para. 158.

³⁰ ICJ, *Reports* 1962, pp. 179 and 180. See also paras. 20 and 21 above.

³¹ *Ibid.*, p. 156.

on the expenses of the United Nations Emergency Force (UNEF) and the United Nations operation in the Congo (ONUC) under Article 17 (2) of the Charter. Under the amendment, the General Assembly would have asked the Court to give an opinion on the question whether the expenditures relating to the indicated operations were "decided on in conformity with the provisions of the Charter"; if that question were answered in the affirmative, the Court would have been asked to proceed to answer the question which resolution 1731 (XVI) actually posed. The amendment was rejected by 47 votes to 5 with 38 abstentions.³²

31. In introducing the amendment the sponsoring delegation stated that it would enable the Court to give a clear-cut opinion on the juridical basis for the financial obligations of Member States or on the United Nations constitutional problems underlying them. Other delegations thought that the amendment was unnecessary because under the original resolution the Court would be able to take into consideration all relative provisions of the Charter, while Member States wishing to do so could submit their views on the questions raised by the amendment. These delegations also thought the amendment was undesirable as it would in their view call into question the resolutions adopted by the General Assembly on the two operations over a period of five years. In any case, one representative pointed out, the Court would have before it the records of the relevant discussions in the Fifth Committee and in the General Assembly on the matter.³³

32. Prior to examining the question whether certain expenses of the United Nations constituted expenses of the Organization, the International Court of Justice considered the implications of the rejection by the General Assembly of the French amendment modifying the question to be asked. This rejection was not assessed by the Court as a directive to exclude from its consideration the related question whether such expenditures were "decided on in conformity with the provisions of the Charter", if the Court should find such consideration appropriate. This conclusion was based on the assumption that the General Assembly had not sought to preclude the Court from interpreting Article 17 in the light of other Articles of the Charter, that is to say, in the whole context of the treaty. This conclusion, the Court said, would be drawn from the clear statements of sponsoring delegations that they took it for granted the Court would consider the Charter as a whole.³⁴

4. QUESTIONS RELATING TO THE SCOPE OF THE POWER OF THE GENERAL ASSEMBLY TO REQUEST AN ADVISORY OPINION

5. THE EFFECT OF A REQUEST FOR AN ADVISORY OPINION UPON CONTINUED CONSIDERATION BY THE REQUESTING ORGAN AND UPON IMPLEMENTATION OF PRIOR DECISIONS IN THE CASE

6. PRIOR DECISIONS CONCERNING THE BINDING EFFECT OF ADVISORY OPINIONS

7. CONSIDERATION OF THE EFFECT TO BE GIVEN TO THE ADVISORY OPINIONS OF THE COURT

a. *Advisory opinion of 11 July 1950 on South West Africa*

33. Several resolutions of the General Assembly contained a reference to the acceptance by the Assembly of the advisory opinion of 11 July 1950 of the International Court of Justice on the question of South West Africa.³⁵

b. *Certain expenses of the United Nations*

34. In its resolution 1854 A (XVII) of 19 December 1962 the General Assembly accepted the advisory opinion concerning certain expenses of the United Nations delivered by the International Court of Justice on 20 July 1962, and referred to it in the context of resolution 1854 B (XVII) of 19 December 1962. Various representatives also referred to this advisory opinion during consideration of the financial situation of the Organization at the fourth special session of the General Assembly in 1963. The debates at both the seventeenth session and the fourth special session raised questions relating to the legal status of the advisory opinion and its implications for the United Nations.

35. At the seventeenth session of the General Assembly in 1962, there was agreement that an advisory opinion of the Court, unlike its judgements, did not have binding force. Accordingly, under Article 96 of the Charter, Member States or the General Assembly should remain free to accept or reject the opinion.

36. In advocating acceptance of the opinion some representatives pointed out the authoritative character of the legal pronouncements of the Court. Whether judgements or advisory opinions such statements on a point of law should command equal respect. Moreover, the General Assembly and its Members would wish to uphold the authority of the Court as the highest judicial organ of the United Nations. A number of countries would not disregard the opinion, even if it conflicted with their previous positions, in view of their traditional respect for international law

³² G A (XVI) Plen., 1086th mtg., para. 135. See also ICJ, *Reports 1962*, p. 156.

³³ G A (XVI), Plen., 1086th mtg.: Canada, paras. 119-125; France, para. 95; United Kingdom, paras. 116-118; United States, para. 132.

³⁴ ICJ, *Reports 1962*, p. 157. See also the separate opinion of Judge Morelli, *ibid.*, pp. 216 and 217; the dissenting opinion of Judge Basdevant, *ibid.*, pp. 235-238; and the dissenting opinion of Judge Bustamante, *ibid.*, p. 288.

³⁵ See, for example, G A resolutions 1356 (XIV), 1358 (XIV), 1359 (XIV), 1360 (XIV), 1361 (XIV), 1563 (XV), 1568 (XV), 1730 (XVI), and 1804 (XVII). See also this *Supplement*, under Article 10, paras. 12-28 on the discussion at the fifteenth session of the General Assembly on whether the Assembly should give effect to an advisory opinion of the Court even if the matter had been referred again to the Court for a decision and was thus *sub judice*. Concerning a discussion of the effect of the 1950 advisory opinion, see the dissenting opinion of Judge Van Wyk in ICJ, *Reports 1962*, pp. 657 and 658; and the dissenting opinion of Judge Tanaka ICJ, *Reports 1966*, pp. 260 and 261.

and support for the solution of problems by legal means. It also seemed logical to others that the General Assembly, having obtained the authoritative legal guidance it had requested, should accept the opinion of the Court and act accordingly.

37. Other representatives could not reconcile the advisory character of the opinion with its acceptance by the General Assembly. They saw no question of lack of respect for international law or the Court itself in the failure to accept formally its opinion, which had no binding force in law. They described any attempt towards acceptance as an imposition of unagreed obligations of Member States. It would be equivalent to imposing the compulsory jurisdiction of the Court on the many Member States which had not yet accepted it. These representatives also questioned the soundness of the opinion in the light of the Charter and its implications for the future of the United Nations. They added that the decision was not unanimous and that the views of only nine members of the International Court of Justice did not constitute an authoritative pronouncement on a point of law.³⁶

38. On 19 December 1962 the General Assembly accepted the advisory opinion of the International Court of Justice by 76 votes to 17, with 8 abstentions.³⁷ On the same date and taking into account the advisory opinion of the Court, the General Assembly adopted resolution 1854 B (XVII) setting up a Working Group to study special methods for financing peace-keeping operations of the United Nations involving heavy expenditures, such as those for the Congo and the Middle East, including a possible special scale of assessments, and requested the Working Group to give particular attention, *inter alia*, to the principle of collective financial responsibility of the Members of the United Nations. This resolution was adopted by 78 votes to 14, with 4 abstentions.³⁸

39. At its fourth special session in 1963, the General Assembly continued consideration of the financial situation of the Organization and the methods of financing the United Nations operations in the Congo and in the Middle East. Several representatives discussed again the implications of General Assembly resolution 1854 A (XVII) of 19 December 1962, which accepted the advisory opinion of the International Court of Justice that the expenses authorized by the General Assembly for UNEF and ONUC constitute expenses of the Organization within the meaning of Article 17 (2), of the Charter.

40. Some representatives reiterated their position at the seventeenth session of the General Assembly against the opinion of the Court. They maintained that because the opinion was in conflict with the Charter, the Assembly's resolution 1854 A (XVII) accepting it could have no binding force. They therefore disputed the contention that all Member States were collectively responsible for the assessments by the General Assembly to finance UNEF and ONUC. In their view, the essential principle governing the financing of United Nations operations for the maintenance of peace and security was that this question was under the exclusive jurisdiction of the Security Council and was subject to the unanimity of its permanent members.

41. In support of the advisory opinion and of General Assembly resolution 1854 A (XVII) some representatives stressed their desire to uphold the value and authority of the advice given, at the request of the General Assembly, by the highest judicial organ. Respect for the rule of law and the best interests of the United Nations imposed a moral obligation on all Member States to comply. Some within this group considered that in any event the opinion had been given binding force by the adoption of General Assembly resolution 1854 A (XVII). Acceptance of the principle of collective responsibility did not preclude disagreement with some aspects of the adoption or implementation of decisions relating to peace-keeping operations. There was support for a special method for the apportionment of the related costs based on the particular circumstances, notably the capacity of developing countries to pay when heavy expenditures were involved. Some representatives questioned the exclusive jurisdiction of the Security Council over all matters relating to the maintenance of peace and security, including the financing of peace-keeping operations.³⁹

42. At the end of the fourth special session, the General Assembly recognized in its resolution 1874 (S-IV) of 27 June 1963 the necessity of sharing equitably the cost of peace-keeping operations not otherwise covered by agreed arrangements, and affirmed that the principle of the collective responsibility of all States Members of the United Nations should serve

³⁶ G A (XVII), 5th Com., 961st mtg.: Denmark, paras. 13 and 14; United States, para. 20; 962nd mtg.: United Kingdom, para. 6; 963rd mtg.: Mexico, para. 19; 964th mtg.: Jordan, para. 2; Poland, para. 9; 965th mtg.: Romania, para. 1; Uruguay, para. 9; 966th mtg.: Hungary, para. 29; 967th mtg.: Italy, para. 9; Ukrainian SSR, para. 5; 968th mtg.: Ivory Coast, para. 34; Mongolia, para. 32; New Zealand, para. 16; Pakistan, para. 5; 969th mtg.: China, para. 6; Iran, para. 2; 971st mtg.: United Kingdom, para. 23; United States, para. 12; 972nd mtg.: Australia, para. 38; Bulgaria, para. 28; Colombia, para. 36; Mali, para. 33; Mexico, para. 44; Yugoslavia, para. 20; 973rd mtg.: Afghanistan, para. 8; China, para. 21; Jordan, para. 6; Madagascar, para. 31; See also G A (XVII), Plen., 1199th mtg.: Afghanistan, paras. 69-71; Canada, paras. 74-76; Congo (Leopoldville), paras. 46 and 47; Denmark, paras. 79-81; USSR, paras. 65 and 66.

³⁷ G A (XVII) Plen., 1199th mtg., para. 82.

³⁸ *Ibid.*, para. 83. See also this *Supplement* under Article 17.

³⁹ G A (S-IV), 5th Com., 985th mtg.: Argentina, paras. 41 and 42; Australia, paras. 4, 5 and 17; Brazil, para. 35; Mexico, paras. 24 and 25; 986th mtg.: Colombia, para. 3; USSR, paras. 9, 11 and 13; United States, paras. 28 and 29; 987th mtg.: Cambodia, para. 8; Ceylon, para. 23; Romania, para. 18; USSR, para. 39; United States, para. 37; 988th mtg.: Congo (Brazzaville), para. 26; Greece, para. 47; Guinea, para. 37; Ireland, para. 14; Ukrainian SSR, paras. 2, 4 and 11, 989th mtg.: Canada, para. 46; Cuba, paras. 33-35; Ecuador, para. 18; Hungary, paras. 4-8; Japan, para. 21; Uganda, para. 42; 990th mtg.: Afghanistan, para. 4; Chile, para. 27; Czechoslovakia, para. 14; Mongolia, paras. 18 and 19; 992nd mtg.: Bulgaria, para. 3; Iran, para. 20; Norway, para. 40; Thailand, para. 31; 993rd mtg.: Jordan, para. 3; Laos, para. 50; Federation of Malaya, paras. 10 and 11; Senegal, para. 41; Sweden, para. 6; Uruguay, para. 32; Venezuela, para. 13; 994th mtg.: Byelorussian SSR, para. 9; Haiti, para. 3; India, para. 17; 995th mtg.: Ghana, para. 5; Pakistan, paras. 37 and 40; Philippines, para. 2; Tunisia, para. 20; 996th mtg.: Cameroon, para. 7; 997th mtg.: Poland, paras. 5-8; 998th mtg.: Cyprus, para. 9; France, paras. 19-21; 999th mtg.: Netherlands, para. 21; United Kingdom, para. 33; 1000th mtg.: Mali, para. 33; 1001st mtg.: Italy, para. 8; Tanganyika, para. 4; 1002nd mtg.: Lebanon, para. 25; Pakistan, para. 31; 1003rd mtg.: Iceland, para. 48; Nepal, paras. 10 and 11. See also G A (S-IV), Plen., 1205th mtg.: Brazil, para. 53; USSR, paras. 57, 58, 68, 74-77 and 88.

as one of the guidelines for the equitable sharing of the costs of peace-keeping operations involving heavy expenditures that might be initiated in the future. This resolution was adopted by 92 votes to 11, with 3 abstentions.⁴⁰

B. Practice bearing upon Article 96 (2)

1. THE QUESTION WHETHER THE AUTHORIZATION UNDER ARTICLE 96 (2) SHOULD BE A GENERAL AUTHORIZATION OR AN AD HOC AUTHORIZATION

2. THE QUESTION OF THE REVOCABILITY OF THE AUTHORIZATION BY THE GENERAL ASSEMBLY

3. THE QUESTION WHETHER A PRIOR REQUEST OF THE ORGAN CONCERNED IS NECESSARY

4. THE QUESTION OF THE ORGANS WHICH MAY BE AUTHORIZED TO REQUEST ADVISORY OPINIONS

43. The judgement of the Court in the South West Africa Cases in 1966 emphasized that only certain international organs, empowered to do so, might request an advisory opinion from the Court.⁴¹

"Under the Court's Statute as it is at present framed, States cannot obtain mere 'opinions' from the Court. This faculty is reserved to certain international organs empowered to exercise it by way of the process of requesting the Court for an advisory opinion. It was open to the Council of the League to make use of this process in case of any doubt as to the rights of the League or its members relative to mandates. But in their individual capacity, States can appear before the Court only as litigants in a dispute with another State, even if their object in so doing is only to obtain a declaratory judgment. The moment they so appear, however, it is necessary for them, even for that limited purpose, to establish, in relation to the defendant party in the case, the

existence of a legal right or interest in the subject-matter of their claim, such as to entitle them to the declarations or pronouncements they seek: or in other words that they are parties to whom the defendant State is answerable under the relevant instrument or rule of law."

5. THE SCOPE OF QUESTIONS ON WHICH ADVISORY OPINIONS MAY BE SOUGHT UNDER THE TERMS OF ARTICLE 96 (2)

44. The question submitted to the International Court of Justice by the Assembly of IMCO was related to the interpretation of article 28 (a) of the IMCO Convention. This article provides that the Maritime Safety Committee shall consist of fourteen members elected by the Assembly of the Organization among those having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations. The Court formulated the problem as follows:⁴²

"... Has the Assembly in not electing Liberia and Panama to the Maritime Safety Committee, exercised its electoral power in a manner in accordance with the provisions of Article 28 (a) of the Convention of 6 March 1968 for the Establishment of the Inter-Governmental Maritime Consultative Organization?"

The Court added the following comment:⁴³

"The Statements submitted to the Court have shown that linked with the question put to it there are others of a political nature. The Court as a judicial body is however bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character."

In the course of its advisory opinion, the Court proceeded to examine and interpret the IMCO Convention, article 28 (a), and to apply it to the circumstances of the case.

6. THE QUESTION OF PRIOR DECISION CONCERNING THE BINDING EFFECT OF AN ADVISORY OPINION OF THE COURT

⁴⁰ G A (S-IV) Plen., 1205th mtg., para. 110. See also resolutions 1875 (S-IV) and 1876 (S-IV).

⁴¹ South West Africa Case, Second Phase, Judgment, ICJ, Reports 1962 pp. 33 and 34.

⁴² ICJ, Reports 1960, p. 153.

⁴³ *Ibid.*, See also dissenting opinion of President Klaestad (*ibid.*, p. 173) and dissenting opinion of Judge Moreno Quintana (*ibid.*, p. 177).

Chapter XV

THE SECRETARIAT