SEPARATE OPINION OF JUDGE MORELLI

[Translation]

I concur in the Court's affirmative reply to the question submitted to it by the United Nations General Assembly. I also agree with the way in which the Court has disposed of most of the particular points which it thought necessary to consider concerning the conformity of the resolutions relating to the Emergency Force and to the operations in the Congo with the Charter. I think however that the Court did not need to go into these particular points, because an affirmative answer to the question as formulated by the General Assembly does not in my view depend on the conformity of those resolutions with the Charter.

I

1. I should like first of all to indicate what in my view are the criteria by which the task that the Court has to perform is to be determined.

The question referred to the Court has a clearly defined subject, namely whether the expenditures authorized in certain General Assembly resolutions, relating to the operations undertaken in pursuance of certain other resolutions of the General Assembly and the Security Council, constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter of the United Nations.

That being the question submitted to the Court, the Court must remain within the bounds of that question, and it is that question alone which the Court must answer in the operative provisions of its Opinion. It is for the organ empowered to request an opinion of the Court to frame in full freedom the question to be submitted to the Court, and that organ is consequently free to give the question the scope which it considers most suitable.

According to the amendment proposed by the French delegation in the General Assembly, the scope of the question ought to have been broader, and the question ought to have been worded as follows:

> "Were the expenditures authorized, etc. ... decided on in conformity with the provisions of the Charter and, if so, do they constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations?"

If such an amendment had been adopted the Court would have been bound, by the actual terms of the request for advisory opinion, to consider in the first place the question of the conformity of

certain resolutions with the Charter, and the Courut wold have had to dispose of this question in the operative provisions of its Opinion. The French amendment having been rejected, it follows that the question of the conformity with the Charter of the resolutions concerned must be regarded as not forming the subject of the request for advisory opinion. This means that the Court is not bound by the actual terms of the request for opinion to consider that question and that it could not, in any case, dispose of it in the operative provisions of the Opinion.

2. However, the question which is the subject of the request for opinion is one thing; another are the various questions which the Court must necessarily consider and dispose of in the reasons for the Opinion in order to be able to arrive at an answer to the question submitted to it.

It is exclusively for the Court to decide, in the process of its reasoning, what are the questions which have to be solved in order to answer the question submitted to it. While, as is stated above, the organ requesting the opinion is quite free as regards the formulation of the question to be submitted to the Court, it cannot, once that question has been defined, place any limitations on the Court as regards the logical processes to be followed in answering it. That organ cannot therefore exclude the possibility of the Court's dealing with a question which the Court might consider it necessary to answer in order to perform the task entrusted to it. Nor can the organ requesting the opinion oblige the Court to presuppose any particular answer to a preliminary question. Any limitation of this kind would be unacceptable because it would prevent the Court from performing its task in a logically correct way.

However, in the present case there is nothing either in the text of the request for opinion or in the debates which preceded the adoption of that request by the General Assembly which shows an intention on the part of the Assembly to limit in any way the Court's freedom to select the path to be followed in answering the question submitted to it. No limitation of this sort, which would be quite unacceptable, could be inferred from the rejection of the French amendment. By rejecting that amendment the Assembly did no more than quite legitimately define the question which is the subject of its request to the Court.

Therefore, even according to the request for advisory opinion, the Court is free to consider or not consider the question of the conformity of the resolutions with the Charter (or the other question, which does not necessarily coincide with the former, of the validity of the resolutions). This freedom can however be understood only as subordinated both to the rules of law and logic by which the Court is bound and also to the objective which the

Court must pursue, which is the solution of the question submitted to it. In the present case that question relates solely to the legal characterization of certain expenditures. The Court would therefore be obliged to consider either the question of the conformity of the resolutions with the Charter, or the question of the validity of the resolutions, should it recognize that it is necessary to dispose of one or other of these questions in order to answer the question of the characterization of the expenditures. Should the Court on the contrary not recognize any such necessity, it should refrain from considering the questions referred to above.

II

3. For the consideration of the question submitted to the Court it is desirable to draw a very general distinction between three different categories of resolutions which may be adopted by the organs of the United Nations.

(a) First from the logical and chronological standpoint, there are (or may be) resolutions in which some activity is decided on or recommended. Such are the General Assembly and Security Council resolutions concerning the Emergency Force and the operations in the Congo.

(b) Secondly, there are resolutions in which the General Asembly, when approving the budget under Article 17, paragraph 1, authorizes expenditures. Such resolutions may be related to resolutions of the first category. This is so in the case of the Emergency Force and the operations in the Congo. But General Assembly resolutions authorizing expenditures may also be independent of any previous resolution. This happens in the case of United Nations activities directly provided for by the Charter.

(c) Thirdly, there are the resolutions by which the General Assembly apportions the expenses among the Members under Article 17, paragraph 2.

This distinction, which is purely schematic, does not exclude the possibility that a resolution falling within one of these categories may be the inferential result of another resolution falling in a different category. In particular, a resolution authorizing a certain expenditure may have to be considered as implied in the resolution by which the General Assembly apportions the same expense under paragraph 2 of Article 17. In this case, the first of the two resolutions must be regarded as a resolution adopted by the Assembly on the basis of paragrpah 1 and not paragraph 2 of Article 17.

4. The question submitted to the Court is whether the expenditures authorized in certain General Assembly resolutions constitute "expenses of the Organization". Reference is made to paragraph 2 of Article 17 of the Charter. This reference defines the subject of the question submitted to the Court, and means that an affirmative reply to the question implies the following consequences: (1) that the expenses referred to must be borne by the Members; (2) that the General Assembly is empowered to apportion those expenses among the Members.

The General Assembly has in fact adopted resolutions in which the expenses in question have been apportioned among the Members. The Court however has not to pronounce either on the validity or on the effects of such resolutions, because the question submitted to it relates to a point logically prior to the apportionment; it is directed solely to the characterization of the expenditures as expenses of the Organization within the meaning of Article 17, paragraph 2.

Such being the problem submitted to the Court, it is not possible to envisage its settlement by saying that it is for the Assembly to decide whether an expenditure is or is not an expense of the Organization within the meaning of Article 17, paragraph 2, and that in the present case the Assembly has expressly or impliedly so characterized the expenditures relating to the Emergency Force and the operations in the Congo. Indeed, even if the view were taken that the General Assembly's characterization of an expenditure as an expense of the Organization within the meaning of paragraph 2 of Article 17 is in any case final and binding upon the Members, and that the Members have consequently no possibility of disputing the validity of such characterization by alleging its non-conformity with the rules of the Charter, such a view would not prevent the Court from verifying whether the General Assembly's express or implied characterization of the expenses relating to the Emergency Force and the operations in the Congo is correct or not. This is for the very simple reason that it is precisely such verification which constitutes the subject of the request for advisory opinion made by the Assembly itself to the Court.

5. I am of the view that the question of what expenditures constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, can be answered only by taking that paragraph in relation with paragraph 1 of the same Article 17. The link between the two first paragraphs of Article 17 shows in my view that the "expenses of the Organization" referred to in paragraph 2 can be only expenditures which the General Assembly has authorized when approving the budget under paragraph 1.

The term "budget" used in paragraph 1 is not accompanied by any restriction (such as that in paragraph 3, which refers to the

"administrative budgets" of the specialized agencies), and must be understood in the widest sense. It means all the budgets of the Organization—not only the ordinary or administrative budgets, but also the extraordinary budgets. The fact is that paragraph 1 of Article 17 confers on the Assembly a general and exclusive competence in budgetary matters.

It follows that the "expenses of the Organization" referred to in paragraph 2 are all the expenditures which the General Assembly has authorized in any way whatever when approving the budget under paragraph 1. I have no need to repeat that authorization of an expenditure may be the inferential result of the resolution in which the General Assembly apportions that expense among the Members.

6. It is however quite clear that according to paragraph 1 of Article 17 the General Assembly may not act in an arbitrary manner when it approves the budget. It can authorize only certain expenditures, that is to say, expenditures which are concerned in some way with the Organization. It can be seen from this that there is a concept of expenses of the Organization which must be regarded as underlying paragraph 1.

It must be observed, however, that the two concepts of expenses of the Organization, that implicit in paragraph 1 and that which is used in terms in paragraph 2, are different. The first indicates the expenses which may be authorized by the Assembly, the second indicates the expenses which are to be borne by the Members as apportioned by the Assembly. Not only do the two concepts have different purposes, but they refer to subjects which are not coincidental, in spite of the relationship between the first two paragraphs of Article 17. The concept of "expenses of the Organization" which is used in terms in paragraph 2 to indicate the expenses which are to be borne by the Members as apportioned by the General Assembly relates not to the expenses which the Assembly *may* authorize but rather to the expenses which have *in fact* been authorized by the Assembly.

The question submitted to the Court is only whether certain expenditures do or do not constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2. The question does not relate (or at any rate does not directly relate) to the other concept of expenses of the Organization implicitly referred to in paragraph 1 of Article 17, that is to say, the expenses which may be authorized by the General Assembly.

I have said that the "expenses of the Organization" referred to in Article 17, paragraph 2, are the expenditures which the General Assembly has authorized when approving the budget under paragraph 1 of that Article. But this is far from disposing of the question referred to the Court. The term approval of the budget (and

hence authorization of expenses) can be used to indicate only *valid* approval. It follows that to characterize an expenditure as an expense of the Organization within the meaning of Article 17, paragraph 2, necessarily presupposes the validity of the General Assembly resolution in which that expenditure was authorized.

But the question may arise whether it is sufficient to stop short at the problem of the validity of the authorization of the expenditure, or whether it is necessary to go further back and examine also the validity of any acts of the Organization which decided on or recommended the activity to which the authorized expenditure relates. In other words, in the present case, the question may arise whether it is also necessary to examine the validity of the General Assembly and Security Council resolutions establishing the Emergency Force and deciding on the operations in the Congo. Moreover, since the Emergency Force was established by a resolution adopted by the General Assembly in pursuance of the Uniting for Peace resolution of 3 November 1950, the question may even arise whether the validity of that resolution also must be verified.

As will be seen, this raises the rather delicate problem of the validity of the acts of the United Nations. It is my view that this problem cannot be avoided at least as far as the resolutions in which the General Assembly authorized the expenditures in question are concerned. It will be seen later if and how consideration also has to be given to the validity of the earlier resolutions.

7. The rules under which in any legal system the problem of the validity of legal acts is considered face two different requirements. On the one hand there is the requirement of *legality*, that is to say, conformity of the act with the legal rule. Exclusive consideration of that requirement would have as its consequence the denial of any value to an act not in conformity with the legal rule. On the other hand, however, there is the requirement of *certainty*, which would be very seriously jeopardized if the validity of a legal act were at all times open to challenge on the ground of its non-conformity with the legal rule.

The two opposed requirements which I have indicated have been happily reconciled in national legal systems, particularly as regards the acts of public authorities and, even more so, as regards administrative acts.

It must first of all be observed that in municipal law there are a whole number of cases in which the non-conformity of an act with the legal rule constitutes a mere irregularity having no effect on the validity of the act. But there are more serious cases where lack of conformity, on the contrary, entails the invalidity of the act. Such invalidity may well constitute *absolute nullity*, operating

ipso jure, so that the act which it affects produces no legal effects. However, in municipal law cases of absolute nullity are of a quite exceptional character. In general, the invalidity of acts in municipal law, and in particular administrative acts, involves not the nullity (absolute nullity), but rather the *voidability* of the act. A voidable act is an act which, in spite of the defects by which it is vitiated, produces all its effects as long as it is not annulled by the competent organ. It is only as a result of being annulled that the act loses, retroactively, its effectiveness. This aspect of invalidity of an administrative act as voidability in municipal law is closely linked with the system of the means of recourse open in such municipal law against the illegitimacy of administrative acts, and which have to be used in a prescribed form and within a fixed time-limit.

It follows that an administrative act, even though vitiated by a defect of such a nature as to entail invalidity, may in spite of that produce all the effects proper to a completely valid act: not only temporary, but also permanent, effects. First, this occurs wherever the existing remedies are not made use of in the manner and within the time-limits prescribed. Secondly, the same occurs when the competent supervisory organ, although the matter has been properly referred to it, does not recognize the defect by which the act is objectively vitiated. It is precisely by prescribing on the one hand forms and time-limits in which the existing remedies against illegitimate acts may be sought, and by conferring on the other hand finality on the supervision exercised by the competent authority, that municipal law ensures that the requirement of certainty in connection with legal situations arising from administrative acts shall be satisfactorily met.

8. In the case of acts of international organizations, and in particular the acts of the United Nations, there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the *absolute nullity* of the act. In other words, there are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the Organization can occur. An act of the Organization considered as invalid would be an act which had no legal effects, precisely because it would be an absolute nullity. The lack of effect of such an act could be alleged and a finding in that sense obtained at any time.

It must be recognized that there may be cases in which an act of the Organization would have to be considered as invalid, and therefore as an absolute nullity, with the rather serious consequences which I have just indicated. The problem is to determine what these cases are. As will be seen, this is a question of construction of the rules determining the conditions for a legal act which are of the nature of absolute requirements, that is to say where failure to satisfy the condition constitutes an essential defect involving the invalidity of the act.

In dealing with such a question of construction, the nature and significance of the invalidity which may be held to attach to an act of the Organization must never be lost sight of, such invalidity constituting, as has been seen, the absolute nullity and not the voidability of the act. This prevents the conditions for the validity of acts of the Organization being given an extension similar to that of the conditions for the validity of acts under municipal law, and in particular administrative acts. If, ignoring the difference between the nature of the invalidity of domestic administrative acts (voidability) and the nature of the invalidity of acts of the United Nations (absolute nullity), the same extension were given to the conditions for the validity of both these classes of act, very serious consequences would result for the certainty of the legal situations arising from the acts of the Organization. The effectiveness of such acts would be laid open to perpetual uncertainty, because of the lack in the case of acts of the Organization of the means by which the need for certainty is satisfied in connection with administrative acts under domestic law.

This makes it necessary to put a very strict construction on the rules by which the conditions for the validity of acts of the Organization are determined, and hence to regard to a large extent the nonconformity of the act with a legal rule as a mere irregularity having no effect on the validity of the act. It is only in especially serious cases that an act of the Organization could be regarded as invalid, and hence an absolute nullity. Examples might be a resolution which had not obtained the required majority, or a resolution vitiated by a manifest *excès de pouvoir* (such as, in particular, a resolution the subject of which had nothing to do with the purposes of the Organization).

It is otherwise in the case, for example, of violation of the rules governing competence. The violation of such rules in domestic law involves the invalidity of the act in the usual form of voidability. For the reasons I have given, the violation of the rules concerning competence by an organ of the United Nations cannot entail the voidability of the act; but the same violation does not have the much more serious effect of the absolute nullity of the act. This means that the failure of the act to conform to the rules concerning competence has no influence on the validity of the act, which

amounts to saying that each organ of the United Nations is the judge of its own competence.

9. The restrictive application of the concept of invalidity to the resolutions in which the General Assembly authorized the expenditures in question in this case must in my view lead to a conclusion upholding the full validity of those resolutions.

It has already been said that the General Assembly may not in this field act in an arbitrary way. The Assembly is bound by the provisions of the Charter which it must interpret and apply correctly. Under these rules, the Assembly is required to establish and appreciate correctly a body of factual circumstances. It must also verify the validity of the resolutions of the different United Nations organs concerning the activity to which the expenditure to be authorized or not relates; this naturally has to be done in accordance with the very restrictive criteria indicated above.

However, it is one thing to say that the General Assembly is bound by the rules of the Charter and by the actual facts or legal situations to which those rules relate; it would be quite another to say that this obligation on the General Assembly has its sanction in the invalidity of resolutions of the Assembly not in conformity with that obligation. For the latter it would be necessary to show that the legal rule concerning the approval of the budget and hence authorization of expenses by the General Assembly (the rule arising from Article 17, paragraph 1, of the Charter) makes the validity of the Assembly's resolution dependent both on conformity of the resolution with the provisions of the Charter and on the correctness of the Assembly's ascertainment of situations of fact or of law in any way relevant. It is my view that this is not possible.

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

10. Once the validity of the resolutions in which the General Assembly authorized the expenditures relating to the Emergency Force and the operations in the Congo has been recognized, it will be seen that the question of validity does not arise at all in connec-

tion with the resolutions which are presupposed by those I have just mentioned, that is to say, the resolutions by which the General Assembly established the Emergency Force and the Security Council decided on the operations in the Congo.

If the question of the validity of these latter resolutions were to be examined independently and in general terms, that is to say, as regards all the effects which those resolutions seek to produce, it would have to be answered in the affirmative, for reasons similar to those which I have given in connection with the validity of the General Assembly resolutions authorizing the expenditures. But the problem of the validity of those resolutions, which might be called the basic resolutions, does not arise at all in connection with the answer to be given to the question submitted to the Court.

For the purposes of that question, the basic resolutions have not to be taken into account as regards the totality of their effects. They constitute only circumstances which the Assembly had to have regard to and satisfy itself as to the existence of. For reasons that I have indicated, the examination by the Assembly of the validity of the basic resolutions for the purpose of authorizing the relevant expenses is final. In consequence, the validity of the basic resolutions cannot be challenged with the purpose of challenging the validity of the Assembly resolutions authorizing the expenses; that would be so even on the supposition (which in my view must be dismissed) of the validity of the basic resolutions having to be denied in respect of their other effects.

To say that in order to authorize a particular expenditure the General Assembly must *inter alia* satisfy itself of the validity of the resolutions concerning the activity to which the expenditure relates, and that its judgment is final, does not mean that the General Assembly exercises true supervision over those resolutions. This is because the General Assembly's examination does not relate to the resolutions in question as far as the whole of their effects is concerned, but relates to those resolutions only as a circumstance which the General Assembly has to take into account with a view to authorizing expenditure. The finality of the Assembly's judgment is but an aspect of the finality of the authorization of the expenditure.

11. My reasoning may be summarized in the following propositions:

(1) "Expenses of the Organization", within the meaning of Article 17, paragraph 2, of the Charter are expenses which have been *validly* authorized by the General Assembly under paragraph 1 of that Article;

(2) The resolutions in which the General Assembly authorized the expenditures relating to the Emergency Force and the operations in the Congo are *valid* resolutions, irrespective of the validity of the General Assembly and Security Council resolutions by which

the Emergency Force was established and the operations in the Congo decided upon;

(3) Consequently, the expenditures relating to the Emergency Force and the operations in the Congo constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter.

(Signed) Gaetano MORELLI.